

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Elizabeth Anne Moler, Chair;  
Vicky A. Bailey, James J. Hoecker,  
William L. Massey, and Donald F. Santa, Jr.

Niagara Mohawk Power Corporation ) Project No. 9222-003

ORDER GRANTING REHEARING AND AMENDING LICENSE

(Issued June 3, 1994)

In an order issued February 10, 1992, the Director, Office of Hydropower Licensing (Director), issued an original license for a minor project to Niagara Mohawk Power Corporation (Niagara Mohawk) for the Yaleville Project No. 9222, located on the Raquette River, a navigable waterway of the United States, 1/ in St. Lawrence County, New York. 2/ On March 9, 1992, the United States Department of the Interior (Interior) filed a request for rehearing of the Director's order. Interior contends that the Director erred in failing to include its prescription of fishways in the license. For the reasons indicated below, we are granting the request for rehearing and amending the license, as noted.

BACKGROUND

The Yaleville Project is an existing project, but Niagara Mohawk plans to construct additional facilities. As pertinent here, the existing project works include a dam, a powerhouse with two turbines having a combined installed capacity of 700 kilowatts (kW), an intake, and a trashrack with 2.5-inch clear bar spacing set perpendicular to the direction of flow. Niagara Mohawk's proposed additions include a second powerhouse with one turbine having a capacity of 800 kW, an intake, and a trashrack with 3-inch clear bar spacing set perpendicular to the direction of flow.

Initially, Interior and its Fish and Wildlife Service (FWS) participated in this proceeding through the submission of recommendations pursuant to the Fish and Wildlife Coordination Act. These included recommendations that the licensee install and operate, at both the existing and proposed powerhouses, 45-degree angled trashracks with a bar spacing of 1 inch or less and an intake velocity of 2 feet per second (fps) or less, and fish

1/ Central New York Power Corp., 8 FPC 547 at 569 (1949).

2/ 58 FERC ¶ 62,114 (1992).

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bypass chutes. In the Environmental Assessment (EA), issued August 20, 1991, Commission staff made a preliminary determination, pursuant to Section 10(j) of the Federal Power Act (FPA), that these trashrack and bypass recommendations were inconsistent with the purposes and requirements of Part I of the FPA. 3/ The EA noted that the expenses associated with these facilities would make the proposed enlargement of the project more costly than the expense of alternative generation. It also concluded that the facilities were not needed, because there was no evidence that the resident fish, primarily smallmouth bass and walleye, migrated or undertook seasonal movements between habitats in the Raquette River. The EA concluded by recommending that the licensee make no modifications to the trashrack at the existing powerhouse and that it install, operate, and maintain at the new powerhouse a trashrack oriented perpendicular (90 degrees) to flows, with 2-inch spacings between the trashrack bars and an approach velocity of 2.0 fps or less. 4/

By letter of August 27, 1991, the Director, Division of Project Review, notified FWS that the EA had made a preliminary determination of inconsistency, noted the EA's trashrack recommendations, and invited FWS to submit additional evidence supporting its previous recommendation or proposing other relevant options to protect and enhance fish and wildlife resources. FWS responded to the preliminary determination, and to the August 27 letter, by letter filed October 15, 1991, in which it defended its recommendations; however, it expressed a willingness to consider other options for the existing powerhouse that would include a downstream passage device with a guidance system and a mechanism to keep fish out of the turbine.

3/ Section 10(j)(1) of the FPA requires each license to include, for the protection, mitigation, and enhancement of fish and wildlife, conditions based on recommendations received pursuant to the Fish and Wildlife Coordination Act from the National Marine Fisheries Service, the United States Fish and Wildlife Service, and state fish and wildlife agencies. Section 10(j)(2) provides that, whenever the Commission believes that any such recommendation may be inconsistent with the purposes and requirements of Part I of the FPA or other applicable law, the Commission and the agencies shall attempt to resolve the inconsistency. If the Commission does not adopt in whole or in part a recommendation of any such agency, the Commission shall publish findings that adoption of the recommendation is inconsistent with those purposes and requirements and that the conditions selected by the Commission are consistent with those purposes and requirements.

4/ 58 FERC ¶ 62,114 at p. 63,317.

Following a telephone conference with staff, FWS, by letter of November 8, 1991, indicated its willingness to accept an alternative trashrack design at the existing powerhouse. This design was to include racks with 1-inch clear spacing, angled perpendicular to the flow, with an approach velocity of 2 fps or less, and a fish bypass facility incorporating an existing ice sluice. However, FWS remained unwilling to modify its design recommendation for the new powerhouse.

On December 6, 1991, Interior filed an untimely motion to intervene, which was granted by notice issued February 4, 1992. 2/ Included in the motion was a prescription of fishways submitted under the authority of Section 18 of the FPA, under which the Commission must require a licensee to construct, maintain, and operate such fishways as the Secretary of the Interior prescribes. 6/ Interior's prescription was for "such fishways as are necessary to provide safe and efficient downstream passage of walleye and other fish through the project."

Specifically, Interior sought to require the licensee to develop functional design drawings of "downstream passage fishways for the existing powerhouse and any new powerhouse." The designs were particularly to include trashracks:

angled 45 degrees or less to the direction of inflow at the turbine intakes, with maximum clear space openings of 1 inch between bars; an approach velocity of two feet per second or less for each trashrack (as measured one foot in front of that trashrack); and a fish bypass sluiceway at the downstream end of each trashrack.

In essence, the fishway prescription is identical to FWS's earlier trashrack and bypass recommendation. 7/ Interior

5/ On March 3, 1992, Niagara Mohawk filed a request for rehearing of the notice. That request was denied by operation of law effective April 2, 1992.

6/ 16 U.S.C. § 811. Section 18 states, as pertinent, that the Commission shall require:

the construction, maintenance, and operation by a licensee at its own expense of ... such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate.

