

77 FERC ¶ 61,306

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. 2569-004

ORDER APPROVING SETTLEMENT OFFER
AND ISSUING NEW LICENSE

(Issued December 24, 1996)

The Niagara Mohawk Power Corporation (Niagara Mohawk), an investor-owned utility that sells electricity throughout upstate New York, applied, on November 27, 1991, for a new license, 1/ under Sections 4(e) and 15 of the Federal Power Act (FPA), 16 U.S.C. §§ 797(e) and 808, to continue to operate and maintain the 29.6-megawatt (MW) Black River Hydroelectric Project No. 2569, located on the Black River, 2/ in Jefferson County, New York. The project has five developments spanning approximately 17 miles: the 5.4-MW Herrings Development, at river mile 27.5, in the Towns of Wilna and Champion and the Village of Herrings; the 10.8-MW Deferiet Development, at river mile 26, in the Towns of Wilna and Champion and the Village of Deferiet; the 5.4-MW Kamargo Development, at river mile 17, in the Towns of LeRay and Rutland and the Village of Black River; the 6.0-MW Black River Development, at river mile 15, in the Towns of LeRay and Rutland and the Village of Black River; and the 2.0-MW Sewalls Development, at river mile 10, in the City of Watertown (Watertown).

- 1/ The Commission issued the original license to Niagara Mohawk on September 15, 1977. 59 FPC 1935, 1936 (1977). The original license expired on December 31, 1993, and since then, the project has operated under annual license. See Section 15(a)(1) of the FPA, 16 U.S.C. § 808(1). On January 21, 1994, the Commission Secretary issued notice authorizing continued operation of the project pending the disposition of Niagara Mohawk's application. 59 F.R. 10125 (March 3, 1994); 66 FERC ¶ 61,145 (1994).
- 2/ The Commission had previously found the Black River to be navigable under the FPA from its mouth at Lake Ontario to at least Lyons Falls, at river mile 72, beyond which the river traverses mountainous area. See Frank E. Peacock, 32 FPC 1101, 1102 (1964). Section 23(b)(1) of the FPA, 16 U.S.C. § 817(1), therefore requires the Black River Project to be licensed.

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Niagara Mohawk amended its new license application by filing a Settlement Offer 3/ that it had negotiated with the entities interested in this relicense proceeding and in the contemporaneous relicense proceeding for the adjacent Beebee Island Project No. 2538, at river mile 9, licensed to Beebee Island Corporation (Beebee Island). 4/ (Niagara Mohawk is the majority stockholder of Beebee Island.) The Settlement Offer contains certain environmental measures. We are approving the Settlement Offer and incorporating all appropriate provisions thereof into this 30-year new license.

I. PROCEDURAL BACKGROUND

Following publication of our December 16, 1992 notice that Niagara Mohawk had filed a new license application, 5/ the following entities filed timely motions to intervene in the proceeding: the U.S. Department of the Interior (Interior), presenting the views of the U.S. Fish and Wildlife Service (FWS) and the National Park service (NPS); the New York State Department of Environmental Conservation (NYSDEC); Watertown; 6/ Beebee Island; the Black Clawson Company (Black Clawson); 7/ the Adirondack Mountain Club (Adirondack); and,

3/ The Black River Project, FERC No. 2569, of Niagara Mohawk Power Corporation and Beebee Island Project, FERC No. 2538, of Beebee Island Corporation, Settlement Offer, September 14, 1995, filed on October 13, 1995.

4/ We are issuing a new license for Project No. 2538 concurrently with this new license for Project No. 2569. See ___ FERC ¶ 61,___ (1996).

5/ 58 FR 13471, 13474 (March 11, 1993).

6/ Watertown is the owner and operator of the Watertown Project No. 2442, located on the Black River at river mile 11, between the Sewalls and Black River Developments. Project No. 2442 received a new license, requiring run-of-river operation, on June 16, 1995. 71 FERC ¶ 62,193.

7/ Black Clawson owns land, structures, and riparian rights along the Black River, in the vicinity of the Sewalls Island Development, specifically on the north bank of the North Channel around Sewalls Island, on Sewalls Island itself, and on the south bank of the South Channel around Sewalls Island. Black Clawson was concerned that Niagara Mohawk's initial proposal to repair or recondition the abandoned powerhouse on the North Channel would adversely affect Black Clawson's lands and structures. The Settlement Offer

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jointly, five environmental interest groups, the American Whitewater Affiliation (Whitewater), American Rivers, Inc. (American Rivers), New York Rivers United (New York Rivers), the National Audubon Society, and the Natural Heritage Institute (Heritage) (jointly, the Environmental Associations). 8/

Interior's intervention motion opposed relicense of the project, as proposed in the new license application, because of concerns over fishways, fish injury and mortality caused by entrainment, degradation of aquatic and terrestrial habitats, and the need for better recreation access. Although a signatory to the Settlement Offer, Interior reserves its opposition to license issuance. 9/

NYSDEC, on November 19, 1992, denied Niagara Mohawk's request for water quality certification, a statutory prerequisite of licensing, in this and eight other Niagara Mohawk relicensing proceedings. 10/ Negotiations ensued in which

7/(...continued)

withdraws the proposed expansion at the Sewalls Development. Since filing its motion to intervene, Black Clawson made no further filings in this proceeding.

8/ These motions to intervene were timely and unopposed and therefore granted automatically under Rule 214(c)(1) of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214(c)(1) (1996).

9/ FWS' April 8, 1996 filing with the Commission, commenting on the Draft Environmental Assessment. FWS stated that Interior would not oppose new licenses for the Beebee Island and Black River Projects if the licenses were consistent with the Settlement Offer, but that the Draft EA had not included the draft license articles for FWS to review for consistency.

10/ The eight other Niagara Mohawk proceedings are: Beaver Project No. 2645, which received a new license on August 2, 1996, 76 FERC ¶ 61,152, reh'g pending, unpublished order granting rehearing for further consideration, issued September 19, 1996; E.J. West Project No. 2318; Middle Raquette River Project No. 2320; Lower Raquette River No. 2330; Oswego River Project No. 2474; Hudson River Project No. 2482; School Street Project No. 2539; and Hoosic River Project No. 2616. All nine projects were the subject of a Black River Fish Entrainment and Mortality Study, conducted by Kleinschmidt Associates. For the Black River Project, the final report (Black River Project, FERC

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intervenors in this relicense proceeding, the related Beebee Island relicense proceeding, and the water quality certification proceedings were invited to participate. For the Beebee and Black River Projects, these negotiations took place between September 1994 and September 1995, and culminated in settlement agreements.

Niagara Mohawk filed the Settlement Offer containing the agreements pertaining to this project and the Beebee Island Project, together with an explanatory statement, on October 13, 1995, pursuant to Commission Rule 602. 11/ The Settlement Offer signatories are: Niagara Mohawk, Beebee Island, NPS, FWS, NYSDEC, Adirondack, Whitewater, American Rivers, New York Rivers, Heritage, the New York Council of Trout Unlimited, and the New York State Conservation Council.

On October 24, 1995, the Commission's staff issued notice that the Black River Project new license application, as modified by the Settlement Offer, was ready for environmental analysis. 12/ Felts Mills Energy Partners L.P. (Felts Mills), on December 22, 1995, filed a motion for late intervention in this and the Beebee Island Project relicense proceedings, and requested dismissal of the Settlement Offer, claiming that the Settlement Offer conflicts with its license application for the proposed Felts Mills Hydroelectric Project No. 4715. By unpublished order issued January 30, 1996, the Secretary granted Felts Mills late intervention.

The Commission's staff issued the Draft Environmental Assessment for the Beebee Island and the Black River Hydroelectric Projects (Draft EA) on March 18, 1996. 13/ Niagara Mohawk, FWS, NYSDEC, New York Rivers, and Adirondack filed comments on the Draft EA. Interior, Adirondack and New York Rivers had filed comments previously on the Settlement Offer. The final Environmental Assessment (EA), issued on September 27, 1996, 14/ and made part of this order, responds to all those comments. The EA contains background information

10/ (...continued)

No. 2569, Fish Entrainment and Mortality Study, Final Report, Kleinschmidt Associates, Pittsfield, Maine, January 12, 1996) was filed on January 16, 1996.

11/ 18 C.F.R. § 385.602 (1996).

12/ 60 FR 56992, 56993 (Nov. 13, 1995).

13/ 61 FR 11823 (March 22, 1996).

14/ See Notice of Issuance, 61 FR 51697 (Oct. 3, 1996).

