

170 FERC ¶ 61,233
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick and Bernard L. McNamee.

Essex Company, LLC

Project No. 2800-050

ORDER DENYING REHEARING

(Issued March 19, 2020)

1. On August 8, 2019, Commission staff issued a Letter Order¹ responding to allegations of non-compliance filed by the City of Lawrence, Massachusetts, Conservation Law Foundation, Inc., Groundwork Lawrence, Inc., Lawrence Community Works, Inc., 60 Island Street, LLC, Everett Mills Real Estate, LLC, GES Realty LLC, and Pacific Mills Acquisition LLC's (jointly, the Petitioners) against the Essex Company, LLC (licensee)² regarding the operation of the Lawrence Hydroelectric Project No. 2800. On September 9, 2019, the Petitioners filed a request for rehearing of the August 8 Letter Order. For the reasons discussed below, we deny rehearing.

I. BACKGROUND

2. On December 4, 1978, the Commission issued a license to Essex Company and Lawrence Hydroelectric Associates to operate and maintain the 14.8-megawatt Lawrence Hydroelectric Project No. 2800 for a 50-year term.³ The project is located on the Merrimack River, in the historic district of the City of Lawrence, Massachusetts. The project encompasses an existing dam on the Merrimack River, known as the Great Stone

¹ August 8, 2019 Letter Order, P-2800-048 (August 8 Letter Order) (responding to the June 2017 complaint).

² The October 9, 2019 Order Granting Rehearing for Further Consideration mistakenly included Lawrence Hydroelectric Associates as a licensee in the caption of the order. The Commission approved the transfer of Lawrence Hydroelectric Associates' interest in the project to Essex Company, LLC in March, 2015. *See Ada County, Idaho*, 150 FERC ¶ 62,210 (2015).

³ *Lawrence Hydroelectric Associates and Essex Company*, 5 FERC ¶ 61,202 (1978).

Dam, and both the North and South Canals.⁴ The Great Stone Dam, North Canal and the associated gatehouse were built between 1848 and 1854 and are listed in the National Register of Historic Places. The project's South Canal, built in 1866 and expanded in 1896, and associated gatehouse are eligible for listing in the National Register.

3. The project facilities are subject to regular inspections under the Commission's dam safety regulations.⁵ Commission staff from the Division of Dam Safety and Inspections - New York Regional Office (Regional Office), conducted an inspection on May 9, 2017, and posted report of the inspection on June 6, 2017.⁶ On May 17, 2017, the Division of Hydropower Administration and Compliance (DHAC) conducted their respective environmental inspection, which evaluated public safety measures and other environmental requirements including recreation and project operation and filed an inspection report on June 20, 2017.⁷

4. On June 7, 2017, the Petitioners filed with the Commission allegations of non-compliance regarding the license for the project. The Petitioners alleged that the licensee failed to operate the project in a way that "duplicat[ed] their historic operation."⁸ Specifically, the Petitioners alleged that the "Licensee is operating the Lawrence Hydroelectric Project in violation of license Articles 17, 18, 19, 20, 29, 32, and 43."⁹ The

⁴ See *id.* at 14-15.

⁵ 18 C.F.R. pt. 12 (2019). The Regional Office inspects the Lawrence Hydroelectric Project at three-year intervals.

⁶ See June 6, 2017, Inspection Follow-up Letter to Licensee at 1, P-2800. There is a typographical error in the first sentence of the letter, the correct date of the inspection is May 9, 2017, not 2016.

⁷ See April 24, 2017 Notice of Environmental Inspection, P-2800-000; and June 20, 2017 Environmental Inspection Report.

⁸ See Petitioners' Allegation of Non-compliance, Docket No. P-2800-048 at 1-2 (filed June 7, 2017) (Allegation of Non-compliance) (alleging, amongst other charges, that the licensee failed to avoid "adverse impact to the historic project works known as the North and South Canals," failed to "duplicate [the North and South Canals'] historic operation as water conveyances," and failed to "protect [the North and South Canals] from the degradations of pollution").