7/ Interior also listed several other requirements as part of its prescription; we will address these in our discussion, infra.

indicated that it reserved authority to prescribe the construction, operation, and maintenance of fishways for upstream fish passage. It also stated that this prescription superseded "previous fishway recommendations." 8/

By letter dated December 10, 1991, Commission staff notified FWS that, in Order No. 533-A, issued November 22, 1991, the Commission had revised its definition of the term "fishway." Staff requested FWS to provide evidence that the fish species in the project area would meet the requirements of the definition, which restricted fishways to situations in which "passage of a population is necessary for the life cycle of a fish species." 9/ FWS responded in a letter dated December 23, 1991, in which it cited publications documenting the migration of walleye within New York rivers and elsewhere.

In the order issuing license, the Director found that Interior's prescription for downstream fishways was not an appropriate fishway prescription under Section 18 of the FPA, because passage of a population was not necessary for the life cycle of any of the fish species occurring in the Raquette River in the vicinity of the project, as identified in Interior's December 23 letter. Citing the EA, the Director then added that downstream fish passage structures were not needed, because a high-quality resident fishery had developed alongside extensive hydroelectric development on the river, there was no substantial

8/ Since Interior had not previously submitted a Section 18 fishway prescription, this statement must be understood as referring to the recommendations for fish passage submitted pursuant to the Fish and Wildlife Coordination Act.

2/ Regulations Governing Submittal of Proposed Hydropower License Conditions and Other Matters, 56 Fed. Reg. 61,137 (December 2, 1991), III FERC Stats. & Regs. Preambles § 30,932 (November 22, 1991). The definition of "fishway" promulgated in that rulemaking proceeding was codified at Section 4.30(b)(9)(iii) of the Commission's regulations, as follows:

"Fishway" means any structure, facility, or device used for the passage of fish through, over, or around the project works of a hydropower project, such as fish ladders, fish locks, fish lifts and elevators, and similar physical contrivances, where passage of a population is necessary for the life cycle of a fish species; and those screens, barriers, and similar devices that operate to guide fish to a fishway; and flows within the fishway necessary for its operation.



evidence demonstrating the importance of seasonal migration to walleye and smallmouth bass in the river, there would be potential for downstream fish passage at the project through spillage alone, and the turbine to be installed at the new powerhouse would be less damaging to entrained fish than the turbines of the existing powerhouse. 10/

The Director reserved authority to the Commission to prescribe fishways in the event that Interior could show, in the future, that fishways were needed, according to the Commission's fishway definition, for fish species that might later occur in the Raquette River. He then considered Interior's proposed prescription as a fish protection recommendation subject to Section 10(j) procedures. Noting that there had already been a preliminary determination that Interior's proposal was inconsistent with Sections 10(a)(1) and 313 of the FPA, he discussed the subsequent efforts between Interior and Commission staff to resolve the inconsistency. The Director concluded that, on balance, the trashrack designs recommended in the EA should be required. 11/

10/ 58 FERC at pp. 63,292-3. The EA's conclusions were based on an evaluation of Interior's recommended facilities in the context of conditions for the protection and enhancement of fish, not in the context of a Section 18 fishway prescription, since Interior did not file its request as a Section 18 prescription until after issuance of the EA.

11/ In respect to the new powerhouse, the Director stated:

Although the trashrack design alternatives that include a sluiceway would provide safer downstream fish passage and protection, any small reduction in entrainment and impingement of fish with such designs [is] not warranted because the fish don't migrate downstream to complete their life cycle. Furthermore, the slight reduction would not justify losing the additional power benefits that would result from making the new powerhouse development uneconomical.

In respect to the existing powerhouse, the Director concluded, based on analysis in the EA, that the existing trashrack provided adequate protection against entrainment and impingement and that downstream fish passage structures were not needed. 58 FERC at p. 63,296.

## DISCUSSION

In its request for rehearing, Interior contends that its prescription of fishways was required to be included in the license. Interior argues that Congress reserved to it mandatory authority under Section 18 to prescribe fishways, and that the Commission must therefore include in a license even those fishway prescriptions with which it disagrees.

The definition promulgated in Order No. 533-A, and applied by the Director, represented a Commission effort to interpret the term "fishway". However, since the issuance of the Director's order and the filing of Interior's request for rehearing, that definition has become inapplicable. In Section 1701(b) of the Energy Policy Act of 1992, 12/ Congress vacated the definition, 13/ and also provided that:

the items which may constitute a "fishway" under Section 18 for the safe and timely upstream and downstream passage of fish shall be limited to physical structures, facilities, or devices necessary to maintain all life stages of such fish, and project operations and measures related to such structures, facilities, or devices which are necessary to ensure the effectiveness of such structures, facilities, or devices for such fish.

Because the Director rejected Interior's fishway prescription on the grounds that it was not an appropriate one under the now-vacated fishway definition, we must reconsider the prescription under such law as is now applicable. Prior to the rulemaking definition, the Commission considered fishway prescriptions on a case-by-case basis. The language of Section 1701(b) does not reflect an intent to invalidate pre-rule Commission case law regarding Section 18. 14/ Nevertheless,

12/ Pub. L. No. 102-486.

13/ The vacation was without prejudice to the Commission's promulgation of a new definition by rule, with the concurrence of the Secretaries of the Interior and Commerce. However, the Commission was not obligated to promulgate such a rulemaking definition. By Final Rule issued March 1, 1994, in Docket No. RM94-11-000, the Commission implemented this Congressional mandate by removing Section 4.30(b)(9)(iii) of its regulations. 66 FERC ¶ 61,260 (1994).

14/ Moreover, the report of the Committee of Conference states that Section 1701(b):

(continued...)

in addressing fishway prescriptions in individual cases, we are now bound to consider also the language of Section 1701(b) that specifies the items which may constitute a fishway.