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and analysis of environmental impacts and of the need for power, and provides the basis for our finding that continued operation of both projects will have no significant impact on the environment. 15/

Felts Mills opposes the Settlement Offer because it would establish the Black River Fund, which a Black River Advisory Council would use to fund, inter alia, the purchase and dedication to conservation purposes of parcels of land that are located within the project boundaries of Felts Mills' proposed Felts Mills Hydroelectric Project No. 4715. 16/ Felts Mills argues that because these lands cannot be both preserved for conservation and licensed for development, our approval of the Settlement Offer necessarily precludes issuance of a license to develop the Felts Mills site. We find that approval of the Settlement Offer does not preclude licensing the Felts Mills Project.

15/ On November 6, 7, and 12, 1996, respectively, New York Rivers, FWS, and Niagara Mohawk filed subsequent comments on the EA.

16/ The proposed Felts Mills Project comprises two developments located at river miles 19.2 and 21.7 of the Black River at two partially-breached dams, which Felts Mills proposes to refurbish, and the site of a third breached dam in between the two other dams, which Felts Mills proposes to demolish. The site of the proposed Felts Mill Project lies between the Black River Project's Deferiet and Kamargo Developments, approximately ten miles upstream from the Beebee Island Project. The EA for the Black River and Beebee Island projects and the environmental impact statement for the Felts Mills Project, issued September 1996, analyze cumulative impacts of the three projects. The Black River/Beebee Island EA (section V.B.) finds no major cumulative impacts of the three projects and includes, by reference, the Felts Mills EIS, which makes specific findings of no significant cumulative impacts on water, terrestrial, transportation, and cultural resources, and findings of positive impacts on socioeconomic and recreation resources. Since the three projects will not contribute to cumulative adverse impacts, and since, as discussed below (see sections VI and VII, infra, and section VII of the Beebee Island order, issued contemporaneously with this order), the projects do not conflict, we are processing the application for the proposed the Felts Mills Project separately from the applications for the Beebee Island and Black River projects. See, e.g., Jack M. Fuls, 32 FERC ¶ 61,424 at pp. 61,934-35 (1985).

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We have fully considered the Settlement Offer, all the motions and comments of the above-named organizations, and the staff's conclusions and recommendations in the EA in determining to issue a new license for the Black River Project.

II. PROJECT DESCRIPTION

The five developments of the Black River Project were constructed or were converted from hydromechanical to hydroelectric plants between 1920 and 1925. The project is one of ten existing or proposed hydroelectric projects on the lower reaches of the Black River, between Carthage, New York, and the river's mouth at Lake Ontario. 17/

All five developments operate run-of-river with pondage, 18/ and are subject to flood control and flow augmentation regulation by upstream storage projects, principally the Hudson River-Black River Regulating District's (Hudson-Black) Stillwater Reservoir Project No. 6743, located on the Beaver River. 19/

All project turbines are manually controlled, and their gate openings to admit water manually set. Typically, they operate at best gate (the discharge at which a turbine-generator unit operates most efficiently), which is normally 85 to 90 percent of full gate (the maximum possible discharge through a turbine-generator unit). When the flow available for generation at a development exceeds the best gate of one turbine but does not

17/ These dams and their associated hydroelectric plants are shown in Figure 2 and Table 5 of the Environmental Assessment issued in this proceeding.

18/ Niagara Mohawk explains run-of-river with pondage as each development utilizing its turbines efficiently, but with minimal impoundment fluctuations, so that normal discharge from the development fluctuates above or below the immediate river flow. License Application at p. B-3.

19/ On March 16, 1984, Hudson-Black was granted an exemption from licensing under Part I of the FPA for the 1.2-MW Stillwater Reservoir Project No. 6743. See 26 FERC ¶ 62,247. The Stillwater Reservoir, located at the headwaters of the Beaver River, is the largest regulating body of water in the Black River Basin. It is primarily operated for flood control and flow augmentation, with a targeted minimum flow of 1,000 cubic feet per second at the Watertown U.S. Geological Survey gaging station, located approximately two miles upstream of the Beebe Island Project.

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exceed development capacity, another turbine utilizes the excess available flow until the development's headpond is drawn down to its pre-set minimum elevation.

Ponding operations are controlled by seasonal wooden flashboards at all developments except Sewells (which has none). Niagara Mohawk installs the flashboards each year, in May or June. Typically, these flashboards wear out and are lost during the following January or February. 20/

Each development is described below in descending river mile order. Ordering Paragraph (B) contains more detailed description.

Herrings Development

The Herrings Development's principal features consist of: (1) a 512-foot-long by 25-foot-high "L"-shaped concrete gravity dam with crest elevation of 679.1 feet U.S. Geological Survey Datum (USGS), topped by 1-foot-high wooden flashboards; (2) an impoundment with surface area of 140 acres at normal maximum surface elevation of 680.1 feet USGS, and gross storage capacity of 669.4 acre-feet; (3) an intake structure, integral with the powerhouse, having a 9-foot-wide stop-log waste sluice upstream of the trashracks; (4) a 101-foot-wide by 31-foot-high trashrack; (5) an 11-foot-wide stop-log waste sluice downstream of the trashracks; (6) nine motor-operated slide gates; and (7) a 137-foot-wide, 33-foot-long brick and masonry powerhouse containing three vertical generating units, each rated at 1,800 kilowatts (kW), for a total installed capacity of 5.4 MW.

Deferiet Development

The Deferiet Development's principal features consist of: (1) a 695-foot-long dam having a 503-foot-long by 18-foot-high Ambursen dam section with crest elevation of 656 feet USGS, topped by 3-foot-high wooden flashboards, and a 192-foot-long sluice gate section that houses eleven 14-foot-wide stop-log bays; (2) an impoundment with surface area of 70 acres at normal maximum surface elevation of 659 feet USGS, and gross storage capacity of 405.0 acre-feet; (3) a 180-foot-wide concrete power canal headworks section housing 20 5-foot-wide by 12.5-foot-high timber slide gates; (4) a 4,200-foot-long power canal; (5) an intake structure, integral with the powerhouse, having a 108-foot-wide by 27-foot-high trashrack, three slide gates, and, adjacent to the trashracks, an 11-foot-wide ice sluice controlled by stop-logs; and (6) a 145.5-foot-wide by 92.5-foot-long

20/ License Application at pp. B-2 to B-4.

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powerhouse containing three vertical generating units, each rated at 3,600 kW for a total installed capacity of 10.8 MW.

Kamargo Development

The Kamargo Development's principal features consist of: (1) a dam consisting of a 647-foot-long by 12-foot-high concrete gravity spillway section with crest elevation of 561.8 feet USGS, topped by 2-foot-high wooden flashboards, a 150-foot-long non-overflow section with crest elevation of 570.0 feet USGS, and a 141-foot-long power canal headworks structure containing fourteen 8-foot-wide by 11-foot-high wooden headgates, at the western end of Poors Island; (2) an impoundment with surface area of 40 acres at normal maximum surface elevation of 563.8 feet USGS, and gross storage capacity of 359.5 acre feet.; (3) a 3,850-foot-long unlined power canal, around the south edge of Poors Island, containing a 143-foot-long bulkhead section at the east end of Poors Island; (4) a 580-foot-long concrete forebay channel at Mill Island, comprised of a 190-foot-long concrete gravity overflow section, a 230-foot-long concrete gravity overflow section topped with 1-foot wooden flashboards, and a 160-foot-long side channel spillway section, equipped with twelve 11-foot-wide stop-log bays; and (5) a 97.5-foot-high by 37-foot-long brick and masonry powerhouse containing three vertical generating units, each rated at 1,800 kW for a total installed capacity of 5.4 MW.

Black River Development

The Black River Development's principal features consist of: (1) a 327.5-foot-long by 16-foot-high horseshoe-shaped dam with a concrete retaining wall abutment, a 36.5-foot-long gated section with two sluice gates, and a 291-foot-long by 25-foot-high concrete gravity spillway with crest elevation of 534 feet USGS, topped by 2-foot-high flashboards; (2) an impoundment with surface area of 25 acres at normal maximum surface elevation of 536.0 feet USGS, and gross storage capacity of 123.0 acre feet; (3) an 80-foot-long concrete power canal headworks structure with twelve timber slide gates and one other gate; (4) a 2,250-foot-long power canal; and (5) an 118-foot-wide by 66-foot-long powerhouse containing three vertical generating units, each rated at 2,000 kW, for a total installed capacity of 6 MW.

