

Appalachian Power's regulation of lakefront property draws ire at Smith Mountain Lake



STEPHANIE KLEIN-DAVIS | The Roanoke Times

Bill Nissen stands with his wife, Lora, and son Sam, 10, in front of their dock that was under construction on the shore of Smith Mountain Lake before the project was halted by legal action by Appalachian Power. The company is seeking to use the authority of its Federal Energy Regulatory Commission-approved Shoreline Management Plan to stop the Nissens' dock-building plans.

Posted: Friday, October 17, 2014 8:57 am

By Zach Crizer | zach.crizer@roanoke.com | 981-3234

Like most owners of lakefront property, Bill Nissen wanted a dock on his land, for access to the waters of Smith Mountain Lake. He owns a plot on the North Shore, off Scruggs Road in Franklin County, and a few months ago he decided to build himself that dock.

It would be about 110 feet long, and 26 feet high, with a 12-foot-wide gravel walkway leading to its entrance. Nissen builds docks for a living — it's part of the business he owns nearby, Dock Solutions Inc. — so he knew how to create exactly what he envisioned for his family.

"I plan to live here forever," Nissen said, explaining that the walkway, for instance, was designed so he could drive a utility vehicle down the slope to the dock to avoid aggravating his back problems.

Being a professional, he also knew the process. He took his plans to the county to obtain a building permit, and it was granted in June. Truth be told, he also knew that Appalachian Power, which created Smith Mountain Lake and operates it as a hydroelectric power project, had been regulating construction along the lake in recent years, setting parameters for docks and vegetation along the shore. But Nissen owned his property, and after examining the easement AEP holds within his property, he decided the project was good to go.

With his company's peak season over, he began constructing his dock earlier in the fall, to try and make sure his men had work during the winter. After the poles had been driven into the lake bed, which he also owns until about halfway across the cove, the envelopes came to his home.

AEP filed a complaint in federal court, on Oct. 3, that asks a judge to stop Nissen from building his dock, since it does not meet the requirements of AEP's Shoreline Management Plan. The document was created in the early 2000s as part of the company's licensing agreement with the Federal Energy Regulatory Commission, which oversees hydroelectric projects such as Smith Mountain Lake. And in the years since, AEP has used this document, and its license with FERC, to assert an authority to oversee and regulate the activities of private landowners along the shore.

Nissen's dock unquestionably violates the Shoreline Management Plan on several fronts, as detailed in AEP's federal complaint. However, it is unclear whether that plan has any legal standing in Nissen's case, as he has never signed one of the permits AEP has used to gain the compliance of many lakefront homeowners.

The complaint has become a flashpoint in a long fight over the plan. Residents, business owners and real estate agents, some of whom protested the plan when it was implemented, now contend that the power company is systematically infringing upon property rights without any legal standing.

The inhabitants of the lands that, in the 1960s, AEP turned into shores, carried on largely unfettered by the power company for the first four decades of the lake's existence. Homes and neighborhoods and businesses sprung up to allow residents to enjoy and capitalize upon the entirely new environment that had been dropped into the middle of the region.

AEP, meanwhile, generated power and held flowage easements on all of the lakefront properties it didn't own, legal documents that give the company the right to flood the land up to a certain point, or clear it should it become necessary for the project. All regulation of construction, of which there was plenty, went through the applicable counties. All along, AEP had been operating the project under a license from FERC, a federal body that regulates many energy-related enterprises (like the Mountain Valley Pipeline project, for example). And in the early 2000s, that license had to be renewed.

"In essence, the way we were handling development within the project boundaries was not totally in compliance with them," said Frank Simms, AEP's manager of hydroelectric operations. "We needed to be more involved."

Much like other projects, AEP made changes to their operation to qualify for the new license. Among the changes was the creation and implementation of a Shoreline Management Plan, a term coined by FERC to describe, according to the group's website "a comprehensive plan to manage a project's shorelines so that the uses are consistent with license requirements," which included safety and environmental measures, among other things.

Though lake residents were given the chance to comment and discuss the plan during its creation, most didn't grasp the implications the plan would have. Bob Holden, a boater who bought a home on the lake in 2005, shortly after the plan was implemented, said the most immediate effect was the fact that AEP was using a permitting process to determine what type of dock could be constructed, and where.

"To me, it was a problem because I couldn't build what I wanted," Holden said. "I can't extend my dock."

But a more troublesome problem, to Holden and others, became apparent later. AEP, with the plan, added a layer of requirements to the standard county permission needed to construct a dock, for instance. Lakefront residents are instructed to apply for an AEP permit to build a dock or change the vegetation below the 800-foot contour elevation line at which AEP has its easements. Residents with existing docks were asked to put their structures on file with AEP, and most residents who have purchased such property since the plan was implemented have been asked to sign an assignment permit to take control of existing docks.

All of those forms required the resident to agree that AEP had the authority, under its FERC license, to review and authorize certain activities. By signing, they also agreed that the permits could be revoked at any time, and that all work would be done in accordance with the Shoreline Management Plan.

The approval of the permits has delayed numerous real estate deals at the lake, according to real estate agents, like Penny Hodges, and in some cases, buyers have abandoned the search for homes in the area because they were not confident they would be able to add docks to their waterfront homes.