As stated above, Interior has prescribed an angled trashrack and a bypass sluiceway for each powerhouse. The sluiceways would serve the specific function of moving fish safely past the turbines and the dam. The proposed trashracks would be designed to guide fish to the sluiceways, which would be located at the downstream end of the trashracks. These sluiceways and trashracks are "physical structures, facilities, or devices" for the safe downstream passage of fish, as specified by Section 1701(b), and therefore constitute a fishway. 15/ Interior also prescribes that flows through each sluiceway equal at least 20 cubic feet per second or 2 percent of the maximum hydraulic capacity of the powerhouse, whichever is greater. The maintenance of appropriate flows within fish passage facilities is necessary for their effective passage of fish. Here, the flow conditions proposed by Interior are appropriate for the effective functioning of the sluiceways and therefore constitute a project operation or measure related to, and necessary to ensure the

14/ (...continued)

does not affect the authority of the Commission to continue to issue license orders that could include fishway prescriptions under section 18.

In essence, the provision returns the Commission and the Secretaries to the position they were in under section 18 of the Federal Power Act prior to the FERC adopting by regulation the fishway definition.

H.R. Rep. No. 102-1018, 102d Cong., 2d Sess. 393 (1992).

- 15/ The Commission has stated, both before and after passage of the Energy Policy Act, that structures such as trashracks, when used to direct fish to a passage structure, and not merely to protect fish from project works, may be prescribed under Section 18. Lynchburg Hydro Associates, 39 FERC ¶ 61,079 at p. 61,219 (1987); City of LeClaire, Iowa, 66 FERC ¶ 61,270 at p. 61,664 (1994). Niagara Mohawk, in its motion to reject the fishway prescription, argues that the primary purpose of the trashracks prescribed by Interior is to prevent mortality and injury caused by entrainment. However, even Niagara Mohawk concedes that the trashracks would provide "a small measure of guidance for downstream migrants."

effectiveness of, the passage facilities, within the meaning of Section 1701(b).

Interior specifies that the fishways be constructed, operated, and maintained in accordance with designs, plans, and schedules approved by FWS, and that these materials must be developed in consultation with FWS and the New York Department of Environmental Conservation (Environmental Conservation) within six months of issuance of the license. Under Section 18, we must require a licensee to construct and operate such fishways as Interior prescribes. Accordingly, we will require the licensee to construct the fishways in conformance with designs and plans approved by FWS, since those approved designs and plans will produce the specifications of the prescribed fishways. Nevertheless, the Commission retains the right of final approval of the fishways, as of all project works, and, therefore, Article 404 reserves to the Commission the right to approve the plans, including the fishway designs, that the licensee has developed.

Interior also specifies that the fishways must be operated in accordance with the approved plan whenever power is generated, unless FWS grants prior written permission not to operate them for a set period. The specification of times during which passage facilities, once completed, must be operating is equivalent to prescribing when flows must be released into the facilities. Consequently, such specification prescribes a project measure related to and necessary for the effective operation of those facilities and is within Section 18 prescription authority, pursuant to Section 1701(b). 16/

We will require the licensee to consult with FWS and Environmental Conservation, as Interior requests. However, a condition requiring consultation in the development of drawings and plans is not the prescription of a fishway. It is, rather, the specification of procedures for a licensee to follow in designing a fishway that meets a prescribing agency's approval. While the Secretaries of the Interior and of Commerce may prescribe a fishway, the Federal Power Act imposes on this Commission the obligation to enforce the terms of licenses and thus to ensure that a licensee construct and operate the fishway that has been prescribed. Therefore, the Secretaries may identify and provide specifications for the kind of fishway they

- 16/ Interior also specifies that, when operating, fishways shall be maintained to operate efficiently at all times. This condition does not prescribe a fishway, but maintenance of the fishways to ensure their efficient operation is implicit in the Commission's requirement that the licensee construct, operate, and maintain such fishways as Interior prescribes.



want incorporated into a project, but it falls to the Commission to establish, administer, and enforce conditions and procedures necessary to ensure that the licensee constructs, operates, and maintains that fishway. As a practical matter, these conditions are likely to include requiring a licensee to consult with the prescribing agency and to submit design drawings and plans for the agency's approval. Accordingly, pursuant to our own obligations under Section 18, we will require such consultation and development of design drawings here to ensure that the appropriate fishways are constructed.

Interior specifies that the facilities at the existing powerhouse must be operable within one year of issuance of a license, and that those at the new powerhouse must be operable prior to commencement of energy production there. Section 18 obligates us only to require the construction and operation of prescribed fishways, not to impose on the licensee an agency's desired schedules for completion of construction or commencement of operation. We recognize that prescribed fishways should be operable at a project as soon as is reasonably possible to conform with the prescribing agency's intention. However, since fish passage structures are project works, the Commission retains final authority over their construction. The timing of a fishway's construction should not be permitted to govern the logical progression of overall project construction, as in the case of unconstructed projects; the Commission must be able to sanction reasonable delays. In the case of the facilities at the existing powerhouse, for example, compliance with Interior's condition is now literally impossible. The deadline for completion of project construction in this proceeding has already been established, and we will not accelerate the deadline for completion of the fishways to an earlier date. Nevertheless, we will require the licensee to make the fishways operable by the deadline for completion of project works.

Interior would require the licensee to provide personnel of FWS and Environmental Conservation access to the project site and to pertinent project records for the purpose of inspecting the fishways in order to determine compliance with the prescription. These monitoring requirements do not prescribe a fishway, but we have, under our authority, imposed them as conditions in a license to enable the Commission and Interior to carry out their respective responsibilities. 17/ We will require access and inspection, consistent with our previous practice and rationale.