Sewalls Development

The Sewalls Development's principal features consist of: (1) a 343-foot-long by 15.5-foot-high concrete gravity dam across the Black River's channel to the south of Sewalls Island, with crest elevation of 463.9 feet USGS; (2) a small impoundment with surface area of 4.0 acres at normal maximum surface elevation of 463.9 feet USGS, and gross storage capacity of 48.0 acre feet;

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(3) a 65.5-foot-long power canal headworks structure with two stop-log bays and two automated steel slide gates; (4) a 400-foot-long and 30- to 55-foot-wide power canal, whose wall adjacent to the river has a permanent crest elevation of 463 feet USGS and is equipped with 2-foot-high flashboards along its entire length; (5) an intake structure at the powerhouse having four steel slide gates; and (6) an 81-foot-wide by 32-foot-long powerhouse, on the south channel, containing two vertical generating units, each rated at 1,000 kW, for a total installed capacity of 2 MW. The project also has a 90-foot-long by 18.5-foot-high concrete gravity dam across the Black River's channel to the north of Sewalls Island, with crest elevation of 463.9 feet USGS, and abandoned headworks and an abandoned powerhouse.

III. THE SETTLEMENT OFFER

The Settlement Offer treats project operation, fish and wildlife resources, water quality, recreation, lands management and ownership, and aesthetics. Its provisions, in these areas, supersede any conflicting proposals made by Niagara Mohawk in its new license application and subsequent submittals. 21/ Niagara Mohawk's proposals not in conflict with the Settlement Offer are maintained. The Settlement Offer maintains all recreational features proposed by Niagara Mohawk and adds to them.

The Settlement Offer resolves a range of resource use issues. For this new license, we consider only those terms that apply to the Black River Project and not those relating solely to the Beebee Island Project. While, absent the Settlement Offer, we may not have conditioned the Black River new license with all the terms we herein approve, we conclude that the agreement negotiated by the parties is in the public interest. We will include in the license those terms of the Settlement Offer that pertain to the Black River Project, 22/ modified to accord

21/ Niagara Mohawk filed responses to additional information requests, reports, studies, and other information concerning its new license application between March 1992 and February 1996. Among these were the various preliminary and supplemental fishery studies, that culminated in the noted final report on fish entrainment and mortality report, filed on January 16, 1996.

22/ Accordingly, our approval of the Settlement Offer does not create a precedent on any specific matters thereunder.

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with our policies, together with provisions enabling us to ensure compliance with all license conditions. 23/

We emphasize that the Settlement Offer's provisions, such as the dispute resolution process, cannot interfere with Niagara Mohawk's compliance with its license. 24/ The licensee must comply with Commission orders, even when an order relates to a matter currently subject to dispute resolution. The licensee cannot perform actions subject to Commission approval without first receiving Commission authorization even if the result of the dispute resolution process requires these actions.

IV. APPROVAL OF THE SETTLEMENT OFFER PROVISIONS

We describe here the Settlement Offer's provisions for the Black River Project new license, followed by how our license articles implement them, with any needed modifications.

A. Withdrawn Proposals

The Settlement Offer withdraws Niagara Mohawk's two proposals intended to increase project generation: construction of a new powerhouse and generating facility at the Sewalls Development, on the North Channel of the Black River, which would have increased installed capacity there by 1.2 MW; and erection of pneumatic flashboards at the Deferiet, Kamargo, and Black River Developments, which would have increased these developments' annual generation by 2,280 megawatt hours (MWh), 2,330 MWh, and 1,620 MWh, respectively.

B. Project Operations

1. Impoundment Levels

The Settlement Offer requires maintenance of project impoundment levels no lower than 0.5 foot below the permanent crest of each development's dam or below the top of the flashboards, when the dam is so equipped. Niagara Mohawk may modify this flow during operating emergencies, or for short time periods with the agreement of NYSDEC, and with notification by Niagara Mohawk to FWS.

23/ See order approving settlement agreement and issuing new license in Niagara Mohawk Power Corporation, supra, 76 FERC at p. 61,833, citing Consumers Power Co., 68 FERC ¶ 61,077 (1994).

24/ Consumers Power Co., supra, 68 FERC at pp. 61,372, 61,374.

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At the Herrings Development, between May 1 and October 1, and when Black River flow is between 1400 cubic feet per second (cfs) and 1900 cfs, the Settlement Offer requires Niagara Mohawk to use its best efforts to maintain the development's impoundment within 0.2 foot of the dam's crest or the flashboards' top. The purpose is to minimize fluctuating flows in the Black River below the adjacent Deferiet Development, 1.5 miles downstream. Niagara Mohawk will submit an annual report of its efforts to maintain the Herrings Development impoundment levels.

At the Sewalls Development, the Settlement Offer requires Niagara Mohawk to maintain run-of-river operation, between May 1 and September 30 whenever river flow is below 2,000 cfs. The Settlement Offer defines run-of-river as active storage volume of zero cubic feet at all times, and the instantaneous sum of all discharges and releases from each impoundment to equal the instantaneous inflow into that impoundment, to the extent practicable. During such run-of-river operation, Niagara Mohawk may maintain constant spillage flows above the dam's permanent crest elevation to provide the run-of-river operation.

Article 401 requires the licensee to restrict all impoundment fluctuations to a lower limit of 0.5 foot below the impoundment dam's crest or the top of the impoundment's flashboards, when mounted. It requires the licensee to use its best efforts to restrict impoundment fluctuations at the Herrings Development to a lower limit of 0.2 foot, from May 1 through September 30, when Black River flows are between 1400 cfs and 1900 cfs, and to make annual report of its success.

Article 401 also takes cognizance of operating emergencies that prevent compliance, and permits the licensee to modify project flows then, but requires the licensee to notify the Commission, FWS and NYSDEC promptly. It similarly permits modification of project flows for short time periods, with the prior consent of NYSDEC and prompt notification to the Commission and FWS.

2. Flashboards

To protect fish spawning in and birds nesting around the project impoundments, the Settlement Offer requires Niagara Mohawk to install flashboards at each development by May 1, or as soon thereafter as safely possible. Article 403 adopts this requirement. Should flashboard problems prevent compliance with the impoundment level requirement, Article 401 requires the licensee to so inform the Commission, FWS and NYSDEC, and to propose remedial action.

3. Run-of-River

Article 402 requires the licensee to operate the Sewalls Development as run-of-river from May 1 through September 30 at times when Black River flows are below 2,000 cfs. It takes cognizance of operating emergencies that prevent compliance, but requires prompt notification to the Commission, FWS and NYSDEC. Similarly, it permits short-time modifications of the required run-of-river flow with the consent of NYSDEC and prompt notification to the Commission and FWS.

C. Flows

1. Continuous flow

The Settlement Offer requires Niagara Mohawk to provide a continuous flow of not less than 1,000 cfs through the entire project, except when inflow to the project is below 1,000 cfs. Then, inflow will determine and equal outflow. Article 404 requires that this standard be met within 270 days of license issuance.

2. Minimum flows

The Settlement Offer requires specific minimum flow releases at identified locations to enable downstream fish passage and to foster aquatic habitat in the project's bypassed reaches.

At the Herrings Development, Niagara Mohawk is to release a year-round minimum flow of 20 cfs through the stop-log section, between the dam and the trashracks, into the river channel to enable fish to move downstream.

At the Deferiet Development, where bypassed reach flows are provided by leakage, releases over the dam, and releases through the stop-log structure, Niagara Mohawk is to provide, regardless of leakage flows, a year-round minimum flow of 45 cfs through the modified stop-log structure at the dam to provide for downstream fish movement. During the walleye spawning season, ^{25/} Niagara Mohawk is to provide an instream flow into the bypassed reach of not less than 800 cfs. Throughout the rest of the year, Niagara Mohawk is to maintain flows there of not less than 245 cfs. At the end of the walleye spawning season, Niagara

^{25/} The Settlement Offer, at p. 3, defines walleye spawning season as that period of the year commencing on March 15 and continuing until 30 days after the average daily water temperature of 50 degrees Fahrenheit is reached or exceeded on four consecutive days after April 15, unless modified by mutual agreement between FWS and NYSDEC.

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Mohawk is to ramp down by increments no greater than 200 cfs and at no less than four hour intervals. This ramping regime may be changed after field inspections by NYSDEC and FWS during the first year after flow release structures (see item C.3, below) are operational at the dam.

At the Kamargo Development, Niagara Mohawk is to release a year-round instream flow of not less than 120 cfs into the bypassed reach through a notched section in the dam.

At the Black River Development, during walleye spawning season, Niagara Mohawk is to release instream flows into the bypassed reach of not less than 300 cfs, utilizing a notched dam and low level sluice-gate(s). During the balance of the year, Niagara Mohawk is to release at least 80 cfs through the notch in the dam to enable downstream fish movement. At the end of the walleye spawning season, Niagara Mohawk is to ramp down by increments no greater than 75 cfs at no less than four hour intervals. This ramping regime may be changed after field inspections by NYSDEC and FWS during the first year after the flow release structures (see item C.3, below) are operational at the dam.

