UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

New York Power Authority — Project No. 2000-036

Massachusetts Municipal Wholesale
Electric Company

v. — Docket No. EL03-224-000

Power Authority of the State of New York

ORDER APPROVING SETTLEMENT AGREEMENTS,
DISMISSING COMPLAINT, AND ISSUING NEW LICENSE

(Issued October 23, 2003)

I. INTRODUCTION

1. On October 31, 2001, the Power Authority of the State of New York (NYPA) filed an application for a new license, pursuant to Sections 4(e) and 15 of the Federal Power Act (FPA),[1] for the continued operation and maintenance of the 912-megawatt (MW) St. Lawrence-FDR Power Project No. 2000.[2] On February 6, 2003, NYPA filed a "Comprehensive Accord" (Settlement Agreement), which is signed by several parties to the licensing proceeding.

[1] 16 U.S.C. §§ 797(e) and 808, respectively.

[2] The original license for the St. Lawrence Project was issued to NYPA in 1953, and expires on October 31, 2003. Power Authority of the State of New York, 12 FPC 172, aff'd sub nom. Lake Ontario Land Development Beach Protection Association, 212 F.2d 227 (D.C. Cir. 1954) cert. denied, 347 U.S. 1015 (1954).

2. The new license application is opposed by the Massachusetts Municipal Wholesale Electric Cooperative (MMWEC). MMWEC is one of several out-of-state public power entities (Out-of-State Allottees, or OSAs), which currently purchase power from NYPA under a contract executed pursuant to an article in the original license (Article 28).[3] In its application, NYPA proposed to eliminate Article 28 from the new license. MMWEC and the other OSAs opposed this proposal. The other OSAs have executed an agreement with NYPA (OSA Agreement) under which they will continue to purchase Project power during the term of a new license. MMWEC seeks to continue purchasing Project power under a new license, but has not accepted the terms agreed to by the other OSAs. We are requiring NYPA to make power available to MMWEC on essentially the same terms as the OSA Agreement provides for sales of power to the other OSAs.

3. The license application is also opposed by the Niagara Power Coalition (NPC), a group of governmental entities in the Niagara Falls area that seeks an allocation of Project power. NYPA opposes that request. We find NPC's arguments to be without merit and deny its request.

4. For the reasons discussed below, this order approves the Settlement Agreement with minor modifications, and issues a new license to NYPA for the St. Lawrence Project. The new license, as conditioned herein, authorizes NYPA to continue to produce substantial amounts of low-cost power and will not result in any major, long-term adverse environmental effects. The new license also includes many measures to protect and enhance the aquatic and terrestrial environments and recreational resources. We therefore find that the St. Lawrence Project, with the conditions attached hereto, will serve the public interest because it is best adapted to the comprehensive development of the St. Lawrence River basin for all beneficial public purposes, in accordance with the requirements of the FPA.

II. PROJECT DESCRIPTION

5. The St. Lawrence Project is part of the International St. Lawrence Power Project (International Project), which spans the international portion of the St. Lawrence River. The International Project is composed of the St. Lawrence Project and Ontario Power Generation's (OPG) Robert H. Saunders Generating Station. NYPA operates and maintains the Robert Moses Power Dam and other associated St. Lawrence Project

[3] See 12 FPC at pp.192-193.

facilities. OPG operates and maintains the Saunders Generating Station and associated facilities located in Ontario, Canada.[4] The Moses-Saunders Dam is one continuous structure spanning the U.S.-Canada border on the St. Lawrence River between Massena, New York and Cornwall, Ontario.[5]

6. The International Project was developed as part of a comprehensive plan by the governments of the United States and Canada to develop and regulate the international waters of Lake Ontario and the St. Lawrence River.[6] The St. Lawrence Seaway Project[7] and the International Project were constructed concurrently between 1954 and 1959.

7. The International Development was undertaken under the jurisdiction of the International Joint Commission (IJC), a bi-national body established by the Boundary Waters Treaty of 1909[8] to regulate new projects and other issues affecting the levels and flows of U.S. and Canadian boundary waters. Flow releases at the St. Lawrence Project and Saunders Generating Station are in accordance with the IJC-approved Plan of Regulation for Lake Ontario and are under the direction of the IJC's International St. Lawrence River Board of Control (Board of Control).[9]

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[4]The Robert H. Saunders Generating Station is located entirely in Canada and is not subject to the Commission's jurisdiction.

[5]The Commission-license portion of the International Project includes only those lands, waters, and facilities located within the United States.

[6]The St. Lawrence River is the outflow from Lake Ontario, and thereby provides drainage for the watersheds of Lakes Ontario, Superior, Michigan, Huron, and Erie. The drainage basin area of the St. Lawrence Project is approximately 300,000 square miles. The St. Lawrence River flows approximately 870 miles from the outfall of Lake Ontario to the Gulf of St. Lawrence.

[7]The St. Lawrence Seaway facilities and their location in relation to project facilities, lands, and waters is shown in Attachment 1e to Attachment 3 to the Settlement Agreement.

[8] Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, January 11, 1909. The Boundary Waters Treaty is posted on the IJC's website at **www.ijc.org/ijcweb-e.html**.

[9]The IJC website fully explains that body's authorities and activities, including the Plan of Regulation and the functions of the Board of Control.

8. The St. Lawrence Project (Project) includes facilities and associated lands and waters along the St. Lawrence River. These facilities impound Lake St. Lawrence, which extends approximately 37 miles upstream from the Moses-Saunders Dam to the outlet of Lake Ontario in the vicinity of Red Mills, New York.[10]

9. NYPA's and OPG's generating facilities have a combined total of 32 turbine/generator units (16 on each side of the border). Each St. Lawrence Project unit (on the Robert Moses portion of the dam) has a generating capacity of approximately 57 MW at a rated head of 81 feet, yielding 912 MW.

10. In addition to the Robert Moses Dam and associated generating facilities, the Project includes the portion of Iroquois Dam within the United States, Long Sault Dam, and the Massena Intake. Iroquois Dam is located 28 miles upstream of the Moses-Saunders Dam and is 1,980 feet long (1,790 feet within the United States) and 72 feet high. It is a gated non-power dam used occasionally to control levels in Lake St. Lawrence and to help form a stable ice cover in winter. Iroquois Dam is operated only at the direction of the IJC.

11. Long Sault Dam is 2,960 feet long and 109 feet high and is located 3.5 miles upstream of the Moses-Saunders, and is entirely in the United States. It is also a gated non-power structure. There is typically no flow through Long Sault Dam because all flows pass through NYPA's and OPG's generating units. However, when the required regulation flow exceeds the capacity of NYPA's and OPG's generating units, the excess flow is released through Long Sault Dam into the 3.9-mile-long bypassed reach (the former south channel of the river).

12. The 721-foot-long, 108-foot-high Massena Intake closes off the former Massena Power Canal and provides process water to local industry as well as potable water to local communities.

13. The Project also includes 10.9 miles of dikes on the United States side of the St. Lawrence River and the portion of Lake St. Lawrence within the United States.

14. Each week a representative of the Board of Control directs NYPA to release a particular average weekly flow in accordance with the Plan of Regulation. The Plan of Regulation is intended to balance the interests of all who use the St. Lawrence River and

[10]Detailed maps showing the location of these facilities on the river and in relation to the international boundary are found in Exhibit G of the application.

Lake Ontario for various purposes and who are affected by water levels in Lake Ontario and the St. Lawrence from the outfall of Lake Ontario to areas downstream of Montreal. OPG receives similar direction from a Canadian Representative of the Board of Control. As a result, the operation of the St. Lawrence Project is closely coordinated with operation of OPG's Saunders Generating Station.

15. The IJC has approved limited peaking and ponding operations at the Moses-Saunders Dam in order to match operations to power demand. Ponding reduces discharge on the weekend and increases it on weekdays, while meeting the required weekly average. It is allowed only during the non-navigation season (generally mid-December through March). Peaking reduces discharge during the night and increases it during the day, while meeting the required daily average. It is allowed throughout the year.

16. Monthly water levels in Lake St. Lawrence fluctuate on a seasonal basis, with the greatest fluctuations occurring during several weeks each winter when the stable ice cover is formed and each spring when the ice cover breaks up. Water level fluctuations are greater near the Moses-Saunders Dam (approximately five to six feet at Long Sault Dam) than in the upstream portion of Lake St. Lawrence (approximately three feet at Iroquois Dam). Incremental fluctuations related to peaking and ponding are relatively small in comparison with season fluctuations related to regulation and natural phenomena.

17. A detailed description of the project facilities is contained in Ordering Paragraph (D) below.

III. BACKGROUND

18. NYPA filed its application for a new license on October 31, 2001. The application was prepared using an alternative licensing proceeding in which collaborative pre-filing consultation procedures were coordinated with the preparation of a Preliminary Draft Environmental Impact Statement by a third-party contractor funded by NYPA, but under the Commission's control and direction, as permitted by National Energy Policy Act of 1992.[11]

[11]P.L. No. 102-486, 106 Stat. 2776-3133 (Oct. 24, 1992). Section 2403 permits the Commission to permit, at the license applicant's election, a contractor funded by the applicant and chosen by the Commission from a list of qualified contractors to prepare an environmental impact statement for the Commission, with the Commission establishing the scope of work and procedures. The use of alternative licensing procedures was

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19. The Commission issued notice of acceptance of the application and requests for interventions and protest on, with responses due by July 22, 2002.[12] Motions to intervene or protests were filed by many entities.[13]

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authorized by an unreported Commission order issued July 15, 2002.

[12]67 Fed. Reg. 37802 (May 30, 2002).

[13]Allegheny Electric Cooperative, Inc. (Allegheny); County of Westchester New York, Public Utilities Agency; Connecticut Municipal Electric Energy Cooperative (CMEEC); City of Cleveland, Ohio (Cleveland); MMWEC; Fort la Presentation Company; The Kanienkeh aka St. Regis Band of Mohawk Indians of New York (SRMT); Mohawk Council of Akwesasne (Council of Akwesasne); Mohawk National Council of Chiefs (Mohawk Chiefs); New York State Conservation Council (Conservation Council); Niagara Mohawk Power Corporation (Niagara Mohawk); Niagara Power Coalition (NPC); Pennsylvania Boroughs of Lansdale, Kutztown, Lehighton, Schuylkill Haven, Weatherly, Berlin, Elwood City, Grove City, and Hooverville (Pennsylvania Boroughs); Pascoag Utility District (Pascoag); Public Power Association of New Jersey (PPANJ); Residents of Old River Road (Old River); St. Lawrence Local Government Task Force for New York Power Authority Relicensing (Task Force); U.S. Department of the Interior (Interior); Vermont Public Power Supply Authority (VPPSA); and Vermont Department of Public Service (VDPS).

Late motions to intervene were filed by Congressman Dennis Kucinich and by the Attorney General of Rhode Island, Rhode Island Division of Public Utilities, and Rhode Island Public Utilities Commission. The Commission Secretary granted the late-filed motions to intervene by notices issued October 21 and October 10, 2003, respectively.

20. Protests were filed by NPC, the Mohawk bodies,[14] and all of the OSAs.[15] NYPA timely filed a non-substantive answer in which it did not oppose the interventions and, on November 20, 2002, a substantive response to the comments and protests. Motions to reject, for leave to respond, and/or responses to NYPA's November 20, 2002 pleading were filed by NPC, MMWEC, Cleveland/CMEEC, Allegheny, Council of Akwesasne, Interior, and Old River.

21. Under Rule 213 of the Commission's Rules of Practice and Procedure,[16] an answer may not be made to a protest or answer unless otherwise ordered by the decisional authority. We have concluded that these pleading will enhance the record and better enable us to understand the issues. We will therefore accept all of these pleadings.[17]

22. The Commission accepted NYPA's license application on May 17, 2002 and, on December 13, 2002, issued a notice of ready for environmental analysis and requesting comments, recommendations, prescriptions, and terms and conditions by February 13, 2003 (REA notice).[18] Many entities filed comments in response to the REA notice.[19]

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[14]SRMT is recognized as an Indian tribe by the U.S. Department of the Interior. The Council of Akwesasne is recognized as an Indian tribe by the Government of Canada. The Mohawk Chiefs are not recognized as a tribe by either the U.S. or Canadian governments, but states that it is recognized by the Haudenosaunee Confederacy as the traditional government of the people residing in the Akwesasne Mohawk Territory. The Haudenosaunee Confederacy consists of the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora nations.

[15]I.e., Allegheny, Cleveland, CMEEC, MMWEC, Pascoag, PPANJ, Pennsylvania Boroughs, Rhode Island, VDPS, and VPPSA.

[16]18 CFR 385.213(a)(2).

[17]This finding applies to all of the untimely and contested filings in this proceeding, which we decided to accept. See Ordering Paragraph (A).

[18]67 Fed. Reg. 77,769 (Dec. 19, 2002).

[19] Comments in response to the REA notice were filed by Alcoa, Inc.; Allegheny; Cleveland/CMEEC; GM.; Lisbon Central School District; Madrid-Waddington Central School District; MMWEC; Massena Central School District; Council of Akwesasne; NPC; Interior; Pascoag; PPANJ; Red Mills Coalition (Red Mills); Old River; St. Lawrence County Board of Commissioners; Task Force; SRMT; the Towns of Lisbon,

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NYPA filed reply comments. Responses to NYPA's reply comments were filed by Interior and Allegheny. Allegheny and Cleveland/CMEEC filed reply comments to NPC's comments.

23. Many entities located in the project vicinity also filed letters urging the Commission to approve NYPA's license application.[20]

24. On February 6, 2003, NYPA, on behalf of the signatories,[21] filed the Settlement Agreement with the Commission. Public notice of the settlement was issued on February 11, 2003, with comments due by March 15, 2003.[22] Comments supporting the Settlement Agreement were filed by many entities.[23]

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Louisville, Massena, and Waddington, and the Villages of Massena and Waddington, New York.

[20]Lisbon and Massena Central School Districts (Lisbon Central and Massena Central, respectively); Clarkson University; Sanford T. Cook; Ann Daniels; GM; Madrid-Waddington Central School District (Madrid-Waddington); Red Mills; St. Lawrence County Board of Legislators; the Towns of Lisbon, Louisville, and Massena; and the Village of Waddington.

[21] The signatories are, in addition to NYPA, the U.S Fish and Wildlife Service and National Park Service of the U.S. Department of the Interior (Interior); New York State Department of Environmental Conservation (NYSDEC); New York State Department of State (DOS); St. Lawrence Aquarium and Ecological Center, Inc. (A&E Center); New York Rivers United (NYRU); and the Task Force and its members.

The New York State Office of Parks, Recreation, and Historic Preservation (OPRHP), while endorsing the settlement, deferred execution pending the completion a Programmatic Agreement (PA) between the Commission, New York State Historic Preservation Officer (SHPO), and the Advisory Council on Historic Preservation (Advisory Council) on protection of cultural resources.

[22] 68 FR 7788 (February 18, 2003).

[23] Comments supporting the Settlement were filed the Conservation Council; Massena Central; Waddington Chamber of Commerce; Task Force; the Towns of Lisbon, Louisville, and Massena; Town of Louisville Recreation Commission; Village of Massena; Lisbon Central; Town of Waddington; Village of Waddington; Madrid-
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25. NPC[24] filed comments opposing the Settlement Agreement and a motion for a trial-type evidentiary hearing or other relief. Council of Akwesasne opposes issuance of a license unless NYPA agrees to make certain compensatory payments to Mohawk Indians.

26. Allegheny and Interior filed comments that do not oppose the Settlement Agreement and issuance of a new license to NYPA, but express concerns with respect to various issues not covered by the Settlement Agreement.

27. NYPA filed reply comments refuting in general the comments opposing issuance of a new license or requesting terms and conditions not contemplated by the Settlement Agreement. NYPA replied more specifically in its reply to the responses to the REA notice.

28. Reply comments to comments on the Settlement Agreement were also filed by Pascoag, VDPS, the Task Force, and Interior. Pascoag and VDPS state that the Settlement Agreement does not resolve the neighboring state power allocation issue. The Task Force opposes NPC's comments on the adequacy of the record, the relevancy to the environmental analysis of certain "off license" payments to which NYPA has agreed, the eligibility of NPC's members for Project power, and various other matters. Interior also takes issue with NPC's comments regarding various Settlement Agreement provisions of interest to Interior.

29. On June 11, 2003, the Commission issued a Draft Environmental Impact Statement (EIS) for the Project pursuant to the National Environmental Policy Act of 1978 (NEPA).[25] Comments on the Draft EIS were filed by several entities.[26]

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Waddington; St. Lawrence County Board of Legislators; Massena Electric Utility Board; A&E Center; Massena Joint Recreation Commission; New York Assembly Members Dierdre Scozzafava and Darrel Aubertine; and State Senator James Wright.

[24]NPC includes the following: Niagara County, New York communities and schools: The County of Niagara, Niagara Wheatfield Central School District, City of Niagara Falls, City of Niagara Falls School District, Town of Lewiston, Lewiston Porter Central School District, and Town of Niagara.

[25] 42 U.S.C. § 4321, et seq.

[26]Interior, U.S. Environmental Protection Agency (EPA), U.S. Army Corps of
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30. On July 31, 2003, NPC filed a motion requesting establishment of procedures to allocate power from the St. Lawrence Project. NPC requests that the Commission schedule settlement proceedings with the participation of the Commission's Dispute Resolution Service, or an evidentiary hearing. NYPA and the Task Force filed answers in opposition.

31. A Final EIS was issued on September 22, 2003. The EIS concludes that issuance of a new license for the St. Lawrence Project, as conditioned herein, will meet the comprehensive development and public interest standards of the FPA.

32. On August 29, 2003, MMWEC filed a complaint against NYPA in Docket No. EL03-224-000. [27] MMWEC states that the St. Lawrence Project license[28] requires NYPA to sell power from the Project to neighboring states and to cooperate with them in arranging for such sales, but that NYPA has refused to renew the existing contract with Massachusetts for the sale of power from St. Lawrence following the expiration of that contract on October 31, 2003, which is also the expiration date of the license. MMWEC requests that the Commission set the matter for hearing and order NYPA to state its intentions with respect to termination of the existing contract and to continue power sales under the contract until the complaint is resolved.

33. MMWEC also requests fast-track processing. In support, it states that the power allocation issue must be resolved quickly in order for its members to carry out their energy and power supply planning, avoid financial losses that would be caused if they were required to make short term arrangements, and comply with scheduling requirements of the ISO New England and NEPOOL. It adds that there are no issues of

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Engineers, NPC, Task Force, NYPA, Allegheny, PPANJ, MMWEC, SRMT, Mohawk Chiefs, and Council of Akwesasne. The deadline for filing comments, originally set at August 11, 2003, was extended to August 15, 2003.

[27] An essentially identical complaint was filed by MMWEC in EL03-225-000. On October 1, 2003, MMWEC filed a notice of withdrawal of that complaint. Pursuant to 18 CFR 385.216, the notice became effective on October 16, 2003, when no motion in opposition was filed within 15 days.

[28] Citing St. Lawrence Article 28, 12 FPC at pp. 192-193 and Niagara Project license Article 21, 19 FPC at 186.

disputed fact that would require an evidentiary hearing, and alternative dispute resolution would be unsuccessful.

34. The Commission issued notice of MMWEC's complaint on September 2, 2003, with responses due by September 17, 2003. Timely motions to intervene were filed by Allegheny, the Pennsylvania Boroughs, and certain New York Municipalities.[29] A timely motion to intervene and protest was filed by NPC. NPC opposes MMWEC's complaint on the ground that any allocation of power from the St. Lawrence or Niagara Projects to neighboring states jeopardizes NPC's request for an allocation of power. NPC states that it does not oppose a proceeding separate from the St. Lawrence and Niagara Project licensing proceedings to resolve all power allocation issues or, if not, that these issues be resolved in the context of the license proceedings. Barring either outcome, NPC requests that the Commission dismiss MMWEC's complaints.

35. NYPA timely filed an answer to MMWEC's complaint. NYPA states that there is no need for an expedited proceeding because MMWEC's claims are premature until the current license expires, and that NYPA will continue to comply with the existing license as long as it applies. NYPA requests that we deny MMWEC's complaint. On October 1, 2003, MMWEC filed a motion for leave to reply and reply to NYPA's answer. MMWEC replies that if a new license is issued, the existing license will no longer apply, which could result in the loss of or a hiatus in service to Massachusetts, so that expedition is required.

36. On September 30, 2003, NYPA filed a settlement agreement with all of the OSAs except MMWEC (OSA Agreement). Under the Commission's Rules of Practice and Procedure, comments and reply comments on the OSA Agreement would ordinarily be due on October 20, 2003, and October 30, 2003, respectively.[30] By notice issued October 3, 2003, the Commission shortened the deadline for comments and reply comments to October 10 and October 15, 2003.

37. Comments opposing the OSA Agreement were filed by MMWEC and NPC. Cleveland/CMEEC and MMWEC filed replies to the comments of NPC. NYPA filed a

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[29]The New York Municipalities are the Villages of Bergen, Freeport, Rockeville Centre, Sherburne, and Solvay; the City of Jamestown Board of Public Utilities; and the City of Sherrill Power & Light.

[30]18 CFR 385.602(f). The signatory OSAs and NYPA stated that their comments are included in the cover letter to the OSA agreement.

reply to the comments of MMWEC and NPC. NYPA filed a motion to strike MMWEC's reply comments

IV. DISCUSSION

38. The Commission strongly favors settlement agreements, which provide the opportunity to eliminate the need for more lengthy proceedings if the parties reach an agreement on the issues that is in the public interest. As discussed below, we find that the Settlement Agreement and the OSA Agreement are in the public interest and have included license conditions to implement those agreements. We commend the parties for their success in this regard.

39. We note in this connection that because the comprehensive development standard of FPA Section 10(a)(1) continues to govern regulation of a project throughout the term of its license,[31] it is the Commission's responsibility to approve, through appropriate license amendments, all material changes to the licensed project and its maintenance and operation. It would be wholly inconsistent with our Section 10(a)(1) responsibilities not to retain, as we do in this license, the authority to initiate on our own, or anyone else's, motion proceedings to amend the Project license as we determine is required by the public interest, after public notice and opportunity for a hearing.[32]

[31] See, e.g., S.D. Warren Co., 68 FERC ¶ 61,213 at p. 62,022 (1994); Thunder Bay Power Co., 88 FERC ¶ 61,078 (1999); City of Seattle, WA, et al., 71 FERC ¶ 61,159 at p. 61,535 n. 30 (1995) and cases cited therein; Horseshoe Bend Electric Co., 42 FERC ¶ 61,072 (1988), aff'd sub nom. Idaho Power Co. v. FERC, 865 F.2d 1313 (D.C. Cir. 1990); Duke Power Co., 67 FERC ¶ 61,061 at p. 61,171 (1994).

[32] In addition to the specific reservations of authority in this license with respect to fishways (Article 403), mandatory conditions under FPA Section 4(e) (Article 418), and annual charges pursuant to FPA Section 10(e) (Article 418), the license includes a broad range of reserved authority in standard form articles (See Ordering Paragraph H). These pertain to, among others, additional capacity, use of the Project reservoir by other entities for various purposes, fish and wildlife, recreation, public access, and soil erosion.

A. Settlement Agreement

1. Contents

40. The Settlement Agreement sets out its background, purpose, general conditions, implementation, and terms for its execution. It adopts and incorporates five separate agreements between NYPA and various signatories and a letter of understanding (LOU) between NYPA and NMFS concerning reservation of the Secretary of Commerce's authority to prescribe fishways.[33] The Settlement Agreement provides that all signatories to the agreement agree to the terms of these six documents.[34]

41. The five agreements and LOU are described below to the extent they contemplate license obligations. The Settlement Agreement includes proposed license articles associated with each agreement and the LOU. These are appended to the relevant agreement and set forth in the LOU.

Fish Enhancement, Mitigation, and Research Fund Settlement Agreement (Fisheries Agreement);[35]

42. The Fisheries Agreement was executed by NYPA and FWS. Section 3 establishes a Fish Enhancement, Mitigation, and Research Fund to provide mitigation in the amount of $24 million. The fund is to be used for research, construction, operation, and maintenance of various projects benefitting fisheries in the Lake Ontario/St. Lawrence River basin affected by the Project and for research on species that may be affected by the Project, such as the American Eel. The funds are to be transferred to and administered by the National Fish and Wildlife Foundation (NFWF), with the FWS as the beneficiary. [36] The NFWF is a private, non-profit, tax exempt organization established by

[33]The five agreements and the LOU are attached to the Settlement Agreement as Attachment 1 (FWS Agreement), Attachment 2 (Ecological Agreement), Attachment 3 (Task Force Agreement), Attachment 4 (Aquarium Agreement), Attachment 5 (Recreation Agreement), and Attachment 6 (LOU).

[34]The Aquarium Agreement, in which NYPA has agreed to fund an aquarium and ecological center in the Project vicinity, is not proposed to be included in the license.

[35]Settlement Agreement, Attachment 1.

[36]The details of how the fund will be administered and the rights and obligations of the signatories with respect to its use are set forth in a Trust Agreement that is Appendix

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Congress in 1984 for the purpose of conserving fish, wildlife, plants, and their habitats.[37] The NFWF will invest and administer the fund. The decisions concerning how the fund is spent will be made by FWS in consultation with a Fisheries Advisory Committee, to be established pursuant to Section 3 of the Fisheries Agreement. Section 3 also sets forth the purpose and funding priorities for the Fisheries Agreement, its administration and governance.

43. Section 4 provides for NYPA to construct, operate, and maintain a ladder for upstream passage of American Eel at Robert Moses dam following approval by the Commission and FWS. The ladder is to be built within two years of license issuance, and will have an operation schedule and effectiveness testing.