As noted above, Interior would reserve its authority to prescribe the construction, operation, and maintenance of fishways for upstream passage. Noting the Commission's policy to reserve authority when requested, the Director reserved authority

17/ Lynchburg Hydro Associates, 39 FERC at p. 61,219.

to the Commission to require such fishways as Interior might prescribe. However, Interior requested a reservation only as to upstream passage, whereas Article 408, which implemented the Director's findings, is unspecific. Consequently, we will revise Article 408 to specify upstream passage, as Interior requested.

In conjunction with its answer to Interior's motion to intervene, Niagara Mohawk moved to reject the fishway prescription on several grounds apart from non-conformance to the Order No. 533-A definition. Niagara Mohawk points out that the prescription was made by the Regional Solicitor from the Northeast Region of Interior's Office of the Solicitor, and that, because the Regional Solicitor had failed to show that he had been legally delegated the Secretary's authority to prescribe fishways, the prescription is invalid on its face. Subsequent to issuance of the license, Niagara Mohawk filed motions to reopen the record and to lodge an administrative order, for the limited purpose of receiving evidentiary materials relating to this issue.

Those materials consist of pleadings, letters, and orders relating to an administrative appeal of the prescription, filed by Niagara Mohawk with Interior's Office of Hearings and Appeals, in which Niagara Mohawk requested that the prescription be vacated, in part because the Regional Solicitor had not been delegated authority to prescribe fishways. 18/ That proceeding culminated in an order in which the Office of Hearings and Appeals determined that it did not have jurisdiction to review the appeal. 19/ Niagara Mohawk contends that the underlying documents provided by the Office of the Solicitor in that proceeding establish that Interior has no procedures or regulations governing the implementation of Section 18 prescriptions, and that the Regional Solicitor had no authority under established procedures to submit the prescription.

18/ Niagara Mohawk also argued that the Regional Solicitor issued the prescription without prior notice or opportunity to present evidence, that the prescription was arbitrary and capricious because it was unsupported by evidence, and that the facilities prescribed were not fishways under Section 18.

19/ The order cited an Interior regulation (43 CFR § 4.7000) that conditions the right of appeal to the Office of Hearing and Appeals on a showing that the proceeding is one in which Departmental regulations allow a right of appeal to the head of the Department. The order stated that Niagara Mohawk had failed to identify any regulation of Interior that permitted an appeal to the Secretary of a decision by the Regional Solicitor prescribing fishways.

We will grant Niagara Mohawk's motions and receive the materials into the record, but we decline to reject the prescription on the grounds of improper delegation. Although Section 18 obligates the Commission to require only such fishways as are prescribed by the Secretary, we do not believe the statute contemplates our requiring proof of the legitimacy of the authority underlying each prescription. We do not consider it a proper exercise of our discretion to judge whether authority has been properly delegated within another agency or department.

Niagara Mohawk also disputes the need for the prescribed fishways. This argument warrants consideration in light of Congress's vacation of our codified definition.

In deciding that Interior had not submitted a valid fishway prescription, the Director concluded that passage of fish populations in the Raquette River were not shown necessary for the life cycle of the species; relying on the EA, he also concluded that there was potential for downstream fish passage without specific fish passage structures and that, in any case, no substantial evidence had been presented to show that smallmouth bass and walleye in the Raquette River required seasonal migration. In essence, the Director concluded that there was no need for the facilities. To the extent that he was analyzing the species' "life cycle" requirements, the Director was applying a need-based test that had been incorporated into the Commission's regulations by Order No. 533-A.

However, Section 18, as now effectively modified by Section 1701(b), does not permit our consideration of the needs of particular fish, fish populations, or fish species in determining whether the fishway has been properly prescribed. Although the structures, facilities, and devices that may constitute a fishway are to be those "necessary to maintain all life stages of such fish," we do not interpret this provision as requiring us to determine that the prescribed physical items are necessary in each individual case for fish populations in the affected stream to be maintained. Since Congress vacated a fishway definition that necessitated an examination of the biological requirements of fish for passage, we cannot assume that it intended to supplant that test with a similar one. Moreover, Section 1701(b) appears to allow us to continue applying our pre-rule case law on Section 18, and that prior case law did not impose a requirement of biological necessity. We construe this phrase simply as clarifying what kinds of structures, facilities, and devices could be prescribed as fishways and as emphasizing that we must consider all life stages in examining whether a prescribed physical item qualifies as a fishway.

Our conclusion that the trashracks and sluiceways are fishways, and therefore must be required in the license,

necessitates reevaluation of the project's economic benefits. The EA determined that the proposed project expansion, even without any fish passage facilities included, would be only marginally economical, because it would have an annual levelized cost of about \$622,000, compared to an annual levelized power value of about \$623,000. The levelized power value calculation was based on Energy Information Administration (EIA) projections of fossil fuel costs for the region. The EIA's projections of fossil fuel costs have fallen more than 20 percent since staff performed its analysis. 20/ This drop significantly reduces the levelized power value of the project with the proposed expansion. In fact, Niagara Mohawk itself has indicated, in a request for an extension of the construction deadlines, filed December 7, 1993, that the value of power generation has decreased since the filing of the application, while the cost of the proposed project has increased. Relying on a detailed study conducted by its consultant in June 1992, and on energy analyses that it itself has conducted, Niagara Mohawk no longer considers the project expansion economically feasible as proposed, which is to say, without fish passage facilities. 21/

The annual levelized cost of the trashrack recommended by the EA for the new powerhouse was estimated to be \$3,900 or only \$440 more than Niagara Mohawk's proposed trashrack, and the EA concluded that it would not impose a significant additional cost on the expansion. However, the EA estimated that the trashrack conforming to Interior's specifications would have an annual levelized cost of \$40,300 and would render the new facility uneconomical. The Director's order, relying on subsequent staff analysis of Interior's design, increased that estimate to \$43,200. 22/ It is apparent that, with the cost of

20/ Based on the projected cost of fossil fuels in the Northeast and New York-New Jersey regions of the country, as shown: (1) on table A3 of its April 1989 publication Regional Projections of End-Use Energy Consumption and Prices Through 2000; (2) on table 116 of its February 1993 publication Supplement to the Annual Energy Outlook; and (3) by its base-case projections of the GNP implicit deflator indices in those same publications.