At the Sewalls Development, Niagara is to provide year-round instream flows into both the North and South Channels' bypassed reaches. In the North Channel, the total release is to be maintained at 32 cfs. At least 20 cfs must come from a notch in the dam, to provide for downstream fish movement, with the remainder from leakage from the dam, which is now 12 cfs. In the South Channel, the instream flow is to be maintained at 137 cfs, the existing leakage from the dam. Should either leakage amount be reduced in the future, Niagara Mohawk is to provide additional release mechanisms to maintain the respective 32 cfs and 137 cfs flows into the North and South Channels' bypassed reaches.

Article 405 adopts these requirements. Additionally, it provides that these minimum flow releases may be modified temporarily for operating emergencies, or, for short periods of time, with the prior consent of NYSDEC and subsequent prompt notification to the Commission and FWS.

Article 405 also requires the licensee, during the first year that the required flow release structures are operational at the Deferiet and Black River Developments, to conduct field investigations there to determine the effects of the ramping regimens on spawning walleye. After consultation with FWS and NYSDEC, the licensee is to report its observations to the Commission, along with any recommendations for changes to the required ramping schedules.

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3. Flow release structures

The Settlement Offer requires installation of flow release structures that are designed to minimize adverse effects to downstream passing fish while being cost effective and reasonable. Final design details, device locations, and other fish conveyance measures, such as plunge pools and piping, are to be based on 1996 field inspections and the judgment of FWS and NYSDEC. Niagara Mohawk is to install approved devices within two years of license issuance.

Article 406 requires the licensee to file, within one year of license issuance, its plan and installation schedule for constructing flow release structures and fish conveyance measures in conformity with the Settlement Offer's conditions, and after consultation with FWS and NYSDEC. It requires installation of the structures and measures within two years of Commission approval of the plan.

4. Staff gages

The Settlement Offer requires Niagara Mohawk to install permanent staff gages to allow independent verification of headpond and tailwater elevations to the nearest 0.1 foot. Niagara Mohawk is to provide FWS and NYSDEC staff and representatives with access to these gages. Article 407 adopts these requirements.

5. Flow monitoring plan

The Settlement Offer requires Niagara Mohawk to develop a flow monitoring plan, after consultation with all signatories and within six months of license issuance, that includes installation and maintenance of a U.S. Geological Survey gaging station, unless Niagara Mohawk provides justification for an alternative gaging system. The plan is to also include all gages or other equipment needed to determine the stage and/or flow of the Black River, all project flows, and headpond and tailwater elevations. Niagara Mohawk is also to calibrate stage versus discharge ratings when rating changes occur. Niagara Mohawk is to keep records of the impoundments elevations and all project discharges to NYSDEC's satisfaction and to provide the recorded data as NYSDEC may prescribe. The plan is to be submitted to NYSDEC for approval, and all equipment is to be made fully operational within one year of license issuance.

Article 408 requires the licensee to file, within 180 days of license issuance and for Commission approval, a plan to monitor its compliance with the flow requirements of this license. The plan is to include a gaging system, calibration, a schedule for making the gages and ancillary equipment operational

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within one year, and provisions for contact people to respond to questions about flow or impoundment conditions. The article requires the licensee to consult with FWS, NYSDEC, and the Advisory Council prior to filing its plan and schedule. The Commission reserves the right to make changes to the plan and schedule, and requires their implementation within one year of approval.

Article 409 requires the licensee to file, within 180 days of license issuance and for Commission approval, a plan describing its current or proposed practices for keeping records of impoundment levels and water flows, and their changes and rates of change. The plan is also to include the licensee's method of advance notification to FWS, NYSDEC, and the Advisory Council before the licensee proposes to the Commission any future changes to the record keeping practices. The plan must also accommodate FWS, NYSDEC and Advisory Council requests for access to the records both for inspection and for copies. The licensee is required to consult with FWS, NYSDEC and the Advisory Council before filing the plan.

D. Fish and Wildlife Protection

1. Fish Entrainment

To prevent entrainment of adult fish, the Settlement Offer requires Niagara Mohawk to replace the existing trashracks at the five developments of the Black River Project with trashracks having two-inch clearance bar spacing. From May 1 through October 1, Niagara Mohawk is to install overlays having one-inch clearance bar spacing over the trashracks in the top half of the water column, except at the Sewalls Development, where only two-inch clearance bar spacing is required. Installation of the new trashracks and overlays at the Black River Project's five developments and at the Beebee Island Project is to begin within two years of license issuance, for both projects, and is to be completed, for both projects, by twelve years from the date the two licenses issue.

Article 410 requires the licensee, within one year of license issuance, and after consultation with FWS and NYSDEC, to file, for Commission approval, design drawings for permanent 2-inch-clearance bar spacing trashracks and for 1-inch-clearance bar spacing overlays for installation, except at the Sewalls Development, and an implementation schedule. The article also reserves the Commission's right to make changes to the plan and schedule.

2. Fish Passage

The Settlement Offer provides for downstream fish passage via the flow release structures in each development's dam, as described above, under Flows (see item C.2, above). The Settlement Offer does not require upstream fish passage measures.

E. Recreation

The Settlement Offer requires Niagara Mohawk, within two years of license issuance, to provide and maintain the recreational facilities described in its new license application and additional information submittals, and in the Settlement Offer, and to maintain these facilities during the term of the license. Niagara Mohawk is to develop the facilities and other recreational enhancements in consultation with members of the Advisory Council. Table 15 of the EA lists, in detail, the new recreational facilities proposed in the license application and the Settlement Offer. Summary descriptions of the recreational facilities added by the Settlement Offer follow:

1. Herrings Development

At the Herrings Development, Niagara Mohawk is to provide parking and a new portage trail from an existing car-top boat launch 26/ to a put-in below the tailrace. Also, Niagara Mohawk is to provide a new car-top boat launch site at the downstream end of the new portage trail, and overland access to the launch site.

2. Deferiet Development

At the Deferiet Development, Niagara Mohawk is to provide: a new road to a new car-top boat put-in/take-out, with a new parking area, on the north shore of the impoundment; a canoe put-in below the dam; a new canoe put-in in the bypassed reach below the dam with signs there warning of downstream whitewater; a new portage trail between the impoundment take-out and the bypass put-in; well-maintained access to the impoundment's south shore; additional recreational access to the Black River through Niagara Mohawk's land and through land belonging to the Village of Deferiet, in cooperation with the village; and various boater safety measures.

26/ The Settlement Offer, at p. 5, defines a car-top boat as one that requires neither a ramp nor trailer for launching and retrieving.

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3. Kamargo Development

At the Kamargo Development, Niagara Mohawk is to permit shoreline fishing on Poors Island and the north and south shorelines of the power canal, upstream of a boat barrier to be installed. Niagara Mohawk is to replace its proposal for a car-top boat take-out on the north shore of the impoundment with a car-top boat take-out from the impoundment at the upstream end of Poors Island. Additionally, Niagara Mohawk is to: provide a new car-top boat put-in immediately downstream of the canal headgate structure of the power canal; allow passage of car-top boats down a portion of the power canal where water velocities are slow; install a new boat barrier and car-top boat take-out on the Poors Island side of the power canal, about 1,600 feet down the canal from the headgate structure; provide a foot trail from the power canal boat take-out to the proposed Poors Island Recreation Area trail system; provide parking near the Poors Island access bridge; provide a new car-top boat put-in upstream of the Main Street Bridge, adjacent to the existing Black River Village Overlook, and modify the area to allow safe access.

4. Black River Development

In addition to providing the car-top boat launch and take-out as described in its new license application, and to make provision for parking, Niagara Mohawk is to: provide a car-top boat put-in in the upstream area of the bypassed reach and a canoe portage trail; maintain the parking area at an existing picnic area along the bypassed reach; and provide additional and handicapped parking at specified locations. Niagara Mohawk is also to replace its existing security fence with protective railings at the overlook and picnic areas, and at other locations deemed necessary.

5. Sewalls Development

Niagara Mohawk is required to provide a new car-top boat take-out on the south shore of the impoundment, and signage directing to potential downstream put-in locations. Niagara Mohawk's maintenance of run-of-river operation between May 1 and September 1, as described above, will stabilize flow levels downstream and facilitate whitewater boating.