Ecological Mitigation and Enhancement Measures Settlement Agreement (Ecological Agreement);[38]

44. The Ecological Agreement was executed by NYPA, FWS, NYSDEC, and NYRU. Section 2.1 provides for NYPA to construct, operate, and maintain various Habitat Improvement Projects (HIPs) within the project boundary, as set forth in Appendix A to that Agreement.[39] NYPA is to develop an implementation plan within one year of license issuance and submit the plan for Commission approval. The plan is to be developed in consultation with a Technical Advisory Council (TAC) to be established pursuant to Section 4 of this Agreement.[40]

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B to the Fisheries Agreement.

[37] See 16 U.S.C. §§ 3701 et seq.

[38] Settlement Agreement, Attachment 2.

[39] In general, the HIPs provide for controlling the levels of several ponds, habitat improvements for the State listed endangered Blandings turtle, improvements to spawning beds for lake sturgeon and walleye, and various bird nesting improvement projects.

[40] The TAC is to consist of three voting members, from NYPA, NYSDEC, and FWS. Various other stakeholders, including NYRU, the A&E Center, SRMT, and St. Lawrence County may participate in an advisory capacity. Ecological Agreement, Section 2.4.

45. Section 2.3 provides for NYPA to set aside approximately $4 million for future, as yet unidentified, HIPs to be located on the St. Lawrence River or its tributaries that will benefit natural resources in the river basin. These future HIPs will be selected by the TAC, subject to Commission approval and oversight.

46. Section 3 provides for various improvements to the Wilson Hill Wildlife Management Area which is located within the Project boundary.[41]

47. Section 4 provides for funding of the St. Lawrence River Research and Education Fund in the amount of $1,008,000. The purpose of the fund is to provide financial support for environmental research and education projects related to the ecology of the St. Lawrence River watershed in the vicinity of the project.[42] The fund would have a Board of Directors composed of representatives from NYPA, NYSDEC, FWS, various local interests, and the SRMT. Research and education proposals would be submitted to the Board for approval, which would issue an annual report.

48. In Section 5, NYPA agrees to conduct springtime monitoring of water temperature in certain areas of the South Channel of the St. Lawrence River downstream from Long Sault Dam, and to submit for Commission approval a temperature monitoring plan for spill events at Long Sault Dam. [43] The monitoring data will be used to determine if project operations impact a warm water fishery that has developed in the South Channel. The need to continue monitoring is to be reexamined every five years.

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[41]These improvements include rehabilitation of dikes, construction of new dikes and water control structures, and various recreational improvements. Ecological Agreement Section 3. The location of Wilson Hill Wildlife Management Area is shown at Application Volume I, Exh. G, Sheets 4 and 5 of 8 and Task Force Agreement Attachment 1d.

[42]Ecological Agreement, Section 4.1.

[43]Ecological Agreement Section 5.

Relicensing Settlement Agreement (Task Force Agreement);[44]

Agreement between NYPA and OPRHP (Recreation Agreement);[45]

49. The Task Force Agreement was executed by NYPA and the members of the Task Force. It concerns facilities in communities in the Project vicinity.[46] The Recreation Agreement was executed by NYPA and New York State Office of Parks, Recreation, and Historic Preservation (OPRHP). It covers numerous improvements to Robert Moses State Park, Coles Creek State Park, and Wilson Hill Boat Launch.[47]

50. In general, these agreements provide for NYPA to rehabilitate existing recreational facilities managed by OPRHP, NYSDEC, and the local communities; expand existing facilities with additional parking, trails, camping facilities, boat launches, and signs; and redesign Robert Moses State Park to facilitate greater use. Improvements are to be in compliance with the Americans with Disabilities Act.[48]

51. NYPA's application includes a Recreation Plan submitted for Commission approval that includes most of the facilities provided for in the Task Force and Recreation Agreements.[49] The Settlement Agreement also reflects post-application negotiations that resulted in NYPA's agreement to revise the Recreation Plan to add certain additional facilities.[50] The Settlement Agreement provides for NYPA to file a plan and schedule to

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[44]Settlement Agreement, Attachment 3.

[45]Settlement Agreement, Attachment 4.

[46]The facilities are located or to be located in the Town of Massena, Town of Louisville, and the Town and Village of Waddington. Task Force Agreement, Attachments 4a-4c.

[47]Recreation Agreement, Attachments 1-3. The location of the parks and boat launch are shown at Application, Volume 1, Exh. G, Sheets 2-4 of 8 (Coles Creek), 7-8 of 8 (Robert Moses), and 5 of 8 (boat launch).

[48]P.L. 101-336, 104 Stat. 327, 42 U.S.C. §§ 225 and 611.

[49]The Recreation Plan is found in Volume III of the Application.

[50]These are included in the lists of facilities covered by the Recreation Agreement.

implement the revised Recreation Plan.[51] NYPA has also agreed to file every twelve years, in addition to the Commission's standard Form 80, the recreation report,[52] a Recreation Use Report.[53]

52. The Task Force Agreement and the Ecological Agreement provide for NYPA to develop a Land Management Plan (LMP).[54] The LMP is to establish guidelines for public access to Project lands, construction activities within the Project boundary, use of motorized recreational vehicles on Project lands, and the use of Project lands for commercial activities that depend on access or proximity to Project waters. The LMP will include a Vegetation Management Plan. The LMP would be filed for Commission approval.[55]

53. The Task Force Agreement provides for NYPA to stabilize eroding shoreline upstream and downstream of Robert Moses Dam over an eight to ten year period following issuance of the new license. [56]

54. The Task Force Agreement provides for NYPA to reduce navigation hazards by providing information and gages at boat launch facilities, marking known navigation hazards with buoys, and informing Federal and Canadian authorities with information on navigation hazards for inclusion in navigation charts.[57]

55. The Task Force Agreement also provides for the removal of approximately 1,340 acres of land from within the Project boundary, and its conveyance to various private or governmental entities. In general, these provisions would: (1) terminate the project

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[51]This agreement would be implemented by the proposed license article on recreation facilities. Settlement Agreement, Appendix A at pp. A-9 to A-10.

[52]See 18 CFR 8.11 and 141.14.

[53]Settlement Agreement, Appendix A at p. 1-10.

[54]Task Force Agreement, Attachment 1, Section V and Ecological Agreement, Section 6.

[55]Settlement Agreement, Appendix A at p. A-7.

[56]Task Force Agreement, Attachment 2.

[57]Task Force Agreement, Attachment 3.

boundary about 2,300 feet upstream of Iroquois Dam, instead of the present six-plus miles, and (2) revise the project downstream of Iroquois Dam to correspond with the maximum surface elevation of Lake St. Lawrence, plus a variable width buffer zone.

56. The majority of these lands, which are included within a state park or are environmentally sensitive, would be transferred to state agencies or the Towns of Lisbon and Waddington. The remaining lands would be conveyed to local municipalities, or to adjoining landowners.[58] NYPA states that the lands are not necessary for any Project purposes, and that it would retain flowage easements to ensure that the Project can continue to be operated in compliance with the requirements of the IJC.[59] As discussed below,[60] Old River opposes removal from the Project boundary and conveyance of about four acres of land to the Town of Massena.[61] Council of Akwesasne and Mohawk Chiefs also have concerns which are addressed below.

Letter of Understanding between NYPA and NMFS.[62]

57. The LOU with NMFS states the signatories' understanding that the Secretary of Commerce intends to reserve authority to prescribe fishways at the Project during the license term pursuant to FPA Section 18, that the reserved authority will be exercised only after consultation with FWS, and that a downstream prescription will not be issued while certain studies are ongoing.

58. In addition to the foregoing agreements and LOU, the Settlement Agreement recommends that the Commission issue the new license for a term of 50 years.[63]

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[58]A complete description of the proposed changes to the Project boundary is found in the Executive Summary to the Application, pp. ES-19 to ES-22, and the maps in Exhibit G.

[59]Explanatory Statement, pp. 32-34.

[60]Section IV.E.

[61]The location of the lands in question is shown on Attachment 1e to the Task Force Agreement.

[62]Settlement Agreement, Attachment 6.

[63]Settlement Agreement § 3 and Explanatory Statement pp. 30-32. See discussion below in Section XVI.

59. The Settlement Agreement also establishes procedures for dispute resolution among the signatories for carrying out their obligations under the Settlement Agreement and underlying agreements. Some of these procedures are in an underlying agreement.[64] There are also different tracks for disputes concerning implementation of agreements that are to be incorporated into the license and those that are not.[65] The track with respect to the license includes provisions for notice, consultation, mediation facilitated by the Commission's Dispute Resolution Service and, if necessary, appropriate filings with the Commission.[66]

60. The Settlement Agreement includes a proposed license article requiring NYPA to prepare a single annual compliance report which consolidates all required compliance reporting under the new license.[67]

2. Proposed License Articles

61. Appendix A to the Settlement Agreement consists of numerous proposed license articles that are intended to embody NYPA's obligations undertaken in the Settlement Agreement that are to be included in the license; that is, enforceable by the Commission. NYPA states that these proposed license articles were developed with reference to Commission guidance documents, recent Commission licensing orders, and in consultation with Commission staff. The Settlement Agreement provides that any signatory may withdraw from the Settlement Agreement if the Commission rejects or modifies the proposed license articles, or takes any other action inconsistent with their complete acceptance by the Commission, and that the withdrawal of any Settling Party may void the entire agreement.[68]

62. NYPA and the other signatories request that the Commission identify any proposed license articles that are not enforceable by the Commission. We have stated on several occasions that license articles are enforceable only against the licensee, and that

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[64] See, e.g., Fisheries Agreement § 3.2.2.

[65] Settlement Agreement § 7.

[66] Settlement Agreement § 7; Explanatory Statement p. 39.

[67] Settlement Agreement, Appendix A at p. A-10.

[68] Settlement Agreement §§ 4.2, 5.1, and 5.2.

we cannot enforce settlement agreements or license articles proposed in settlement agreements that purport to bind non-licensees.[69] These are typically procedural provisions involving consultation and dispute resolution. We have identified only one such provision in the proposed license articles.

63. The proposed article reserving the Commission's authority to require installation of fishways as may be prescribed by the Secretaries of Interior or Commerce pursuant to FPA Section 18 includes an undertaking by those agencies to delay issuance of a prescription for downstream passage while certain studies are being conducted.[70] This undertaking is entirely reasonable, but we cannot enforce it against Interior or Commerce. We have therefore excised that portion of the proposed license article.[71]

64. The proposed articles establish numerous deadlines for action by the licensee with respect to various activities, such as construction and effectiveness testing of upstream eel passage facilities[72] and submission of plans for installation of the HIPs identified in the Ecological Agreement.[73] These provisions, which bind only the licensee, are enforceable by the Commission, and we do not object to any of the proposed time periods. The signatories must however be aware that the Commission, as the agency with statutory responsibility for compliance, must maintain control over its compliance processes. This includes the timing of compliance filings.[74]

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[69]In Erie Boulevard Hydropower LP, 88 FERC ¶ 61,176 (1999), we identified the types of settlement provisions that are beyond our authority to enforce because they apply to non-jurisdictional entities. They typically include provisions which govern relations among parties to the settlement agreement, such as dispute resolution, and the procedural practices of such groups. See also Avista Corporation, 93 FERC ¶ 61,116 (2000) and 93 FERC ¶ 61,116 at p. 61,329). In Erie Boulevard Hydropower, PP and Hudson River-Black River Regulating District, 100 FERC ¶ 61,321, at p. 62,502 (2002) we determined that such provisions would be enforced as to licensees.

[70]See Settlement Agreement, Appendix A, p. A-1.

[71]See Article 404 (Reservation of Authority).

[72]See Settlement Agreement, Appendix A, pp. A-1 and A-2.

[73]See Settlement Agreement, Appendix A, p. A-3.

[74]The timing of a compliance filing, even one required by a mandatory condition pursuant to FPA Sections 4(e) or 18, is an administrative matter between the licensee and

(continued…)

65. Some of the proposed license articles do not appear to contemplate Commission approval of filings required pursuant to the exercise by Interior or Commerce of their FPA Section 18 authority.[75] We have modified these proposed articles to require Commission approval of the plans for construction, operation, and maintenance, and effectiveness testing of all such facilities.[76]

66. The proposed license articles which require NYPA to fund the Fish Enhancement, Mitigation and Research Fund[77] and the St. Lawrence River Research and Education Fund[78] require NYPA to file annual reports with the Commission for informational purposes, but do not require Commission approval of expenditures from the funds. Consistent with our statements above concerning the need to ensure that the Project is operated and maintained in the public interest throughout the license term, we have modified these articles to reserve our authority to amend the funding requirement if necessary.

67. The proposed license article on shoreline stabilization[79] establishes an annual limit on NYPA's expenditures under the Commission-approved Shoreline Stabilization Plan of $500,000. We have no reason to think that this amount will not suffice for its intended purpose. We note however that agreements among settlement parties to limit a licensee's

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the Commission. The Commission, as the agency having statutory responsibility for license compliance, needs to maintain control over its compliance processes. See e.g., Wisconsin Valley Improvement Company, 88 FERC ¶ 61,054 (1999); Bangor Hydro-Electric Company, 87 FERC ¶ 61,035 (1999); Central Maine Power Co., 82 FERC ¶ 61,190 at pp. 1,732-33 (1998); and Holyoke Water Power Co., et al., 88 FERC ¶ 61,186 (1999). See also 18 CFR 375.308(c)(4) (delegation of authority to Director of the Office of Energy Projects to grant extensions of time).

[75]See Settlement Agreement, Appendix A, pp. A-1 and A-2.

[76]See Articles 405 (Construction of Upstream Eel Passage Facilities); 4-6 (Operation of Upstream Eel Passage Facilities); 407 (Effectiveness Testing of Upstream Eel Passage Facilities).

[77]See Settlement Agreement, Appendix A, p. A-2.

[78]See Settlement Agreement, Appendix A, p. A-5.

[79]See Settlement Agreement, Appendix A, p. A-8.

costs for agreed-upon measures do not limit the Commission's reserved authority to require additional measures, as future circumstances may warrant.[80]

68. With the modifications discussed above, we find that the Settlement Agreement and proposed license articles are in the public interest and we are approving the Settlement Agreement and e including the license articles in the license.[81]

3. NPC's Objections to the Settlement Agreement

a. Power Allocation and Request for Hearing

69. NPC contends that its members are entitled to an allocation of Project power at cost-based rates. In pursuit of this objective, NPC has filed numerous pleadings requesting studies, investigations of NYPA's dealings with other entities and the Commission staff, and evidentiary hearings, and registering various objections to the Settlement Agreement.[82]

70. At the root of NPC's pleadings is its position that: (1) NYPA is required by the New York Power Authority Act[83] to sell preference power to municipalities and other political sub-divisions of New York that are authorized by law to engage in the distribution of electric power; (2) several of NPC's members have received or are seeking such authorization in New York; (3) Project power allocated to NPC members would be

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[80]See, e.g., Southern California Edison Co., 77 FERC ¶ 61,313 p p. 62,428 n. 46 (1996), and cases cited therein.

[81]Because of its volume, we are not attaching the Settlement Agreement to this license order.

[82]See, e.g., Comments on Scoping Document 2 and Request for Additional Studies (September 7, 2000); Supplementary Comments and Answer to NYPA's Response to Request for Additional Studies (December 18, 2000); Comments on Preliminary Draft EIS and Draft Application and Request for Additional Studies (May 2, 2001); Motion to Investigate Actions of NYPA (July 1, 2002); Preliminary Term and Conditions (February 11, 2003); Comments Opposing Settlement Agreement and Motion for Hearing and Other Procedural Relief (March 14, 2003); Comments in Draft EIS (July 31, 2003); and Motion to Establish Procedures for Allocation of Power (July 31, 2003).

[83]N.Y. Pub. Auth. Law, Art. 5, Title 1, § 1000-11017.

used to serve domestic and rural customers in economically depressed areas of New York consistent with the purposes of the Power Authority Act; and (4) the sale of power to NPC members at market-based rates would prevent them from realizing economic benefits to which they are entitled by the Power Authority Act.[84] NPC adds that our authority to allocate Project power was settled in the original license order, and asserts that it would be discriminatory for NYPA to charge NPC market-based rates for power while selling to other in-state entities at cost-based rates.[85]

71. NPC asserts that an evidentiary hearing is required on its request for an allocation of Project power because the Settlement Agreement fails to address that issue. It adds that various aspects of the Settlement Agreement also lack evidentiary support and that an evidentiary hearing is required to determine whether those components are in the public interest. Specifically, NPC states that there is no evidence to support NYPA's refusal to offer preference power to NPC's members, the proposed 50-year license term, and NYPA's opposition to a reopener provision in the license to address potential cumulative environmental impacts if and when NYPA files a new license application for the Niagara Project.[86]

72. NPC goes on to add that the Settlement Agreement is not in public interest because NYPA has discriminated against NPC by agreeing to the "off-license" funding arrangements described above,[87] and by agreeing to fund protection, mitigation, and enhancement measures that have not been demonstrably linked to Project impacts.[88]

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[84]Comments Opposing Settlement Agreement at pp. 13-14; Reply to NYPA Response to Protests (December 3, 2002), passim.

[85]Reply to NYPA Response to Protests at pp. 5-9.

[86]Reply to NYPA Response to Interventions and Comments, pp. 9-12. Applications for a new license for the Niagara Project are due August 31, 2005.

[87]Comment Opposing Settlement Agreement at p. 15. NPC also suggests that the if the off-license financial commitments in the Settlement Agreement were excluded from the Commission's economic analysis, "additional funds" would be available to benefit NPC members. Our economic analysis only takes the cost of these financial commitments into account to the extent that they are components of the total cost of Project power. That analysis does not serve to approve or disapprove of any of those expenditures.

[88]E.g., NPC states that the provisions in the Fisheries Agreement for the benefit of (continued…)

NPC also contends that the Settlement Agreement is not in the public interest because NYPA refused to include NPC is the settlement discussions.[89]

73. NYPA responds that NPC has no direct interest in this proceeding and that its members are not entitled to Project power, and no determination in this proceeding affects any determination to be made in the future relicensing of the Niagara Project.[90]

74. The short answer to all of these issues is that the eligibility of NPC's members for Project power and the price at which it is offered to in-state entities are matters to be resolved by New York authorities pursuant to the Power Authority Act.[91]

75. NPC's other assertions regarding the need for an evidentiary hearing are also unconvincing. There is sufficient evidence to resolve NPC's license term issue, which we discuss below.[92] It is also not necessary to hold an evidentiary hearing to determine if it is appropriate to include a reopener provision relating to potential cumulative impacts of the St. Lawrence and Niagara Projects. We discuss that matter below.[93] In sum, we conclude that the evidentiary record is fully adequate to resolve NPC's issues.

76. Although we question whether NPC has shown any true interest in the outcome of this proceeding, we now turn to its specific objections to other elements of the Settlement Agreement.

(continued…)
the American Eel (Section 4) have not been shown to be needed. Comments Opposing Settlement Agreement at p. 14.

[89]Comments Opposing Settlement Agreement at pp. 2-5.

[90]NYPA Response to Protests at pp. 21-22.

[91]See discussion in Section IV.C. concerning our authority to require allocations of Project power and the appropriate use of that authority.

[92]See Section XVI.

[93]See Section IV.A.4.g.

b. Effect of Settlement on EIS

77. NPC asserts that the Settlement Agreement may have predetermined the outcome of the EIS by binding the hands of resource agencies. In this connection, it states that the resource agencies have agreed not to oppose the Settlement or exercise their statutory authorities in a manner inconsistent with the Settlement.[94]

78. The resource agencies' agreement to support the Settlement Agreement does not prejudice the Commission's ability to conduct an independent review of the environmental issues in this proceeding. The Settlement Agreement was preceded by a multi-year collaborative effort in which environmental issues and study needs were identified and appropriate studies were undertaken. The study results were made available to all participants, including separated members of the Commission staff assigned to assist the collaborative process, and the Preliminary DEIS submitted by NYPA with its application was developed in consultation with, among others, the resource agencies. The Commission also independently requested and received substantial additional environmental information after the application was filed.[95] All of this information was available to the resource agencies when they executed the Settlement Agreement.[96]

c. Confidentiality of Settlement Negotiations and Request for Investigation

79. NPC states that the Settlement Agreement is not in the public interest because the settlement negotiations were "closed and secretive,"[97] which appears to refer to NYPA's refusal to include NPC in those negotiations. NPC notes in this regard that it filed a motion alleging improper ex parte communications between NYPA and others, possibly

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[94]NPC Settlement Comments at p. 19, citing Settlement Agreement Section 2.2, p. 6-7.

[95] See letter accepting license application and requesting additional information, issued May 17, 2002.

[96]NPC also stated that the Preliminary DEIS contained no discussion of the power allocation issue. Both the Commission's Draft and Final EIS' discuss this issue. See , e.g., Final EIS at pp. 1-11 to 1-17.

[97]Comments Opposing Settlement Agreement at pp. 20-21.

including the Commission staff and other interested Federal agencies, and requesting an investigation.[98]

80. In support, NPC cited a newspaper article indicating that officials of NYPA met with officials of GM, Alcoa, and the Task Force to coordinate efforts to influence the Commission and members of Congress to support existing allocations of power to NYPA's industrial customers. NPC requested from NYPA an explanation of the lobbying efforts to be undertaken, a copy of any documents provided to Federal officials, and identification of any person to whom such materials were provided. NYPA did not respond to NPC's requests other than to state that its intention to actively support the existing industrial customers and that it is appropriate for parties with common interests to share information.[99] NYPA filed an answer opposing NPC's motion and denying that it engaged in any prohibited off-the-record communications with the Commission's decisional staff or engaged in any improper lobbying efforts.[100]

81. As a general matter, parties to Commission proceedings, and entities participating in pre-filing activities that may affect future Commission proceedings, are free to communicate among themselves in any manner they consider to be appropriate that does not violate the FPA or the Commission's regulations thereunder. In this instance, the only regulation applicable prior to filing of the application is the requirement of 18 CFR 4.34(i)(3)(ii), which requires a potential applicant filing a request to use the alternative licensing procedures (ALP) to submit with its request a communications protocol, supported by interested entities, governing how the potential applicant and other participants in pre-filing consultation, including the Commission staff, may communicate with one another regarding the merits of the potential applicant's proposals and proposals and recommendations of interested entities. NYPA's application to use the ALP contained a detailed protocol concerning development of the license application and the

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[98] See "Motion to Investigate Actions of the New York Power Authority by the Niagara Power Coalition," filed July 1, 2002.

[99] The newspaper articles and correspondence between NPC and NYPA concerning the newspaper article and related actions are attached to NPC's motion.

[100] Answer of the Power Authority of the State of New York to the Niagara Power Coalition's Motion to Investigate Actions," filed July 15, 2002. NPC filed a motion for leave to file an answer to NYPA's answer and renewing its request for an investigation.

Preliminary DEIS, which the Commission approved, and which governed communications among the participants for that purpose.[101]

82. When a proceeding has begun (in this case, when the application was filed), the parties are free to communicate among themselves off the record in whatever manner they deem appropriate, and no party is compelled to engage in settlement negotiations with all parties to a proceeding. There was therefore no impropriety in NYPA electing not to attempt settlement with NPC or any other entity.

83. Communications between the parties and Commission staff however are constrained by the Commission's rules concerning ex parte communications.[102] Under these regulations, NYPA and any other party to the proceeding are free to provide the Commission with whatever information they think is appropriate in support of the positions they take, so long as they do so on the record. If they do so off the record, then the rules require the Commission Secretary to place the communication into the public file for the proceeding, and other parties are provided an opportunity to respond.[103] That requirement has been scrupulously observed.[104]

84. Communications by NYPA or other parties to this proceeding with their elected Federal or state representatives or other Federal officials are not governed by the Commission's regulations. It is however the practice of the Commission to place into the public record any communication concerning the merits of a proceeding submitted to the Commission by non-party elected or other government officials. We have followed that practice in this proceeding.[105]

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[101] In this proceeding, the Commission designated certain staff members as "separated staff," in order to enable them to communicate freely with and advise the ALP participants, including any settlement discussions. The separated staff have had no communication with the Commission's decisional staff concerning the merits of the application.

[102] See 18 CFR 385.2201.

[103] 18 CFR 385.2201(f)(2).

[104] NPC makes no specific allegation of ex parte communications to or from Commission staff, but merely requests an investigation to see if there have been any.

[105] See, e.g., Letter from State Representative John Sciback to Chairman Patrick Wood, filed April 23, 2003, and response thereto, issued May 7, 2003.

d. Precedential Effect of Settlement Agreement

85. Section 1.5 of the Settlement Agreement provides that Commission approval of the Settlement "shall not be deemed precedential or controlling regarding any particular issue or contention in any other proceeding." NPC states that this section should be eliminated because the Settlement Agreement addresses certain issues of interest to it, such as payments by NYPA in lieu of taxes, socioeconomic impacts in the project vicinity, and the removal of land within the project boundary that NYPA proposes to convey to local entities. It states that the "no precedent" clause will undermine the use of these provisions of the Settlement Agreement as precedent for the future relicensing of NYPA's Niagara Project. In this regard, NPC contends that it is our policy to harmonize license terms and conditions for projects in the same region or watershed, and that this policy is particularly important where projects are owned by the same licensee.[106]

86. We reject NPC's request. It is well-established that settlements have no precedential value,[107] and NPC provides no justification for departing from this well-established policy. Contrary to NPC's assertion, we have no general policy of harmonizing the conditions of licenses for projects located in the same watershed. We do sometimes include license conditions to ensure that projects which can affect the operation of other projects do so in an appropriate manner.[108] That, however, is entirely different from such matters as payments in lieu of taxes, socioeconomic impacts, and removal of lands from the project boundary. Such matters are governed by generally applicable policies, e.g., lands may not be removed from a Project boundary that are needed for project purposes, but the decisions in each proceeding are based on the evidentiary record in that proceeding.

e. Choice of Law

87. Section 10 provides that to the extent its provisions are within the Commission's jurisdiction under the FPA, they will be incorporated into the new license and be enforceable through proceedings at the Commission. All other provisions are considered

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[106] Comments Opposing Settlement Agreement, pp. 21-22.

