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# CURB UPDATE



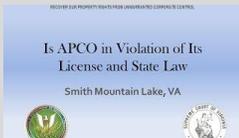
**81 LIGHTHOUSE LN MONETA, VA 24121**

**[CONTACT-US@CURB-FERC-AEP.COM](mailto:CONTACT-US@CURB-FERC-AEP.COM)**

**FEBRUARY 1, 2016**

**OUR MISSION IS TO EDUCATE AND INFORM ...**

**VOLUME 2, NUMBER 1**



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## **IMPORTANT LINKS**

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## **Breaking News – APCO Answered Pressls' Appeal on 20 January 2016.**

APCO raised no new issues or plausible legal theories in their answer to the Pressls' appeal. APCO did however misrepresent several facts, for which they will be called out. (1) APCO lied that the Pressls want to build a larger dock, even though the Pressls submitted no dock plans. (2) APCO lied that the Pressl's property contains a wetland, even though in 2010 APCO permitted a dock to be located on Pressls' land and emphatically stated there were no wetlands present, and represented those facts to the FERC.

In their latest brief APCO devotes most of its discussion to its responsibilities and obligations to the FERC. All of this discussion is irrelevant, however, because APCO cannot credibly cite a single federal statute that Pressl (or for that matter Nissen) has violated. The Federal Power Act (FPA), upon which APCO singularly relies, simply does not apply to non-licensee property owners – it only applies to the FERC and its licensees. Never-the-less APCO continues to accuse the Pressls' of violating the FPA, APCO's license, and their SMP ... all of which is impossible and untrue, as the Pressls have made no effort to construct a dock.

APCO insists that the flowage easement must be interpreted along with its federal license, which is nonsensical -- the 1960 flowage easement does not mention APCO's federal license, SMP, or any federal law (FPA), or regulatory entity (FERC).

1. APCO's original 1960 license contained no requirements to regulate shorelines ... positive proof is that it wasn't until 1998 (Article 41) that it was amended to include shoreline regulation, and it was not until 2005 that FERC approved the first SMP. APCO began issuing permits in 2004.
2. The 1960 easement limits APCO's flowage rights to a specific **Purpose**: to operate and maintain a dam to impound waters; and to operate and maintain a power station, period.
3. The 1960 easement granted APCO the **Privilege** and the **Right**: to flood a portion of the land up to the 800' contour on SML.
4. The 1960 easement allows APCO to reenter to clear and remove "anything" below the contour of 800' that materially impacts its right to flood for operation and maintenance of the dam and/or power station.
5. The 1960 easement places NO restrictions upon the landowner grantor, allowing the owner to possess and use all of the easement, for any purpose, so long as those uses do not materially adversely limit APCO's flowage rights.
6. The 1960 easement explicitly does NOT require the landowner to seek APCO's permission or to sign a revocable license (Permit) for any recreational use of the easement.
7. APCO bears the burden of proof to show that clearing of vegetation, planting of vegetation, stabilization of shoreline to prevent erosion, building improvements, such as a dock to access impounded waters for recreational purposes, materially adversely impacts their flowage rights. It is impossible to prove, as over 7,500 residential docks exist (most of which (approximately 6,400) were not permitted by APCO); 29 commercial businesses with thousands of rental boat slips exist (most unpermitted by APCO), Vista Point Condos, numerous commercial buildings and homes occupy land below the contour of 800', and APCO successfully operates and maintains its dam and/or power station and floods every property along the shoreline (whether cleared or not) to the 800' contour. In fact, APCO continues to permit the construction of easement improvements such as docks for recreational purposes.