⁹ *Id.* at 16. Articles 17-20 are standard license articles. Generally, Article 17 requires the licensee to construct, operate, and maintain reasonable recreational facilities; Article 18 requires the licensee to allow public access to project waters and adjacent lands; Article 19 requires the licensee to take reasonable measures to prevent soil erosion

allegations focused on the licensee's impact on the project's canals, the public accessibility of the historic project buildings, and the accumulation of litter in the canals and other project works.¹⁰ The Petitioners stated that these violations have caused property damage and reduced property values; frustrated economic development and reduced business opportunities; caused aesthetic blight; reduced recreation and impaired quality of life; impaired public infrastructure and created threats to personal and public safety; and exposed the public to harmful pollution and related public health risks.

A. August 8 Letter Order

5. The August 8 Letter Order found that the Licensee was not in violation of its license¹¹ and that the licensee has maintained the project in a safe and adequate condition.¹² Specifically, it found that the Licensee was not in violation of Articles 17, 18, 19, 20, 29, 32, and 43 of its license or in violation of its approved Recreation Plan.¹³ Further, the Licensee was found to be in compliance with Part 12 of the Commission's regulations. However, the licensee was directed to make several repairs, file an updated Public Safety Plan, file a plan to regularly remove floating debris at the gatehouses, and file a proposal for additional signage to notify the public of the availability to tour the Carriage House.¹⁴ These findings were based upon: 1) the May 2017 inspections of the facilities by the Regional Office and DHAC; 2) the Petitioners' June 7, 2017 Complaint, the Licensee's July 17, 2017 answer to the complaint and the Petitioners' September 27, 2017 answer to the Licensee's answer; 3) Licensee's June 2017 Dam Safety Surveillance and Monitoring Review filed on March 26, 2018 which was reviewed and accepted by the Regional Office on June 23, 2018; and 4) a May 16, 2019 site visit by Commission staff from DHAC and the Division of Dam Safety and Inspections and representatives of

on lands adjacent to the streams and prevent any form of water or air pollution; and Article 20 requires the licensee to clear and keep clear the reservoir area and the surrounding lands. Article 29 generally concerns possible adverse effects to historic structures at the project. Article 32 contains a minimum flow requirement. Article 43 allows the licensee to grant permission to third parties to use project lands without prior Commission approval under certain conditions.

¹⁰ *Id.* at 1-2.

¹¹ *Id.* at 2.

¹² *Id.* at 5.

¹³ *Id.* at 10.

¹⁴ *Id.* at 2.

the licensee. Finally, the August 8 Letter Order noted that under a separate letter issued concurrently, the Licensee was required to file information to allow the Commission staff to determine whether the North and South Canals should remain project facilities.¹⁵

B. Rehearing Request

6. On September 9, 2019, the Petitioners filed a request for rehearing of the August 8 Letter Order.¹⁶ The Petitioners argue that Commission staff's response was tainted due to improper off-the-record communications;¹⁷ violated the Petitioners' due process rights by depriving the Petitioners of an ability to weigh in on the possible removal of the North and South Canals from the project;¹⁸ and failed to adequately assess the matters alleged in the complaint.¹⁹

II. DISCUSSION

A. Allegation of *Ex Parte* Communications

7. Petitioners allege that the Commission staff engaged in improper off-the-record communications with the licensee at the May 2019 site visit.²⁰ As Petitioners note, Commission staff did engage with the licensee at the site visit.²¹ Petitioners argue that these communications "tainted the Commission's decision-making process so as to make

¹⁵ *Id.* at 6. Project licenses by the Commission include only structures and lands that are used and useful or necessary or appropriate in the maintenance and operation of the complete unit of development that includes the project. *See* section 3(11) of the Federal Power Act, 16 U.S.C. § 396(11) (2018).

¹⁶ Request for Rehearing at 2.

¹⁷ *Id.* at 2, 11-12.

¹⁸ *Id.* at 2, 8-11.

¹⁹ *Id.* at 2, 5-8.

²⁰ *Id.* at 2, 11.