[107] See, e.g., Kelley v. FERC, 96 F.3d 1482, 1489-90 (D.C. Cir. 1996).

[108] In this license Form L-5, Article 10 (18 FPC at p. 1835) specifically reserves authority to require the Licensee to coordinate the hydraulic and electric operation of the Project with other projects or electric power systems.

to be a contract among the signing parties, governed by New York Law, and any judicial enforcement proceeding are to be brought only in a court in Albany County, New York. Any proceedings against NYRU are limited to injunctive relief.[109]

88. NPC contends that this provision should be eliminated because it improperly seeks to exclude portions of the Settlement Agreement from Commission jurisdiction. NPC adds that if any choice of forum is permitted, it should be made clear that only settling parties are bound. Finally, NPC objects to the limitation of actions against NYRU to injunctive relief. It would apparently eliminate this provision, or apply it to all settling parties.[110]

89. There is nothing improper about Section 10. It specifically states that all provisions of the Settlement that are subject to the Commission's jurisdiction are to be incorporated into the license. Indeed, it could not be otherwise. With regard to any matters not subject to our jurisdiction, we could not create jurisdiction by eliminating the settling parties' choice of law provision. It is equally clear that the choice of law provision, as it concerns matters not subject to the Commission's jurisdiction, is a contractual agreement, and cannot bind any entity that did not execute the Settlement Agreement. Section 10 says as much. Finally, this Commission has no jurisdiction with respect to the provision concerning actions against NYRU.

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[109]Section 10 reads as follows:

To the extent that these provisions are within the jurisdiction of the Federal Power Act, the provisions of this Settlement Accord shall be incorporated into the New License and shall be enforceable through proceedings before FERC. With regard to any and all other matters, this Settlement Accord, as a binding contract between the Parties, shall be governed by and construed under New York law without reference to its conflicts of law principles. Any action at law, suit in equity, or other judicial proceedings for the enforcement of this Settlement Accord or any of its provisions must be brought in an maintained only in a court located in Albany County, New York; provided, however, that any action against NYRU shall only be for injunctive relief.

[110]Comments Opposing Settlement Agreement, pp. 22-23.

f. Consultation Requirements

90. The proposed license articles in connection with the LMP[111] and the Recreation Agreement[112] include provisions for post-licensing consultation by NYPA with the various parties to determine the details of implementing the plans. Specifically, the LMP article states that NYPA is to consult with appropriate parties with interest in land management issues, including, but not limited to, the members of the Task Force, FWS, NYSDEC, and any other signatory to the Settlement Agreement. The Recreation Agreement article provides for consultation with all parties to the Settlement Agreement.

91. NPC interprets these provisions to exclude from such consultation any entities other than the signatories, and contends that such a provision is inconsistent with the public interest, particularly in light of NYPA's exclusion of certain parties from settlement negotiations.[113] NPC requests that we require consultation to be open to all interested parties.

92. There is nothing improper here. The LMP article does not, as shown above, limit consultation to the Settlement Agreement signatories. The Recreation Agreement article does limit consultation in that manner, but that agreement is between NYPA and OPRHP, and is concerned only with facilities in state parks. Moreover, no commenter, including NPC, has requested to be consulted on these matters. NPC makes no attempt to explain what interest its members, none of which exists specifically for the purposes of land management and recreation, and all of which are located some 250 miles from the St. Lawrence Project, have in being consulted concerning the implementation of either agreement.

g. Reopener Provisions

93. The Task Force Agreement provides that the signatories will review that agreement every ten years during the term of the license beginning in 2013 for the purpose of discussing issues not anticipated at the time of relicensing. A non-exclusive list of such issues includes matters related to the environmental and local economic conditions, resolution of the UMLC, and the economic status of the St. Lawrence project

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[111] Settlement Agreement, Attachment A, p. A-6 to A-7.

[112] Settlement Agreement, Attachment A, p. A-9.

[113] Comments Opposing Settlement Agreement, p. 23.

in light of costs or operational considerations. The provision makes no mention of license amendments or any other potential result of such discussions.[114]

94. NPC construes this provisions as special treatment for members of the Task Force and avers that the Commission should include reopener provisions in the license broad enough to encompass consideration of any public interest issue that may arise. More specifically, it asserts that the St. Lawrence and Niagara Projects are operationally interrelated and requests that we include an article requiring the St. Lawrence license to be reopened in connection with any future Niagara Project relicense proceeding.[115]

95. NPC's contention that the two projects are related rests on: (1) the fact that both projects are located in upstate New York and are owned and operated by the same licensee; (2) operation of the Niagara Project affects the flows available for power generation at St. Lawrence; (3) one of the potential recreational resources discussed in the Preliminary DEIS is a National Scenic Byway that would be located in the St. Lawrence River watershed; and (4) the sale of power from both projects is subject to the provisions of the Power Authority Act.

96. NYPA denies that any of these facts result in any cumulative environmental or other impacts.[116] NPC responds that the operational link is proved by the fact that the Commission issued an order in 1958 approving a proposed transmission line to interconnect the two projects, which increased the combined firm capacity of the two projects.[117]

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[114]Settlement Agreement, Attachment 3, pp. 2-3.

[115]Niagara Settlement Comments at pp.23-24. See also NPC Settlement Comments (Amended), filed April 28, 2003.

[116]See, e.g., "Response of the Power Authority of the State of New York to Substantive Comments and Allegations Raised in Previously Filed Protests and Motions to Intervene," filed November 20, 2002, at p. 22.

[117]NPC Settlement Comments (Amended) at p. 4, citing Power Authority of the State of New York, 20 FPC 823 (1958).

97. The EIS discusses cumulative environmental impacts at some length.[118] The discussion does not mention the Niagara Project. This is appropriate. The two projects are separated by hundreds of miles and the backwater effects of the St. Lawrence Project extend only to the area around Red Mills, seven miles upstream from the Iroquois Dam. The Niagara Project is operated as a peaking facility. Its ability to store and release water and thereby affect environmental conditions in the St. Lawrence project area is negligible because the Niagara Project discharges into the Niagara River, and thence into Lake Ontario, where its effects are so attenuated as to be vanishing.[119] NPC has not explained how the operation of either project, and particularly how their power is allocated, could effect whether or not a scenic byway is designated.

98. The only arguably cumulative impact of these projects would be socioeconomic, in the sense that the allocation of low-cost power can have beneficial economic effects for the recipients. As discussed above, whether NPC's members receive such an allocation is a matter for resolution by the New York authorities. Nothing proffered by NPC in this proceeding gives us any basis to conclude that its members are or will become authorized to purchase power from either project, or how much power they might receive were they authorized to purchase it. Therefore, any attempt to consider the economic impacts of such authorization on NPC or any other entity would be wholly speculative. It would therefore not serve as the basis for any reasonable alternative to NYPA's proposal.[120]

4. Settled Issues Excluded from Licensing

99. The Settlement Agreement also provides for NYPA to undertake various actions not intended by the settling parties to be included in the new license. These include:

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[118]EIS Section 4.6, pp. 4-152 to 4-168 and Section 6.2, pp. 6-18 to 6.20

[119]The Niagara Project reservoir has a usable storage capacity of 69,500 acre-feet. New York Power Authority, First-Stage Consultation Report, Volume I, pp. 3-2, 3-6. This is about .00005 percent of Lake Ontario's volume of 393 cubic miles. See www.great-lakes.net/lakes/ontario.html.

[120]The adequacy of the content of an EIS is determined by a rule of reason which requires only a reasonably thorough discussion of the significant aspects of the probable environmental consequences. Columbia Land Basin Protection Assn. v. Schlesinger, 643 F.2d 585, 592 (9th Cir. 1981).

- A cooperative program with residents adjacent to the Project boundary to I install purple martin houses (on project lands?);[121]

- A community enhancement fund for the benefit of St.Lawrence County and various municipalities therein;[122]

- Rehabilitation of recreation facilities in the Town of Lisbon;[123]

- Renegotiation of existing agreements with local governments for the maintenance of recreational facilities;[124]

- Conveyance of lands removed from the Project boundary;[125]

- Work with the Task Force to identify potential sites for private marine development;[126] and

- Establish a $20 million fund for construction and operation of an aquarium and research center on 2,020 acres of land land within the Project boundary owned by the Seaway Corporation, that NYPA proposes to remove from the Project boundary.[127]

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[121]Ecological Agreement, Section 2.2.

[122]Task Force Agreement, Attachment 6.

[123]Task Force Agreement, Section 4d.

[124]Task Force Agreement, Sections 4a § 2, 4b § 2, and 4c § 2.

[125]Task Force Agreement, Section 1; Explanatory Statement, pp. 35-36.

[126]Task Force Agreement, Sections 4a§ 4, 4b § 4, and 4c § 4.

[127]Explanatory Statement at pp. 32, n. 141 and 36. NYPA has also agreed to provide interests in lands adjacent to the aquarium for the purpose of permitting access to the shoreline, install interconnection facilities for and supply power to the Aquarium, and provide an additional $500,00 for equipment associated with the aquarium.

100. We note these undertakings by NYPA for the record, but because they are not proposed to be elements of any new license issued to NYPA will not be considered in our comprehensive development determination under FPA Section 10(a)(1). [128]

B. OPRHP's Concerns

101. The New York State Office of Parks, Recreation, and Historic Preservation's (OPRHP) comments on the Draft EIS were untimely filed,[129] which prevented them from being more fully considered in the Final EIS. We respond to those comments here. OHRHP states that the level of detail of analysis of impacts from new recreational development is insufficiently detailed. We think the analysis of these facilities in the EIS[130]. is adequate, particularly in light of the fact that NYPA will be required pursuant to the Recreation Agreement executed by it and OHRHP to update and submit for Commission approval the revised Recreation Plan discussed above in consultation with OHRHP.[131]

C. Power Allocation

102. Article 28 requires NYPA to allocate a reasonable portion of the Project power for use within the economic market area in neighboring states.[132] Pursuant to Article 28,

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[128] See, e.g., Rochester Gas & Electric Co., 76 FERC ¶ 61,182 (1996).

[129] Comments were due August 11, 2003; OPRHP's comments were filed on August 22.

[130] EIS Section 4.1.7 and pp. 4-24 and 4-54.

[131] Article 415.

[132] Article 28 reads, in its entirety:

The licensee shall make a reasonable portion of the power capacity and a reasonable portion of the power output available for use within the economic market area in neighboring states and shall cooperate with agencies in such states to insure compliance with this requirement. In the event of disagreement between the licensee and the power marketing agencies (public and private) in any of the other states within the economic market area, the licensee further agrees that the Commission may determine and fix the applicable portion of power capacity and power output to be made available hereunder and the terms applicable thereto; provided, That if any state shall have

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Massachusetts, Vermont, Rhode Island, Connecticut, New Jersey, Pennsylvania, and Ohio (the Out-of-State Allottees, or OSAs) currently purchase at cost-based rates 68 MW of Project power.[133] This is about 8.5 percent of Project power.[134] The amounts contracted for were the result of negotiations between NYPA and the OSAs, in some cases following extensive litigation.[135] Article 28 is not based on a statutory requirement, but on the Commission's view of Congressional intent at the time of original licensing. Under the same contract, NYPA sells 10 percent of the power from its Niagara Project No. 2116 to the OSAs.

103. NYPA's application proposed to remove Article 28 from the new license, thereby eliminating from the license the obligation to offer power to neighboring states**.** As noted above, the neighboring states all opposed this proposal.

1. The OSA Agreement

104. The OSA Agreement resolves the dispute with respect to all of the neighboring states except Massachusetts. It does so by proposing to include in the new license[136] an article requiring NYPA to offer power to the neighboring states that executed that

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(continued…)
designated a bargaining agency for the procurement of such power capacity and power output on behalf of such state, the licensee shall cooperate and deal only with such agency in that state. 12 FPC at pp. 192-193.

[133]Each state has designated a bargain agent for the purpose of negotiating contracts. For instance, MMWEC is the bargain agent for Massachusetts.

[134]Massachusetts receives about 88 million kWh annually under the current license, which is about .17 percent of the total electrical consumption in that state. EIS, Table 1-2, p. 1-12.

[135]Until the 1980s, NYPA made an out-of-state allocation of St. Lawrence power only to Vermont, Pennsylvania, and Ohio. In 1980, MMWEC and CMEEC filed complaints against NYPA which resulted in a Commission opinion directing NYPA to provide power as well to Connecticut and Massachusetts. See Opinion No. 229, 30 FERC ¶ 61,363 at p. 61,644.

[136]See OSA Agreement, Section 2.1.

agreement.[137] The proposed license article provides for NYPA to make available to the settling states 4.25 percent of the firm power (and associated energy) and 4.25 percent of the non-firm energy of the Project. The power and energy is to be divided among the settling states on a pro rata basis based on population, except that NYPA will make available additional firm power and non-firm energy to ensure that each states receives at least one MW of firm power (and associated energy) and a corresponding share of non-firm energy.

105. The OSA Agreement also provides that upon Commission issuance of a new license ontaining the proposed license article, the parties will execute power sales agreements for a term extending through April 20, 2017. Attached to the OSA Agreement is a pro forma power sales contract providing for sales at cost-based rates, which the cover letter explains is submitted for informational purposes only.

106. We have reviewed the OSA Agreement and conclude that it is in the public interest to approve it and to include the associated proposed license article in the new license.[138]

2. Massachusetts

107. Because NYPA and MMWEC have not resolved their differences, we turn to the merits of these parties' dispute. NYPA contends that the Commission has no authority to allocate Project power and, even if it does, the public interest favors elimination of the article because: (1) Congress did not explicitly require Project power to be shared regionally and Article 28 is anomalous; (2) State law establishes a sufficient framework for distribution of Project power; (3) Current Commission policy is to let the market allocate power; and (4) Article 28 is an anachronism because of technological advances in transmission and the Commission's policies favoring regional transmission organizations.[139]

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[137] Connecticut, New Jersey, Ohio, Pennsylvania, Rhode Island, and Vermont.

[138] Article 419. As with the Settlement Agreement, we are approving the OSA Agreement, but have not made it an attachment to this order.

[139] See Application, Volume I, Executive Summary at ES-31 to ES-32 and Exhibit H, pp. H-2 to H-4.

108. MMWEC disputes all of these contentions. It argues that the Commission has authority to allocate project power under FPA Sections 10(a), 10(g), 19, and 20.[140] It adds that: (1) Congress intended for low cost power from the Project to be treated as a regional resource;[141] (2) there is no inconsistency between the Commission's policies on market pricing and RTOs and a regional power allocation;[142] and (3) Article 28 needs to be strengthened to, among other things, increase the existing allocation, in light of NYPA's history of resisting compliance with Article 28.[143]

109. We first consider whether this Commission has the authority to establish an allocation of Project power in the absence of an explicit legislative directive. Only if we decide that we have such authority, and exercise it to require an allocation to Massachusetts, do Sections 19 or 20 come into play.

a. Authority to Allocate Power

110. MMWEC asserts that FPA Sections 10(a)(1) and 10(g) authorize the Commission to include power allocation conditions in a license.[144] Section 10(a)(1), in concert with Section 4(e), establishes the comprehensive development/public interest standard for licenses issued by the Commission.[145] Section 10(g) is a general grant of authority to

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[140]16 U.S.C. §§ 803(a), 803(g), 812, and 813, respectively.

[141]MMWEC Preliminary Terms and Conditions in Response to REA, pp. 5-14.

[142]MMWEC Protest, pp. 19-22.

[143]MMWEC recommends that Article 28 be revised to include an allocation of 20 percent of existing output, including any additional output from future generation enhancements or surplus water flows, a specific entitlement to associated transmission services, cost-based rates, identification of eligible states; and minimum contract terms of 20 years. MMWEC Preliminary Terms and Conditions, pp. 15-23, 28-29.

MMWEC also requests that the Commission make clear that NYPA is required to continue the out-of-state power allocations under the existing contracts until a new license is issued, and condition any new license to affirm the right of the OSAs to receive Project power without having to initiate any administrative or judicial proceedings. MMWEC Protest at pp. 11-12.

[144]MMWEC Protest, pp. 17, 22-24.

[145]Section 10(a)(1) provides, in pertinent part, that the licensed project will be:

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include in licenses "such other conditions not inconsistent with the provisions of this Act as the Commission may require." MMWEC states that the Commission exercised this authority in the original license order in light of a clear expression of Congressional intent.

111. NYPA responds that there is no explicit authority in the FPA for the Commission to impose an allocation of Project power and that if Congress had intended for such authority to exist, it would have made that clear in a statute.[146] NYPA also asserts that regional power allocation does not come within the ambit of the comprehensive development standard, indeed is beyond the Commission's jurisdiction to even consider, because it does not pertain to any environmental, economic, or other impacts of the Project.[147] It states that Section 10(g) is not applicable because that section only permits conditions that are not inconsistent with the FPA, and the Commission's authority (at least as to the setting of rates) is found only in FPA Part II[148] and in Sections 19 and 20, none of which apply to NYPA.

112. We conclude that, in the unique circumstances presented in this case, this Commission does have the authority to require the licensee to allocate project power. Section 4(e) empowers the Commission to issue licenses, and Section 10(a)(1) to condition them, for a very broadly stated set of purposes. The courts have made clear that the FPA "is not to be given a tight reading wherein every action of the Commission is justified only if referable to express statutory authorization. On the contrary, the Act is

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> best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes . . . .

[146] Response of the Power Authority of the State of New York to Substantive Comments and Allegations Raised in Previously Filed Protests and Motions to Intervene (NYPA Response to Protests), filed November 20, 2002, at pp. 7-9.

[147] NYPA Reply to Preliminary Terms and Conditions, pp. 25, 63.

[148] 16 U.S.C. §§ 824-824m.

one that entrusts a broad subject matter to administration by the Commission."[149] In short, the comprehensive development standard requires the Commission to consider all issues in a license application that affect the public interest and to condition licenses to ensure that the public interest is protected.

113. NYPA's contention that the Commission's conditioning authority is limited to mitigation for the environmental, economic, or other effects of a project is incorrect. Sections 4(e) and 10(a)(1) do not so provide. Indeed, the developmental aspects of hydropower development in the context of a comprehensive plan for the waterway are equally emphasized. The FPC relied on this broadly framed mandate when it determined in the original license order that the economic benefits of low-cost energy from the project were a "national resource of the entire northeastern region of the United States" and that a share of Project power should be allocated to neighboring states. [150]

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[149] Niagara Mohawk Power Corp. v. FPC, 379 F.2d 153, 158 (D.C. Cir. 1967) (affirming authority to backdate a license effective date in the absence of explicity statutory authority). The court also stated with reference to FPA Section 309, which authorizes the Commission to prescribe orders necessary or appropriate to carry our the provisions of the Act:

> While such "necessary or appropriate" provisions do not have the same majesty and breadth in statutes as in a constitution, there is no dearth of decisions making clear that they are not restricted to procedural minutia, and that they authorize an agency to use means of regulation not spelled out in detail, provided the agency's action conforms with the purposes and policies of Congress and does not contravene the terms of the Act. * * * Finally, we observe that the breadth of agency discretion is, if anything, at zenith when the action assailed relates primarily . . . to the fashioning of policies, remedies, and sanctions. . . in order to arrive at maximum effectuation of Congressional objectives [footnote omitted]

See also Northern States Power Co. v. FPC, 118 F.2d 141, 143 (7th Cir. 1941) ("[I]f the Commission is to intelligently exercise its extensive regulatory and supervisory power, it must have been intended that it shall have the power to do everything essential to the execution of its clearly granted powers and the achievement of the purposes of the legislation."); California v. FPC, 345 F.2d 917, 924-25 (9th Cir. 1965) (FPA Section 6, which states that licenses may only be altered or surrendered upon mutual agreement between the licensee and the Commission, does not bar the Commission from including reopener clauses that allow it to change a condition of the license during its term).

[150] 12 FPC at 177, 183-184.

114. MMWEC and NYPA spar over whether a continued regional allocation is in the public interest in light of today's conditions, disagreeing on the continued economic significance of an allocation of low-cost power to the neighboring states, the state of power supplies in the Northeast; the import of advances in long-distance electric transmission technology, and the Commission's actions to require open access transmission, promote Regional Transmission Organizations, and to otherwise foster distribution of power by means of competitive markets.[151]

115. We need not sort out these arguments, for it is clear to us that Congress intended for the power production component of the International Project to economically benefit the Northeastern United States as a whole. For example, in a 1946 report accompanying Senate Joint Resolution No. 104, which addressed an Executive Agreement between the United States and Canada with regard to the proposed International Project, the Senate Committee on Foreign Relations stated:

> . . .Section 5 of Senate Joint Resolution 104. . .contains provisions for the protection of interests of the United States and of other States. The Committee assumes that, consistent with such provisions, the ultimate agreement with New York, which in any event will be subject to approval by the Congress, will include provisions for the allocation of power to adjoining States within economical transmission distance of the St. Lawrence power site. Representatives of the State of New York, including the chairman of the New York State Power Authority, stated before the subcommittee that New York is ready to make power available to public agencies in adjoining States.[152]

116. This statement of Congress' understanding of the terms under which the International Project was to be developed is fully consistent with numerous statements by Federal and New York officials over a span of years beginning in the 1920s and continuing through completion of the treaty and legislative processes that enabled the Project to become a reality.[153] NYPA makes no attempt to dispute the significance of this

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[151] MMWEC Protest, pp. 4, 20, 22; Preliminary Terms and Conditions, pp. 21-23; NYPA Application, pp. ES-32, Exhibit H, pp. H-2 to H-4; Response to Protests, pp. 3-7, and 13-15; Reply to Preliminary Terms and Conditions, pp. 27-28;

[152] Great Lakes- St. Lawrence Basin Report to Accompany S.J. Res. 104, S.R. No. 1499 at 44, 79th Cong. 2nd Sess. (June 13, 1946).

[153] These statements are found in Presidential speeches, Congressional committee (continued…)

history except to argue that it did not result in a specific statutory directive for a regional allocation. As discussed above, no such explicit directive is necessary to empower the Commission to carry out the will of Congress in this regard.

117. We conclude, notwithstanding our strong support for the principle that competitive markets are the best means of allocating power, that Congress intended for the economic benefits of power from this particular project to be shared throughout the Northeastern United States. We therefore find that it is in the public interest to require MMWEC to be offered an allocation of Project power. Finally, we emphasize in this regard the uniqueness of this proceeding. We are aware of no other instance in which Congress has clearly expressed its intent that project power be regionally distributed, but has not reflected that intent in a statutory directive. Our decision here should not be construed as a departure from the consistent policy of this Commission and its predecessor Commission that, in the absence of a clear expression of Congressional intent to the contrary, a licensee may distribute the power from its project in the manner it deems most appropriate.

b. Rate Jurisdiction

118. This brings us to the matter of rates. NYPA and MMWEC dispute whether FPA Sections 19 or 20 confer any authority on this Commission with respect to NYPA's rates.

119. Section 19 provides that every non-municipal licensee is subject to state regulation of its electric rates and services.[154] The second sentence provides that, if there is a

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reports, Congressional hearings, and other statements by Federal and New York government officials cited by cited MMWEC and the other OSAs. See e.g., Allegheny Protest, pp. 11-16 and 19-23; Allegheny Preliminary Terms and Conditions, pp. 5-10; CMEEC Protest, pp. 7-16; Cleveland Protest, pp. 7-17. MMWEC Protest, pp. 6-14; PPANJ Protest, pp. 10-13; PPANJ Comments and Request, pp. 6-9; MMWEC Protest, pp. 6-14; MMWEC Preliminary Terms and Conditions, pp. 5-14; Cleveland/CMEEC Reply to NYPA Response, pp. 11-14.

[154]FPA Section 19 states in pertinent part:

> every licensee thereunder which is a public service corporation, or a person, association, or corporation owing or operating any project. . .shall abide by such reasonable regulation of the services. . .and of the rates. . .as may from time to time be prescribed by any duly constituted agency of the State in which the

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licensee (municipal or other) whose rates and services are not regulated by the state, jurisdiction is conferred on the Commission to regulate such licensee until such time as the state establishes regulation.[155]

120. Section 20 provides that the rates and services in connection with sales of energy generated at licensed hydroelectric projects shall be reasonable to the customer. Jurisdiction is conferred on the Commission to regulate the rates and services for such sales if: (1) There is no state regulation of such sales, or (2) "whenever any of the States directly concerned . . .are unable to agree through their properly constituted authorities on the services. . .or on the rates."[156]

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> service in rendered. . . . That in the case of the. . .distribution by any licensee hereunder or its customer. . .within a state which has not authorized and empowered a commission. . .to regulate the service to be rendered by such licensee or by its customer. . .or the rates and charges. . .therefore,. . .it is agreed. . that jurisdiction is hereby conferred upon the Commission, upon complaint of any person aggrieved or upon its own initiative, to exercise such regulation and control until such time as the State shall have provided a Commission or other authority for such regulation and control. . . .

[155]The Commission has held that the second sentence of Section 19 applies to municipal as well as non-municipal licensees, because unlike the first sentence it does not define licensee to exclude municipalities. See Brazos River Authority, 28 FPC 151 (1962), cited in Municipal Electric Utilities Association of New York State, 10 FERC ¶ 61,001, at p. 61,005 n.11 (1982).

[156]FPA Section 20 states in pertinent part that when power from projects licensed under Part I:

> shall enter into interstate or foreign commerce the rates. . .and the services. . .by any. . .licensee. . .or by any person, corporation, or association purchasing power from such licensee, for sale and distribution, or use in public service shall be reasonable. . .to the customer. . .; and whenever any of the States directly concerned has not provided a commission or other authority to enforce the requirements of this section within such State. . .or such States are unable to agree through their properly constituted authorities on the services. . .or on the rates. . ., jurisdiction is hereby conferred upon the Commission. . .to regulate. . .so much of the service . . and. . .rates. . .therefor as constitute interstate or foreign commerce.

