

124 FERC ¶ 61,256
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

Central Nebraska Public Power
and Irrigation District

Project No. 1417-227

ORDER GRANTING REHEARING

(Issued September 18, 2008)

1. On July 9, 2008, Commission staff modified and approved an application filed by Central Nebraska Public Power and Irrigation District (licensee) to amend its Land and Shoreline Management Plan (shoreline plan) for the Kingsley Dam Project No. 1417, with regard to certain lands at Plum Creek Reservoir (reservoir).¹ On August 7, 2008, the licensee filed a request for rehearing.²

Background

2. The Commission approved a shoreline management plan for the project in 2002.³ Pursuant to its plan, the licensee performed an initial classification survey and classified

¹ *Central Nebraska Public Power and Irrigation District*, 124 FERC ¶ 62,020 (2008). The project is located on the North Platte and Platte Rivers in Keith, Adams, Gosper, Phelps, Kearney, Lincoln, and Dawson Counties, Nebraska. Plum Reservoir is one of 29 lakes associated with the project.

² In addition, certain affected homeowners filed a motion to intervene and rehearing request. Their motion to intervene was denied as untimely and the request for rehearing rejected by notice issued September 5, 2008. This order authorizes the licensee to grant the homeowners the relief they are seeking.

³ See *Central Nebraska Public Power and Irrigation District*, 101 FERC ¶ 62,015 (2002). As relevant here, the plan's goals for managing project lands, set forth in section 5.B of the shoreline plan, include: protecting and managing the project's environmental and recreation resources; evaluating the impact of all land use proposals on surrounding project and non-project lands; and evaluating all proposed changes in land use and/or occupancy to assure such uses/occupancy are consistent with the purposes of protecting and enhancing the project's scenic, recreational, and environmental values.

(continued...)

all project lands into several categories including project works, open space, and residential. The licensee further listed the classifications of land adjacent to the project boundary.

3. As set forth in the shoreline plan, the licensee may issue permits to allow specific activities within the project boundary. As relevant here, it may issue a Permit to Construct to allow shoreline facilities, and it may issue a Permit for Special Water Access for adjoining residents who want access across project lands and waters.

4. When a Permit to Construct is issued for a shoreline facility, the shoreline plan requires a setback be established suitable to the type of structure or facility proposed and compatible with the location, terrain, erosion and public use when a facilities permit is requested.⁴ Specifically, the plan requires a minimum setback for structures and facilities 50 feet from the normal high water mark, and it notes that deeper setbacks can be required.⁵

5. In addition, the shoreline plan lists activities that would require approval through the shoreline facilities permit process. This includes landscape plantings, fences, retaining walls, decks, walkways, and ground disturbing activities including digging, compacting, or erosion of soil.⁶ The plan also identifies activities that do not require prior approval. These activities include the planting of flowers and small shrubs near

To achieve the above goals, section 5.C of the shoreline plan sets forth several policies, such as requiring shoreline plan compliance, building setbacks, and shoreline erosion prevention measures.

The shoreline plan, at section 5.C.4, states that the licensee shall continue to permit new uses, structures and facilities when they are in compliance with the shoreline plan. Section 5.C.5 requires suitable setbacks from the shoreline for all future residential development on project lands to promote reasonable public use and access to project lands and water. Section 5.C.6 requires that the licensee, where necessary, will support activities to protect the shoreline from excessive erosion and will require permit holders to provide adequate shoreline protection in the land areas they use under the terms of a permit.

⁴ Shoreline plan at section D.1.

⁵ *Id.* The shoreline plan states that this requirement applies on both project and private lands.

⁶ Shoreline plan at section D.1.a.

homes, normal lawn care activities such as fertilization and mowing, and the installation of gravel or wood-chipped pathways less than four feet wide.⁷

6. There has been recent development in three areas located outside of, but adjacent to, the project boundary at the Plum Creek Reservoir. The first area consists of two parcels, referred to as the Nelson and Peterson lots; the second area consists of two parcels, the Bellamy and Hutt subdivisions; and the third area consists of one parcel, the Wightman subdivision.

7. The Nelson and Peterson lots are located adjacent to the northeast shoreline of the reservoir and are part of an existing cluster of residences. These lots were existing at the time of the initial shoreline survey, but were classified as open space.

8. The Bellamy subdivision consists of seven lots adjacent to 9,950 feet of shoreline along the east shoreline of the reservoir. At the time of the initial shoreline survey, only one lot in the Bellamy subdivision was developed, though the property was subdivided. The lots range from about two to 15 acres and each is adjacent to about 1,400 feet of shoreline. The Hutt subdivision comprises a single, one-acre lot adjacent to 497 feet of shoreline at the south end of the reservoir.

9. The Wightman subdivision consists of nine lots adjacent to 1,195 feet of shoreline on the south end of the reservoir near the project dam and adjacent to the Nebraska Game and Parks Commission public boat ramp.⁸ At the time of the initial land classification for the shoreline plan, the Wightman subdivision did not exist. A county road and one cabin existed in the area now occupied by the Wightman subdivision. A subsequent land exchange between the landowner and the county resulted in the relocation of the county road and the creation of the Wightman subdivision adjacent to the project boundary. The lots are small, ranging from 0.51 to 0.92 acres. The lots each abut a 100-foot-long length of shoreline.