²¹ *Id.* at 11.

its ultimate decision unfair.”²² Their argument reflects a misunderstanding of the Commission’s *ex parte* regulations and compliance procedures.²³

8. Commission regulations prohibit Commission staff from having off-the-record communications in contested on-the-record proceedings.²⁴ DHAC’s investigations into licensee non-compliance—such as the one here—are not such proceedings.²⁵

9. The Commission is not required to treat allegations of license violations as a formal complaint.²⁶ Even when a pleading is styled as a Rule 206 Complaint, the Commission may determine the most efficient way of handling such allegations²⁷ and has broad discretion in doing so.²⁸ To fully investigate allegations of non-compliance, it is vital that the Commission staff be able to communicate with the licensee of a project, which may include conducting site visits, carrying out inspections, and engaging with stakeholders. The Commission’s delegation of allegations of non-compliance to DHAC

²² *Id.* at 2.

²³ The Commission’s rules governing off-the-record communications “apply to all contested on the record proceedings, except that the Commission *may, by rule or order, modify any provision of this subpart.*” 18 C.F.R. § 385.2201 (2019) (emphasis added).

²⁴ 18 C.F.R. § 385.2201(b) (“In any contested on-the-record proceeding, no person outside the Commission shall make or knowingly cause to be made to any decisional employee, and no decisional employee shall make or knowingly cause to be made to any person outside the commission, any off-the-record communication.”).

²⁵ Here, the Petitioners’ filing was referred to Commission staff in DHAC, which responded to the Petitioners’ allegations regarding the licensee’s compliance with the terms of their license. August 8 Letter Order at 1-2.

²⁶ *See PPL Montana, LLC*, 139 FERC ¶ 61,231, at P 28 (2012), *aff’d sub nom. Anderson v. FERC*, 583 F.App’x 747 (9th Cir. 2014) (affirming decision to refer a formal section 206 complaint that alleged violations of a hydroelectric project license to Commission staff to investigate and respond to).

²⁷ *PPL Montana, LLC*, 139 FERC ¶ 61,231 at n.87 (noting that the Commission has discretion to determine the best procedures to address the issues before it).

²⁸ 18 C.F.R. § 385.101(e) (2019). The Commission has the authority to “prescribe any alternative procedures that it determines to be appropriate.” 18 C.F.R. § 385.101(e).

does not constitute the initiation of a formal complaint proceeding to which the off-the-record communications rule applies.²⁹

B. Violation of Petitioners' Due Process Rights

10. The Petitioners allege that the August 8 Letter Order—instructing the licensee to determine whether the North and South Canals should remain within the project—violates their rights to due process by depriving the Petitioners an opportunity to participate in that proceeding. Specifically, they argue that “the DHAC’s letter fails to provide any mechanism or procedure by which parties impacted by the potential removal of the canals from the project license, which include Petitioners, can submit comments and otherwise participate in the Commission’s determination of whether the project license will be amended.”³⁰

11. Petitioners’ claims misapprehend the Commission’s procedures. The August 8 Letter Order instructed the licensee to “[f]ile information with the Commission’s Secretary demonstrating whether the North and South Canals are still needed for project purposes and if not, file an application conforming to the requirements of 18 CFR § 4.200 with the Commission’s Secretary to propose removing these two structures from the project license for Commission approval.”³¹ The Petitioners’ argue that this request precludes their participation in the potential removal proceedings.³²

²⁹ *Pacific Gas and Electric Co.*, 115 FERC ¶ 61,324 at 62,155 (2006) (Chairman Kelliher concurring) (“It would be inconsistent, and a waste of administrative effort, for us to treat differently those allegations of license non-compliance that are styled ‘formal complaint’ and those that are not. It is only those complaints that raise substantial legal or policy issues that warrant immediate commission consideration as formal complaints, rather than being handled at the initial state by our compliance staff. Therefore . . . as a general matter, allegations regarding compliance with hydroelectric licenses should be handled in the first instance by our compliance staff.”). See also *Jeffrey Lake Dev., Inc.*, 161 FERC ¶ 61,184, at PP 6-7 (2017); *PPL Montana, LLC*, 139 FERC ¶ 61,231 at P 28 & n.87 (the Commission is not required to treat allegations of non-compliance as a formal complaint, which would require public notice).