Article 413 requires the licensee to file, within six months of license issuance, a detailed plan and implementation schedule to construct, operate, and maintain recreational features at the project in conformity with its license application, its responses to additional information responses, and the Settlement Offer. The licensee must first consult with appropriate federal, state and local agencies, and with the Advisory Council.

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F. Aesthetics

The Settlement Offer requires Niagara Mohawk to paint or finish in a dark green-brown color all new and replacement fencing, including support structures. It must maintain the color scheme for existing fences or structures that need re-painting.

Article 414 adopts the color scheme requirements. Additionally, Article 413 requires the recreational features to have consistent designs and colors to make a unified system, and Article 415 requires maintenance of the existing wooded areas around the project impoundments and visual screens for the new access road and parking area at the Deferiet Development.

G. Water Quality Certification

The Settlement Offer foresees NYSDEC's issuance of water quality certification, pursuant to Section 401 of the Clean Water Act to the Black River Project. It provides that, to the extent that certification incorporates the Settlement Offer's provisions, or that the Commission incorporates these provisions into the terms and conditions of the issued new license, any signatory may enforce the Settlement Offer's provisions. If the certification or the issued new license contains conditions that conflict with the Settlement Offer's provisions, any signatory may withdraw from the Settlement Offer.

As discussed below (section VI), valid water quality certification conditions become part of an issued license and are enforced by the Commission.

H. Other Provisions

The signatories agreed not to request the Commission to include in the issued license any terms or conditions inconsistent with the Settlement Offer's provisions. The Settlement Offer also provides that if the Commission rejects or modifies the provisions of the Settlement Offer, each signatory has the right to modify or withdraw from the Settlement Offer, but the rest of the agreement would remain in effect.

The Settlement Offer's provisions are to remain in effect during the term of an issued license and any annual license issued subsequently, subject to any authority that the Commission may reserve to itself to require modifications during the term of the new license. Should a signatory wish to modify a term or condition through a license reopener, the signatory must first request all signatories to commence negotiations for 90 days to resolve the issue and to try to agree on modification of the Settlement Offer. Should a dispute arise over the provisions of

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the Settlement Offer, the signatories agree to negotiate in good faith for at least 90 days to resolve the dispute. If resolution can not be attained, the dispute may be referred to the Commission pursuant to the Commission's Rules of Practice and Procedure. As noted (see section III, supra), the dispute resolution process cannot interfere with Niagara Mohawk's compliance with license requirements.

V. ENVIRONMENTAL ANALYSIS

The staff's environmental assessment of Niagara Mohawk's new license application, as amended by the Settlement Offer, analyzed the effects of continued project operation on water quality, maintenance of stable minimum flows, fisheries (including fish passage), vegetation and wildlife, geological resources, recreation, aesthetic resources, and cultural resources.

It concluded that Niagara Mohawk's implementation of the Settlement Offer's proposed project conditions will produce beneficial effects. Reducing fluctuations of impoundment water levels in the project's five impoundments will reduce shoreline erosion and will enhance habitat and reproduction conditions for resident fish. Fish stranding will be reduced, and the more stable wetlands around the impoundments' shorelines will provide increased habitat for birds and other animals. Fish entrainment at the intakes will be reduced and fish passage will be improved. The 1,000 cfs continuous flow and surge control will stabilize riverine fish habitat downstream of the project. Boating, picnicking and other recreational activities will be expanded. Project aesthetics will be enhanced. The project will be subject to mitigation measures to protect aesthetics values.

VI. WATER QUALITY CERTIFICATION

Under Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341 et seq., applicants for federal license or permit for any activity that may result in any discharge into navigable waters of the United States must request, from the state in which the discharge originates, certification that any such discharge will comply with applicable state water quality standards. The Commission may not issue a license for a hydroelectric project unless the state certifying agency has issued water quality certification for the project or has waived certification by failing to act on a request for certification within a reasonable time, not to exceed one year. 27/

27/ On November 25, 1991, Niagara Mohawk submitted to NYSDEC a request for water quality certification. On November 19, 1992, NYSDEC denied the request without prejudice. Niagara
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On November 3, 1995, after signing the Settlement Offer, NYSDEC issued water quality certification for the Black River Island Project. 28/ Its provisions are contained in the appendix to this order. The certification includes both NYSDEC's standard conditions and the terms and conditions of the Settlement Offer.

NYSDEC's standard conditions include: (1) inspection of the project and project records by NYSDEC to determine project compliance with the certification conditions; (2) cessation of generation and flow through turbines before dredging in any intake or forebay area; (3) contaminant testing of sediments to be disturbed or removed from project waters; (4) NYSDEC approval of an erosion and sediment control plan prior to the licensee commencement of activities that could adversely affect water quality; (5) placement of cofferdams, ramps, roads and other structures encroaching on the Black River in accord with the erosion and sediment control plan; (6) maintenance, during construction, of adequate flows to ensure that established water quality standards are met; (7) upstream and downstream turbidity monitoring during construction, and correction of activities that cause downstream turbidity to exceed upstream turbidity; and (8) prior notification to NYSDEC of any activities subject to the above conditions.

These standard conditions are valid certification conditions and are adopted as license requirements. However, we note that the state's power under the Clean Water Act is not unbounded, and that it is the Commission, not the state certifying agency, that administers and enforces all license conditions, including those in a Section 401 certification. 29/ Accordingly, whereas standard certification condition 4 requires NYSDEC approval of an erosion and sediment control plan prior to undertaking any activity that affects water quality, it will be the Commission that authorizes Niagara Mohawk to commence those activities, NYSDEC's prior approval notwithstanding.

27/ (...continued)

Mohawk submitted a request for a NYSDEC hearing on the certification denial. Subsequent negotiations led to the Settlement Offer.

28/ November 3, 1995 letter to Niagara Mohawk from NYSDEC, included in Niagara Mohawk's November 9, 1995 filing. NYSDEC's water quality certification covered both the Beebee Island and the Black River Projects.

29/ See Great Northern Paper, Inc., 77 FERC ¶ 61,068 at pp. 61,271-72 (1996).

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The certification (p. 2) states that NYSDEC "reserves the right to reconsider the entire Certification if there is a significant change in the scope of the proposal or the project license, or in the event that the referenced application or Settlement Agreement are further amended." To the extent that the reservation referred to pre-relicensing amendments to the proposed project, it was governed by section 4.38(f)(7) of our regulations, which requires a new request for water quality certification "if the amendment would have a material adverse impact on the water quality in the discharge from the project or proposed project." ^{30/} However, to the extent that the reservation purports to give NYSDEC the right to revise certification conditions after the license has been issued and becomes final, we reject such reservation as outside the scope of Section 401 of the Clean Water Act. ^{31/}

VII. BLACK RIVER FUND AND BLACK RIVER ADVISORY COUNCIL

The Settlement Offer provides for Niagara Mohawk to contribute \$3,000 annually for the first 15 years of the expected new license, and \$4,000 annually for the next 15 years, to a Black River Fund (Fund), to be administratively managed by Niagara Mohawk and distributed according to the recommendations of the Advisory Council, which the Settlement Offer also establishes.

The Advisory Council is to be chaired by NYSDEC and composed, at a minimum, of Jefferson County and the signatories to the Settlement Offer, except for Beebee Island and Heritage. Each member has one vote, and decisions are to be by majority vote. In addition to recommending uses of the Fund, the Advisory Council is to recommend to regulatory agencies and project licensees measures concerning management of the Black River and hydropower project operations.

The Advisory Council is to use the Fund within the Black River Basin for ecosystem restoration and protection, natural resource stewardship, public education, facility maintenance, applied research to accomplish these undertakings, and additional public access to outdoor recreational resources not required by the project licenses.

The Settlement Offer provides specifically for acquisition of interests in lands owned by Niagara Mohawk and located along the shores of the Black River. These property interests would include permanent conservation easements, reserved rights, and

^{30/} 18 C.F.R. § 4.38(f)(7)(iii).

^{31/} See Niagara Mohawk, supra, 76 FERC at p. 61,832.

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fee titles of certain land parcels lying between the Deferiet and Kamargo Developments. The Fund also provides for additional purchase from Niagara Mohawk of other, as yet-identified, lands, easements, and mineral rights not essential for project purposes.

NYSDEC is to prepare, without cost to Niagara Mohawk or to the Fund, the title documents, appraisal, surveys and other documents necessary to transfer title of the lands. The Settlement Offer is unclear as to whether the lands transferee is NYSDEC or the Advisory Council, and, if the latter, to whom the interests in land would be transferred, should the Advisory Council disband.