121. FPA Sections 19 and 20 were enacted in the Federal Water Power Act of 1920.[157] At that time, there was no federal regulation of wholesale electric rates and services in interstate commerce. These sections reflect that state of affairs, and a Congressional policy judgment at that time that the traditional state utility regulation should continue with respect to power production licensed under the Federal act, except in the circumstance of a disagreement between states directly concerned.[158]

122. NYPA argues that the Commission has ruled that it has no authority under Section 19 over NYPA's rates for sales to any entity, wherever located, because it is a municipality which has been granted self-regulatory powers by New York.[159] NYPA adds, however, that the language of the first clause of Section 20 ("When *said* power. . .shall enter into interstate. . .commerce. . .the rates charge and the service rendered by any *such* licensee. . .") (NYPA's emphasis) refers to licensees and power previously described in Section 19. Since Section 19 does not apply to municipal licensees that have been empowered by the state to establish rates, it reasons, neither does Section 20.[160]

123. MMWEC responds that the original license order relied upon Section 20 and treated it as a separate source of authority from Section 19.[161] MMWEC acknowledges that the Commission there cited Section 19 in disclaiming authority over NYPA's rates,[162] but states that this disclaimer was later criticized and limited in Brazos River Authority,[163] where the Commission exercised authority under Section 19 over the rates

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[157]The Federal Water Power Act of 1920 became Part I of the Federal Power Act in 1935.

[158]See United States v. Public Utilities Commission of California, 345 U.S. 295, 302-03 (1953).

[159] See, e.g., Villages of Andover, et al. v. Power Authority of the State of New York, 64 FERC ¶61,066. reh'g denied, 64 FERC ¶61,358 (1993), petition for review denied sub nom. Village of Bergen v. FERC, 33 F.3d 1385 (D.C. Cir. 1994) (Bergen).

[160]NYPA Response to Protests at pp. 9-11; Reply Comments of the Power Authority of the State of New York to Comments, Recommendations, Terms and Conditions, and Prescriptions (NYPA Reply Comments), pp. 5-20.

[161]MMWEC Request to Reject, p. 6.

[162] See 12 FPC, p. 178.

[163] 28 FPC 151 (1962).

of a municipal licensee, and that Brazos remains good law.[164] MMWEC seeks to distinguish Bergen on the ground that it concerned rates for sales to in-state customers and the issue of jurisdiction under Section 20 was not raised.[165]

124. NYPA also cites the recent Yakama proceeding,[166] in which we disclaimed jurisdiction over the rates for the sale of power from the Priest Rapids Project No. 2114 under Sections 19 and 20 because of the licensee's municipal status. MMWEC suggests that Yakama was wrongly decided, or does not apply here because it did not distinguish between rates for sales to in-state and out-of-state customers.[167]

125. Finally, NYPA states that FPA Section 201(f)[168] specifically excludes rates for the sale of municipal power from the Commission's jurisdiction.[169] MMWEC replies that this is true for FPA Part II, but Section 201(f) specifically states that it applies only to Part II, and so is irrelevant to MMWEC's claims under Part I[170]

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[164] MMWEC Reply to NYPA Response at pp. 5-6.

[165] Id., p. 7

[166] The Yakama Nation v. Public Utility District No. 1 of Grant County, WA, 101 FERC ¶61,197, 61,795-796 (2002), reh'g denied on other grounds, 103 FERC ¶ 61,073 (2003).

[167] MMWEC Request to Reject, p. 8, n.8.

[168] 16 USC § 824(f). This Section states:

No provision in this part shall apply to, or be deemed to include, the United States, a State or political subdivision of a state, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agency, employee of the foregoing acting as such in the course of his official duty, unless such provisions makes specific reference thereto.

[169] NYPA Response to Protests, pp. 11-12, citing Bergen.

[170] MMWEC Request for Rejection of NYPA Response to Protests (Request to Reject), filed December 5, 2002, pp. 5-6. MMWEC and NYPA also cross swords over whether Commerce Clause of the U. S. Constitution deprives NYPA of the power to establish rates for sales of project power to neighboring states. Because we hold that we have authority to regulate such rates for the sale of licensed project power under the state

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126. We conclude that the Commission has jurisdiction under FPA Section 20 to establish NYPA's rates for the sale to neighboring states of St. Lawrence Project power. Our authorities under Sections 19 and 20 are not linked in the manner suggested by NYPA. Section 19, unlike Section 20, is not limited to rates and services for sales of project power in interstate commerce. Moreover, the clause in Section 20 referring to disagreements between states is absent from Section 19, and the use of the word "or" with reference to disagreements between states is clearly disjunctive. Thus, a lack of Commission jurisdiction based on a licensee's municipal status plainly does not apply where there is a disagreement between states.

127. NYPA's reference to Section 201(f) is unavailing. First, MMWEC is correct that Section 201(f) on its face only excludes the provisions of Part II from municipalities. That section says nothing about Part I. The Commission has moreover relied on Section 20 in proceedings with respect to other projects to assert jurisdiction over the interstate wholesale rates of a licensee.[171]

128. The disclaimer of jurisdiction over NYPA's rates and services pursuant to Section 19 in the original license order was made in the context of a discussion rejecting requests by some interveners for a requirement that NYPA give preference in selling power to public bodies and cooperatives. Section 20 is an independent grant of authority which, as we have noted, rests in this case on a disagreement between concerned states. Other orders that disclaim jurisdiction over NYPA's rates are based on Section 19, not Section 20.

129. Recent cases cited by NYPA involving the Priest Rapids Project where the Commission has disclaimed jurisdiction over the rates of municipal licensees are not to the contrary. NYPA is correct that in Yakama we said that Section 20 does not apply because the licensee is a municipality.[172] There was however no dispute between

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disagreement clause of Section 20, and will exercise that authority, we need not resolve this argument.

[171] See Safe Harbor Water Power Corp. v. FPC, 179 F.2d 179 (3rd Cir. 1949) and Pennsylvania Water and Power Co. v. FPC, 193 F.2d 230 (D.C. Cir. 1951), aff'd 343 U.S. 414 (1952).

[172] See 101 FERC at 61,795.

concerned states, but between the licensee and an Indian tribe. In Kootenai[173] we asserted authority to regulate the rates for the municipal licensee's interstate wholesale rates pursuant to project-specific legislation.[174]

130. In sum, we hold that here, where we have determined that Congress intended the power from this project to be allocated on a regional basis, and there is clearly a disagreement between the directly concerned states, Section 20 confers on us the jurisdiction to require that the rates and services for such allocation of power be "reasonable. . .to the customer."

c. Rate Methodology

131. NYPA indicates that it would sell power to MMWEC at market-based rates, consistent with Commission policies applicable to wholesale rates and services in competitive markets. Cost-based pricing, it asserts, would constitute undue discrimination.[175] In this regard, NYPA cites Kootenai, where we found that cost-based pricing of a Commission-determined (30 percent) allocation of power to neighboring states statutorily entitled to a purchasing preference would be unfair and discriminatory.[176] We required that any applicant for a new license for the project to used market-based pricing principles to allocate power among the class of customers entitled to the statutory preference.

132. For its part, MMWEC asserts that market-based rates for project power are inconsistent with the public interest because they would: (1) violate the rate formula of the Power Authority Act, which requires not-for-profit sales; (2) deprive the

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[173] Kootenai Electric Cooperative v Public Utility District No. 2 of Grant County (Kootenai), 82 FERC ¶ 61,112 (1998), reh'g denied, 83 FERC ¶ 61,289 (1998), petition for review denied, Kootenai Electric Cooperative v. FERC, 192 F.3d 144 (1999).

[174] The relevant portion of Pub. Law. 83-544 states that in the event of disagreement over such the allocation of project power to neighboring states, the Commission "may determine and fix the applicable portion of power capacity and power output to be made available hereunder and the terms applicable thereto." See 72 FERC at 62,030.

[175] NYPA Application, p. H-4.

[176] See 83 FERC at 62,209.

neighboring states that are intended to share in the economic benefits of the Project from receiving any benefit; (3) be unduly discriminatory since NYPA charges in-state customers cost-based rates for Project power; and (4) be akin to an illegal tax on the export of power from New York.[177]

133. In the particular circumstances presented, we conclude that market-based rates are not appropriate. The OSAs are entitled to share in the economic benefits of an unspecified portion of Project power at low cost. In this regard, we note two things. First, this case is unlike Kootenai because NYPA and the OSAs other than Massachusetts have settled as to both amount of and rates for sales of Project power. There is no way to use a market-based approach to allocate a share to Massachusetts since it is the only remaining member of this class of preference customers. Second, the Power Authority Act provides that sales to in-state rural and domestic customers are to be made at the "lowest possible price" and that sale to neighboring states are to be made "under the same terms and conditions as power is disposed of in New York" [178] We are not bound by this provision when acting pursuant to Section 20, but it certainly informs our thinking about what is reasonable in the unique circumstances of this case. We conclude that NYPA should be required to make Project power available to MMWEC at cost-based rates, using the same formula used for sale to the states that executed the OSA Agreement.

d. Reasonable Portion

134. The only remaining issue is how much power NYPA should be required to allocate to Massachusetts. There is no precedent upon which we can rely in this regard. Both the existing allocations and the allocations provided for in the OSA Agreement are the product of settlement agreements. Unlike MMWEC, we do not think the Niagara Redevelopment Act offers much guidance. That Act was enacted in 1957, and presumably reflected the perception of Congress as to what was a reasonable allocation of power from the Niagara Project in light of relative power resources and demands in the northeastern United States at that time. Kootenai likewise does not purport to base the 30 percent allocation of Priest Rapids project power to neighboring states therein on any generally applicable formula or principals, but on the specific facts of that case.

135. We are also not inclined to make any judgments concerning the relative importance of cost-based project power to the economies of New York versus MMWEC,

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[177] MMWEC Protest at pp. 50-51; Reply to NYPA's Response at pp. 2-3.

[178] N.Y. Pub. Auth. §1005(5).

other neighboring states, or the northeastern United States in general. Any state can reasonably argue that low-cost power is vital to its economic well-being. In this regard, we note only that the relative significance of an allocation of St. Lawrence power to the rates of the OSAs is less than it was when the Project was originally licensed.[179]

136. Under these circumstances, we think it is reasonable to require NYPA to offer to MMWEC power in the same proportion (and under the same terms and conditions) that the other neighboring states are to receive under the OSA Agreement. We calculate this to be 0.6 percent of the Project's firm power (based on a total firm power amount of 800 MW), or 4.8 MW of firm power.[180] This allocation is in addition to the allocation of power for the other OSAs under the OSA Agreement. Stated another way, NYPA will be required to offer to the OSAs in total 4.85 percent of the Project's firm power (about 38.8 MW) and the same percent of non-firm power. In the context of a Project with a rated capacity of 912 MW, we believe this represents an equitable allocation to neighboring states.

3. Council of Akwesasne

137. In its comments on the Draft EIS, the Council of Akwesasne requested an allocation of at least 9 MW of project power for the entire Akwesasne Community, to be sold at NYPA's lowest rate for Project power. It states that such an allocation would address environmental and cultural impacts of the Project on the residents of Akwesasne and compensate for harm to traditional economic activity by encouraging economic growth, and assist the ability of tribal elders to cope with harsh winter weather.[181]

138. As discussed above, the Commission's authority to require allocation of project power has only been exercised where there is a clear Congressional intention that such an allocation will be made. No such intent has been expressed regarding the Mohawk

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[179] According to the Department of Energy's EnergyInformation Administration, the consumption of electricity in Massachusetts has increased 318 percent since 1960, with similar increases in other OSA states and New York. EIA. 2003. Table 7: Electric Consumption by Source 1960-2000. http://www.eia.doe.gov/emeu/states/_states.html.

[180] The other OSAs settled for half of their current firm power allocation. We are allocating to Massachusetts the same proportion.

[181] See Preliminary Terms and Conditions, pp. 25-27; Comments on Draft EIS, p. 10, and EIS at p. 1-15.

community and we are unwilling to expand the circumstances under which we will require such an allocation. We further note, as discussed above,[182] that the license contains numerous requirements that will benefit environmental resources of significance to the Mohawk community and that a Programmatic Agreement has been executed to address Project effects on cultural resources.[183]

D. Tribal Issues

139. As previously noted, three entities from the Mohawk Community have intervened in this proceeding: The SRMT, which is recognized as an Indian tribe by the U.S. Government; the Council of Akwesasne, which is recognized by the Canadian government; and the Council of Chiefs.[184] The Mohawks have a particular interest in this proceeding because the Project is located in and near historical Mohawk territory, the SRMT reservation boundary is close to the Project boundary, and the Project's location on the St. Lawrence River bisects the Mohawk communities on either side of the international border. None of the Mohawk representatives or BIA executed the Settlement Agreement. They have raised several concerns.

140. We note as well that all three of the Mohawk Representatives have brought suit in Federal district court against the State of New York and NYPA[185] asserting ownership of approximately 11,650 acres of land in the Project vicinity. These claims are commonly referred to as the Unified Mohawk Land Claim (UMLC). Some of the lands included in the UMLC lies within the Project boundary.[186] On May 12, 2003, the State of New York and SRMT entered into a Memorandum of Understanding (MOU) that would resolve several issues between those parties, including the UMLC. As discussed below, resolution of the UMLC may affect the Project license. The MOU however has not yet

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[182] Section IV.A.1.

[183] See Section V, infra.

[184] See note 14, supra.

[185] 82 CV 783; 82 CV 1114; and 89 CV 829.

[186] The land within the Project boundary includes Barnhart, Croil, and Long Sault Islands (see EIS Figure 3-11) and includes portions of Robert Moses Dam and Long Sault Dam and the Project administration building, switchyard, and portions of Robert Moses State Park.

been ratified by either party and will require the approval of the Federal government. We have reserved appropriate authority in this regard.[187]

141. SRMT asserts that its treaty rights were violated when the Project was originally constructed and that the Project diminishes its treaty rights with respect to the use of the St. Lawrence River. It states that it does not seek adjudication of its treaty rights in this proceeding, but rather requests that the Commission acknowledge with respect to the use of the St. Lawrence River that treaties are the supreme law of the land and endorse SRMT's statements concerning certain principals applicable to interpretation of Indian treaties.[188] The Commission acknowledges that treaties have the effect of law and that the Commission has a fiduciary duty to Indian tribes. The Commission carries out its fiduciary responsibilities in the context of the FPA.[189] . SRMT correctly observes that this licensing proceeding is not the appropriate forum to resolve issues concerning treaty rights. Instead, we have attempted to address issues of concern to the Mohawk Community in this proceeding in a manner that, consistent with our fiduciary duty, recognizes that resolution of the UMLC could affect this Project.

142. As discussed below, the license requires NYPA to develop in consultation with the Mohawks a Historic Properties Management Plan (HPMP) that addresses numerous matters, including: Effects of shoreline erosion on traditional cultural properties (TCPs); restoration and propagation of treaty-protected fish species; access to Project lands and waters for hunting, fishing, gathering, and traditional cultural purposes; revisitation of cultural resources studies; inventory, monitoring, and protection of TCPs; and curation of Native American artifacts. Other license requirements established in the context of the Settlement Agreement that will benefit the Mohawks are also discussed below. In addition, we are reserving BIA's authority to establish license conditions pursuant to FPA Section 4(e).

1. Tribal Recommendations

143. In this section we consider various recommendations for license conditions made by SRMT and Council of Akwesasne. These recommendations to some extent overlap other recommendations that are considered in the following section on Cultural

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[187] Article 418.

[188] SRMT Preliminary Terms and Conditins, pp. 4-5.

[189] Covelo Indian Community v. FERC, 895 F.2d 581, 586 (9th Cir. 1990).

Resources. The following discussion identifies those recommendations that we have determined are best resolved in the context of a Programmatic Agreement (PA) and (HPMP) developed pursuant to Section 106 of the National Historic Preservation Act (NHPA)[190] and implementing regulations.

a. Wildlife Management Plan

144. SRMT recommended that NYPA be required to develop a Wildlife Protection and Management Plan and to establish a Wildlife Advisory Committee. The LMP discussed above[191] includes measures to protect and manage habitat for various wildlife species and would to a large extent achieve the purpose of SRMT's recommendation. Staff therefore recommended that the LMP specifically include a Wildlife Protection and Management Plan. Staff also recommended that in lieu of an advisory committee, NYPA include SRMT as a consulted party in the development of the LMP.[192] We concur. Article 413 so provides.

b. Emergency Action Plan

145. SRMT recommended development of a Public Safety and Disaster Preparedness Plan.[193] Part 12, Subpart C, of our regulations and our Engineering Guidelies require NYPA to have, annually update, periodically test, and revisit every five years, an emergency action plan (EAP).[194] During the annual updates and periodic reassessments of the EAP, NYPA must coordinate with all appropriate emergency management agencies. It is the licensee's responsibility to provide timely notification of an EAP activation to the emergency management agencies. Following the licensee's notification of an activated EAP, it is the emergency management agencies' responsibility to notify and evacuate the public if necessary in accordance with emergency plans developed by the emergency management agencies. If the emergency management agencies requires assistance by the licensee in certain areas, that is coordinated and made a part of the

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[190] 16 U.S.C. § 470f.

[191] See Section IV.A.1.

[192] EIS, p. 6-7.

[193] SRMT Preliminary Terms and Conditions, p. 25.

[194] 18 CFR Subpart C, 12.20-12.25.

emergency action plan with the emergency management agencies' approval. In this manner the entire, potentially-affected downstream population is protected. In order to accommodate the concerns of SRMT, we are including a license article to clarify that the St. Regis Mohawk Tribal Police is an appropriate emergency management agency for this purpose.[195]

c. Dredge Spoils Disposal Area Study

146. SRMT recommended that the Commission require NYPA to prepare a study to identify the location of areas used for the disposal of dredge spoil during construction of the Project. The EIS finds that NYPA did prepare such a study. The study concludes that that dredge spoil associated with the original construction of the project covered some terrestrial habitat on Cornwall Island, and the combination of dredging and spoil disposal on Chimney Island impacted the integrity of Fort Lewis as a historical site.[196] There does not appear to be any additional need for study in this regard. We therefore affirm the recommendation of the EIS that no additional study be required.[197]

d. Fishery Compensation

147. SRMT and Council of Akwesasne recommend that NYPA be required to provide financial compensation to the Mohawk Community for harm to subsistence and economically important fisheries attributable to Project construction and operation. This is essentially a request for the Commission to award damages to the Mohawk Community for economic harm. We are however without authority to make such awards.[198]

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[195] Article 416.

[196] EIS, pp. 4-123 to 4-124, 4-156, 4-163, and 4-179.

[197] EIS, p. 6-11.

[198] See, e.g., Indiana Michigan Power Co., 72 FERC ¶ 61,153 (1995), aff'd Kelley v. FERC, 96 F.3d 1482 (D.C-. Cir. 1996), and South Carolina Public Service Authority v. FERC, 850 F.2d 788 (D.C. Cir. 1988).

e. Fish Passage

148. The Council of Akwesasne recommends that NYPA be required to install upstream and downstream fish passage at the Project.[199] FWS has determined that upstream passage for American eel is necessary, but that a general requirement for upstream and downstream fish passage is not needed at this time. Instead, FWS has requested that we reserve the authority of Interior and Commerce to prescribe fishways. The record does not indicate that upstream and downstream fish passage is necessary to protect or enhance the Project-area fisheries, so we will adopt staff's recommendation[200] that we not impose such a requirement, but will reserve Interior's and Commerce's prescription authority.[201]

f. Fish and Wildlife Improvement Fund

149. The Council of Akwesasne recommends that NYPA be required to fund a fish and wildlife habitat improvement program.[202] The EIS finds, and we agree, that this is unnecessary in light of the provisions in the Fisheries and Ecological Agreements, which should bring substantial improvements to the aquatic and terrestrial habitats.[203]

g. Recreation

150. The Council of Akwesasne recommends that NYPA be required to grant free use to Mohawks of all Project recreational facilities.[204] The EIS indicates that most Project lands and recreational facilities are free of charge, and in those few areas where fees are charged (such as Coles Creek and Robert Moses State Parks) the fees are used to defray operation and maintenance costs. The EIS states that there is no basis to award preferential status to Mohawks in this regard and we agree.

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[199]Council of Akwesasne Preliminary Terms and Conditions, pp. 11.

[200]EIS, p. 6-13.

[201] See Article 418.

[202]Council of Akwesasne Preliminary Terms and Conditions, p. 12.

[203]EIS, pp. 6-14.

[204]Council of Akwesasne Preliminary Terms and Conditions, p. 24.

151. Council of Akwesasne also recommends that NYPA be required to construct unspecified new recreation facilities downstream from the Project accessible from Mohawk lands. Nothing in the record indicates a need for such facilities, and there are ample facilities within the Project boundary and otherwise available locally that are open to all, including those which NYPA has agreed to construct and rehabilitate in the Task Force and Recreation Agreements. We agree with the EIS[205] that this recommendation should not be adopted.

h. General Compensation Fund

152. Council of Akwesasne recommends that NYPA be required to provide the Mohawk Community with an annual payment of no less than $1 million to compensate for negative impacts to Mohawks not otherwise provided for in other recommendations and in light of NYPA's agreements to make other payments or incur funding obligations as described above.[206] This request, like the request for financial compensation for harm to fisheries discussed above, is essentially a claim for money damages that the Commission lacks authority to award.

i. Cultural and Environmental Education Fund

153. Council of Akwesasne also recommends that NYPA be required to fund a Community Cultural and Environmental Education Fund in the amount of $400,000 annually.[207] This proposal also does not appear to mitigate for any specifically identified Project impact, and so we concur with the EIS' recommendation[208] that it not be required.

j. Fisheries Management Plan

154. SRMT recommends that NYPA be required to establish a fisheries management plan for the specific purpose of protecting Haudenosaunee treaty rights in the St. Lawrence River fishery.[209] SRMT indicates that treaty protected fish resources include

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[205]EIS, p. 6-14.

[206]Preliminary Terms, Conditions, and Recommendations, pp. 25-26.

[207]Preliminary Terms, Conditions, and Recommendations, pp. 25-26.

[208]EIS, p. 6-15.

[209] Preliminary Terms and Conditions, p. 25.

yellow perch, sturgeon, and salmon.[210] The Settlement Agreement provides for significant enhancements to fisheries resources.[211] Also, the EIS recommends that to the extent any such fish resources are found to be traditional cultural properties (TCPs), appropriate protection measures should be determined in the context of the HPMP to be prepared pursuant to the PA discussed in the following section.[212] We believe that these measures will adequately protect any SRMT treaty-protected fish resources.

2. BIA Recommendations

155. Interior executed the Settlement Agreement on behalf of FWS. Interior made additional recommendations on behalf of its Bureau of Indian Affairs (BIA) that were not adopted in the Settlement Agreement, which we discuss below.

a. Dissolved Gas Monitoring

156. Interior/BIA recommends that NYPA be required to monitor dissolved gases in the Project tailwaters downstream of the spillways due to concerns about potential effects of gas bubble disease caused by nitrogen supersaturation.[213] The record does not indicate that there is a problem in this regard, and spills are an infrequent occurrence.[214] The Settlement Agreement however provides for NYPA to conduct water temperature monitoring in the South Channel immediate downstream of Long Sault Dam (the Project spillway)[215] and there would be little additional cost if dissolved gas monitoring were conducted in conjunction with the temperature monitoring. Staff therefore recommended that NYPA be required to develop a plan to conduct dissolved gas monitoring in

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[210] Fisheries identified as significant to the Mohawks are discussed in EIS Section 4.1.3.

[211] These enhancements include Habitat Improvement Plans for sturgeon and walleye restoration, wetlands at Coles Creek State Park, Little Sucker Brook, and Nichols Island pond levels. See EIS, pp. 4-13 to 4.21.

[212] EIS, p. 4-130.

[213] Interior Preliminary Terms, Conditions, and Recommendations, pp. 45-49

[214] See EIS at p. 6-6. Over the past 40 years, the average number of spill days per year has been 16. See EIS Table 3-12, EIS at p. 3-24.

[215] EIS pp. 4-25 and 4-26.

conjunction with temperature monitoring related to spill flows for a period of five years and include the data in the annual report on water quality required by the water quality certification for the Project. At the conclusion of the five-year period the Commission would determine what further action, if any, is needed in this regard, or whether monitoring can be discontinued.[216] We adopt staff's recommendation.[217]

b. Downstream Erosion

157. Interior/BIA recommends that NYPA be required to prepare an erosion monitoring and management plan focused on erosion downstream of the Moses-Saunders Dam.[218] The EIS finds however that such erosion is limited and is attributable to several factors, of which water level fluctuations from Project operations is a minor contributor. It therefore recommends against requiring NYPA to prepare such a plan.[219] We agree. We also note, however, that the HPMP will include measures to protect TCPs that may be affected by erosion.

c. Downstream Sedimentation

158. Interior/BIA recommends that NYPA be required to prepare a sedimentation management and monitoring plan for Mohawk territory downstream from the Project.[220] The EIS concludes that erosion and sedimentation at these locations is a natural occurrence which has been affected minimally, if any by Project operations, and therefore recommends that the license not include such a requirement. We concur with staff's recommendation.

d. Water Levels

159. Interior/BIA recommends that NYPA be required to prepare a water level monitoring and management plan in order to document and assess the individual and

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[216]EIS, p. 6-6.

[217] Article 402

[218]Interior Preliminary Terms, Conditions, and Recommendations, pp. 26-32.

[219]EIS, pp. 4-61 to 4-62, 4-119 to 4-122, and 6-10.