21/ However, Niagara Mohawk hoped to explore ways of making the project feasible with different equipment and a different configuration.

22/ This increase resulted from staff's evaluation that Interior's design would not guide fish as intended without the construction of a flow training wall, extending from the western end of the new powerhouse into the reservoir, to channel flows to the powerhouse from the proper direction.

(continued...)



constructing and maintaining the prescribed fishway added to the other costs of developing the project expansion, the expansion would not be economically beneficial under currently projected economic conditions. Therefore, we will amend the license to withdraw authorization of the new development.

The existing project has an installed capacity of 700 kW and generates about 3.82 gigawatt-hours of energy annually, which would have a gross value of about \$1.5 million in 1994. In its November 8, 1991 letter, submitted during the Section 10(j) resolution process, FWS estimated that it would cost about \$170,000 to construct a 45-degree angled trashrack, with 1-inch bar spacing, and a fish bypass for the existing powerhouse. Staff estimates that, adjusted for 1994 price levels, the cost of construction would be approximately \$188,400. Assuming a capital recovery cost of 10 percent, the annual carrying cost on these facilities would be about \$18,840, only about one percent of the current value of the project power, under current EIA forecasts. Thus, we have no reason to conclude that this prescription would significantly affect the existing project's economic benefits.

Even though we are obligated to require properly prescribed fishways, regardless of whether the prescribing agency has demonstrated a need for them, we are not precluded from expressing our opinion as to whether the fishways are needed or beneficial. The EA evaluated the facilities recommended by Interior and concluded that their benefits were not significant when considered in the light of several factors, especially evidence that resident smallmouth bass and walleye have flourished even in the presence of extensive hydropower development in the Raquette River, the lack of evidence regarding the importance of passage for these resident fish, and the opportunities for passage that would exist even after expansion of the project. Our review of the record does not cause us to disagree with the EA's evaluation.

FWS does not allege that fish present in the project area require passage, rather than mere protection, to survive. There is no evidence that these fish need to move past the project to reach suitable habitat. FWS's principal concern appears to be protecting downstream fisheries that may depend on recruitment from upstream. However, we have not been presented with evidence that any downstream communities are actually dependent on such recruitment or that existing passage conditions at the project interfere with such recruitment as is needed.

22/(...continued)

Staff included the cost of the training wall in its revised cost estimate for the angled trashrack and fish bypass facilities. As a result, the capital cost of the trashrack increased from the EA's estimate of \$227,000 to \$253,000.

As we have stated, FWS, in its November 8, 1991 letter, indicated that it would be willing to accept, at the existing powerhouse, a trashrack with 1-inch clear spacing, angled 90 degrees to the flow, with an approach velocity of 2 fps or less, plus a fish bypass facility incorporating an existing ice sluice. Thus, immediately before Interior filed its fishway prescription, FWS was willing to concede that the 45-degree angled trashrack and new bypass sluiceway, though preferable, would not be essential at the existing powerhouse, even if a second powerhouse were constructed. As we are amending the license to withdraw authorization of the project expansion, the prescribed facilities would seem even less important, since spillage would continue to occur about 93 percent of the time, and since a high-quality fishery has been maintained under existing project conditions.

FWS estimated that its recommended alternative perpendicular trashrack would cost \$56,000 at 1991 price levels; adjusted for 1994 price levels, the cost would rise to \$62,000, considerably less than the cost of the 45-degree angled trashracks that have been prescribed pursuant to Section 18. At the time it submitted its fishway prescription, Interior was not presented with the possibility that the project might be licensed without the additional construction. Under these circumstances, Niagara Mohawk may wish to pursue with Interior and FWS the options of retaining the existing trashrack or of installing the less expensive facilities in place of those that have been prescribed. However, as fishways properly prescribed under Section 18 are mandatory, we are required to direct construction and operation of the 45-degree angled trashrack and bypass sluice at the existing powerhouse unless Interior modifies its prescription.

As a result of our reconsideration of Interior's prescription, we will modify or add appropriate license articles to withdraw authorization of the proposed project expansion, to require the construction, operation, and maintenance of the fishway Interior has prescribed at the existing powerhouse, and to include such other conditions as we have discussed. Although we are only amending this license here, not issuing it, the description of project works and the license articles require substantial revision and, as revised, are set out here in their entirety. 23/

23/ Niagara Mohawk has already been granted a two-year extension of the deadline for commencement of construction, as permitted by Section 13 of the FPA. Our amendment of this license does not afford Niagara Mohawk the right to an additional extension of this deadline.

Revised findings:

On reconsideration, based on our review of the agency and public comments filed for this project, Interior's fishway prescriptions, and staff's independent analyses for the proposed and existing project facilities, pursuant to Sections 4(e), 10(a)(1), and 10(a)(2) of the FPA, we conclude that the existing Valeville Project as it would be modified by the license articles, and as the articles are amended herein, is best adapted to a comprehensive plan for the proper use, conservation, and development of the Raquette River and other project-related resources.

The mitigative and enhancement measures that we are requiring include: (1) immediate run-of-river project operation to minimize upstream and downstream water-level fluctuations for the protection and enhancement of aquatic resources; (2) preparation of a flow monitoring plan to ensure compliance with run-of-river operation; (3) installation, at the existing powerhouse, in accordance with Interior's prescription, of a trashrack set at 45 degrees to the direction of flow with 1-inch bar spacing, and an average approach velocity of no more than 2.0 feet per second (fps), for the protection of resident fishes; and (4) construction of recreation facilities to provide public access to the Raquette River at the project.