"When they realized the permit said it was revocable," Hodges said of a family that had made a cash offer, only to be held up by AEP processes, "They said, 'Forget it.'"

AEP spokesman John Shepelwich said that AEP is not looking to create difficulties for property owners. Instead, they are seeking to be good stewards of the lake. And their policies state that the permits would not be revoked without a pressing reason.

"We're not opposed to docks on the lake," he said. "We want everyone to have one if they want one."

Still, the furor over several episodes involving real estate transfers led, in part, to the creation of a group that has railed against "government overreach" in the AEP regulations. Cut Unnecessary Regulatory Burden, known as CURB, sprung up around the lake in 2011. Founder Bill Brush, who is also a member of the Franklin County School Board, said it grew out of concerns about AEP's lake procedures and their effect on property rights. The group has sought to inform residents about the regulations and at several junctions has lobbied against the AEP rules. Congressman Robert Hurt, R-Pittsylvania County, in 2011, proposed the SHORE Act after meeting with CURB members, which would have required property rights to be factored into FERC's regulatory equation.

Many local land owners now lack confidence in their standing with the company, and others feel that, in signing the permits to have their docks, they were duped.

"They stole my property rights," Holden said, "And I'm not too thrilled about that."

It's unclear whether landowners who haven't signed such a form are bound by the Shoreline Management Plan that adds size restrictions and other requirements to dock construction. Nissen, with backing from a local advocacy group, says that he is not.

“Everything I did fit the valid county and state requirements,” he said.

Nissen’s land, like all lakefront land that isn’t owned by AEP, has a flowage easement — dating to the beginning of the project, in the 1960s — running through it near the water line. That gives AEP the right to flood the land or clear it below the line to maintain the functionality of the lake and its power generation program. But it also has language allowing Nissen, and the other property owners with similar easements, to cross the easement for “recreational purposes,” among a variety of reasons.

“In all of those flowage easements, the landowner in some way had the right to use the water of Smith Mountain Lake,” said Franklin County Attorney Jim Jefferson. “And that had generally not been talked about or contested until recent years.” Jefferson said that in his view — he is not associated with the case in any way, but has dealt with legal issues involving the lake over the years — the definition of “recreational purposes” would likely be key in determining whether AEP had the authority to regulate the construction of docks.

But Brush and Nissen believe the case could speak to a larger issue: the legal standing of AEP’s enforcement activities. Shepelwich, the AEP spokesman, said this week that AEP regulates “interactions with the lake.” Though they could not discuss Nissen’s case specifically, Shepelwich and Simms, the AEP hydropower official, said it is their contention that the easements they hold on privately held properties give them the right to control activities below the boundary.

However, the complaint was filed in federal court, whereas a case over a deed filed in Franklin County’s courthouse would typically be a matter for a state court. The complaint cites the Federal Power Act as its reason for taking the case to a federal judge. That piece of legislation authorizes FERC to license and regulate energy enterprises like AEP, but does not have any bearing on a power company’s ability to regulate the land around its project.

FERC spokeswoman Celeste Miller said this week that licensees like AEP are expected to obtain the appropriate property rights to enforce the terms of their Shoreline Management Plan. She was also speaking in general terms, and was not aware of the AEP complaint against Nissen.

She said that FERC has no jurisdiction over property rights and that those issues are typically matters of state law. However, the AEP complaint’s first count against Nissen is that his construction violates the obligations of the FERC license and the Shoreline Management Plan. In asking a judge to stop his dock from moving forward, it charges that he created a dispute by “ignoring and acting in contravention [of]” AEP’s obligations and authority under the FERC license and their shoreline plan. But while Nissen purchased a property that had an existing AEP easement, he has never signed any sort of contract or permit with AEP, and it is unclear how he is bound by the Shoreline Management Plan.

FERC, for its part, simply approves and monitors its licensees, like AEP. The approval of Shoreline Management Plans effectively delegates the enforcement of the shoreline conditions, but the obligation referred to in the complaint clearly refers to AEP in FERC’s language. Each Shoreline Management Plan is drafted for the specific project by the project operators. It is approved, and can be modified, by FERC to meet their guidelines, but the stipulations set for docks and vegetation were created by AEP. FERC holds the licensee accountable for carrying out its own plans.

Miller, the spokeswoman, and FERC’s website reiterated that the FERC license does not grant AEP any powers that it doesn’t hold with existing property rights.

Shepelwich said AEP derives its power to regulate activities and construction on the lake from the easements, and that the Shoreline Management Plan is an extension of the easements, that it is simply a plan to streamline enforcement of the requirements.

CURB and Nissen, who has become the most publicized example of a property owner affected by the AEP regulations, believe AEP has overstepped its bounds, and that the company’s stated obligations to the plan cannot be enforced with its current property rights. Further, Nissen said he was never contacted by AEP prior to the filing of the complaint, even though AEP officials said their procedures typically call for conversations with any property owners violating the plan. Nissen has hired a Washington, D.C., law firm to represent him when the case goes to court in November, and CURB is putting forth a fundraising drive to support his defense.

“By the time we’re done,” Nissen said, “I probably won’t have enough money to build my dock anyway.”