[220]Interior Preliminary Terms, Conditions, and Recommendations, pp. 32-35.

combined causes and effects of water level fluctuations on the physical and biological environment of the Project area.[221] The EIS finds that the record already includes sufficient information to characterize the temporal and spatial extent of water fluctuation, the IJC's flow regulation authority leaves NYPA very little room to manage water level fluctuations, and the Settlement Agreement provides for substantial measures to protect, mitigate effects on, and enhance aquatic habitat. It concludes that Interior/BIA's recommendation is unreasonable and should not be required in a new license.[222] We agree.

e. Turbidity and Suspended Solids

160. Interior/BIA also recommends that NYPA be required to prepare a water quality monitoring plan focused on turbidity and suspended solids.[223] The EIS finds that the sediment load in the St. Lawrence is small compared to other rivers of similar size, the Project meets state water quality standards, erosion that does occur is largely a natural phenomenon, and that little of the erosion downstream of the Project is attributable to it.[224] We agree with the EIS's recommendation that the plan proposed by Interior/BIA not be required.

3. Section 4(e) Conditions

161. If the SRMT land claims were resolved in SRMT's favor, these lands could become part of a Federal reservation, and would therefore be subject to Interior's mandatory conditioning authority pursuant to FPA Section 4(e).[225] Interior[226] and

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[221]Interior Preliminary Terms, Conditions, and Recommendations, pp. 36-39.

[222]EIS, Section 4.1.2 and 4.2.2, and p. 6-12.

[223]Interior Preliminary Terms, Conditions, and Recommendations, pp. 41-45.

[224]EIS Section 4.2 and p. 6-12.

[225]NYPA claims that even if the Mohawks prevail in the UMLC the land in question would not be within reservation boundaries, so FPA Sections 4(e) and 10(e) would not apply. NYPA Response to Protests at p. 18. The Council of Akwesasne (Reply to NYPA Response to Protests at p. 3) and Interior (Reply to NYPA Response to Protests at pp. 3-4) dispute this claim. We need not address this issue in order to reserve our authority.

SRMT[227] request that the Commission reserve authority to amend the license pursuant to the exercise by Interior of that authority should the lands in question become part of a Federal reservation during the term of the license. We are including the requested reservation of authority in the license.[228]

162. Section 4(e) provides, in pertinent part:

> That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.

163. FPA Section 3(2) defines reservation to include "tribal lands embraced within Indian reservations."[229]

164. SRMT asserts that because certain lands and waters within the project boundary are included in the Unified Mohawk Land Claim, and because the U.S. Department of Justice supports that claim, that the lands and waters in question are Indian reservation lands, and therefore subject to the Section 4(e)'s conditioning authority. Based on this assertion, SRMT purports to impose eleven license conditions under authority of FPA Section 4(e).[230]

165. SRMT's assertion of Section 4(e) conditioning authority is without basis. First, the Unified Mohawk Land Claim remains pending. Second, even if the claim was to be

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(continued…)

[226]Interior Preliminary Terms and Conditions at p. 23.

[227]SRMT Preliminary Terms and Conditions at p. 13.

[228]See Article 418.

[229]16 USC § 796(2).

[230]These purported conditions, set forth at pp. 18-22 of the SRMT's Preliminary Comments, concern erosion control, cultural resources, annual charges, and reservation of authority.

resolved in favor the Mohawks, 4(e) conditions may only be prescribed by the Secretary of the relevant department, in this case the Department of the Interior.[231] We will therefore treat these conditions as recommendations pursuant to FPA Section 10(a). In addition, SRMT made 13 other recommendations under color of Section 10(a).[232]

166. SRMT's recommendations were considered in the EIS, and are discussed above.[233]

4. Annual Charges

167. Section FPA Section 10(e)[234] provides that when a license is issued involving the use of tribal lands within an Indian reservation the Commission, subject to the approval of the Indian tribe with jurisdiction over the reservation, shall establish reasonable annual charges for the use of reservation lands.[235] Citing this section, and evidently relying on its assertions concerning the legal implications of the UMLC, SRMT recommends that the Commission include license conditions pertaining to annual charges for the use of

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[231]We note also that Interior states that if the UMLC is resolved in accordance with the Department of Justice position, the lands in question "would likely" qualify as reservations and "it remains to be determined whether Barnhart, Croil, and Long Sault Islands are in fact held by the United States for the benefit of the Mohawks." Response of the Department of the Interior to Reply Comments of the Power Authority of the State of New York, filed April 28, 2003, at p. 4 .

[232]SRMT Preliminary Recommendations at pp. 23-26.

[233]EIS Section IV.E.

[234]16 USC § 803(e).

[235]The Commission's regulations at 18 C.F.R. 11.4 state that the Commission will determine these charges on a case-by-case basis. Our general practice is that the charges are to rest on an agreement between the licensee and the Indian tribe. See e.g., PUD No. 1 of Pend Oreille County, 77 FERC ¶ 61,146 at 61,553 (1996); Minnesota Power & Light Co., 72 FERC ¶ 61,028 at 61,154; order on reh'g, 75 FERC ¶ 61,131 at 61,454 (1996). If these entities are not able to negotiate a reasonable annual charge, the Commission has set the matter for evidentiary hearing. See, e.g., Wisconsin Power & Light Co., 94 FERC ¶ 61,294 (2001); Portland General Electric Company and the Confederated Tribes of the Warm Springs Reservation of Oregon, 93 FERC ¶ 61,183 (2000).

lands within the project boundary covered by the UMLC.[236] Section 10(e) does not apply to this license for the same reason that FPA Section 4(e) does not apply.[237] We will however, reserve our authority to establish reasonable annual charges for use of the subject lands should they be determined to be reservation lands during the term of the new license.[238]

E. Removal of Lands from Project Boundary

1. Proposal in General

168. NYPA proposes to remove lands totaling about 3,360 acres from the existing Project boundary.[239] The lands in question consist of:

- o 2,020 acres owned by the Seaway Corporation;
- o 900 acres of island and mainlands upstream from Iroquois Dam (the most upstream dam); and
- o About 350 acres of land downstream from Iroquois Dam and upstream of the Moses-Saunders and Long Sault Dams (Lake St. Lawrence), which would cause the boundary in this area to generally correspond with the normal maximum surface elevation (NMSE) of Lake St. Lawrence.[240]

169. The Project boundary upstream of the Moses-Saunders and Long Sault Dams is currently set at the maximum design water elevation of Elevation 250 feet mean sea level (EL 250). Under the terms of the Task Force Agreement, the boundary would be

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[236]SRMT Preliminary Recommendations at pp. 26-27.

[237]See Section VII.

[238]See Article 418

[239]NYPA also proposes to add about 315 acres to the Project boundary, consisting of existing flood easements and other lands needed for project purposes. See, e.g., Task Force Agreement, Attachment 1d.

[240]Application Volume I, ES-19 to ES-21. Also Application Vol. III, Preliminary DEIS § 4.1.5.1, at pp. 4-58 and 4-59.

redefined to the NMSE of Lake St. Lawrence, which varies from EL 245-246, plus a variable-width buffer. The existing buffer width would be retained in lands adjacent to Project structures, local and state recreation areas, and the Wilson Hill Wildlife Management Area. Areas adjacent to New York State-designated Significant Fish and Wildlife Habitats and other environmentally sensitive areas would have a 100-foot-wide buffer zone. Other areas, principally those which would be acquired by local municipalities or private citizens with adjacent residential property, would have a 25-foot-wide buffer zone. NYPA's proposal would change the upper boundary of the Project from the vicinity of Red Mills, New York to a point about 2,300 feet upstream of Iroquois Dam, a difference of over six miles.[241] NYPA proposes to retain a flowage easement on all of the land removed from the Project boundary to EL 250.

170. Section 3(11) of the FPA,[242] defines a "project" subject to licensing as a complete unit of development, consisting of all dams, powerhouses, impoundments, water rights, and lands which are used in connection with such unit of development. Whether the lands in question are part of the unit of development (and therefore required to be licensed) depends on the facts of each case. Thus, we must determine whether any of the lands NYPA proposes to remove from the Project boundary are needed for project purposes, to include operation and maintenance, recreation, protection of environmental or cultural resources, or shoreline control. The EIS discusses this issue at length.[243]

171. In most respects, we are satisfied that NYPA's proposal in this regard complies with the FPA and the public interest. Of the 12,100 acres of land within the current project boundary, 8,740 acres would remain. Only two formal recreation areas would be removed from the Project boundary. One is the Lisbon Town Beach and Campground.[244] This facility would however remain as a park. Most other lands that would be removed from the Project boundary and not conveyed to the state or a municipality for use as parkland are not well suited for public recreation because there is little land between the property of existing adjacent property owners and the river or, in some places, access can only be had by water, or by crossing private property. The other is a scenic overlook maintained by the Seaway Corporation at the Eisenhower Lock. That facility is expected

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[241] See Task Force Agreement, Attachment 1a.

[242] 16 U.S.C. § 796(11).

[243] EIS pp. 4-62 to 4-70.

[244] See Task Force Agreement, Attachment 1a.

to remain open to the public. In any event, as discussed above, the Settlement Agreement makes ample provision for public recreation. In particular, the Recreation Agreement provides for extensive rehabilitation and expansion work to be done on facilities at the Robert Moses and Coles Creek State Parks, and the Wilson Hill Boat Launch, all of which will remain within the project boundary.

172. Some of the lands proposed to be removed provide important wildlife habitat, but these would largely be protected by being transferred to the state for parkland or wildlife protection, or would be subject to federal and state wetland regulations.[245] The EIS finds that removal from the Project boundary and transfer of these lands to the Seaway Corporation is unlikely to have any deleterious effects on natural or cultural resources. [246] As discussed above, the license will ensure that wildlife resources are adequately protected and enhanced.

173. About 600 acres would be conveyed to the municipalities or adjoining residential landowners. About 359 acres of this would be conveyed to adjacent residential owners. Of the 200 acres to be conveyed to municipalities, about 170 acres, located at various places along the shoreline, is currently not developable under local zoning regulations. It is likely that the municipalities will make zoning changes in the future to allow some of the transferred lands to be developed for residential or other use. Which areas would be developed, to what degree, and when, are things we cannot determine and on which we will not speculate. We have not, in any event, heard specific objections to such development, except by Old River, which we discuss below.

174. The part of NYPA's proposal in this regard that gives us pause relates to water levels. The Project was designed and constructed for a maximum water surface elevation of EL 249, and has the capability to impound water to this level. This was done consistent with a 1952 Order of Approval from the IJC to NYPA and OPG's predecessor[247] that required project works below Iroquois Dam to be designed for Lake Ontario at full level, which is approximately EL 249, based on a 100-year record high

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[245]For example, 741-acre Galop Island, at the upstream end of Lake St. Lawrence would be transferred to the state for use as Galop Island State Park. Other land would be transferred to NYSDEC to establish a 300-foot buffer zone to protect bank swallows.

[246] EIS pp. 4-69 to 4-70.

[247]OPG's predecessor agency was Ontario Hydro.

elevation in that year. NYPA then acquired most lands to EL 250, which corresponds to the design elevation of the Project, plus an additional foot to account for wave action.[248]

175. The original IJC Plan of Regulation called for Lake Ontario levels to remain within natural limits (EL 242.68 to EL 249.29). This was modified in later plans following significant property damage from the high water levels in 1952. Under all modifications to the Plan of Regulation since 1956, the International Project is operated to maintain Lake Ontario levels between EL 244 and 248, which in turn affects water levels in Lake St. Lawrence. Since that time, the International Project has been operated so that water levels in Lake St. Lawrence do not normally exceed EL 246. They have not exceeded EL 247 since the present plan was adopted in 1963, and then only in the very upstream portion of the existing Project boundary, in the vicinity of Red Mills and Lisbon.

176. It would appear then, that the great majority of the time, water levels would remain in the EL 245 to 246 range (i.e., within the proposed Project boundary), but would sometimes be between EL 246 and EL 247 at Lake St. Lawrence, and would occasionally go higher than EL 247in the six-mile reach above Iroquois Dam proposed to be removed from the Project boundary. It is also possible that on rare occasions naturally-occurring high water levels would cause water levels to exceed the proposed boundary. This could also occur more regularly if the IJC modified the Plan of Regulation. The IJC has initiated a plan to study regulation of water levels in Lake Ontario. It is not known when the study will be completed. However, the lands proposed to be removed from the Project boundary would be inundated if the IJC ordered NYPA and OPG to provide for a full Lake Ontario level.

177. In sum, NYPA seeks to remove from the Project boundary a small amount of land at the upper reaches of the Project that currently is inundated occasionally, and a much larger (albeit undetermined) amount of land that could be inundated by a rare, very high water event, or by changes to the Plan of Regulation. The issue is whether the land on which NYPA proposes to retain a flowage easement up to the current Project boundary (EL 250) needs to remain with the project boundary because it is needed for Project purposes.

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[248] The IJC does not require NYPA to own designated lands (as defined by elevation or other means), nor does it specify a maximum water level in the Project area. See EIS, pp. 4-66.

178. There is no need at this time for the Project boundary to remain at EL 250. That level is based on the 100-year high water level for Lake Ontario. It is not necessary for a project boundary to be set at this level; the normal high water mark is generally sufficient.

179. We are however concerned about the possibility that the IJC could modify the Plan of Regulation so as to increase the target levels for Lake Ontario, which could, as noted, cause lands that would be outside the proposed Project boundary at Lake St. Lawrence to be commonly inundated. In such an event, NYPA would need to request an amendment to the license to modify the Project boundary so as to bring those lands back into the Project boundary. This would not necessarily require NYPA to reacquire fee title to any lands previously conveyed to another entity. The easement agreements into which NYPA proposes to enter pursuant to its proposal may suffice for that purpose. We intend license Article 421, which requires NYPA to comply with all applicable orders of the IJC, to encompass the obligation to apply for such an amendment.

180. As for the Lake St. Lawrence shoreline and those lands upstream of the proposed upstream boundary (approximately 2,300 feet above Iroquois Dam) that are inundated from time to time above EL 246, the record does not contain information indicating how often this occurs. Until we have such information, we are unable to determine whether these inundations are sufficiently frequent that the project boundary needs to remain at a higher elevation than NYPA proposes. We are therefore including a license article requiring NYPA to provide additional data prior to our approval of the proposed changes to the Project boundary.[249]

2. Old River Concerns

181. Old River[250] opposes NYPA's proposal to remove from the Project boundary and convey to the Town of Massena approximately four acres of land along the shoreline of Lake St. Lawrence. The parcel in question is currently undeveloped.[251] NYPA would retain the abovementioned flowage easement up to EL 250 and access easements for

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[249] Article 204.

[250] Old River comprises the owners of six residences which border approximately four acres of land currently within the project boundary.

[251] See Task Force Agreement, Attachment 1e, which shows the location of the parcel in question in the larger context and in detail in an inset.

shoreline stabilization and any other project purposes. Old River states that the parcel is a valuable wildlife corridor; is included in the Seaway's emergency action plans; New York's Open Space Plan[252] identifies undeveloped St. Lawrence River shoreline for preservation; the land cannot be developed under local code requirements; and its development would adversely affect the character of the Old River Road neighborhood.[253]

182. NYPA asserts that the removal of these lands from the project boundary is beyond the scope of this proceeding, on the ground that they are not jurisdictional under the FPA and Commission precedent because they are neither used and useful nor necessary and appropriate for project purposes.[254] Whether in fact the lands in question are jurisdictional is a question to be answered by the Commission in this proceeding. That said, we agree with NYPA that these lands are not needed to effect the Project purposes.

183. The EIS finds that this property was not identified as an important wildlife corridor and NYSDEC did not have any concerns with its removal from the Project boundary. It agrees that there could be a conflict with goals and objectives of the Open Space Plan as it pertains to St. Lawrence River shoreline, but that any such effect would be offset by other proposed recreational measures that improve public access to the shoreline in the Massena area, including improvements at the Massena Town Beach, the Massena Intake boat launch, and the Hawkens Point boat launch.[255] That the land may not be developed under existing zoning codes is not relevant to whether it is needed for Project purposes. Finally, Old River does not explain how the location of the land within the area of the Seaway Corporation's emergency action plan would be prejudiced by its removal from the Project boundary. We think it reasonable to presume that the Seaway Corporation and the Town of Massena will cooperate in the implementation of that plan.

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[252] See www.dec.state.ny.us/website/dlf/osp/toc2002.html.

[253] Old River Motion to Intervene and Protest, pp. 2-3; Reply to NYPA's Reponse to Motions to Intervene and Protest (February 14, 2003).

[254] NYPA Response to Protests at pp. 22-23, citing FPA Sections 3(11) and 4(e), 16 USC § § 796(11) and 797(e), Public Service Company of Colorado, 82 FERC ¶ 61,334 at p. 62,320 (1998), and S. Carolina Electric & Gas Co., 100 FERC ¶ 61,288 at p. 14-15 (2002), and S.C. Public Service Authority, 7 FERC ¶ 61,148 at p. 61,236 (1979).

[255] See EIS Section 4.1.7.1, pp. 4-95 to 4-98, and Section 4.2.5.1, pp. 4-133 to 4-134.

In sum, we concur that this property is not necessary for Project purposes, and approve its removal from the Project boundary.

3. Tribal Concerns

184. NYPA proposes to remove from the Project boundary all Seaway Corporation-owned land except those lands occupied by Project dikes and the Project access road.[256] The lands are not needed for hydropower operations, but were acquired by NYPA prior to the original construction of the International Project for navigation purposes. The lands are managed by the Seaway Corporation, which is an agency within the U.S. Department of Transportation.

185. Approximately 20 acres of the land included in NYPA's proposal are included within the UMLC.[257] SRMT objects to this change on the ground that no analysis has been done on the impact of the removal of these lands from the Project boundary on Mohawk environmental and cultural resources.[258] Council of Akwesasne objects to the removal of any land within the UMLC because the EIS does not include an analysis that assumes the claim will be successful.[259] Interior does not oppose this modification, but requests that the Commission ensure that the Seaway Corporation is subject to the same obligations as NYPA would have under a license.[260]

186. We find that removal of these lands from the Project boundary is consistent with the public interest. NYPA will retain within the Project boundary the lands and facilities under Seaway Corporation ownership that are necessary for the continued operation and maintenance of the Project. The lands to be removed from the project boundary would be retained in Federal ownership and the Seaway Corporation, like every other Federal agency, is subject to the trust responsibility, so there should be no loss of Federal oversight or protection.

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[256] See Task Force Agreement, Figure 2-4D.

[257] This consists of the western bank of the Grasse River near the mouth of that river. See Application Volume II, Section 4, Figure 4-1D.

[258] SRMT Comments on Draft EIS, p. 40.

[259] Council of Akwesasne Comments on Draft EIS, p. 36.

[260] Interior Comments on Draft EIS, p. 25.

187. Regarding the lands included within the UMLC, we presume the Seaway Corporation will carry out its trust obligations as a Federal agency and will comply with any obligations it may have in connection with the UMLC litigation. We cannot, as suggested by Interior, make the Seaway Corporation subject to the same land use obligations as NYPA because, unlike NYPA, we have no jurisdiction over the Seaway Corporation.

188. Council of Akwesasne and Mohawk Chiefs indicate that they oppose the removal of any land from the Project, whether or not included within the UMLC, that may contain or be identified as Traditional Cultural Properties (TCPs). They further request that the Haudenosaunee Standing Committee on Burial Rules and Regulations be consulted if any artifacts, burial sites, or other culturally significant sites are identified on these lands. The PA and HPMP that we are requiring to be developed in the following section, and as discussed above, will ensure that TCPs in the Project vicinity are protected, even if they are outside of the Project boundary.

V. CULTURAL RESOURCES

189. Before it may issue a new license for the Project, the Commission must comply with the consultation requirements of Section 106 of the NHPA and the implementing regulations of the Advisory Council on Historic Preservation (Advisory Council).[261] Consultation under Section 106 usually results in the preparation of a PA between the Commission, the State Historic Preservation Officer (SHPO), and the Advisory Council which provides for the protection of historic and cultural resources through the establishment of an HPMP.

190. On October 1, 2003, a PA was executed by the Commission, SHPO, and Advisory Council. NYPA signed the PA as a concurring party. Consultations with the SRMT, and with the Council of Chiefs and Council of Akwesasne as other interested parties, are continuing, but none of these entities have yet signed the PA.

VI. SECTION 18 FISHWAY PRESCRIPTIONS

191. Section 18 of the FPA,[262] states that the Commission shall require construction, maintenance, and operation by a licensee of such fishways as the Secretaries of

[261] 36 CFR Part 800.

[262] 16 U.S.C. §811.

Commerce or the Interior may prescribe. The Commission's policy is to reserve such authority in a license upon the request of either designated Secretary.

192. Appendix A of the Settlement Agreement includes a proposed license article which would reserve the authority of the Secretaries of Interior and Commerce to prescribe fishways. As noted, FWS is a signatory to the Settlement Agreement. Although NMFS did not sign the Settlement Agreement, it has concurred in the proposed license article.[263] The Secretaries of Interior and Commerce have requested that the Project license reserve their authority to prescribe fishways.[264]

193. Consistent with our policy, we are including a license article including the requested reservation of authority.[265]

VII. RECOMMENDATIONS OF FEDERAL AND STATE FISH AND WILDLIFE AGENCIES

194. Section 10(j)(1) of the FPA[266] requires the Commission, when issuing a license, to include conditions based on the recommendations of federal and state fish and wildlife agencies submitted pursuant to the Fish and Wildlife Coordination Act,[267] for the protection and enhancement of fish and wildlife and their habitat affected by the project. The fish and wildlife recommendations of the FWS and NYSDEC are encompassed within the Settlement Agreement which, as noted, we are approving.[268]

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[263] See NMFS letter at p. 2 (Settlement Agreement, Attachment 6). The Settlement Agreement provides for NYPA to construct upstream passage facilities for American eel within two years of the effective date of a new license. See Article 403.

[264] See Appendix A at p. A-1.

[265] Article 403.

[266] 16 U.S.C. §803(j)(1).

[267] 16 U.S.C. §661, et seq.

[268] FWS' recommendations are listed in EIS Section 6.3.

VIII. THREATENED AND ENDANGERED SPECIES

195. Section 7(a)(2) of the Endangered Species Act of 1973 (ESA)[269] requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of federally listed threatened and endangered species, or result in destruction or adverse modification of designated critical habitat. No Federally-listed threatened or endangered species are resident in the Project area. The only Federally-listed species known to occur in the Project area is the Federally-listed threatened bald eagle, which overwinters in the Project area.[270]

196. On July 15, 2003, Commission staff submitted a biological assessment (BA) to the FWS under Section 7 of the ESA. Staff requested FWS' concurrence that the proposed project would not be likely to adversely affect the Federally-threatened bald eagle. On August 14, 2003, FWS filed a letter concurring with staff's determination.

197. Various state-threatened or -endangered animal[271] and plant[272] species are known to occur within the Project area. The EIS finds that they would not be adversely affected by the proposed project.[273]

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[269] 16 U.S.C. §1536(a)(2).

[270] See EIS Sections 4.1.4.3 and 6.5.2.

[271] State endangered species that occur in the Project area are the short-eared owl, Blanding's turtle, Northern harrier, least bittern, pied billed grebe, upland sandpiper, black tern, and common tern. See EIS Section 4.1.4.2.

[272] State threatened and endangered plant species that occur in the Project area are the slender bulrush, white camas, lesser fringed gentian, balsam willow, and wiry panic grass. See EIS Section 4.1.4.2.

[273] EIS Section 4.1.3.4, pp. 4-41 to 4-42.

IX. WATER QUALITY CERTIFICATION

A. New York

198. Under Section 401(a)(1) of the Clean Water Act (CWA),[274] the Commission may not issue a license for a hydroelectric project unless the state water quality certifying agency has issued a water quality certification for the project or has waived certification. Certification (or waiver) is required in connection with any application for a federal license or permit to conduct an activity which may result in a discharge into U.S. waters. Under Section 401(d) of the CWA, any conditions of the certification become conditions of the federal license or permit,[275] and only a reviewing court may revise or delete those conditions.[276] .

199. NYSDEC issued a water quality certification for the project on March 19, 2003. Ordering Paragraph (G) incorporates the water quality certification into this license order, and a copy of the certificate is attached as Appendix A. [277]

B. SRMT

200. On October 16, 2002, EPA approved SRMT's application for a determination of eligibility to administer certain CWA regulatory programs, including water quality certification under Section 401. As part of that approval, EPA has granted SRMT "treatment as state" status for purposes of CWA Section 401.[278] SRMT does not however have jurisdiction to issue water quality certification for the Project, because the Project's discharge occurs upstream of the SRMT reservation.[279]

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[274] 33 U.S.C. §1341(a)(1).

[275] 33 U.S.C. §1341(d).

[276] See American Rivers v. FERC, 229 F.3d 99 (D.C. Cir. 1997).

[277] The special conditions of the water quality certificate incorporate many of the requirements of the Ecological Agreement.

[278] See Interior Comments on DEIS at p. 32.

[279] See, e.g., City of Augusta, 51 FERC ¶ 61,363, p. 62,236 (1989) (certification authority resides in the state in which the point of discharge is located). Pursuant to 40 CFR 121.11of EPA's regulations implementing the CWA, the water quality related portions of the license application were forwarded to EPA's Regional Administrator for

(continued…)

X. COASTAL ZONE CONSISTENCY CERTIFICATION

201. Section 307(c)(3)(A) of the Coastal Zone Management Act[280] states that after final approval of a state's shoreline management program by the Secretary of Commerce, any applicant for a federal license or permit to conduct an activity affecting land or water uses in the coastal zone of the state shall provide in the application a certification that the proposed activity complies with the state's program. At the same time it must furnish the state a copy of the certification with the supporting data. The state must notify the federal agency whether it concurs with or objects to the certification at the earliest possible time. If it fails to notify the federal agency within six months, its concurrence is conclusively presumed. The federal authorization cannot be given until the state either concurs with the certification or concurrence is conclusively presumed.