³⁰ Request for Rehearing at 9.

³¹ August 8 Letter Order at 6. Section 4.200 of the Commission’s regulations requires any licensee seeking to change the physical features of a project or its boundary to file a formal “Application for Amendment of License.”

³² Request for Rehearing at 9.

12. As the Letter Order indicated,³³ should the licensee file an application to amend the license to remove one or both of the canals, such a filing would be “a significant alteration” of the license triggering the public notice requirement in section 4.202 of our regulations.³⁴ Thus, the Commission would issue a public notice of the amendment application soliciting public comments, protests and motions to intervene. Accordingly, Petitioners will have a full opportunity to review and comment on any potential amendment application and seek party status in the amendment proceeding.

C. Adequacy of the Commission Staff’s Investigation

13. Petitioners allege Commission staff’s non-compliance investigation to be inadequate, claiming that Commission staff gave their allegations a cursory review.³⁵ Specifically, Petitioners argue that the August 8 Letter Order fails to “accurately evaluate the dangerous and deteriorating condition of the canals,”³⁶ “incorporate any review or analysis by the DHAC’s Land Resources Branch,”³⁷ and “fully and accurately assess Petitioners’ allegations” concerning violations of the license conditions to protect the character of the North and South Canals.³⁸

1. Sufficiency of Staff’s May 2019 Site Visit

14. Petitioners cite the Commission staff’s May 2019 site visit as evidence of insufficient treatment of their allegations.³⁹ However, the Commission staff’s response was not based solely upon the May 2019 site visit. Rather, Commission staff based their conclusions on the May 2017 inspections by the Regional Office and DHAC, the parties’ filings, the licensee’s June 2017 Dam Safety Surveillance and Monitoring Review filed

³³ August 8 Letter Order at 6 n.6.

³⁴ 18 C.F.R. § 4.202(a) (2019) (requiring a 30-day public notice of any application for an amendment that would constitute a significant alteration of the license).

³⁵ Request for Rehearing at 6.

³⁶ *Id.* at 6.

³⁷ *Id.*

³⁸ *Id.* at 7.

³⁹ *Id.* at 8. Petitioners further allege that during this visit, “Commission staff did not, and could not, fully and accurately assess the matters alleged in the complaint.” *Id.*

on March 26, 2018, which was reviewed and approved by the Regional Office on June 23, 2018, and, finally, the May 2019 site visit.

15. Commission staff issued the August 8 Letter Order after considering the findings from the May 2019 site visit and previous inspections and filings. In the order, staff noted the Petitioners' allegations that the project facilities are in disrepair, compromising dam safety.⁴⁰ In response, staff noted that the Regional Office has regularly inspected the project pursuant to its dam safety authority under Part 12 of the Commission's regulations.⁴¹ The last inspection was in May 2017; the next inspection is scheduled for 2020. During the 2017 inspection, the Regional Office found minor maintenance issues but no significant dam safety or public safety issues. Staff noted this in the August 8 Letter Order and concluded that the licensee has "maintained the project in a safe and adequate condition."⁴²

16. During staff's May 2019 visit, staff did not find wide-spread public safety issues. Staff confirmed Petitioners' assertions about the missing walkway railing and found two other needed repairs at the North Canal gatehouse. Staff required the licensee to both make necessary repairs and update its Public Safety Plan.⁴³ While the May 2019 site visit informed the Commission staff's decision, it was not the sole basis for the August 8 Letter Order.

2. Analysis of the Canals' Condition

17. To support their assertion regarding the condition of the canals, Petitioners state that the May 2019 site visit was both late and insufficient to fully assess the canals'

⁴⁰ August 8 Letter Order at 4. Petitioners allege that masonry in the canal walls has collapsed in some places; penstocks that leave the canals have fallen into disrepair, allowing canal water to leak into abutting properties; and that end-of-canal infrastructure is in poor condition and needs maintenance. *Id.*

⁴¹ 18 C.F.R. pt. 12 (2019).