Since, pursuant the Fund, interests in property affecting the Black River Project could be transferred for environmental purposes, we are requiring Niagara Mohawk to file for Commission approval annual plans of its proposed annual monetary contribution to the Black River Fund to be spent on the purposes described in the provisions in the Settlement Offer. However, since the sole named Advisory Council member under our jurisdiction is Niagara Mohawk, we lack the authority to establish the Advisory Council or to direct its actions. With respect to the provisions for Niagara Mohawk to transfer specified property rights under provisions of the Fund, the terms of such conveyances must ensure that Niagara Mohawk retains all rights necessary to carry out not just hydropower operations but also project purposes identified in the license. ^{32/}

Article 412 requires the licensee to file, for Commission approval, annual plans of monetary contributions and their intended disposition. We reserve the right to require changes to a plan, after notice and opportunity for hearing.

VIII. FELTS MILLS' OPPOSITION TO THE NEW LICENSE

Pursuant to the Offer of Settlement, NYSDEC would acquire rights to Niagara Mohawk-owned lands that are included in the project boundary for the proposed 13.2 MW Felts Mills Project No. 4715, for which an original license application has been filed by Felts Mills Energy Partners, L.P. The Felts Mills Project would comprise two developments, to be located at what are currently partially breached dams on the Black River at river miles 19.2 and 21.7, between two (of five) Black River Project developments, Kamargo (mile 17) and Deferiet (mile 26).

Felts Mills protests that, under the River Fund aspect of the Black River settlement, parties on record as opposing the

^{32/} See Niagara Mohawk, supra, 76 FERC at p. 61,833.

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Felts Mill Project -- including Niagara Mohawk and NYSDEC -- have deliberately selected for conservation easements lands proposed for inclusion in the Felts Mills Project. It asserts that the settlement should be dismissed because it places the Black River and Felts Mills Projects in competition long after the deadline for the filing of competing applications; and that approving the Black River settlement will necessitate the denial of the Felts Mills license application.

Niagara Mohawk and NYSDEC respond that the Commission cannot block the land transfers at issue, because the settlement does not propose to include such lands within the Black River Project boundary, and so their management will be beyond the Commission's jurisdiction. They also note that issuance of a license does not by itself create or alter property rights; consequently, the licensing of the Felts Mills Project would not automatically impose restrictions on Niagara Mohawk's ability to convey or encumber any of its property within the Felts Mills Project boundary. They assert that there has been no showing that transfer to NYSDEC of the lands in question would have anything more than a de minimis impact on the Felts Mills Project and license. They state that, any event, the Black River settlement does not require denial of the Felts Mills license application, because (1) the settlement authorizes, but does not require, the River Fund to be used to transfer the Niagara Mohawk property rights in question to NYSDEC, and other lands could be selected; and (2) a license would give Felts Mills access to the eminent domain powers described in FPA Section 21, pursuant to which Felts Mills could acquire whatever property rights it needed for its project.

We agree with the basic legal points made by Niagara Mohawk and NYSDEC. Moreover, if the Commission licenses Felts Mills, then Commission approval will be needed for any future transfer of project property rights. Even if lands have already been transferred to NYSDEC, the Commission can require Felts Mills to obtain those rights deemed necessary to enable the Commission and its licensee to fulfill project purposes. We stress that our approval of the Settlement Offer in this proceeding does not mean that we are requiring the Fund to acquire the noted property interests located within the boundary for the proposed Felts Mills Project, and we affirm that, if we license Felts Mills, we could require its licensee to reacquire whatever property rights it needs for project purposes. Accordingly, we find that issuance of a new license for Niagara Mohawk's Black River Project will not prevent the licensing of the Felts Mills Project.

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IX. SECTION 18 FISHWAY PRESCRIPTION

Section 18 of the FPA, 16 U.S.C. § 811, states that the Commission shall require construction, maintenance, and operation by a licensee of such fishways as the Secretaries of Commerce and the Interior may prescribe. Commerce did not submit a prescription. Interior requested reservation of its authority to prescribe upstream and downstream fishways in the future. 33/ FWS, in the Settlement Offer, agreed to defer installation of upstream fish passage devices at the Black River Project until development of salmonid restoration management goals for the Black River Basin, but specifically reserved Interior's authority to prescribe fishways as may be deemed necessary in the future. 34/ FWS subsequently specified that the reservation includes both upstream and downstream fishways. 35/

With recent installation of fish ladders at the two projects between the Beebee Island Project and Lake Ontario, the Dexter Project No. 2695 at river mile 1 and the Glen Park Project at river mile 6, anadromous salmonids (Atlantic salmon and steelhead trout) can now migrate upstream to the base of the Beebee Island Dam. Interior's reservation of its fishway prescription authority is reasonable. Consistent with Commission practice, Article 411 reserves our authority to require Niagara Mohawk to construct, operate, and maintain such fishways as the Secretary of the Interior may prescribe. 36/

X. CULTURAL RESOURCES

The Historic Preservation Field Services Bureau, New York's state historic preservation office (SHPO), 37/ notified Niagara Mohawk, on January 18, 1991, that the Black River Project

33/ Interior's filing of December 19, 1995, at 8.

34/ Settlement Offer at 4.

35/ FWS' April 8, 1996 filing.

36/ See Wisconsin Public Service Corporation, 62 FERC ¶ 61,095 at p. 61,685-86 (1993), aff'd sub nom. Wisconsin Public Service Corporation v. FERC, 32 F.3d 1165 (7th Cir. 1994).

37/ See National Historic Preservation Act, 16 U.S.C. § 470 et seq. In issuing licenses, the Commission must act to preserve the nation's historic, cultural and archaeological heritage, and must consult with the appropriate State Historic Preservation Officer.

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will have no effect on cultural resources in or eligible for inclusion in the National Register of Historic Places. 38/

On July 19, 1996, a Programmatic Agreement was executed between the Commission, the (U.S.) Advisory Council on Historic Preservation (Historic Preservation), the SHPO, and Niagara Mohawk and its associated or subsidiary companies. The Programmatic Agreement requires the licensees to administer each project in accord with the project's cultural resources management plan (CRMP) that specifies how historic properties will be protected. Historic Preservation found that the Programmatic Agreement satisfied the Commission's responsibilities under the National Historic Preservation Act, 16 U.S.C. § 470 et seq., and regulations thereunder. 39/ On December 1, 1996, the Commission's staff revised the appendices to the Programmatic Agreement for the Beebee Island and Black River Projects, including the changes proposed by Historic Preservation, the SHPO, and Niagara Mohawk (acting for both projects). 40/ The Programmatic Agreement requires the licensees to administer each project in accord with the project's cultural resources management plan (CRMP), which specifies how historic properties will be protected.

Article 416 requires Niagara Mohawk: to implement the Programmatic Agreement, including the filing of a CRMP; to implement the provisions of an approved CRMP; and, should the Programmatic Agreement be terminated prior to Commission approval of the CRMP, to obtain Commission approval before engaging in any ground disturbing or other activities that may affect historic properties.

XI. SECTION 10 OF THE FEDERAL POWER ACT

Section 15(a)(2) of the FPA, 16 U.S.C. § 808(a)(2), provides that the requirements of Section 10 of the FPA, 16 U.S.C. § 803, pertaining to conditions of licenses are applicable also to Commission consideration of new license applications.

38/ Niagara Mohawk's filing of January 25, 1991.

39/ August 5, 1996 filing by the Advisory Council on Historic Preservation.

40/ December 1, 1996 letter from Director, Division of Licensing and Compliance, to the Advisory Council on Historic Preservation, the New York State Office of Parks, Recreation and Historic Preservation, and Niagara Mohawk.

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A. Federal and State Comprehensive Plans

Section 10(a)(2)(A) of the FPA, 16 U.S.C. § 803(a)(2)(A), requires us to consider the extent to which a project is consistent with federal or state comprehensive plans for improving, developing, or conserving waterways affected by the project. 41/ Under this statutory provision, federal and state agencies filed 27 comprehensive plans that address various resources in New York. Of these, the Commission's staff identified and reviewed ten plans relevant to the project, 42/

41/ Comprehensive plans for this purpose are defined at 18 C.F.R. § 2.19 (1996).

42/ The federal plans are: (1) Nationwide Rivers Inventory, National Park Service, U.S. Department of the Interior, Washington, D.C., January 1982; (2) North American Waterfowl Management Plan: A Strategy for Cooperation, Fish and Wildlife Service, U.S. Department of the Interior, and Canadian Wildlife Service, Environment Canada, Washington, D.C., May 1986; and (3) Fisheries USA: the Recreational Fisheries Policy of the U.S. Fish and Wildlife Service, Washington, D.C., undated.