202. New York's shoreline management program has been approved by the Secretary. The St. Lawrence Project is within New York's designated Coastal Zone Management Area. NYPA's application provides the required certification, and it submitted a certification to the New York Department of State (DOS), the agency which administers New York's coastal zone program, on October 31, 2001. DOS has neither concurred with nor objected to NYPA's certification. Rather, DOS signed the Settlement Agreement, and has indicated that the provisions of the Settlement Agreement are sufficient to meet the requirements for a consistency certification, if there are no material changes in the applicable law or the collection or discovery of new information by DOS through its consistency certification process. [281] DOS has also issued public notice of the NYPA's consistency certification on October 15, 2003.

203. DOS has conclusively waived certification by failing to act within the six month period provided by the CZMA.

(continued…)
its review and for transmission to the SRMT for the latter's review. Neither EPA nor SRMT has filed any comments on water quality matters in this context, but both entities were served directly with the application and filed comments on the Draft EIS.

[280] 16 U.S.C. § 1456(c)(3)(A).

[281] Settlement Agreement Section 1.3.2.

XI. COMPREHENSIVE PLANS

204. Section 10(a)(2)(A) of the FPA[282] requires the Commission to consider the extent to which a project is consistent with federal or state comprehensive plans for improving, developing, or conserving a waterway or waterways affected by the project.[283] Federal and state agencies filed 18 qualifying comprehensive plans, of which we identified one New York and two Federal comprehensive plans[284] that are applicable. We did not find any conflicts.

XII. APPLICANT'S PLANS AND CAPABILITIES

205. In accordance with Section 10 and 15 of the FPA,[285] we have evaluated NYPA's record as a licensee with respect to the following: (1) conservation efforts; (2) compliance history and ability to comply with the new license; (3) safe management, operation, and maintenance of the project; (4) ability to provide efficient and reliable electric service; (5) need for power; (6) transmission service; (7) cost effectiveness of plans; and (8) actions affecting the public.

A. Conservation Efforts

206. FPA Section 15(a)(2)(c) requires the Commission to consider the extent of electric consumption efficiency programs in the case of license applicants engaged primarily in the generation or sale of electric power. NYPA is such an applicant. NYPA has an efficiency improvement program for: (1) energy conservation targeted at New

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[282]16 U.S.C. § 803(a)(2).

[283]Comprehensive plans are defined at 18 CFR 2.19 (2000).

[284]The applicable Federal Plans are: U.S. Fish and Wildlife Service. Canadian Wildlife Service. 1986. North American Waterfowl Management Plan. Department of Interior. May 1986.; and National Marine Fisheries Service. 2000. Fishery Management Report No. 36 of the Atlantic States Marine Fisheries Commission.: Interstate Fishery Management Plan for American Eel. American Eel Plan Development Team. April 2000. The New York Plan is the Statewide Comprehensive Outdoor Recreation Plan. New York State Office of Parks, Recreation, and Historic Preservation. 1983. People, Resources, Recreation. Albany, NY. March 1983

[285]16 U.S.C. §§ 803 and 808.

York City; (2) residential energy audits and weatherization for residential customers; (3) energy conservation for public buildings operated by New York State Agencies; and (4) research and development of alternative electric supply options. Through these programs, NYPA is making satisfactory efforts to conserve electricity and reduce peak hour demands.

B. Compliance History and Ability to Comply with New License

207. FPA Section 15(a)(3)(A) requires the Commission to take into consideration an existing licensee's record of compliance with the terms and conditions of the existing license.

208. MMWEC asserts that NYPA has a poor compliance record with respect to Article 28. Specifically, it states that:

- NYPA refused to allocate any power to Massachusetts until after extensive litigation;[286]
- The rates charged by NYPA to neighboring states under the existing OSA contract exceed the lowest possible rate, as required by the Power Authority Act;[287] and
- The 8.5 percent allocation of St. Lawrence power demonstrates non-compliance because it is lower than the 10 percent allocation of Niagara Project power to OSAs.[288]

209. MMWEC's assertion that NYPA acceded to an allocation of St. Lawrence power to Massachusetts only after extensive litigation is supported by copies of newspaper articles from the 1950's. These articles indicate a dispute regarding such an allocation, but are not clear concerning why the dispute arose.[289] Massachusetts did file a complaint before the Federal Power Commission seeking an allocation, but later withdrew that

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[286]MMWEC Protest, p. 25 and n.16.

[287]Id. at p. 25.

[288]Id. at p. 26.

[289]MMWEC Preliminary Term and Conditions, p. 24 and Attachment B.

complaint. There was litigation concerning the eligibility of Massachusetts and Connecticut for NYPA's hydro power, but that concerned power from the Niagara Project.[290] NYPA's rates, as discussed above,[291] are properly before this Commission only in the very limited context of its rates for sales to Massachusetts pursuant to the provision of FPA Section 20 pertaining to disagreements between states and where the Commission requires an allocation of project power. Finally, we reject MMWEC's assertion that the 8.5 percent negotiated power allocation is a violation of the license, since Article 28 simply requires that a "reasonable portion" of the project power be made available to neighboring states.

210. We have also reviewed NYPA's compliance with the terms and conditions of the existing license in other respects. We find that NYPA's overall record of making timely filings and compliance with its license is satisfactory.

C. Safe Management, Operation, and Maintenance of the Project

211. FPA Section 15(a)(2)(B) requires us to review NYPA's plans to safely manage, operate, and maintain the St. Lawrence Project. We have reviewed operation and management of the Project pursuant to the requirements of 18 C.F.R. Part 12 and the Commission's Engineering Guidelines, as well as all applicable safety requirements, such as warning signs and boat barriers, NYPA's Emergency Action Plan, and periodic Independent Consultant's Safety Inspection Reports. We conclude that the dam and other project works are safe, and we have no reason to believe that NYPA cannot continue to safely manage, operate, and maintain these facilities under a new license.

D. Ability to Provide Efficient and Reliable Service

212. Section 15(a)(2)(C) requires us to review NYPA's ability to operate the Project in an efficient and reliable manner. Based on our review, NYPA has been operating the

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[290] See MMWEC and CMEEC v. NYPA, 30 FERC ¶61,323 (1985), aff'd Metropolitan Transportation Authority v. FERC, 796 F.2d 584 (2nd Cir. 1986).. MMWEC also repeatedly and incorrectly characterizes litigation over the availability and price of Niagara and/or St. Lawrence power to NYPA's in-state customers as violations of the St. Lawrence license. See, e.g., MMWEC Protest at pp. 25-28.

[291] Section IV.

project in an efficient manner within the constraints of the existing license and is likely to continue to do so under a new license.

E. Need for Power

213. Section 15(a)(2)(D) requires the Commission to consider the license applicant's short-term and long-term need for the Project power. The EIS finds there is a need for Project power in both the short and long terms.[292] The Project is in the New York Power Pool (NYPP) area of the Northeast Power Coordination Council Region of the North American Electric Reliability Council (NERC). As a member of the NYPP, NYPA must meet certain electric system planning requirements in order to balance the regional need for power with power supplies and generation. The NYPP requires that NYPA maintain for planning purposes a capacity margin, the difference between the planned generation capacity and the actual capacity demand, equal to 18 percent of the peak demand to provide an adequate level of system reliability. As of January 1, 2002, there were nearly 36,342 MW of generation capability in the New York Control Area in which the Power Authority operates.

214. The NERC estimated that reserve capacities during peak demand in the summer of 2002 would only be 16.6 percent for New York and 19.4 percent for the New England ISO. These figures indicate a need for capacity in a traditional utility planning sense. There are also many ongoing efforts to expand generation capacity by non-utility developers in New York, and many state permitting processes are moving forward.

215. All of the Project's power output is contracted for. Alcoa and GM take a majority of the Project's power – about 54 percent (386 MW) of the Project's firm power and 100 percent of its interruptible power (104 MW). An additional 35 percent (252 MW) of the (firm) power is sold to rural and domestic customers of Investor Owned Utilities (IOUs). The rest is sold to the IOUs and OSAs.

216. If a new license is issued to NYPA, continued operation of the Project could provide an annual net energy production in excess of 800 MW of power, or an anticipated 6,650,000 MW-hours (MWh) annually for the term of the next license.[293] This capacity

[292] EIS, pp. 1-2 to 1-4.

[293] NYPA also states that it plans to conduct a Life Extension and Modernization (LEM) Program that would increase power output over the long term about 2 percent. The LEM Program is discussed below in the context of the proposed license term. See Section XVI.

and energy would help NYPA to meet expanding power demand projections through the life of the license.[294] In the short and long term, the capacity supplied by re-licensing the Project would help NYPA to maintain sufficient capacity to meet local industrial demand, as well as the NYPP requirements, while maintaining resource diversification and displacing nonrenewable fossil fuel generation. Also, the Project will continue to displace emissions from fossil-fueled power generation, estimated at 30 to 40 tons per year of oxides of nitrogen (NOx) and 10 tons per year of volatile organic compounds (VOCs), both of which are issues in managing the regional air quality throughout the New York and New England airshed.

F. Transmission Lines

217. FPA Section 15(a)(1)(3)(A) requires the Commission consider existing and planned transmission services of the applicant. The Project has no transmission lines. NYPA's transmission lines are operated under the control of the New York Independent System Operator.

G. Cost Effectiveness of Plans

218. NYPA proposes no changes in project facilities or operations for power development purposes at this time. It is however proposing several measures for the enhancement of fish and wildlife, recreation, and cultural resources, and we are approving its plans as set forth in the Settlement Agreement. Our review of NYPA's record as an existing licensee indicates that these plans are likely to be carried out in a cost-effective manner.

H. Actions Affecting the Public

219. The St. Lawrence Project generates electricity used to serve the needs of the public. Environmental enhancement measures and recreational improvements included in the license will generally improve environmental quality, particularly in aquatic and wildlife resources and will have a beneficial effect on public use of Project facilities for recreational purposes.

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[294]The New York State Energy Research and Development Authority predicts that the annual growth rate for average electricity demand will be about one percent over the next 20 years, with a somewhat lower projected growth rate for peak demand. See EIS Section 1.2, p. 1-2.

I. Ancillary Services

220. In analyzing public interest factors, the Commission takes into account that hydropower projects offer unique operational benefits to the electric utility system (ancillary benefits). These benefits include their value as almost instantaneous load-following response to dampen voltage and frequency instability on the transmission system, system-power-factor-correction through condensing operations, and a source of power available to help in quickly putting fossil-fuel based generating stations back on line following a major utility system or regional blackout.

221. Ancillary benefits are now mostly priced at rates that recover only the cost of providing the electric service at issue, which do not resemble the prices that would occur in competitive markets. As competitive markets for ancillary benefits begin to develop, the ability of hydropower projects to provide ancillary services to the system will increase the benefits derived from hydropower projects.

XIII. ECONOMIC BENEFITS OF PROJECT POWER

222. In determining whether a proposed project will be best adapted to a comprehensive plan for developing a waterway for beneficial public purposes, the Commission considers a number of public interest factors, including economic benefits of project power.

223. Under the Commission's approach to evaluating the economics of hydropower projects, as articulated in Mead Corporation,[295] the Commission employs an analysis that uses current costs to compare the costs of the project and likely alternative power, with no forecasts concerning potential future inflation, escalation, or deflation beyond the license issuance date. The basic purpose of the Commission's economic analysis is to provide a general estimate of the potential power benefits and costs of a project, and reasonable alternatives to project power. The estimate helps to support an informed decision concerning what is in the public interest with respect to a proposed license. In making its decision, the Commission considers the project power benefits both with the applicant's proposed mitigation and enhancement measures and with the Commission's modifications and additions to the applicant's proposal.

224. To determine whether the proposed project is currently economically beneficial, we customarily subtractthe project's cost from the cost of the most likely source of alternative power. The record in this proceeding does not contain the latter information.

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[295]Mead Corporation, Paper Publishing Division, 72 FERC ¶ 61,027 (1995).

We have therefore substituted the market value of project power as a proxy for the cost to generate power from the most likely alternative. When licensed in accordance with the conditions adopted herein, the project power would produce about 6.65 GWH of energy annually at a cost of about $81.5 million, or $197.75 million less than the cost toobtain the same amount of power in the market of $279.2 million.[296]

XIV. LICENSE TERM

225. Pursuant to Section 15(e) of the FPA,[297] relicense terms shall not be less than 30 years nor more than 50 years from the date on which the license is issued. Our general policy is to establish 30, 40, or 50-year terms for projects with little, moderate, or extensive redevelopment, new construction, new capacity, or environmental mitigation and enhancement measures, respectively.

226. The Settlement Agreement recommends a 50-year license term in light of NYPA's willingness to engage in a cooperative pre-filing consultation process; the level of its investment in resource protection, mitigation, and enhancement (PM&E) measures; and its program for life extension and modernization of Project facilities (LEM Program).[298] The annualized cost of PM&E measures proposed to be included in the license is about $6,250,000.[299] The LEM program, which is not part of the Settlement Agreement and is not a license obligation, has an estimated annualized cost of $15 million, and would increase generation about 150,000 Mwh per year, or about two percent.[300]

227. NPC argues for a 30-year term. It states that a longer term is not appropriate in the context of a competitive electric industry, and would be inconsistent with our policy on terms for new licenses because many of the expenditures to which NYPA has committed under the Settlement Agreement not intended to be included as license conditions.[301]

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[296]EIS Section 5.

[297]16 U.S.C. §808(e).

[298]Settlement Agreement Section 3.

[299]EIS, p. 5-5.

[300]EIS, p. 5-4.

[301]NPC comments on Settlement Agreement at p. 17. NPC also states (Id. at pp. 8-9) that resolution of the power allocation issue implicates the license term because

(continued…)

228. In applying our policy on terms for new licenses, we do not consider expenditures to which a license applicant has agreed that are outside the scope of the license.[302] Accordingly, we do not consider such expenses which are included in the Settlement Agreement. NPC's invocation of competitive markets is not relevant here. We license the project proposal that best satisfies the comprehensive development/public interest standard, regardless of the identity of the licensee. Moreover, this standard applies throughout the term of the license.[303] Accordingly, we have reserved authority to amend the license during its term as the public interest may require. We find that the LEM program would provide little new capacity or energy. We also find however that the PM&E measures to which NYPA has committed that are intended to become license obligations are reasonably characterized as extensive. That, and the agreement of the Settlement Agreement signatories on a 50-year term, leads us to conclude that a 50-year term is in the public interest.

XV CONCLUSION

229. Based on our independent review and evaluation of the St. Lawrence-FDR Project as proposed by NYPA with the Settlement Agreement and the OSA Agreement, and with the additional measures we are requiring, recommendations from the resource agencies, Indian tribes, and other participants, and the no-action alternative, as documented in the Final EIS, we have selected the St. Lawrence-FDR Project as proposed by NYPA with the Settlement Agreement, the OSA Agreement, staff's recommended measures and the allocation of power to Massachusetts discussed above, as the preferred alternative.

(continued…)
entities that receive an allocation of power under the license are likely to favor a longer license term, while entities that do not are likely to favor a short license term. As discussed above, the eligibility of NPC's members for a power allocation is a matter to decided by New York authorities pursuant to the Power Authority Act or otherwise. That decision has no bearing on the appropriate length of a license term.

[302] See, e.g., Rochester Gas & Electric Co., 76 FERC ¶ 61,182 (1996).

[303] See, e.g., Thunder Bay Power Co., 88 FERC ¶ 61,078 (1999); City of Seattle, WA, et al., 71 FERC ¶ 61,159 at p. 61,535 n. 30 (1995) and cases cited therein; Horseshoe Bend Electric Co., 42 FERC ¶ 61,072 (1988), aff'd sub nom. Idaho Power Co. v. FERC, 865 F.2d 1313 (D.C. Cir. 1990); Duke Power Co., 67 FERC ¶ 61,061 at p. 61,171 (1994); Rancho Riata Hydropower, 54 FERC ¶ 61,176 at p. 61,534 (1994)

230. For the reasons discussed in the Final EIS and in this order, the St. Lawerence-FDR Project, as licensed herein, will be best adapted to the comprehensive development of the St. Lawrence River for beneficial public uses. The project will provide 912 MW of electric energy generated from a renewable resource that continues to offset fossil-fueled, steam-electric generating plants, thereby conserving non-renewable resources, and protecting and enhancing fish, wildlife, recreation, and aquatic resources in the Project vicinity.

The Commission orders:

(A) All untimely and contested filings made in this proceeding are hereby accepted.

(B) The complaint filed by the Massachusetts Municipal Wholesale Electric Company in Docket No. EL03-224-000 is hereby dismissed.

(C) All requests for relief not granted in the body of this order are hereby denied.

(D) This license is issued to the New York Power Authority (Licensee) for a period of 50 years, effective the first day of the month in which the license is issued, to operate and maintain the St. Lawrence-FDR Project No. 2000. This license is subject to the terms and conditions of the Federal Power Act (FPA), which is incorporated by reference as part of this license, and subject to the regulations the Commission issues under the provisions of the FPA.

(E) The project consists of four concrete dams and a series of dikes:

1. Iroquois Dam

   i. All lands, to the extent of the licensee's interests in those lands, enclosed by the project boundary shown by the Exhibit G drawings (Sheets 1 to 9) included in the application for new license, filed on October 31, 2001

Exhibit F-	FERC No 2000-	Showing
1	1001	Project Boundary
2	1002	Project Boundary
3	1003	Project Boundary
4	1004	Project Boundary
5	1005	Project Boundary
6	1006	Project Boundary
7	1007	Project Boundary

8	1008	Project Boundary
9	1009	Project Boundary

(ii) The dam is a buttressed concrete gravity structure consisting of upstream and downstream retaining walls with earth embankments (on the United States side), two segments housing electric switchgear, 32 gated sluiceway openings, and an embankment section which connects the concrete structures to the St. Lawrence Seaway Authority lock on the Canadian shore.

Exhibit A–consisting of 15 pages, A-1 to A-15

The following Exhibit F drawings, filed on October 31, 2001:

Exhibit F-	FERC No 2000-	Showing
1	1010	Project Site Plan
8	1011	Iroquois Dam Plan and Downstream Elevation
9	1012	Iroquois Dam Sections

2. Massena Intake

(i) All lands, to the extent of the licensee's interests in those lands, enclosed by the project boundary shown by Exhibit G drawings (Sheets 1 to 9) included in the application for new license, filed on (October 31, 2001)

Exhibit G-	FERC No 2000-	Showing
1	1001	Project Boundary
2	1002	Project Boundary
3	1003	Project Boundary
4	1004	Project Boundary
5	1005	Project Boundary
6	1006	Project Boundary
7	1007	Project Boundary
8	1008	Project Boundary
9	1009	Project Boundary

(ii) The existing structure is comprised of an earthen embankment, two abutment blocks, a pump room block, two intake blocks (with four gates), seven abutment blocks, and an earthen embankment at the east side. State

Highway 131 crosses the structure. The axis of the structure has a 30-degree dogleg at about its midpoint, and the total axis length is 721 ft.

Exhibit A–consisting of 15 pages, A-1 to A-15

The following Exhibit F drawings, filed on October 31, 2001

Exhibit F-	FERC No 2000-	Showing
6	1013	Massena Intake Plan and Sections
7	1014	Massena Intake Elevations

3. Long Sault Dam

(i) All lands, to the extent of the licensee's interests in those lands, enclosed by the project boundary shown by Exhibit G drawings (Sheets 1 to 9) included in the application for new license, filed on (October 31, 2001)

Exhibit G-	FERC No 2000-	Showing
1	1001	Project Boundary
2	1002	Project Boundary
3	1003	Project Boundary
4	1004	Project Boundary
5	1005	Project Boundary
6	1006	Project Boundary
7	1007	Project Boundary
8	1008	Project Boundary
9	1009	Project Boundary

(ii) Long Sault Dam is 2,960-ft-long (along the axis) curved concrete gravity overflow structure with 30 gated bays; each bay is 50 ft wide. At the southern end of the dam are three non-overflow blocks and an earthen embankment. At the downstream base, the structure has a reinforced concrete stilling basin anchored to bedrock. Each bay is equipped with a 52-ft by 30-ft vertical-lift, fixed gate wheel. Eighteen gates have individual motor-operated hoists, while the remaining 12 gates are operated by either of two 275-ton gantry cranes. Gates are mounted between piers, which extend above the dam crest.

Exhibit A–consisting of 15 pages, A-1 to A-15

The following Exhibit F drawings, filed on October 31, 2001:

Exhibit F-	FERC No 2000-	Showing
4	1015	Long Sault Dam Plan and Downstream Elevation
5	1016	Long Sault Dam Typical Sections

4. Robert Moses Power Dam

(i) All lands, to the extent of the licensee's interests in those lands, enclosed by the project boundary shown by Exhibit G drawings (Sheets 1 to 9) included in the application for new license, filed on (October 31, 2001)

Exhibit G-	FERC No 2000-	Showing
1	1001	Project Boundary
2	1002	Project Boundary
3	1003	Project Boundary
4	1004	Project Boundary
5	1005	Project Boundary
6	1006	Project Boundary
7	1007	Project Boundary
8	1008	Project Boundary
9	1009	Project Boundary

(ii) Robert Moses Power Dam is 1,600-ft long and functions as the St. Lawrence-FDR Power Project's powerhouse. The superstructure consists of steel and masonry. The dam contains three ice sluices, 16 turbine/generator units (Units No. 17-32) and associated structures, and an administration-service bay structure.

Exhibit A–consisting of 11 pages, A-1 to A-15

The following Exhibit F drawings, filed on October 31, 2001

Exhibit F-	FERC No 2000-	Showing
2	1017	Robert Moses Power Dam Plan and Section
3	1018	Robert Moses Power Dam Sections

5. Dikes

(i) All lands, to the extent of the licensee's interests in those lands, enclosed by the project boundary shown by Exhibit G drawings (Sheets 1 to 9) included in the application for new license, filed on (October 31, 2001)

Exhibit G-	FERC No 2000-	Showing
1	1001	Project Boundary
2	1002	Project Boundary
3	1003	Project Boundary
4	1004	Project Boundary
5	1005	Project Boundary
6	1006	Project Boundary
7	1007	Project Boundary
8	1008	Project Boundary
9	1009	Project Boundary

(ii) The Project includes 10.9 miles of dikes constructed across low-lying areas along the southern shore of the St. Lawrence River. The series of dikes includes the following: the South Forebay and Long Sault Dikes, the Richard's Landing Dike, the Mutton Ridge Dike, the Wilson Hill Road Dike, and the Coles Creek Dike.

Exhibit A–consisting of 15 pages, A-1 to A-15

The following Exhibit F drawings, filed on October 31, 2001

Exhibit F-	FERC No 2000-	Showing
10	1019	South Forebay Dike Plan
11	1020	South Forebay Dike Sections
12	1021	Long Sault North Dike Plan
13	1022	Long Sault Dike No. 1 Detail Location Plan
14	1023	Long Sault Dikes No. 3A, 3B, 3C, 4A, & 4B Detail Location Plan
15	1024	Long Sault Dikes No. 1, 3B, & 3C Sections Detail Location Plan
16	1025	Long Sault Dikes 3A, 4A, & 4B Sections
17	1026	Richard's Landing Dike- Stage 1 Location Plan
18	1027	Richard's Landing Dike- Stage 1 Location Sections and Details

19	1028	Richard's Landing Dike- Stage II Plan and Sections
20	1029	Mutton Ridge Dike No. 6 Plan
21	1030	Mutton Ridge Dike No. 6 Section
22	1031	Mutton Ridge Dike No. 7 and 8 Plan
23	1032	Mutton Ridge Dike No. 6, 7, & 8 Section
24	1033	Wilson Road Dike Plan and Sections
25	1034	Coles Creek Dike Plan and Section

(F) The Exhibits F and G described above are approved and made part of the license.

(G) This license is subject to the conditions submitted by the State of New York Department of Environmental Conservation under Section 401 of the Clean Water Act, as those conditions are set forth in Appendix A to this order.

(H) This license is subject to the articles set forth in Form L-5 (published at 54 FPC 1832-42 (1975)), "Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters of the United States," and the following additional articles:

Article 201. *Administrative Annual Charges*. The licensee shall pay the United States an annual charge effective the first day of the month in which this license is issued, for the purpose of reimbursing the United States for the Commission's administrative costs, pursuant to Part I of the Federal Power Act, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time. The authorized installed capacity for that purpose is 912,000kilowatts.

Article 202. *Exhibit Drawings.* Within 45 days of the effective date of the license, the licensee shall file three sets of aperture cards of the approved exhibit drawings. The sets must be reproduced on silver or gelatin microfilm and mounted on type D (3 1/4c x 7 3/8c) aperture cards.

Prior to microfilming, the FERC drawing number and project facility name shall be shown in the margin below the title block of the approved drawing. The exhibit number shall be revised to agree with the exhibit number assigned in Ordering Paragraph (B) above. Additionally the project number, FERC Exhibit (e.g., F-1, G-1, etc.), drawing title, and date of this license must be typed on the upper left corner of each aperture card.

Two sets of aperture cards must be filed with the Secretary of the Commission. The remaining set of aperture cards shall be filed with the Commission's New York Regional Office.

Article 203. *Headwater Benefits*. If the licensee's project was directly benefitted by the construction work of another Licensee, a permittee, or the United States on a storage reservoir or other headwater improvement during the term of the original license (including extension of that term by annual licenses), and if those headwater benefits were not previously assessed and reimbursed to the owner of the headwater improvement, the licensee shall reimburse the owner of the headwater improvement for those benefits, at such time as they are assessed, in the same manner as for benefits received during the term of this new license.