⁴² August 8 Letter Order at 4. Staff also noted that the licensee conducts annual dam safety reviews and has filed its Dam Safety Surveillance and Monitoring Reports in a timely fashion and conducted any repairs deemed necessary. Recent repairs required by the Regional Office "included repairing animal burrow holes in sections of the north and south canal walls; replacing several feet of north canal stone which had fallen into the canal; and installing signs that prohibit heavy vehicles from parking over the tunnel that drains the south canal into the Merrimack River." *Id.*

⁴³ August 8 Letter Order at 10, 11.

condition,⁴⁴ and filed with their request for rehearing an engineering report dated May 2019 from the firm Woodard & Curran, which concludes that certain sections of the canal walls are unstable, and are at risk of “fail[ing] or collapse at any time.”⁴⁵

18. With respect to the engineering report, which was submitted to the Commission on September 9, 2019, the Petitioners provide no reason why this report was not provided at an earlier date. The Commission generally disallows the introduction of new evidence with a request for rehearing absent a showing of good cause.⁴⁶ Nevertheless, because of the report’s alleged structural safety concerns,⁴⁷ we have fully reviewed and considered it as discussed below.

19. In light of Petitioners’ engineering report, the Regional Office conducted a site visit on December 10, 2019, during which staff visually inspected the accessible portions of the North Canal walls. In its inspection, staff did not identify any canal wall conditions that would present a danger to adjacent structures or features.⁴⁸ Nonetheless, staff will continue to inspect the project and make recommendations as needed. As noted above, the next regular inspection of the project is scheduled for this year.

⁴⁴ Request for Rehearing at 8.

⁴⁵ *Id.* at 8 and Exhibit 1.

⁴⁶ See *PaTu Wind Farm, LLC v. Portland General Electric Company, LLC*, 151 FERC ¶ 61,223, at P 42 (2015) (“Parties are not permitted to introduce new evidence for the first time on rehearing since such practice would allow an impermissible moving target, and would frustrate needed administrative finality.”); see also *Potomac-Appalachian Transmission Highline, L.L.C.*, 133 FERC ¶ 61,152, at P 15 (2010) (“[T]he Commission generally does not permit parties to introduce new evidence for the first time on rehearing.”).

⁴⁷ Request for Rehearing at Exhibit 1 (discussing signs of disrepair, including but not limited to out-of-plumbness, dislodged or misaligned stones, and vegetation growth).

⁴⁸ However, as a result of the Commission’s regional engineer’s inspection of the water conveyance features that are fed or formally fed from the two canals, by letter dated December 4, 2019, the licensee is required to prepare an inventory of canal penetrations for both the North and South Canals, note the condition of these penetrations, and include these structures in the licensee’s Dam Safety Surveillance and Monitoring Plan and Reports.

20. We again disagree with Petitioners' claim that the Commission staff's May 2019 inspection was inadequate and late.⁴⁹ Commission staff's investigation of Petitioners' June 7, 2017 complaint was informed by not only the May 2019 inspection, but also, both the Regional Office's May 9, 2017 inspection and DHAC's May 17, 2017 environmental inspection. The May 9, 2017 safety inspection determined that the project's features were in "satisfactory condition," and found only minor maintenance needs.⁵⁰ This maintenance included repairing several linear feet of stone wall along the North Canal that had fallen into the canal. However, such maintenance is not unexpected for structures that are up to 170 years old and canal wall maintenance is an ongoing effort. Similarly, DHAC's May 17, 2017 environmental inspection report concluded that the "licensee maintains the project structures in the preservation and enhancement of their historic nature,"⁵¹ with the only follow-up action item being installing proper signage at the Visitor Center's Carriage House.⁵²

3. Assessment of License Violations Relating to Historic Operation

21. The Petitioners argue that the Commission staff's August 8 Letter Order failed to assess the alleged violation of License Articles 29 and 32 and Exhibit R of the license, which generally require the protection of the cultural and historic character of the North and South Canals.⁵³ Petitioners argue that, aside from oblique mentions, "there is no review or analysis of Petitioners' allegations of violations of these key license provisions."⁵⁴

⁴⁹ We note that neither DHAC's compliance investigation process nor Rule 206's complaint procedures provide a prescribed timeframe for addressing complaints. *See* 18 C.F.R. § 385.206 (2019).