The state plans are: (1) Adirondack Park State Land Master Plan, Adirondack Park Agency, Ray Brook, New York, January 1985; (2) New York State Wild, Scenic, and Recreational Rivers System Field Investigation Summaries, Adirondack Park Agency, Albany, New York, undated; (3) Fisheries Enhancement Plan for the Black River, New York, Fish and Wildlife Service, U.S. Department of the Interior and New York State Department of Environmental Conservation, Amherst, New York, March 1994; (4) New York State Wild, Scenic, and Recreational River System Act, New York State Department of Environmental Conservation, Albany, New York, March 1985; (5) Article 27 -- Adirondack Park Agency Act, New York State Executive Law, Albany, New York, July 15, 1981; (6) Regulation for Administration and Management of the Wild, Scenic, and Recreational Rivers Systems in New York State excepting the Adirondack Park, New York State Department of Environmental Conservation, Albany, New York, March 26, 1986; and (7) State Comprehensive Outdoor Recreation Plan, New York State Parks, Recreation, and Historic Preservation, 1994.

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and found no conflicts between these plans and the Black River Project. 43/

B. Recommendation of Other Agencies

Section 10(a)(2)(B) of the FPA, 16 U.S.C. § 803(a)(2)(B), requires us to consider the recommendations of relevant federal and state agencies exercising administration over flood control, navigation, irrigation, recreation, cultural, and other relevant resources, as well as the recommendations of Indian tribes affected by the project. The Settlement Offer constitutes the recommendations of NYSDEC concerning relevant state resources. No federal agency recommendations were filed concerning flood control or navigation, and no Indian tribe made any filings.

C. Consumption Efficiency Improvement Program

Section 10(a)(2)(C) of the FPA, 16 U.S.C. § 803(a)(2)(C), requires that the Commission, in acting on a license application such as this, consider the electricity consumption efficiency improvement program of the applicant, including its plans, performance, and capabilities for encouraging or assisting its customers to conserve electricity cost-effectively, taking into account the published policies, restrictions, and requirements of state regulatory authorities.

Responding to a request from the New York State Public Service Commission, Niagara Mohawk prepared twelve demand-side

43/ FWS' November 7, 1996 filing argues that the Settlement Offer qualifies as a comprehensive plan pursuant to this section of the FPA, and accordingly, to the extent that the Felts Mills Project conflicts with the Settlement Offer, it cannot be considered to be in the best interest of the comprehensive development of the waterway involved. We disagree; although two federal and two state agencies are among the signatories to the Settlement Offer, the signatories, as a body, do not constitute an agency authorized by the United States or New York State to prepare such a plan. See the definition of comprehensive plan 18 C.F.R. § 2.19. In any event, a project's conflict with a comprehensive plan does not preclude licensing. Section 10(a)(2)(A), 16 U.S.C. § 803(a)(2)(A), of the FPA does not limit the Commission's ability to carry out its broad responsibilities under Sections 10(a)(1) and 4(e) of the FPA, 16 U.S.C. §§ 803(a)(1) and 797(e), to consider and balance all aspects of the public interest in determining whether, and under what conditions, a hydroelectric license should be issued. See Richard Balagur, 57 FERC ¶ 61,315 at p. 62,016 (1991).

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management programs whose goals are to encourage efficient use of energy resources. These programs include measures ranging from water heater wraps to high efficiency lighting and equipment. Niagara Mohawk also has innovative rate options that include time-of-use rates, real-time pricing, and voluntary interruptible and curtailable rate programs. ^{44/} Periodically, Niagara Mohawk re-evaluates these programs for their cost-effectiveness, and for examination of whether they continue to meet customer and system needs.

Niagara Mohawk's conservation and load management programs show that the company has made an effort to conserve electricity and reduce peak hour demands. We conclude that Niagara Mohawk has made a satisfactory good faith effort to comply with Section 10(a)(2)(C) of the FPA.

D. Recommendations of Federal and State Fish and Wildlife Agencies

Section 10(j) of the FPA, 16 U.S.C. § 803(j), requires the Commission to include license conditions based on recommendations of federal and state fish and wildlife agencies submitted pursuant to the Fish and Wildlife Coordination Act, 16 U.S.C. § 661 et seq., for the protection, mitigation, and enhancement of fish and wildlife resources. The Settlement Offer represents the recommendations of FWS and NYSDEC. We have required their implementation in Articles 401 through 411.

^{44/} Time-of-use rates are prices that vary according to the time of day, week, or year of the power bought, with power during high demand times being more costly.

Real-time pricing means that the cost to the customer for power bought will be the market price for the power at the time of sale.

Interruptible rates are prices that are lower than rates for non-interruptible service. Customers buying at this lower rate run the risk that the power will be cut off during periods of unusually high demand or loss of generation in order to maintain service to customers paying higher rates for non-interruptible service.

Curtilable rates are prices that are lower than would otherwise be charged because only an agreed-upon amount of power will be sold at these rates. Additional power will be more costly.

XII. APPLICANT'S PLANS AND CAPABILITIES

In accordance with Section 15(a) of the FPA, 16 U.S.C. § 808(a), which requires us to determine whether the proposed license is best adapted to serve the public interest, we have evaluated Niagara Mohawk's record as a licensee. Under Section 15(a)(2), we evaluated: (1) plans and abilities to comply with the new license; (2) safe management, operation, and maintenance of the project; (3) ability to provide efficient and reliable electric service; (4) need for power; (5) transmission services; and (6) cost-effectiveness of plans. Under Section 15(a)(3), we evaluated: (7) compliance record and (8) actions affecting the public.

1. Plans and Abilities to Comply with the New License

Section 15(a)(2)(A) requires us to consider Niagara Mohawk's plans and abilities to comply with the articles, terms, and conditions of any license issued, and with other applicable provisions of Part I of the FPA. We have reviewed Niagara Mohawk's license application, and have also reviewed Niagara Mohawk's record for good faith compliance with the articles, terms, and conditions of its current license. As a result of our review, we believe that Niagara Mohawk has or can acquire the resources and expertise to comply with the conditions of the new license.

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

Section 15(a)(2)(B) requires us to consider Niagara Mohawk's plans to manage, operate, and maintain the project safely. Niagara Mohawk routinely inspects the Black River Project and makes needed repairs. Each development's energy output is continuously monitored by Niagara Mohawk staff, who would notice any equipment failure or water conduit failure and would take remedial action promptly. During unusually high flow periods, Niagara Mohawk dispatches staff to the project site to monitor conditions and to operate all generating units at maximum gate openings. Niagara Mohawk has a comprehensive employee safety program that includes regularly scheduled safety meetings. Niagara Mohawk promotes public safety at the project by use of warning signs, boat barriers and booms, and by fencing hazardous areas to prevent public access.

The Commission's staff in the New York Regional Office (NYRO) inspected the project most recently on June 7 and 8, 1994. NYRO staff described the project as being in good condition and having no significant public or dam safety problems. All project dams have low hazard potential as defined by the U.S. Army Corps

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of Engineers. 45/ On the basis of Niagara Mohawk's March 1991 dambreak analysis and supplemental information of June 24, 1991, NYRO staff exempted the project, on October 23, 1991, from the requirement of filing an Emergency Action Plan (EAP) unless conditions changed so as to require revision of the hazard potential. 46/ On June 13, 1996, NYRO staff, after review of the project's safety and adequacy, reported that the dam and project works are in safe condition, the licensee having completed all necessary repairs pursuant to the June 1994 inspection report, and recommended that the new license include no special article related to dam safety. 47/

Niagara Mohawk has incorporated the notification procedure in case of dam failure or errant operation for all its projects on the Black River, including the Black River Project, into a Black River Drainage Basin EAP, which it updates quarterly.

We conclude that the project will be safe for continued operation during the new license term, and will pose no threat to public safety if operated and maintained according to good engineering practices and our regulations governing hydroelectric projects.

45/ See 33 C.F.R. Part 222. The hazard potential pertains to the potential for loss of human life or property in the area downstream of the dam in the event of a failure or errant operation of the dam. Low hazard potential requires the downstream area to have no permanent structures for human habitation and to be relatively undeveloped so that only minimal economic loss would occur.

46/ October 23, 1991 letter from NYRO staff to Niagara Mohawk, exempting the Beebee Island and the Black River Projects from the requirement of filing an EAP. NYRO staff confirmed the continuing exemption in December 1993 and November 1994. On January 4, 1996, Niagara Mohawk filed with the NYRO staff its report attesting to its continued compliance with Commission regulations (18 C.F.R. § 12.21(c)) enabling exemption.