Article 204 *Project Boundary*. The Licensee shall file with the Commission within 90 days from issuance of the license data regarding the frequency and level to which lands outside of the proposed project boundary are flooded under the International Joint Commission's requirements for operation of the Project extant at the time this license is issued. Based on this data, the Commission will make a final determination of whether to approve or modify the Licensee's proposed project boundary.

Article 301. *As Built Drawings*. Within 90 days of completion of construction of the facilities directed by any article of this license (trashracks, fish passage, recreation, etc.), the licensee shall file for Commission approval revised Exhibits A, F, and G, as appropriate, to show those project facilities as built.

Article 401. *Shoreline Stabilization*. (a) The Licensee, in consultation with the Land Management and Recreation Committee referenced in Attachment 2 of the Local Government Agreement ("Committee"), shall develop a Shoreline Stabilization Plan to stabilize the eroding shorelines within the Project boundary. The Plan shall identify the areas to be stabilized and shall establish the criteria, method, and preliminary schedule for accomplishing stabilization, as set forth in Attachment 2, Section 1 of the Local Government Agreement. For work activities performed under the Shoreline Stabilization Plan, the Licensee shall provide up to $500,000 annually, 25 percent of which shall be available, as determined by the Licensee, for adjoining landowners to perform small stabilization projects. The Licensee shall complete all stabilization work identified in the Shoreline Stabilization Plan within ten years following the effective date of this license.

(b) Within one year following the effective date of this license, the Licensee shall file the Shoreline Stabilization Plan with the Commission for approval. Prior to filing with the Commission, the Licensee shall allow a minimum of 30 days for the Subcommittee to comment on the Shoreline Stabilization Plan. When filing the Shoreline Stabilization Plan with the Commission, the Licensee shall include documentation of its consultation with the Committee, including copies of the comments on the proposed plan received during the consultation. Further, the Licensee should identify in its filing how the comments are accommodated by the proposed plan. The Commission reserves the

right to require changes to the Shoreline Stabilization Plan. The Licensee shall not commence stabilization activities until after the Commission has approved the Shoreline Stabilization Plan.

(c) Following Commission approval of the Shoreline Stabilization Plan, the Licensee shall submit an annual shoreline stabilization compliance report, which shall list and describe all stabilization work performed during the previous calendar year and identify all stabilization work to be performed in the current year.

(d) Should the Licensee, after consultation with the Committee, determine that the stabilization work specified in the Shoreline Stabilization Plan has been completed earlier than 10 years following the effective date of this license, the Licensee is authorized to seek amendment of the license to permanently discontinue the requirements of this license article. Upon approval of the license amendment by the Commission, the Licensee's obligation to prepare an annual shoreline stabilization compliance report shall expire.

Article 402. *Water Temperature Monitoring*. (a) Within 180 days following the effective date of this license, the Licensee shall file with the Commission, for approval, a plan to monitor water temperatures and dissolved gas supersaturation in shallow areas of the South Channel downstream of Long Sault Dam for the reporting period of April 1 (or as soon as ice is no longer in the South Channel) through June 30 of each year ("Reporting Period").

(b) The water monitoring plan shall include provisions for: (1) the placement of water temperature and dissolved gas monitors in the South Channel; (2) the frequency at which data will be collected; (3) notification requirements for spill events over Long Sault Dam, including the requirement for the Licensee to provide DEC reasonable advance notification for all planned spills over Long Sault Dam, and to notify DEC regarding any non-planned spills, as soon as practicable following the initiation of such spills; and (4) annual reporting of monitoring data, including the provision to DEC, on or before September 30 of each year, a report describing the effects of spill events on water temperatures in the South Channel during the Reporting Period.

(c) The Licensee shall prepare the plan after consultation with the New York State Department of Environmental Conservation ("DEC"). The water monitoring plan shall include a schedule for:

1. implementation of the program (which must be implemented within 12 months from the effective date of this license);

2. consultation with the DEC concerning the results of the monitoring; and

3. filing the results, agency comments, and Licensee's response to agency comments with the Commission.

The Commission reserves the right to require changes to the plan. Upon Commission approval, the Licensee shall implement the water quality monitoring plan, including any changes in the plan required by the Commission.

(d) To the extent that spills over Long Sault Dam are not anticipated in any year during the period from April 1 to June 30, the Licensee may petition DEC to modify or suspend activities pursuant to the monitoring plan for the year. Upon approval of DEC of the petition, the Licensee shall notify the Commission, providing the terms of DEC'S modification or suspension of the water monitoring plan for the year.

(e) The Licensee, after consultation with the U.S. Fish and Wildlife Service, DEC, and New York Rivers United, may petition to DEC every fifth year to permanently modify or terminate the water monitoring plan for the South Channel. Upon approval of DEC of the petition, the petition may be submitted to the Commission as a request for amendment to this license article.

Article 403. *Reservation of Authority - Fishways*. Pursuant to Section 18 of the Federal Power Act, authority is reserved to the Commission to require the Licensee to construct, operate, and maintain, or provide for the construction, operation, and maintenance, of such fishways as may be prescribed by either the Secretary of the Interior or the Secretary of Commerce, as appropriate, acting in full consultation and coordination under the Fish and Wildlife Coordination Act.

Article 404. *Construction of Upstream Eel Passage.* (a) The Licensee shall construct, operate, and maintain, at its own expense, a ladder for upstream American Eel passage on the Robert Moses Power Dam. The United States Fish and Wildlife Service ("Service") must approve the design and specification of the upstream eel ladder prior to the commencement of construction activities. The upstream eel ladder shall utilize state-of-the-art techniques to pass American Eel in accordance with the Service's passage criteria, which will be established by the Service in consultation with the Power Authority as set forth in Article 406. The upstream eel ladder must be constructed within two (2) years of the effective date of this license, subject to an extension by mutual agreement of the Service and Licensee.

(b) At least 60 days before starting construction of the upstream eel ladder facilities, the Licensee shall submit one copy to the Division of Dam Safety and

Inspections – New York Regional Engineer, and two copies to the Commission (one copy shall be a courtesy copy the Director, Division of Dam Safety and Inspections), of the contract plans and specifications. The Commission may require changes to the plans and specifications to assure the work is completed in a safe and environmentally sound manner. Construction may not commence until authorized by the Regional Engineer.

(c) At least 60 days before starting construction of the upsteam eel ladder facilities, the licensee shall submit one copy to the Division of Dam Safety and Inspections – New York Regional Engineer, and two copies to the Commission (of one these shall be a courtesy copy to the Director, Division of Dam Safety and Inspections), of the Quality Control and Inspection Program (QCIP) for the Commission's review and approval. The QCIP shall include a sediment and erosion control plan.

(d) Before starting construction of the upstream eel ladder facilities, the Licensee shall review and approve the design of contractor-designed cofferdams and deep excavations. At least 30 days before starting construction of the cofferdams, the Licensee shall submit one copy to the Division of Dam Safety and Inspections – New York Regional Engineer, and two copies to the Commission (one of these shall be a courtesy copy to the Director, Division of Dam Safety and Inspections), of the approved cofferdam drawings and specifications and the letters of approval.

(e) At least 60 days before starting construction of the upsteam eel ladder facilities, the licensee shall submit one copy to the Division of Dam Safety and Inspections – New York Regional Engineer, and two copies to the Commission (of one these shall be a courtesy copy to the Director, Division of Dam Safety and Inspections), of the Temporary Emergency Action Plan (TEAP) for the Commission's review and approval. The TEAP shall describe emergency procedures in case failure of a cofferdam, large sediment control structure, or any other water retaining structure could endanger construction workers or the public. The TEAP shall include a notification list of emergency response agencies, a plan drawing of the proposed cofferdam arrangement, the location of safety devices and escape routes, and a brief description of testing procedures.

Article 405. *Operation of Upstream Eel Passage*. The upstream eel ladder facilities shall be operated on a continuous basis throughout the eel movement period, up to five months each year. Upon completion of construction of the upstream eel ladder, the Licensee shall operate the ladder on a continuous basis during the period of July 1 through October 31. Upon the submittal of scientific evidence by the United States Fish and Wildlife Service ("Service"), the Licensee, after consultation with the Service and other parties referenced in Section 4.2 of the Fish Enhancement, Mitigation, and Research Fund Settlement Agreement (Attachment 1 to the Settlement Agreement submitted in

Project No. 2000-036 on February 6, 2003), is authorized, after at least 30days prior notification to the Commission, to alter this period of continual operation, but in no event shall the period exceed five months per year.

Article 406. *Effectiveness Testing of Upstream Eel Passage.* (a) The Licensee shall consult with the United States Fish and Wildlife Service ("Service") regarding the development of a plan for post-construction studies to monitor the effectiveness of the upstream eel passage facilities. At least 90 days prior to the start of operation of the upstream eel passage facilities, the Licensee shall file with the Commission for approval an upstream eel passage monitoring plan, which shall include: (1) a schedule for implementing the monitoring plan and consulting with appropriate agencies; and (2) a plan for filing the monitoring results with the Commission. Upon Commission approval, the Licensee shall implement effectiveness testing of the upstream American eel ladder.

(b) Within two years of commencement of operation of the upstream eel passage facilities, the Licensee, in consultation with the Service, shall establish passage criteria for the upstream eel ladder; provided, however, that the Licensee may extend this deadline for establishing passage criteria upon the Licensee's notification to the Commission that the Licensee and Service have mutually agreed to an extension thereof. If the upstream American eel ladder is not meeting the established passage criteria, the Licensee, in consultation with the Service and other parties referenced in Section 4.3 of the Fish Enhancement, Mitigation, and Research Fund Settlement Agreement (Attachment 1 to the Settlement Agreement submitted in Project No. 2000-036 on February 6, 2003), shall make reasonable efforts to achieve these criteria through modification of the eel passage facilities and/or modification of the operations of the eel passage facilities. The Licensee shall notify the Commission in the event the upstream eel ladder facilities are proposed to be modified, and shall seek Commission approval, as appropriate, for any such physical modification to the upstream eel passage facilities.

Article 407. *Fish Enhancement, Mitigation, and Research Fund*. (a) Within twenty days after issuance of this license, the Licensee shall deposit $24 million into an escrow account for the National Fish and Wildlife Foundation ("NFWF") to establish the Fish Enhancement, Mitigation, and Research Fund (FEMRF). The Licensee shall release these funds from the escrow account to the NFWF in accordance with Section 3.1.1.1 of the Fish Enhancement, Mitigation, and Research Fund Settlement Agreement (FEMRF Settlement Agreement) executed on January 15, 2003 and submitted in Project No. 2000-036 on February 6, 2003).

(b) The Licensee shall prepare an annual FEMRF compliance report for review by the U.S. Fish and Wildlife Service and other parties referenced in Section 3.2.2.4 of the FEMRF Settlement Agreement ("Reviewing Parties"). Following review of the annual

FEMRF compliance report by the Reviewing Parties, the Licensee shall file a copy of the annual FEMRF compliance report with the Commission for informational purposes.

Article 408. *Technical Advisory Council*. The Licensee shall facilitate and support the organization of a Technical Advisory Council ("TAC"), so as not to delay implementation of any of the Habitat Improvement Projects ("HIPs") required under Article 410. As set forth in Section 2.4 of the Ecological Mitigation and Enhancement Measures Settlement Agreement ("Ecological Settlement Agreement"), executed on January 15, 2003 and filed on February 6, 2003, in Project No. 2000-036, the TAC shall assist with the design, development, and monitoring of the HIPs established pursuant to Sections 2.1 and 2.3 of the Ecological Settlement Agreement.

Article 409. *Habitat Improvement Projects*. (a) The Licensee shall design, construct, monitor, operate, and maintain the ten HIPs identified in Section 2.1 of the Ecological Settlement Agreement and set forth in detail in Appendix A of the Ecological Settlement Agreement. Within one year following the effective date of this license, the Licensee shall develop and prepare an HIP implementation plan for the design, construction, and effectiveness monitoring of each of the ten HIPs. The HIP implementation plan shall be filed with the Commission for approval.

(b) The Licensee shall prepare the HIP implementation plan in consultation with the TAC, which contains both voting and advisory members (Consulted Entities), as set forth in Sections 2.1 and 2.4 of the Ecological Settlement Agreement. The Licensee shall include with the plan filed with the Commission documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the Consulted Entities, and specific descriptions of how comments of the Consulted Entities are accommodated by the plan. The Licensee shall allow a minimum of 30 days for the Consulted Entities to make recommendations before filing the plan with the Commission. If the Licensee does not adopt a recommendation of a Consulted Entity, the filing shall include the Licensee's reasons, based on project-specific information.

(c) The Commission reserves the right to require changes to the plan. No land-disturbing or land-clearing activities pertaining to such HIP shall begin until the Licensee is notified by the Commission that the plan is approved. Upon Commission approval, the Licensee shall implement the plan, including any changes required by the Commission.

(d) The Licensee shall submit an annual HIP compliance report to the Commission for informational purposes. The annual HIP compliance report shall list and describe all work performed on HIPs during the previous calendar year and identify all pre-construction, construction, and effectiveness monitoring activities to be conducted for

any of the HIPs proposed for funding in the upcoming year. Prior to submitting the annual HIP compliance report to the Commission, the Licensee shall submit the report to the Technical Advisory Council (TAC) for approval, in accordance with Section 2.1 of the Ecological Settlement Agreement. Following TAC approval, the Licensee shall exercise reasonable efforts in completing all pre-construction, construction, and effectiveness monitoring activities identified in the annual HIP compliance report for completion during the year.

(e) For each of the ten HIPs set forth in Section 2.1 of the Ecological Settlement Agreement, the Licensee is authorized, after it has completed five years of post-construction monitoring of the HIP, to address the status of such HIP in every fifth of its annual HIP compliance reports.

Article 410. *Future Habitat Improvement Projects*. (a) Within 20 days of the effective date of this license, and in accordance with Section 2.3 of the Ecological Settlement Agreement, the Licensee shall make available Future Habitat Improvement Funds (FHFs) not to exceed $3,920,000 (2003 dollars) to cover the design, construction, environmental monitoring, and operation and maintenance costs of future HIPs, as selected by the Technical Advisory Council (TAC), to be located on the St. Lawrence River or its tributaries within New York that benefit the St. Lawrence River ecology. After 2003, the available FHFs shall be adjusted annually to account for the rate of inflation by averaging the indices from the Cost Trends of Building Construction contained in the Handy/Whitman Index (North Atlantic Region).

(b) The Licensee is authorized to use FHFs to fund HIPs located within or outside of the Project boundary, but the Licensee shall not use FHFs to fund the HIPs listed in Sections 2.1 and 2.2 of the Ecological Settlement Agreement, unless approved by the TAC. For any TAC-approved future HIP that is located within the Project boundary and affects any Project structure, the Licensee shall, as appropriate, file with the Commission for approval an implementation plan detailing the design and construction of the HIP, and no land-disturbing or land-clearing activities pertaining to such HIP shall begin until the Licensee is notified by the Commission that the plan is approved. Upon Commission approval, the Licensee shall implement the plan, including any changes required by the Commission.

(c) For each HIP funded by the FHF that is located within the Project, the Licensee shall include such HIP in its annual HIP compliance report until the Licensee has completed five years of post-construction monitoring of the HIP, after which time the Licensee shall address the HIP in every fifth of its annual HIP compliance reports.

Article 411. *Wilson Hill Wildlife Management Area*. (a) The Licensee shall design, construct, monitor, operate, and maintain the improvement projects to the Wilson Hill Wildlife Management Area (WHWMA) identified in Section 3 and set forth in detail in Appendix B of the Ecological Settlement Agreement. Within one year following the effective date of this license, the Licensee shall develop and prepare a WHWMA implementation plan for the design, construction, monitoring, operation, and maintenance of the WHWMA improvement projects. The Licensee shall file the WHWMA implementation plan with the Commission for approval.

(b) The Licensee shall prepare the WHWMA implementation plan in consultation with the New York State Department of Environmental Conservation ("DEC"). The Licensee shall include with the plan filed with the Commission documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to DEC, and specific descriptions of how comments of DEC are accommodated by the plan. The Licensee shall allow a minimum of 30 days for DEC to make recommendations before filing the plan with the Commission. If the Licensee does not adopt a recommendation, the filing shall include the Licensee's reasons, based on project-specific information.

(c) The Commission reserves the right to require changes to the plan. No land-disturbing or land clearing activities shall begin until the Licensee is notified by the Commission that the plan is approved. Upon Commission approval, the Licensee shall implement the plan, included any changes required by the Commission

(d) The Licensee shall prepare an annual WHWMA compliance report to the Commission. The annual WHWMA compliance report shall list and describe all work performed under the WHWMA implementation plan during the previous calendar year and identify all pre-construction, construction, and effectiveness monitoring activities to be conducted under the implementation plan in the upcoming year. Following submittal with the Commission, the Licensee shall exercise reasonable efforts in completing the construction, pre-construction, and effectiveness monitoring activities identified in the annual WHWMA compliance report for completion during the year.

(e) Once all improvement projects approved in the WHWMA implementation plan have been completed, the Licensee shall prepare the WHWMA compliance report every five years.

Article 412. *St. Lawrence River Research and Education Fund*. Within 20 days of the effective date of this license, and in accordance with Section 4 of the Ecological Settlement Agreement, the Licensee shall establish a St. Lawrence River Research and Education Fund (SLRREF) entrusting the principal sum of $1,008,000 to one or more

banks or trust companies doing business in the State of New York. As set forth in Section 4.2 of the Ecological Settlement Agreement, income from the SLRREF shall be used to provide financial support for environmental research and environmental education projects relating to the ecology of the St. Lawrence River watershed in the immediate vicinity of the Project, as well as to pay for operational costs (including expenses, grants, and other disbursements) of the SLRREF. As part of its annual compliance reporting, the Licensee shall submit to the Commission for informational purposes the SLRREF annual report, prepared in accordance with Section 4.3.2 of the Ecological Settlement, which describes funding activities of the SLRREF, including all active projects and a project-by-project listing of all expenditures of the previous year and planned expenditures for the current year.

Article 413. *Land Management Plan*. (a) The Licensee, in consultation with appropriate parties with interest in land management issues, including, at a minimum, all parties to the Relicensing Settlement Agreement, executed February 22, 2002, by and among the Licensee, St. Lawrence County, Town and Village of Massena, Town of Louisville, Town and Village of Waddington, Town of Lisbon, Massena Central School District, Madrid-Waddington School District, and Lisbon School District (hereinafter "Local Government Agreement"), the U.S. Fish and Wildlife Service, and the New York State Department of Environmental Conservation, any other Party to the Comprehensive Relicensing Settlement Accord executed on January 15, 2003, that notifies the Power Authority of its interest in such consultation, and the SRMT ("Consulted Parties"), shall develop and implement a Land Management Plan for Project lands, consistent with Attachment 1, Section V of the Local Government Agreement.

(b) The Land Management Plan shall identify Project lands and all associated buffer zones, and shall establish guidelines for the use of these lands, including public access, construction activities, the protection and preservation of wildlife habitats and scenic and cultural resources, and commercial uses, in accordance with Attachment 1, Section V.A of the Local Government Agreement. The Land Management Plan shall also establish a vegetation management plan, in accordance with Attachment 1, Section V.B of the Local Government Agreement. Finally, the Licensee shall, in accordance with Attachment 1, Section V.C of the Local Government Agreement, have the authority to issue permits to the public or to State or Federal agencies for proposed Project land uses that are consistent with the guidelines of the Land Management Plan, and that cover, at a minimum, construction, maintenance, and operation of water dependent structures, and any existing structures and uses.

(c) Within one year following the effective date of this license, the Licensee shall file the Land Management Plan with the Commission for approval. Prior to filing with the Commission, the Licensee shall allow a minimum of 30 days for all Consulted Parties

to comment on the Land Management Plan. When filing the Land Management Plan with the Commission, the Licensee shall include documentation of its consultation with the Consulted Parties, including copies of the comments on the proposed plan received during the consultation. Further, the Licensee should identify in its filing how the comments are addressed by the proposed plan. The Commission reserves the right to require changes to the Land Management Plan, and the Licensee shall not commence land management activities until the Commission has approved the Land Management Plan.

(d) Following Commission approval of the Land Management Plan, the Licensee shall prepare and submit to the Commission a Land Management Plan compliance report every five years. The Land Management Plan compliance report shall list and describe the land management activities performed during the previous five calendar year and identify any land management activities scheduled or anticipated to be conducted during the next five years.

(f) Following issuance of any permits pursuant to the Land Management Plan, the Licensee shall have continuing responsibility to supervise, monitor, and control the use and occupancies for which the Permits were issued. If a permitted use and occupancy violates any condition of this article, guideline established in the Land Management Plan, or any other condition imposed by the Licensee for protection and enhancement of the project's scenic, recreational, cultural or other environmental resources, the Licensee shall take any lawful action necessary to correct the violation, including, if necessary, canceling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities.

(g) All specific-use permits issued by the Licensee under the Land Management Plan shall have a 5-year term and may be assigned or amended with the Licensee's consent. The Licensee shall not issue any permits for any construction or other activities that would interfere with public access to and use of Project lands, significantly increase flood damage liability, impede river views of adjacent landowners, or pose an unacceptable risk of damage to environmental, scenic, and cultural resources.

(h) As part of the Land Management Plan required in this article, the Licensee shall include a Wildlife Protection and Management Plan. The Licensee shall also include the St. Regis Mohawk Tribe as a consulted party in the development of the LMP.

Article 414. *Navigation Hazards*. In accordance with the schedule set forth in the Recreation Plan submitted in its Application for New License, the Licensee shall install information kiosks, staff gages, and seasonal buoys to address navigation hazards within the Project boundary, as specified in Attachment 3 of the Local Government

Agreement. The kiosks shall provide, at a minimum, information on the St. Lawrence River, rules of operation of watercraft at the specified locations, and fishing regulations. The staff gages shall inform the public of the expected water depth in Project waters. The Licensee shall identify, measure, and record the two concrete structures located in the water near the Hawkins Point Boat Launch, and such information shall be reported to the National Ocean Service within the National Oceanic and Atmospheric Administration and the Canadian Hydrographic Service for publication in navigation charts. The Licensee shall install and maintain seasonal buoys at these two concrete structures, as well as at the remains of the milk factory boated in Project waters near Waddington.

Article 415. *Recreation Facilities*. (a) The Licensee, in consultation with all parties to the Settlement Agreement filed with the Commission on February 6, 2003 in Project No. 2000-036 (Consulting Parties), shall update and revise the Recreation Plan submitted to the Commission on October 31, 2001, as part of the Licensee's Application for New License. The revised Recreation Plan shall provide for the Licensee's design and arrangement for the construction or rehabilitation of the recreational facilities located in the Towns of Massena and Louisville, and in the Town and Village of Waddington, as specified in the Local Government Agreement, Attachments 4a section 1, 4b section 1, and 4c section 1, respectively; and at facilities located at the Robert Moses State Park, the Coles Creek State Park, and the Wilson Hill Boat Launch, as specified in the OPRHP Agreement, Attachments 1, 2, and 3, respectively.

(b) Within 90 days following the effective date of this license, the Licensee shall file the revised Recreation Plan with the Commission for approval. Prior to filing with the Commission, the Licensee shall allow a minimum of 30 days for the Consulting Parties to comment on the revised Recreation Plan. When filing the revised Recreation Plan with the Commission, the Licensee shall include documentation of its consultation with the Consulting Parties, including copies of the comments on the proposed plan received during the consultation. Further, the Licensee should identify in its filing how the comments are accommodated by the proposed plan. The Commission reserves the right to require changes to the revised Recreation Plan to accommodate increased recreational use. The Licensee shall not commence rehabilitation or construction activities under the revised Recreation Plan until the Commission has approved the revised Recreation Plan and the Licensee has received any appropriate permits and certifications.

(c) Every twelfth year following license issuance, the Licensee, in consultation with the Consulting Parties and using information submitted to the Commission in its two previously filed FERC Form 80 reports, shall prepare and file with the Commission a Recreational Use Report assessing whether the recreation facilities at me Project are sufficient to meet the recreational demand. The Licensee shall monitor recreational use

at the Project to ensure that such use is adequately accommodated. The Recreational Use Report shall include the results of the Licensee's monitoring program and a description of the methodology used to monitor recreational use at the Project.

Article 416. *Emergency Action Plan*. As required by Part 12, Subpart C, of the Commission's regulations, the Licensee must have an acceptable Emergency Action Plan (EAP) designed in coordination and consultation with appropriate Federal, state, and local agencies to provide early warning to upstream and downstream inhabitants, and other persons on the vicinity of the Project who might be affected by an emergency. In coordination and consultation with all appropriate emergency management officials, include the St. Regis Mohawk Tribal Police, the Licensee must annually conduct a comprehensive review of the EAP's adequacy, perform drills to test the readiness of key Licensee personnel, and, if necessary, make revisions to the EAP.

Article 417. *Consolidated Annual Report*. For all compliance reports required under this license to be filed with the Commission, the Licensee shall prepare a single compliance report, consolidating all required compliance reporting information, each year. The consolidated annual report shall be filed with the Commission on or before June 1 of each year. The Commission reserves the right to require the licensee to take reasonable remedial action to correct any violation of the terms and conditions of this Article, for the protection and enhancement of the project's scenic, recreational, and other environmental values.

Article 418. *Unified Mohawk Land Claim*. Authority is reserved to the Commission to require the Licensee to implement such conditions for the protection and utilization of the St. Regis Mohawk Tribe Reservation as may be provided by the Secretary of the Interior pursuant to Section 4(e) of the Federal Power Act. Authority is also reserved to establish a reasonable annual charge for the use of federal reservation lands pursuant to Section 10(e) of the Federal Power Act. Exercise of these authorities is contingent on resolution of the Mohawk land claim litigation pending on the issuance date of this license in the United States District Court for the Northern District of New York, Civil Action Nos. 82-CV-829, 82-CV-1114, and 82-CV-783, in a such a manner sufficient as to cause the lands and waters subject to the referenced claims to become Federal reservations for purposes of the Federal Power Act.