⁵⁰ June 6, 2017, Inspection Follow-up Letter to Licensee at 1, P-2800.

⁵¹ Environmental Inspection Report, at 1 (filed June 20, 2017).

⁵² The signage was installed by mid-September 2017. *See* Licensee's September, 15, 2017, Letter of Environmental Inspection Items' Completion.

⁵³ Request for Rehearing at 7.

⁵⁴ *Id.* at 8.

a. **Article 29**

22. The Petitioners argue that the licensee “violated Article 29 by failing to avoid adverse impact to the North and South Canals,”⁵⁵ including by exposing historic project works to elements by substantially lowering the water levels in both canals which adversely impacted the canals’ fundamental water retaining structures, and causing the deterioration of historic penstocks and other wooden structures due to vegetation growth.⁵⁶

23. The August 8 Letter Order addressed each of these specific allegations. First, in a subsection titled “*Dam Safety Concerns*,” the order notes that the licensee has complied with the annual dam safety review program, and that the Regional Office’s May 2017 inspection found that only minor maintenance was necessary,⁵⁷ including “repairing animal burrow holes in sections of the north and south canal walls; replacing several feet of north canal stone which had fallen into the canal; and installing signs that prohibit heavy vehicles from parking over the tunnel that drains the south canal into the Merrimack River.”⁵⁸

24. Next, in a subsection titled “*Trash, Vegetation Management, and Water Levels in the Canals*,” the Letter Order notes that the license does not specify a minimum or maximum water level elevation.⁵⁹ Furthermore, the Letter Order found that the vegetation growth was “minor and within norms for hydropower projects within municipal and industrial areas” and that the licensee has a commercial contract for removal and maintenance of canal vegetation.⁶⁰ Further, the 2017 dam safety inspection and the May 2019 inspection, and the December 2019 site visit confirmed that the licensee has taken steps to plug non-project intakes to avoid seepage, but that its ability to do so is limited due to private ownership of penstocks along the canals due to the past industrial character and use of the canals. In addition, the Regional Office has recently

⁵⁵ Allegation of Non-compliance at 17.

⁵⁶ *Id.* at 17-18.

⁵⁷ August 8 Letter Order at 4.

⁵⁸ *Id.* at 4 n.2.

⁵⁹ *Id.* at 7.

⁶⁰ *Id.*

required the licensee to inventory, evaluate, and monitor each non-project penstock where it enters or penetrates North and South Canal walls.⁶¹

b. Article 32

25. The Petitioners alleged that the licensee has violated Article 32 of the license, citing the general language of the license requiring the “project [to] be operated in a manner that duplicates the historical operation.” However, Article 32 does not include such a requirement, but rather only specifies a minimum flow for the project.⁶² The article does not establish minimum or maximum water levels within the canals.⁶³ The statement in the license order that “[t]he project will be operated in a manner that duplicates the historical operation of the dam and canals” is a general statement regarding project operation, but is not required by Article 32 or any other license condition.⁶⁴ Moreover, as noted above, DHAC’s May 17, 2017 environmental inspection report determined that the project is maintained consistent with its historic nature,⁶⁵ and, with respect to Article 32, the May 17, 2017 inspection report found no violations or follow-up action items.⁶⁶

c. Exhibit R

26. The Petitioners also contend that the licensee has violated the Exhibit R requirements to “maintain and perpetuate the cultural and historic character of the area” and “duplicate the historical operation of the dam and canals.”⁶⁷ They allege that the debris and decay generally around the canals constitute a violation of Exhibit R. The

⁶¹ December 4, 2019 letter from the Regional Office to the licensee.