An EA was issued for this project, which included background information, analysis of impacts, and support for license articles. Based on the information contained therein, we conclude that the existing project, with Interior's fishway prescription, and as modified by the license articles included herein, would not cause a significant impact on the environment. Amendment of this license is not a major federal action significantly affecting the quality of the human environment.

The design of this project is consistent with the engineering standards governing dam safety. The project will be safe if constructed, operated and maintained in accordance with the requirements of this license. Analysis of related issues was provided in the Safety and Dam Assessment, issued previously.

Therefore, we conclude that the project would not conflict with any planned or authorized development, and would be best adapted to comprehensive development of the waterway for beneficial public uses.

License Term

The Director issued a license for a term of 50 years, effective February 1, 1982. 24/ Subsequently, in City of Danville, Virginia, 58 FERC ¶ 61,318 (1992), the Commission established a new policy regarding license terms for existing projects that were required to be licensed earlier. For post-1935 projects located on navigable streams, and involving an existing dam and very little new construction, the license term was set at 30 years, and annual charges were to be assessed from the date of project construction. 25/ The Valeville Project now falls within this category, since only the new fishway must be constructed. Therefore, consistent with the Danville policy, we will amend the license term to extend for 30 years, effective February 1, 1992, the first day of the month in which the license was issued. The record indicates that the project was constructed in 1940. 26/ Therefore, we will assess annual charges from January 1, 1941.

Project Retirement

The Commission has issued a Notice of Inquiry (NOI), dated September 15, 1993, requesting comments that address the potential decommissioning of licensed hydropower projects at some future time, based on project-specific circumstances. 27/ The NOI states that the Commission is not proposing new regulations at this time, but is inviting comments on whether new regulations may be appropriate. Alternatively, the Commission may consider issuing a statement of policy addressing the decommissioning of licensed hydropower projects, or take other measures. The Valeville Project may be affected by future actions that the Commission takes with respect to issues raised in the NOI. Therefore, the license includes Article 203, which reserves authority to the Commission to require the licensee to conduct studies, make financial provisions, or otherwise make reasonable provisions for decommissioning of the project in appropriate circumstances.

24/ Under the Commission policy then applicable, the license should have been issued for a 50-year term, effective 30 years before the date of issuance, or February 1, 1962, and annual charges should have been assessed from the date of project construction. See City of Danville, Virginia, 58 FERC ¶ 61,318 (1992) at p. 62,019.

25/ 58 FERC at pp. 62,020-21.

26/ 58 FERC at p. 63,302.

27/ Notice of Inquiry, Project Decommissioning at Relicensing, Docket No. RM93-23-000, September 15, 1993.



By including Article 203, the Commission does not intend to prejudge the outcome of the NOI. We are simply including the article so that we will be in a position to make any lawful and appropriate changes in the terms and conditions of this license, which is being issued during the pendency of the NOI, based on the final outcome of that proceeding.

The Commission orders:

(A) The request for rehearing filed March 9, 1992, by the Department of the Interior, is granted, and the license is amended as provided in the following ordering paragraphs.

(B) Niagara Mohawk's motions to admit additional materials into the record are granted, and its motion to reject Interior's fishway prescription is denied.

(C) This license, as amended, is issued to Niagara Mohawk Power Corporation (licensee), for a period of 30 years, effective February 1, 1992, to modify, operate and maintain the Yaleville Project. This license is subject to the terms and conditions of the Act, which is incorporated by reference as part of this license, and subject to the regulations the Commission issues under the provisions of the Federal Power Act (FPA).

(D) The project consists of:

(1) All lands, to the extent of the licensee's interests in those lands shown by exhibit G:

Exhibit G-	FERC No. 9222-	Showing
1	5	Project Site

(2) Project works consisting of: (a) an existing concrete gravity overflow dam about 170 feet long and 13 feet high, with proposed 2-foot-high flashboards at the crest; (b) an existing concrete gravity flood gate structure, 75 feet long, composed of two stop log gates 15 feet long and 10 feet high, one electrically operated lift gate for water surface control, about 11 feet long by 10 feet high, and three intermediate piers about 3 feet wide and 15 feet high; (c) an existing 67-foot-long intake with 4 timber slide gates, each 10 feet long; (d) an existing concrete and brick powerhouse on the southwest bank, 66 feet long, 37 feet wide and 43 feet high, equipped with two dissimilar open flume Francis units with a total capacity of 700 kW; (e) an existing forebay canal for the existing powerhouse, about 60 feet wide and 275 feet long, connecting with the southwest end of the overflow dam; (f) a reservoir with a surface area of 95 acres and a storage volume of about 720 acre-feet, at a normal water surface elevation of 305.2 feet NGVD; (g) an existing tailrace at the existing powerhouse, about 25 feet wide and 140 feet long;

(h) a 2.3/23-kV transformer for the powerhouse, connecting to an existing transmission line 70 feet long; and (i) appurtenant facilities.

The project works generally described above are more specifically shown and described by those portions of exhibits A and F shown below:

Exhibit A:

Pages A.2-1 through A.2-1 of Exhibit A, filed with the application for license on October 26, 1988, but only to the extent they describe the existing electrical and transmission equipment.

Exhibit F Drawing	FERC No.	Description
Sheet 1	9222-1	General Plan of Project, Dam & Flood Gates
Sheet 2	9222-2	Retaining Walls
Sheet 3	9222-3	Existing Westside Powerhouse

(3) All of the structures, fixtures, equipment or facilities used to operate or maintain the project, all portable property that may be employed in connection with the project, and all riparian or other rights that are necessary or appropriate in the operation or maintenance of the project.

(E) The exhibits A, F, and G described above, to the extent they describe the existing project as modified by the license articles included herein, are approved and made part of this license.