Article 419. *Allocation of Project Power*. The Licensee shall make available to the states of Connecticut, New Jersey, Ohio, Pennsylvania, Rhode Island, and Vermont (collectively, "States") the sum of 4.25 percent of firm power (and associated energy) and 4.25 percent of non-firm energy of the Project. This sum shall be divided among the States on a pro-rata basis based on the United States Department of Commerce U.S. Census Bureau population data for each of the States, provided that the Licensee shall

also make available such additional firm power and non-firm energy from the Project as may be necessary to ensure that each State receives at least one (1) Megawatt of firm power (and associated energy) and a corresponding share of non-firm energy from the Project. To ensure the efficient provision of the power and energy to the States under this article, the Licensee shall cooperate and deal only with the single entity in each State that has been designated as the Bargaining Agent for the procurement of such power and energy.

Article 420. *Allocation of Project Power to Massachusetts*. The Licensee shall make available to the state of Massachusetts 0.6 percent of firm power (and associated energy) and a corresponding share of non-firm energy from the Project. The firm power and non-firm energy shall be made available to Massachusetts on the same terms as power and energy is made available to States designated in Article 419 of this license. The Licensee shall cooperate and deal only with the single entity in Massachusetts that has been designated as the Bargaining Agent for the procurement of such power and energy.

Article 421. *International Joint Commission*. In the design, construction, maintenance, and operation of the Project, the Licensee shall comply with all applicable orders and plans of the International Joint Commission (IJC), and shall file any applications to amend the license that are necessary to give effect to any applicable IJC orders or plans.

Article 422. *Historic Properties.* The Licensee shall implement the "Programmatic Agreement Among the Federal Energy Regulatory Commission, the Advisory Council on Historic Preservation, and the New York State Historic Preservation Officer for Managing Historic Properties that May be Affected by a License Issuing to New York Power Authority for the Operation of the St. Lawrence-FED Power Project in St. Lawrence County, New York (FERC No. 2000)," executed on October 1, 2003, including but not limited to the Historic Properties Management Plan (HPMP) for the project. In the event that the Programmatic Agreement is terminated, the licensee shall implement the provisions of its approved HPMP. The Commission reserves the authority to require changes to the HPMP at any time during the term of the license. If the Programmatic Agreement is terminated prior to Commission approval of the HPMP, the licensee shall obtain approval before engaging in any ground-disturbing activities or taking any other action that may affect any historic properties within the project's area of potential effect.

Article 423. *Use and Occupancy.* (a) In accordance with the provisions of this article, the licensee shall have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands

and waters for certain types of use and occupancy, without prior Commission approval. The licensee may exercise the authority only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project. For those purposes, the licensee shall also have continuing responsibility to supervise and control the use and occupancies for which it grants permission, and to monitor the use of and ensure compliance with the covenants of the instrument of conveyance for, any interests that it has conveyed, under this article.

If a permitted use and occupancy violates any condition this article or any other condition imposed by the licensee for protection and enhancement of the project's scenic, recreational, or other environmental values, or if a covenant of a conveyance made under the authority of this article is violated, the licensee shall take any lawful action necessary to correct the violation. For a permitted use and occupancy, that action includes, if necessary, canceling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities.

(b) The type of use and occupancy of project lands and water for which the licensee may grant permission without prior Commission approval are:

(1) landscape plantings;
(2) non-commercial piers, landings, boat docks, or similar structures and facilities that can accommodate no more than 10 watercraft at a time and where said facility is intended to serve single family type dwellings;
(3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline; and
(4) food plots and other wildlife enhancement.

To the extent feasible and desirable to protect and enhance the project's scenic, recreational, and other environmental values, the licensee shall require multiple use and occupancy of facilities for access to project lands or waters. The licensee shall also ensure, to the satisfaction of the Commission's authorized representative, that the use and occupancies for which it grants permission are maintained in good repair and comply with applicable state and local health and safety requirements. Before granting permission for construction of bulkheads or retaining walls, the licensee shall:

(1) inspect the site of the proposed construction;
(2) consider whether the planting of vegetation or the use of riprap would be adequate to control erosion at the site; and
(3) determine that the proposed construction is needed and would not change the basic contour of the reservoir shoreline.

To implement this paragraph (b), the licensee may, among other things, establish a program for issuing permits for the specified types of use and occupancy of project lands and waters, which may be subject to the payment of a reasonable fee to cover the licensee's costs of administering the permit program. The Commission reserves the right to require the licensee to file a description of the standards, guidelines, and procedures for implementing this paragraph (b) and to require modification of those standards, guidelines, or procedures.

(c) The licensee may convey easements or right-of-way across, or leases of, project lands for:

(1) replacement, expansion, realignment, or maintenance of bridges or roads there all necessary state and federal approvals have been obtained;
(2) storm drains and water mains;
(3) sewers that do not discharge into project waters;
(4) minor access roads;
(5) telephone, gas, and electric utility distribution lines;
(6) non-project overhead electric transmission lines that do not require erection of support structures within the project boundary;
(7) submarine, overhead, or underground major telephone distribution cables or major electric distribution lines (69 kV or less); and
(8) water intake or pumping facilities that do not extract more than one million gallons per day from a project reservoir.

No later than January 31 of each year, the licensee shall file three copies of a report briefly describing for each conveyance made under this paragraph (c) during the prior calendar year, the type of interest conveyed, the location of the lands subject to the conveyance, and the nature of the use for which the interest was conveyed.

(d) The licensee may convey fee title to, easements or rights-of-way across, or leases of project lands for:

(1) construction of new bridges or roads for which all necessary state and federal approvals have been obtained;
(2) sewer or effluent lines that discharge into project waters, for which all necessary federal and state water quality certification or permits have been obtained;
(3) other pipelines that cross project lands or waters but do not discharge into project waters;
(4) non-project overhead electric transmission lines that require erection of support structures within the project boundary, for which all necessary

federal and state approvals have been obtained.

(5) private or public marines that can accommodate no more than 10 watercraft at a time and are located at least one-half mile (measured over project waters) from any other private or public marina;

(6) recreational development consistent with an approved Exhibit R or approved report on recreational resources of an Exhibit E; and

(7) other uses, if; (i) the amount of land conveyed for a particular use is five acres or less; (ii) all of the land conveyed is located at least 75 feet, measured horizontally, from project waters at normal surface elevation; and (iii) no more than 50 total acres of project lands for each project development are conveyed under this clause (d)(7) in any calendar year.

At least 60 days before conveying any interest in project lands under this paragraph (d), the licensee must submit a letter to the Director, Office of Energy Projects, stating its intent to convey the interest and briefly describing the type of interest and location of the lands to be conveyed (a marked Exhibit G or K map may be used), the nature of the proposed use, the identity of any federal or state agency official consulted and any federal or state approvals required for the proposed use. Unless the Director, within 45 days from the filing date requires the licensee to file an application for prior approval, the licensee may convey the intended interest at the end of that period.

(e) The following additional conditions apply to any intended conveyance under paragraph (c) or (d) of this article:

(1) Before conveying the interest, the licensee shall consult with federal and state fish and wildlife or recreation agencies, as appropriate, and the State Historic Preservation Officer.

(2) Before conveying the interest, the licensee shall determine that the proposed use of the lands to be conveyed is not inconsistent with any approved Exhibit R or approved report on recreational resources of an Exhibit E; or, if the project does not have an approved Exhibit R or approved report on recreational resources, that the lands to be conveyed do not have recreational value.

(3) The instrument of conveyance must include the following covenants running with the land: (i) the use of the lands conveyed shall not endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; (ii) the grantee shall take all reasonable precautions to ensure that the construction, operation, and maintenance of structures or facilities on the conveyed lands will occur in a manner that will protect the scenic, recreational, and environmental values of the project, and (iii) the grantee shall not unduly restrict public access to project waters.

(4) The Commission reserves the right to require the licensee to take reasonable remedial action to correct any violation of the terms and conditions of this article, for the protection and enhancement of the project's scenic, recreational, and other environmental values.

(f) The conveyance of an interest in project lands under this article does not in itself change the project boundaries. The project boundaries may be change to exclude land conveyed under this article only upon approval of revised Exhibit G or K drawings (project boundary maps) reflecting exclusion of that land. Lands conveyed under this article will be excluded the project only upon a determination that the lands are not necessary for project purposes, such as operation and maintenance, flowage, recreation, public access, protection of environmental resources, and shoreline control, including shoreline aesthetic values. Absent extraordinary circumstances, proposal to exclude lands conveyed under this article from the project shall be consolidated for consideration when revised Exhibit G or K drawings would be filed for approval for other purposes.

(g) The authority granted to the licensee under this article shall not apply to any part of the public lands and reservations of the United States included within the project boundary.

(I) The licensee shall serve copies of any Commission filing required by this order on any entity specified in this order to be consulted on matters related to that filing. Proof of service on these entities must accompany the filing with the Commission.

(J) This order is final unless a request for rehearing is filed within 30 days from the date of its issuance, as provided in Section 313(a) of the Federal Power Act. The filing of a request for rehearing does not operate as a stay of the effective date of this license or of any other date specified in this order, except as specifically ordered by the Commission. The licensee's failure to file a request for rehearing shall constitute acceptance of this license.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

APPENDIX A

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
WATER QUALITY CERTIFICATION

CERTIFICATION

The New York State Department of Environmental Conservation (Department) hereby certifies:

The Department has reviewed the Application for New License for Major Project – Existing Dam (Application), which the New York Power Authority (Power Authority) filed with the Federal Energy Regulatory Commission (FERC or the Commission) for the St. Lawrence-FDR Project, FERC Project No. 2000-036 (Project). The Department has also reviewed the Power Authority's Request for Water Quality Certification (Request) and all other available pertinent information, including studies submitted in support of the Application.

The Project, as conditioned below, complies with Sections 301, 302, 303, 306, and 307 of the Federal Water Pollution Control Act as amended and as implemented by the limitations, standards, and criteria of the state statutory and regulatory requirements set forth in 6 NYCRR Section 608.9(a). The Project, as conditioned, also will comply with applicable New York State effluent limitations, water quality standards and thermal discharge criteria, as applicable, as set forth in 6 NYCRR Parts 701, 702, 703, and 704.

The Water Quality Certification is issued solely for the purposes of Section 401 of the Federal Water Pollution Control Act (33 USC 1341), as amended (Clean Water Act).

CONTACTS: Except as otherwise specified, all contacts with the Department concerning this certificate shall be addressed to:

New York State Department of Environmental Conservation
Regional Permit Administrator
317 Washington Street
Watertown, NY 13601

Written submissions to the Department must include (5) complete copies of the submission.

SPECIAL CONDITIONS

A. OVERSIGHT AND ADMINISTRATION

I. Inspections

The Project, including relevant records, is subject to inspection at reasonable hours and intervals, upon reasonable notice to the certificate holder, by an authorized representative of the Department to determine whether the applicant is complying with this certification. A copy of this certification and the FERC license, including all maps, drawings and special conditions, must be available for inspection by the Department during such inspections at the Project, consistent with FERC policy on critical energy infrastructure information and any New York State policy relating to Sensitive Information, as that term is defined in the Memorandum from the Executive Chamber date January 17, 2002.

II. Emergencies

With the exception of emergency activities in or potentially affecting waters of the State, the Power Authority's activities affecting or having an impact upon waters of the State will comport with the Operating Conditions in Section B, below, except as provided for in the Ecological Mitigation and Enhancement Measures Settlement Agreement (Ecological Agreement) dated January 15, 2003.

Prior to commencement of emergency activities not otherwise authorized under these conditions, the Power Authority, to the extent possible, shall notify the Department of the nature of the emergency and the extent to which emergency actions may be required. The Department shall determine, to the extent possible, whether, and under what conditions, to grant approval. If circumstances require that the emergency activities be taken immediately such that prior notice to the Department is not possible, then the Power Authority must notify the Department within 24 hours of commencement of the emergency activities and provide a description of the conditions that warrant or warranted immediate action. Such immediate action notice shall be by telephone and a log of the contact provided to the Department indicating time, date, information provided in the contact describing the emergency condition, names and affiliations of persons making contact, the name of the contact at the Department, and, if possible, information on the action taken or anticipated. In either case, notification must be first by telephone to the Regional Permit Administrator (RPA), followed by a written record by certified mail, telegram, or other written form of communication, including fax and electronic mail. This notification must be followed within 3 weeks by submission of the following information:

- A description of the action;
- Location map and plan of the proposed action; and
- Reasons why the situation was an emergency.

All notifications, requests for emergency authorization, and information submitted to support such requests shall be sent to the RPA at the address listed above.

III. Modifications and Revocations

The Department reserves the right to modify, suspend, or revoke this certificate when:

- The scope of the certified activity is exceeded or a violation of any condition of this certificate or provisions of the Ecological Agreement and/or pertinent regulation is found;
- The certificate was obtained by misrepresentation or failure to disclose relevant facts;
- New material information is discovered;
- Environmental conditions, relevant technology, or applicable law or regulation have materially changed since the certificate was issued.

B. OPERATING CONDITIONS

I. <u>Water Level Fluctuations, Peaking and Ponding, Flow Rate Changes</u>

The operation of the Project to pass flow in the St. Lawrence River will be regulated in accordance with the then currently effective International Joint Commission (IJC) Plan of Regulation for Lake Ontario. The International St. Lawrence River Board of Control (Board of Control) manages flows of the St. Lawrence River in the section of the River affected by the Project. The Power Authority controls the allocated water jointly with Ontario Power Generation (OPG), which operates the Canadian side of the International Power Project works, within rules approved by the Board of Control. The Power Authority's operation of the Project, including the management and use of water level fluctuations and flows related to the International Board of Control regulation of the St. Lawrence River, is consistent with applicable New York State effluent limitations, water quality standards and thermal discharge criteria, as applicable, as set forth in 6 NYCRR Parts 701, 702, 703, and 704.

II. Physical and Chemical Water Quality

All waters in and around the Project area meet State standards for Class A waters. The project has 52 point source discharges that are regulated under Section 304 of the Clean Water Act through the State Pollution Discharge Elimination System (SPDES) (Permit No. NY-0000728, modified March 31, 1992). Each of these discharges complies with State discharge standards separately through the SPDES process, which supports the State's efforts in managing the water quality in Project waters. The Department monitors some of these outfalls separately under the SPDES permit reporting process and elects to include no additional monitoring of water quality under this Certification, except as noted below.

A. *PCBs*

The State lists waters in the Project area as impaired, primarily for priority organics (PCBs), and lists contaminated sediments as the potential source of impairment. Samples collected in and around the Project determined that Project operations and equipment have been sources of elevated levels of PCBs in sediments in isolated locations (see Section 3.3.2 of Volume 2 of the Application). Based on samples at several locations, the likely sources for PCBs from Project operations appear to be: (1) oil/water separator and grit chambers within the stormwater drainage system on site; and (2) Power Dam sumps that collect drainage on the dam near the transformer bank. The Department will rely on the SPDES permitting process and Stormwater Management planning process to regulate and manage future actions – likely to include maintenance procedures for and removal of contaminated sediments – addressing PCBs related to the Project and on-site activities.

B. *South Channel Flows*

Long Sault Dam extends from the western end of Barnhard Island to the mainland and blocks what was the original main river channel prior to Project construction - an area now referred to as the South Channel. Historically, water spills over Long Sault Dam into the South Channel infrequently and in varied amounts. A warm water aquatic habitat has developed in what is essentially a backwater habitat in the St. Lawrence River. Spills into the South Channel occur infrequently when the river flows exceed the hydraulic capacity of the Moses-Saunders Power Dam and cannot be managed within the peaking and ponding rules. During these events in early spring and early summer, the potential exists for cooler river water to spill into the warmer, shallow-water habitats of the upper end of the South Channel, causing concern for the propagation and survival of warm-water species immediately downstream of the dam that use this area preferentially as spawning and nursery habitat.

In the interest of preserving this habitat, the Department requires the Power Authority to monitor spills and conditions in the South Channel, including continuously-recorded water temperatures at four locations extending downstream of the spillway to the confluence of the South Channel with the mainstem of the St. Lawrence River, as set forth in Section 5 of the Ecological Agreement.

III. Habitat Enhancements Required for Propagation and Survival of Species Affected by Project Operations

To ensure the continued propagation and survival of aquatic species affected by Project operations and related Project facilities pursuant to 6 NYCRR Sections 701 and 702, the Department determines that granting of a certificate under this section requires the following environmental enhancement projects to meet the State's Water Quality Standards. The FERC license for the Project must be conditioned to require the following habitat improvement projects and enhancements in the Project area.

A. *Habitat Improvement Projects*

In Section 2.1 of the Ecological Agreement, the Power Authority has agreed to provide for the construction, operation and maintenance of the ten Habitat Improvement Projects (hereinafter referred to as "HIPs") within the Project Boundary, in accordance with the general description of each project and the proposed schedule and cost set forth in Section 2.l and Appendix A of the Ecological Agreement. The Department finds that the following six of the proposed HIPs relate directly to water quality objectives in 6 NYCRR Sections 701 and 702 and may potentially affect waters of the State:

1. Coles Creek Controlled-Level Pond;
2. Nichols Island Controlled Level Pond;
3. Little Sucker Brook Controlled-Level Pond;
4. Blandings Turtle Habitat Improvements;
5. Lake Sturgeon Spawing Beds; and
6. Walleye Spawning Bed in Brandy Brook.

Accordingly, the Department conditions the granting of this certificate to include these six enhancements. The Power Authority shall design, construct, monitor, and operate and maintain each of the six above-listed HIPs, as set forth in Section 2.1 and Appendix A of the Ecological Agreement. The specific design and implementation schedule for each of these HIPs shall be developed by the Power Authority, in consultation with the Technical Advisory Council established under Section 2.4 of the Ecological Agreement.

B. ***Future HIPS Fund***

In Section 2.3 of the Ecological Agreement, the Power Authority has agreed to establish a Future Habitat Improvement Fund (FHF) to cover the design, construction, environmental monitoring and operation and maintenance costs of future HIPs to be located on the St. Lawrence River or tributaries within New York that will benefit the ecology of the St. Lawrence River. The Department finds that HIPS constructed under the FHF may relate directly to water quality objectives in 6 NYCRR Sections 701 and 702, and may potentially affect waters of the State. Accordingly, the Department conditions the granting of this certificate to require the Power Authority, in accordance with Section 2.3 of the Ecological Agreement, to consult with the Technical Advisory Council for all HIPs proposed to be funded from the FHF and to obtain approval from the Technical Advisory Council for all such HIPS prior to commencing construction of the FHF-funded HIPS.

C. ***Technical Advisory Council***

In Section 2.4 of the Ecological Agreement, the Power Authority has agreed to facilitate the organization of a Technical Advisory Council (Council) to assist with the design, development, and monitoring of the HIPS established pursuant to Sections 2.1 and 2.2 of the Ecological Agreement, as well as future HIPS established under the FHF pursuant to Section 2.3. Because, as discussed *supra*, such HIPs may relate directly to water quality objectives in 6 NYCRR Sections 701 and 702 and may potentially affect waters of the State, the Department conditions the granting of this certificate to require the Power Authority to facilitate the organization and support of the Council pursuant to Section 2.4 of the Ecological Agreement.

D. ***Wilson Hill Wildlife Management Area***

In Section 3 of the Ecological Agreement, the Power Authority has agreed to provide for improvements to the Wilson Hill Wildlife Management Area (WHWMA) in accordance with the general description of the improvements and the general schedule set forth in Appendix B of the Ecological Agreement. The Department finds that such WHWMA enhancements may relate directly to water quality objectives in 6 NYCRR Sections 701 and 702 and may potentially affect waters of the State. Accordingly, the Department conditions the granting of this certificate to require the Power Authority to provide for the WHWMA improvements in accordance with Section 3 and Appendix B of the Ecological Agreement.

E. ***St. Lawrence River Research and Education Fund***

In Section 4 of the Ecological Agreement, the Power Authority has agreed to establish a St. Lawrence River Research and Education Fund (SLRREF) to provide financial support for environmental research and environmental education projects relating to the ecology of the St. Lawrence River watershed in the immediate vicinity of the Project. The Department finds that the environmental research and environmental education projects funded by the SLRREF may relate directly to water quality objectives in 6 NYCRR Sections 701 and 702 and may potentially affect waters of the State. Accordingly, the Department conditions the granting of this certificate to require the Power Authority to establish the SLRREF, as well as its Board of Directors and required by-laws, organization, structure and decision-making process, in accordance with Section 4 of the Ecological Agreement.

IV. ***Fish Passage and Entrainment***

Fish Passage and Entrainment have been addressed in the Fish Enhancement, Mitigation and Research Fund Agreement dated January 15, 2003.

V. ***Rare, Threatened, and Endangered Species***

The lake sturgeon (*Acipenser fulvenscens*) Is a State-listed (threatened) aquatic species that occurs in the area affected by the Project. Section 702 of 6 NYCRR provides for the protection of aquatic habitat. The Lake Sturgeon Spawning Beds HIP required under this Certification is expected to provide aquatic habitat-benefits to lake sturgeon. Specifically, the monitoring program required for the Lake Sturgeon Spawning Beds HIP should provide the Department with Information regarding the effectiveness of the habitat improvements relative to the needs of lake sturgeon.

VI. ***Dreissenid Mussels***

Consistent with the Management Plan to be developed for WHWMA as described in Appendix B, Section B of the Ecological Agreement, the Power Authority shall monitor discharges from the WHWMA to the Grasse River below the water control structure that will be installed to move water between the East Pool at WHWMA and the Grasse River for water quality and presence of dreissenid mussels and veligers. During periods of discharges to the Grasse River, water temperature and dissolved oxygen will be monitored on a weekly basis in the discharge channel mid-way between the East Pool and the Grasse River. Also during periods of discharge from May to October, sampling for dreissenid mussel veligers will be conducted weekly within a 500-foot radius of the East Pool siphon tube intake and immediately below the siphon tube discharge. Annually,

surveys of dreissenid mussel distribution will be conducted in the Grasse River within a one-mile stretch of the river immediately above and below the East Pool outfall. In the event that dreissenid mussels are documented upstream of the East Pool outfall in the Grasse River or that existing Grasse River dreissenids extend their current range upstream to within one mile of the East Pool outfall, all dreissenid sampling requirements will cease. The Power Authority shall submit to the Department on a monthly basis a copy of all water temperature and dissolved oxygen data collected during discharge periods. Data pertaining to the presence of dressinid mussel veligers above and below the East Pool siphon and the distribution of dreissenid mussels in the Grasse River shall be submitted to the Department annually.

C. PROJECT MAINTENANCE AND CONSTRUCTION

I. Maintenance Dredging

The Power Authority shall install and maintain appropriate turbidity-control structures while conducting any maintenance dredging activities in the intake/forebay area.

II. Sediment Analysis and Disposal

The Power Authority shall sample sediments to be disturbed or removed from the Project waters and test them for contaminants. Sampling and testing of sediments shall be accomplished according to a protocol submitted to and approved by the Department beforehand: Prior to dredging or other excavation, the Power Authority shall secure Department approval for all disposal locations for any sediments to be removed from the Project waters.

III. Erosion and Sediment Control

The Power Authority shall ensure that erosion and sediment control measures, as described below, are in place prior to the commencement of construction that will result in erosion or sedimentation to the water body. At a minimum, the Power Authority shall accomplish the following objectives:

1. Isolate in-stream work from the flow of water and prevent discolored (turbid) discharges and sediments from entering the waters of the river due to excavation, dewatering and construction activities.

2. Exclude heavy construction equipment from below the mean high water line until the work area is protected by a watertight structure and dewatered.

3. Stabilize any disturbed banks by grading to a stable slope, followed by armoring or vegetating as appropriate to prevent erosion and sedimentation into the water body.

4. Minimize soil disturbance, provide grading that prevents or minimizes erosion and provide temporary and permanent revegetation on stockpiles and other disturbed areas to minimize erosion/sedimentation potential.

5. Protect all waters from contamination from deleterious materials such as wet concrete, gasoline, solvents, epoxy resins or other materials used in construction, maintenance and operation of the Project.

6. Install erosion control measures that prevent erosion from entering the water body on the down slope of all disturbed areas and maintain them in a fully functional condition. These erosion control measures are to be installed before commencing any other activities involving soil disturbance.

7. Ensure complete removal of all dredged and excavated material, debris or excess materials from construction from the bed and banks of all water areas to an approved upland disposal site.

8. Ensure that all temporary fill and other materials placed in the waters of the river are completely removed immediately upon completion of construction, unless otherwise directed by the Department.

IV. Temporary Structures

The design of all cofferdams, temporary access roads or ramps or other temporary structures that encroach upon the bed or banks of the river shall be approved by the Department prior to installation.

V. Maintenance of River Flows

During all periods of construction, the Power Authority shall maintain adequate flows immediately downstream of work sites to ensure that the flow conditions of this certificate are met. The Power Authority, moreover, shall maintain flows according to the IJC Order of Approval and Plan of Regulation.

VI. Turbidity Monitoring

During construction related activities, the Power Authority shall monitor the waters of the river at a point immediately upstream of Project activities and at a point no more than 100 feet downstream from any discharge point or other potential source of turbidity, unless the Power Authority proposes another location that is agreeable to the Department. If, at any time, turbidity measurements from the downstream locations exceed the measurements from the locations upstream of the work areas, the Power Authority shall cease all related construction on the Project until the source of the turbidity is discovered. If the source of the turbidity is related to construction activities, the situation shall be corrected before construction work resumes.

VII. Notification

At least two weeks prior to commencing any work performed under the authority of this Certificate, the Power Authority shall provide written notification to the Regional Permit Administrator.