⁶² *Lawrence Hydroelectric Associates and Essex Company*, 5 FERC ¶ 61,202 at Article 32.

⁶³ *Id.*

⁶⁴ Modes of operation discussed in a license order but not required by a license condition are not enforceable. *See Clifton Power Corporation v. FERC*, 88 F.3d 1258 (D.C. Cir. 1996).

⁶⁵ June 20, 2017 Environmental Inspection Report at 1.

⁶⁶ *Id.* at 2 (inspection findings) and 5 (noting that licensee operates the project to maintain the minimum flow requirement).

⁶⁷ Allegation of Non-compliance at 19.

Petitioners assert that wear and tear on the canals will, at some point, destroy the integrity of the canals.⁶⁸

27. The canals' integrity is a safety issue (which is addressed supra PP 24-27) and is not within the intended purview of Exhibit R. Rather, Exhibit R encompasses the recreation plan for the project, seeking to ensure the safe existence of recreation opportunities within the project boundary. The August 8 Letter Order addresses the recreational issues raised in the Petitioners' complaint. Specifically, Commission staff examined Petitioners' allegations regarding the lack of: railings on certain canal bridges within the project boundary; signage at the Carriage House; publicity regarding the Carriage House being open to the public; and recreational space near the Carriage House; but, overall found that the licensee was in compliance with the approved Recreation Plan,⁶⁹ and that many of the Petitioners' concerns "are not required by the plan."⁷⁰ Additionally, staff determined that the land behind the Carriage House should not be developed for picnicking and passive recreation because the area's proximity to the dam creates a potential danger to anyone entering the water at that location.⁷¹ Staff reasonably concluded, based on the record, that the licensee complied with its Recreation Plan.

28. We find that the August 8 Letter Order demonstrates that Commission staff adequately investigated and considered the Petitioners' allegations concerning the license requirements to protect the cultural and historic character of the canals and correctly determined, as we affirm here, that there was no license violation.

4. Failure to Consult the DHAC's Land Resources Branch

29. Petitioners argue that Commission staff's August 8 Letter Order was deficient because it failed to incorporate review or analysis by DHAC's Land Resources Branch. They reach this conclusion by noting that the August 8 Letter Order was issued by the acting branch chief of DHAC's Environmental and Project Review Branch.⁷² Again, the

⁶⁸ *Id.* at 19-20.

⁶⁹ *Lawrence Hydroelectric Associates and Essex Company*, 72 FERC ¶ 62,074 (1995).

⁷⁰ August 8 Letter Order at 8-9.

⁷¹ *Id.* at 10 (noting that this parcel is located close to the dam and North Canal gatehouse, and public access to the parcel would likely constitute a public safety issue).

⁷² Request for Rehearing at 6.

Petitioners misunderstand the Commission's practice of addressing allegations of non-compliance.

30. The fact that the branch chief of DHAC's Environmental and Project Review Branch signed the August 8 Letters does not mean that only the Environmental and Project Review Branch of DHAC examined the Petitioners' allegations of non-compliance. Allegations of non-compliance may be assigned to a team made up of members from multiple branches of DHAC and depending on the nature of the allegations may also include staff from the Division of Dam Safety and Inspections. In this case, analysis included staff from the Land Resources Branch and the Environmental and Project Review Branch, as well as staff from the Division of Dam Safety and Inspections. This team reviewed and analyzed Petitioners' allegations and provided a joint response to them. Therefore, the Petitioners' assertion that the failure to consult the DHAC Land Resources Branch necessitates rehearing is incorrect.

31. For the reasons discussed above, rehearing is denied.

The Commission orders:

The request for rehearing filed by the City of Lawrence, Massachusetts, Conservation Law Foundation, Inc., Groundwork Lawrence, Inc., Lawrence Community Works, Inc., 60 Island Street, LLC, Everett Mills Real Estate, LLC, GES Realty LLC, and Pacific Mills Acquisition LLC, is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.