**The critical argument in this case is that Federal District Court Justice Moon had no business hearing Pressls' case because his court lacked jurisdiction to decide purely state property law disputes – per the U.S. Constitution Article III and the FPA!**

**More Breaking News – Nissens Filed Their Notice of Appeal to the U.S. Court of Appeals for the Fourth Circuit --** No surprise here – the same court and the same judge – was consistent (and wrong) to declare that APCO has the property rights to require Nissen to sign APCO’s permit and that APCO has the right to remove Nissens’ dock, require them to re-vegetate, and remove their path to the lake. As with Pressl, this Court had no jurisdiction to hear Nissens’ case or to define Nissens’ state property rights. The appeal will ask the 4<sup>th</sup> Circuit to vacate Judge Moon’s order and dismiss the case, with prejudice. When this happens, this will be the end of APCO intimidating property owners with the threat of a federal lawsuit. Once the appeal brief is filed, CURB will share the document on-line for all.

**So Where Do We Go from Here?**

Appeals courts exist for one reason: lower court judges frequently make bad decisions and are unduly influenced by local situations. Since 2001 the Western District of Virginia Federal District Court issued several opinions favoring APCO’s rights under its federal license, which were in conflict with both established federal law, superior court rulings and Virginia property law. So it was not surprising to see both APCO and Judge Moon cite previous decisions by his court as justification. Federal judges are required to uphold constitutional law, including separation of federal and state powers. Unfortunately, this court has been developing federal property law, which the responsibility and within the original jurisdiction of state courts.

Pressl and Nissen are the first to appeal this court’s decisions for the absence of federal jurisdiction and the authority of state courts to determine state property law. Both cases will be heard by a panel of three appellate justices who are guided purely by law. The appeal asks the appellate justices to correct the mistakes the lower court made when it issued its decisions.

Appeals courts are very busy. Their dockets are crowded. Their deliberations and decisions take time. In Pressl’s case we do not expect to hear from the 4<sup>th</sup> Circuit Court of Appeals before the end of this year; and Nissens’ appeal is approximately 3 months behind Pressl. So we must be patient and allow this process to unfold.

Meanwhile, before you agree to sign any APCO’s property taking revokable permits, at least read them and your flowage easement. Seek the professional advice of a competent attorney. We know several. If you can postpone efforts for another few months, do so to avoid signing away your property rights without being compensated. Remember APCO will allow you to maintain or repair your dock without interference, so long as you don’t change its footprint. Be patient and be vigilant.

**SIGN APCO'S PERMIT and REPLACE YOUR DEEDED RIGHTS  
with 374 PAGES OF ADDED REQUIREMENTS**

**Deeded Property Rights**

**Estates, Rights & Privileges**

Grantors hereby grant, bargain, sell and convey with covenants of general warranty, unto Appalachian forever the right to overflow and/or affect so much of said premises as may be overflowed and/or affected, continuously or from time to time in any manner whatsoever, as the result of the construction, existence, operation and/or maintenance of the aforesaid dam and/or power station.

**Grantor's Retained Rights**

Grantors shall have the right to possess and use said premises in any manner not inconsistent with the estate, rights and privileges herein granted to Appalachian, including the right to cross said land to reach the impounded waters for recreational purposes ... and that the covenants and agreements herein shall be covenants attaching to and running with said premises.

**Deeded Property Right**

THIS DEED and the provisions hereof shall extend to and be binding upon the parties hereto and their heirs, personal representatives, successors, assigns, lessees, licensees, permittees and tenants.

**Flowage Right & Easement Deed  
3 Pages**

**APCO Requirements Imposed By Permit**

APCO Permitting	Pages
APCO Low Density Dock Permit	18
Shoreline Stabilization Permit	4
Vegetation Permit	3
Property Line Waiver	1
Setback Waiver	1
Dock Assignment	6
Non-Commercial Dock Assignment	12
Joint ACOE Permit Stabilization	6
Dredging	1
Bulkhead	1
Riprap	1
FERC Order Imposing 2014 SMP	30
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SMP Appendix A	2
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SMP Appendix H	4
SMP FAQ	5
2009 FERC License	82
<b>Total Page Count New Requirements</b>	<b>374</b>

For a more in-depth understanding, we recommend viewing the following CURB videos: [Read Your Flowage Easement](#) [Read APCO's Dock Permit](#) [History of Regulation](#) [What Did APCO Permit](#) [APCO Manipulated the Judicial System](#)

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*Bill Brush*