(F) The following sections of the Act are waived and excluded from the license for this minor project:

4(b), except the second sentence; 4(e), insofar as it relates to approval of plans by the Chief of Engineers and the Secretary of the Army; 6, insofar as it relates to public notice and to the acceptance and expression in the license of terms and conditions of the Act that are waived here; 10(c), insofar as it relates to depreciation reserves; 10(d); 10(f); 14, except insofar as the power of condemnation is reserved; 15; 16; 19; 20; and 22.

(G) This license is subject to the articles set forth in Form L-9 (October 1975), entitled "Terms and Conditions of License for Constructed Minor Project Affecting Navigable Waters

of the United States," except article 15, and the following additional articles:

**Article 201.** The Licensee shall pay the United States the following annual charges for the purpose of reimbursing the United States for the cost of administration of Part I of the FPA.

1. From January 1, 1941, through January 31, 1991, an amount determined for each year in accordance with the provisions of the Commission's regulations in effect during each year, and based on the installed capacity (expressed in horsepower) for each year.

2. From February 1, 1992, through the term of the license, an 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 940 horsepower.

**Article 202.** The Licensee shall clear and keep clear to an adequate width all lands along open conduits and shall dispose of all temporary structures, unused timber, brush, refuse, or other material unnecessary for the purposes of the project which result from maintenance, operation, or alteration of the project works. In addition, all trees along the periphery of project reservoirs which may die during operations of the project shall be removed. All clearing of lands and disposal of unnecessary material shall be done with due diligence to the satisfaction of the authorized representative of the Commission and in accordance with appropriate federal, state, and local statutes and regulations.

**Article 203.** The Commission reserves authority, in the context of a rulemaking proceeding or a proceeding specific to this license, to require the licensee at any time to conduct studies, make financial provisions, or otherwise make reasonable provisions for decommissioning of the project. The terms of this article shall be effective unless the Commission, in Docket No. RM93-23, finds that the Commission lacks statutory authority to require such actions, or otherwise determines that the article should be rescinded.

**Article 204.** The Licensee shall commence construction of the project modifications no later than February 9, 1996, and shall complete construction of the modifications no later than February 9, 1998.

**Article 205.** Before starting construction, the Licensee shall review and approve the design of contractor-designed cofferdams and deep excavations and shall make sure construction of cofferdams and deep excavations is consistent with the approved design. At least 30 days before starting construction of any cofferdam, the Licensee shall submit one copy to the

Commission's Regional Director and two copies to the Commission (one of these copies shall be a courtesy copy to the Commission's Director, Division of Dam Safety and Inspections), of the approved cofferdam construction drawings and specifications and the letters of approval.

**Article 206.** The Licensee shall, at least 60 days prior to the start of construction, submit one copy to the Commission's Regional Director 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 final contract drawings and specifications for the installation of new project features of the project, such as trashracks, any water retention structures, and water conveyance structures. The Commission may require changes in the plans and specifications to assure a safe and adequate project. If the Licensee plans substantial changes to location, size, type, or purpose of the water retention structures, powerhouse, or water conveyance structures, the plans and specifications must be accompanied by revised Exhibit F and G drawings, as necessary.

**Article 207.** The Licensee, within 90 days of completion of construction, shall file for approval by the Commission, revised Exhibits A, F, and G, to describe and show the project as built, including all facilities determined, by the Commission, to be necessary and convenient for transmission of all of the project power to the interconnected transmission system.

**Article 208.** The Licensee shall prepare a final erosion and sediment control plan for any areas to be disturbed by the construction of new project facilities. At a minimum, it shall include the elements of the sediment control plan filed July 26, 1990, as it would relate to the modifications to the existing powerhouse and new recreation facilities, with the following additions and modifications.

- (1) Silt fences shall be installed to control sediment runoff at the construction staging areas, disposal site, and recreation facility construction sites.
- (2) All areas disturbed during construction shall be revegetated to provide final stabilization of all lands, and shrubbery indigenous to the area shall be planted around the project substation to improve the appearance of the facility.
- (3) The remnants of a paper mill located on the east side of the river shall be cleaned up and disposed of in conjunction with on-site disposal of spoil material.
- (4) Control measures shall be inspected daily during the construction period and shall be immediately maintained or repaired as necessary.



- (5) A schedule shall be included that shows when, in relation to the various construction phases, the control measures would be implemented and maintained.

The Licensee shall file the final plan and the final drawings, specifications, and schedule for implementing the plan along with the final project drawings and specifications required by article 302. The final drawings, specifications, and schedule for the plan shall be prepared in consultation with the Soil Conservation Service and the New York State Department of Environmental Conservation. The filing shall also include documentation of agency consultation. The Licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations prior to filing the plan with the Commission.

The Commission reserves the authority to require changes to the final plan, drawings, specifications, and schedule to ensure proper control of erosion and discharge of sediment to wetlands and watercourses, and adequate protection of the environmental, scenic, and cultural values of the project area. The Licensee shall implement the controls, and restore and revegetate disturbed areas according to the final plan, drawings, specifications, and schedule, including any changes required by the Commission.

Article 402. The Licensee shall operate the project in a run-of-river mode for the protection of water quality and aquatic resources in the Raquette River. The Licensee shall at all times act to minimize the fluctuation of the reservoir surface elevation by maintaining a discharge from the project so that, at any point in time, flows, as measured immediately downstream from the project tailrace, approximate the sum of inflows to the project reservoir. Run-of-river operation may be temporarily modified if required by operating emergencies beyond the control of the Licensee or for short periods upon mutual agreement between the Licensee, the U.S. Fish and Wildlife Service (FWS), and the New York State Department of Environmental Conservation (DEC). If the flow is so modified, the Licensee shall notify the Commission as soon as possible, but no later than 10 days after each such incident.