10. On February 12, 2007, the licensee filed a request to amend its shoreline plan to reflect a change in classification of these five parcels of land from various categories to “residential.” With a land classification of “residential,” residents of these parcels would be eligible to apply for permits to access the reservoir across project lands and to construct shoreline facilities at the reservoir.⁹

⁷ *Id.*

⁸ The project boundary generally runs along the high water mark in this area.

⁹ *See* shoreline plan at section 5.D.1 at 50.

11. For the first two parcels, Nelson and Peterson, the licensee proposed no conditions other than compliance with the shoreline plan. For the remaining three parcels, the licensee proposed to restrict shoreline activities at these locations by requiring owners with facilities permits to maintain a 50-foot setback from the reservoir's normal high water mark. For two of the parcels, Bellamy and Hutt, facilities permitted would be limited to two watercraft per lot. At Wightman, the remaining parcel, facilities permitted would be limited to one watercraft per lot due to the small size of the lots. At Wightman, the licensee also proposed to allow residents with facilities permits to build and maintain certain structures such as ground level patios, excavation, or retaining walls within the setback area between 25 and 50 feet from the normal high water mark.

12. The order approved the request to amend the shoreline plan to reflect the changed classification of these parcels, and generally allowed, except for the Wightman ground level structures exception, all other conditions set forth in the application.

Discussion

A. Clarification of Land Classification Change Approval

13. The July 9 order approved the licensee's request to change the land use classification of certain areas around the reservoir. The licensee did not specify exactly what land was within the boundary as opposed to outside of the boundary. We clarify in this order that our approval of the change in classification only applies to that portion of the land within the boundary. As to the portion outside the boundary, we acknowledge the updated information, but we have no authority with respect to the classification of non-project lands.

B. Establishment and Maintenance of Lawns within 50-Foot Setback

14. The July 9 order approved the licensee's proposal to prohibit lawns within a 50-foot setback when approving a request for a permit for shoreline facilities for residents with land adjacent to the project boundary.

15. On rehearing, the licensee clarifies that it only intended the lawn prohibition to apply to the Bellamy and Hutt parcels, not to the Wightman parcel, or any other parcel. The licensee explains that the Bellamy and Hutt parcels already have vegetation along the shoreline and that by prohibiting lawns in the 50-foot setback, it is protecting those vegetative areas which serve to protect the shore from erosion and provide a visual barrier between the houses and the reservoir itself. However, the licensee asserts that the same is not true for the Wightman parcel. Because there is no existing shoreline vegetation to preserve on those lands, the licensee argues that lawns would actually improve the existing conditions, rather than cause adverse impacts. In addition, the licensee notes that it has worked with the developers of Wightman to restore and stabilize the shoreline by installing rip rap and other approved erosion control facilities, thereby

reducing the need for vegetation. In consequence, the licensee asks the Commission to allow it to permit lawns on the Wightman parcel and to confirm that the licensee is not required to prohibit lawns or vegetation control within the 50-foot setback for all new requests for facilities permits.

16. We agree with the licensee that the shoreline plan does not prohibit lawns within the 50-foot setback. Generally, the Commission has no authority to require conditions on non-project land. However, here the requirement is not applied to land simply for being next to the project, it is being applied in exchange for the benefit of using the project lands. Therefore, we affirm the “no lawn” requirement for the Bellamy and Hutt parcels. We agree that based on the facts specific to the Wightman parcel, is it not necessary to preclude the Wightman residents from having lawns within the 50-foot setback on their lots.¹⁰

C. Structures within the 50-foot setback on the Wightman subdivision

17. The July 9 order did not grant the licensee permission, as it requested, to allow residents of the Wightman parcel to construct ground level patios, excavations or retaining walls within the upper portion (25 to 50 feet from the normal high water mark) of the setbacks for the Wightman parcel.¹¹ The order noted that licensee’s amendment application stated that lots at the Wightman parcel are subject to a 50-foot setback from the shoreline, and that the setback is required by the shoreline plan for adjacent landowners who desire access facilities.

18. On rehearing, the licensee acknowledges that allowing such structures is inconsistent with the approved shoreline plan and clarifies that it is seeking an amendment to the shoreline plan to permit limited improvements in portions of the Wightman parcel. The licensee states that the purpose of maintaining the setback, which includes reducing both the visual impacts to boaters on the lake and the likelihood of further erosion, does not apply to this parcel.

19. The 50-foot setback would apply only to those residents who request a facilities permit. The licensee notes that the Wightman lots are small and situated between the reservoir and the road. As the lots are private property, the owners who do not request facilities permits can place structures, including their homes, close to the reservoir. The licensee argues that allowing limited ground level structures such as patios between the

¹⁰ By this action, we are not intending to change the shoreline plan. Consideration of whether lawns or vegetation control should be prohibited will need to be assessed by the licensee for future requests pursuant to the requirements of the shoreline plan.

¹¹ The structures would be no more than 625 square feet in size.

25 and 50 feet from the normal high water mark for those Wightman residents who seek a facilities permit is not inconsistent with the intent of the shoreline plan. In this limited instance, given that granting the request would result in equal treatment of all Wightman residents, we agree.

The Commission orders:

The request for rehearing filed by Central Nebraska Public Power and Irrigation District on August 7, 2008, is granted.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.