Article 403. The Licensee, after consultation with the U.S. Geological Survey (USGS), the U.S. Fish and Wildlife Service (FWS), and the New York State Department of Environmental Conservation (DEC), shall develop a plan to install streamflow monitoring equipment in the project's reservoir and Raquette River to monitor compliance with the run-of-river mode of operation as stipulated by article 402. The plan shall include, but not be limited to, an implementation schedule, the proposed location, design, and calibration of the monitoring equipment, the method of flow data collection, and a provision for providing

flow data to the USGS, the FWS, and the DEC within 30 days from the date of the agency's request for the data.

The Licensee shall include documentation of consultation with the agencies before preparing the plan, copies of agency comments or recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how all the agency comments were accommodated by the plan. The Licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations prior to filing the plan with the Commission.

The Licensee shall file the plan with the Commission for approval at least 90 days prior to any land-disturbing activities and, upon approval, shall implement the streamflow monitoring plan. The Commission reserves the right to require changes to the plan.

Article 404. The licensee shall install, operate, and maintain at the Valeville Project a trashrack angled 45 degrees to the direction flow with an approach velocity of 2 feet per second or less, as measured 1-foot in front of the trashrack, and a downstream fish bypass structure, with flows through the bypass structure of at least 20 cubic feet per second (cfs) or 2 percent of the maximum hydraulic capacity of the powerhouse, whichever is greater, to reduce entrainment of fish into the project's intake and to provide efficient downstream fish passage. The licensee, within 180 days after the issuance of a license, shall file for Commission approval a plan for downstream fish passage that includes functional design drawings of the angled trashrack and fish bypass structure at the project, quantification of the flows required to operate the bypass structure, a schedule to install the trashrack and fish bypass structure at the project, and a plan of operation, including specification of periods of the fishway's operation, as agreed to by the U.S. Fish and Wildlife Service (FWS). The plan shall also include a provision to allow personnel from the U.S. Fish and Wildlife Service (FWS) and the New York State Department of Environmental Conservation (DEC) to inspect the downstream fish passage facilities and the project's records pertaining to the construction, operation, and maintenance of the facilities.

The plan shall be prepared in consultation with the FWS and the DEC. The licensee shall include documentation of consultation with those agencies before preparing the plan, copies of agency comments or recommendations on the completed plan after it has been prepared and provided to the agencies, and specific descriptions of how the agency's comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations prior to filing the plan with the Commission. Upon approval by the Commission, the licensee shall implement the downstream fish

passage plan. The Commission reserves the right to require changes to the plan. The licensee shall file as-built drawings of the angled trashracks and downstream fish passage facilities pursuant to Article 304.

**Article 405.** The Licensee, before starting any land-clearing or ground-disturbing activities within the project boundaries, other than those specifically authorized in this license, including recreation developments at the project, shall consult with the State Historic Preservation Officer (SHPO).

If the Licensee discovers previously unidentified archeological or historic properties during the course of constructing or developing project works or other facilities at the project, the Licensee shall stop all land-clearing and ground-disturbing activities in the vicinity of the properties and consult with the SHPO.

In either instance, the Licensee shall file for Commission approval a cultural resource management plan (plan) prepared by a qualified cultural resource specialist after having consulted with the SHPO. The plan shall include the following items: (1) a description of each discovered property indicating whether it is listed on or eligible to be listed on the National Register of Historic Places; (2) a description of the potential effect on each discovered property; (3) proposed measures for avoiding or mitigating effects; (4) documentation of the nature and extent of consultation; and (5) a schedule for mitigating effects and conducting additional studies. The Commission may require changes to the plan.

The Licensee shall not begin land-clearing or land-disturbing activities, other than those specifically authorized in this license, or resume such activities in the vicinity of a property, discovered during construction or operation, until informed that the requirements of this article have been fulfilled.

**Article 406.** No later than February 9, 1998, the Licensee shall complete construction of and provide for the operation and maintenance of the recreation facilities shown on sheet 1-A, Conceptual Plan for Recreation Facilities, in Exhibit-E of the Licensee's application. Specifically, the Licensee shall provide the following: (1) a canoe portage with put-in and take-out areas to accommodate car-top boats; (2) a parking area; and (3) a picnic area.

The Licensee shall construct the facilities after consultation with the New York Department of Environmental Conservation (DEC). The Licensee shall permit fishing access along the entire length of the project's east bank and shall install appropriate handrails or fencing to ensure public safety.

The Licensee shall consider the needs of the disabled in the final designs for all recreation facilities at the project.

The recreation facilities shall be shown on the as-built drawings filed pursuant to this license. The Licensee shall file a report with the as-built drawings which shall include the entity responsible for operation and maintenance of the facilities and documentation of consultation and copies of comments and recommendations on the report after it has been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the report. The Licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations prior to filing the report with the Commission. If the Licensee does not adopt a recommendation, the filing shall include the Licensee's reasons, based on project-specific information.

**Article 407.** (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 of 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 or 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 waters 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; and (3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline. 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 its 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 rights-of-way across, or leases of, project lands for: (1) replacement, expansion, realignment, or maintenance of bridges and roads for which 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 marinas that can accommodate no more than 10 watercraft at a time and are located at least one-half mile 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 the edge of the project reservoir at normal maximum 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 45 days before conveying any interest in project lands under this paragraph (d), the Licensee must submit a letter to the Director, Office of Hydropower Licensing, 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 covenants running with the land adequate to ensure that: (i) the use of the lands conveyed shall not endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; and (ii) the grantee shall take all reasonable precautions to insure 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.

(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 changed 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 from 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, proposals 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.

**Article 408.** Authority is reserved to the Commission to require the Licensee to construct, operate and maintain, or to provide for the construction, operation, and maintenance of, such upstream fishways, as may be prescribed by the Secretary of the Interior, pursuant to Section 18 of the Federal Power Act.

(H) 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.

(I) 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 FPA. The filing of a request for rehearing does not operate as a stay of the effective date of this order on or 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 order.

By the Commission.

( S E A L )

  
Linwood A. Watson, Jr.,  
Acting Secretary.