47/ June 13, 1996 internal memorandum from Director, NYRO, to Director, Division of Dam Safety and Inspections. Subsequently, on June 20, 1996, NYRO staff again inspected the project, but found nothing to merit changing the earlier recommendation. June 25, 1996 letter from NYRO staff to Niagara Mohawk.

3. Ability to Provide Efficient and Reliable Electric Service

Section 15(a)(2)(C) requires us to review the plans and abilities of Niagara Mohawk to operate and maintain the project in a manner most likely to provide efficient and reliable electric service. Niagara Mohawk periodically evaluates the feasibility of increasing capacity or generation at its hydroelectric projects.

Niagara Mohawk has a program of frequent inspection and regularly scheduled maintenance. Before filing its new license application, Niagara Mohawk rehabilitated the facilities at each of the project's five developments. Niagara Mohawk coordinates the operation of the Black River Project with the upstream Stillwater Reservoir to efficiently use daily releases from the Stillwater Reservoir for generation.

Based upon our review of past project operation, we conclude that Niagara Mohawk has been operating the project in an efficient manner within the constraints of the existing license, and that it will continue to provide efficient and reliable electric service in the future.

4. Need for Power

Section 15(a)(2)(D) requires us to review Niagara Mohawk's need for project electricity to serve its customers.

Hydroelectric generation accounts for approximately 10 percent of Niagara Mohawk's total owned generation capability. The Black River Project has provided and can continue to provide a portion of Niagara Mohawk's power requirements, and contribute to Niagara Mohawk's resource diversity, as well as to the capacity needs of the New York Power Pool (NYPP) area of the Northeast Power Coordination Council region.

The NYPP forecasts an average annual increase in peak capacity demand of 0.6 percent during the summer months and 0.5 percent during the winter months for the 1995 to 2004 planning period. Based on these estimates, current capacity reserve margins, while adequate, may diminish in the short run. Relicensing the project will contribute to maintaining available capacity. Niagara Mohawk states that if it does not receive a new license for the Black River Project, it will have to purchase power or to replace the project's capacity by constructing new facilities. Short-term replacement power would probably come

from increased generation by Niagara Mohawk's oil and gas facilities. 48/

We conclude that Niagara Mohawk's and short and long term need for power justifies licensing the project.

5. Transmission Services

Section 15(a)(2)(E) requires us to consider Niagara Mohawk's transmission services in relation to system reliability, costs and other applicable economic and technical factors. Niagara Mohawk proposes no new or additional transmission facilities at the project because no added generation is proposed and the existing transmission system suffices. We are satisfied that existing transmission facilities are adequate.

6. Cost-effectiveness of Plans

Section 15(a)(2)(F) requires us to consider whether Niagara Mohawk's plans will be achieved in a cost-effective manner. After review of the new license application, we conclude that the project as presently configured and operated, as Niagara Mohawk proposes, will continue to provide power in a cost-effective manner. We agree that adding additional capacity at this time is unnecessary.

7. Compliance Record

Section 15(a)(3)(A) requires us to consider Niagara Mohawk's record of compliance with the terms and conditions of its existing license. We have reviewed Niagara Mohawk's record of making timely filings and of complying with the terms and conditions of its existing license, including the reports made by the NYRO staff. We conclude that Niagara Mohawk's overall record is satisfactory.

8. Actions Affecting the Public

Section 15(a)(3)(B) requires us to consider Niagara Mohawk's actions relating to the project that affect the public. The project has a beneficial effect on the socioeconomics of the lower Black River area by contributing taxes to state and local governments, and by its expenditures to foster recreational opportunities that attract recreational users. Niagara Mohawk has emphasized improving water-based and other recreational activities in the Black River corridor by extending the Black River canoe route and by maintaining boat launch and day use areas at the Herrings and Black River Developments. Under the

48/ License Application at p. H5-2.

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new license, Niagara Mohawk will continue and increase these recreational services.

XI. COMPREHENSIVE DEVELOPMENT AND RECOMMENDED ALTERNATIVE

Sections 4(e) and 10(a)(1) of the FPA, 16 U.S.C. §§ 797(e) and 803(a)(1), require the Commission, in acting on applications for a license, to give equal consideration to the power and development purposes and to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of fish and wildlife, the protection of recreational opportunities, and the preservation of other aspects of environmental quality. Any license issued shall be such as in the Commission's judgment will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for beneficial public uses. Our decision to issue a new license for this project, with the terms and conditions included herein, reflects such consideration.

We have analyzed the Settlement Offer and have adopted license terms and conditions consistent with it. Among the environmental and recreational enhancements that will occur under the new license are: improved habitat and reproductive conditions for resident fish; improved fish protection at intakes; improved fish passage through the project; additional recreational facilities; and improved visual aspects.

We have also analyzed the economic benefits of power produced by the project. Under our approach to evaluating the economics of hydropower licensing, as articulated in Mead Corp., 49/ our analysis 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 our economic analysis is to provide a general estimate of the potential power benefits and the 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 issuing the license.

In addition, certain economic factors related to project decommissioning impinge on the decision to issue a new license that are not present in the original licensing of new projects. If an existing project is not issued a new license, or if the licensee declines to accept the new license, the project probably will have to be retired in one form or another. This could range from simply removing the generator at the project to major

49/ 72 FERC ¶ 61,027 (1995), reh'g, 76 FERC ¶ 61,352 (1996).

environmental restoration varying from minor measures to dam removal.

Based on current economic condition, without future escalation or inflation, the Commission's staff predicts that the Black River Project, if licensed as proposed in the Settlement Offer, will produce approximately 148.8 gigawatt hours of energy annually at a cost of approximately \$4,998,200, about 33.6 mills per kilowatt hour (kWh). The staff estimated the cost of an equivalent amount of power from alternative sources to be \$3,459,800, or about 23.3 mills per kWh, based on 1995 data of natural gas-fueled electric plants in the Middle Atlantic area. Thus, the cost of Black Project power is approximately \$1,538,400, or about 10.3 mills per kWh, greater than the cost of an equivalent amount of power from comparable alternative sources. 50/

Nevertheless, we find that the project remains a viable energy-producing resource to Niagara Mohawk and its customers. We have taken into account the other public interest factors that apply to the decision whether or not to issue a license, inter alia, a source of power to replace fossil-fueled generating systems, the capability of hydropower to come on-line momentarily, recreation, fish and wildlife enhancements, flood control, and cultural resource preservation. 51/

We therefore find that the Black River Project, with our mitigative and enhancement measures, will be best adapted to the comprehensive development of the Black River for beneficial public purposes. We leave to Niagara Mohawk the business decision of whether or not to accept the license. We also conclude that issuance of a new license for the Black River Project will not constitute a major federal action significantly affecting the quality of the human environment.

XIII. LICENSE TERM

Pursuant to Section 15(e) of the FPA, 16 U.S.C. § 808(e), relicense terms shall be not less than 30 years nor more than 50 years. Our general policy is to establish 30-year terms for projects with little or no redevelopment, new construction, new capacity, or environmental mitigative and enhancement measures; 40-year terms for projects with a moderate amount of proposed redevelopment, new construction, new capacity, or mitigative and enhancement measures; and 50-year terms for projects with

50/ See EA at VI. Developmental Analysis and Table 19.

51/ See Mead Corp., supra.

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proposed extensive development, new construction, new capacity, or mitigative and enhancement measures.

According to the Settlement Offer filed in this proceeding, the parties contemplate a 30-year license for the Black River Project. Because the term of the new license was likely an important element in the negotiations that led to the Settlement, and because Niagara Mohawk proposes no additional capacity or new construction, we will issue the license for a term of 30 years.

XIV. SUMMARY

In light of all of the above, including our review of the staff's environmental analysis of the proposed project and alternatives to it, we conclude that issuing a new license for the Black River Project with the requirements included herein will not conflict with any planned or authorized development and will best adapt the project to a comprehensive plan for developing the Black River for beneficial public purposes.

The Commission orders:

(A) This license is issued to Niagara Mohawk Power Corporation (Licensee), for a term of 30 years, effective the first day of the month in which the license is issued, to operate and maintain the Black River Project. 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.

(B) The project consists of:

(1) All lands, to the extent of the Licensee's interests in those lands, shown by the following drawings in Exhibit G, which were included in the application for new license filed on November 29, 1991:

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Exhibit	FERC Drawing No.	Description
G-1	2569-1001	Herrings Development Project Boundary and Location Map
G-2	2569-1002	Deferiet Development Project Boundary and Location Map
G-3	2569-1003	Kamargo Development Project Boundary and Location Map
G-4	2569-1004	Black River Development Project Boundary and Location Map
G-5	2569-1005	Sewalls Development Project Boundary and Location Map
G-6	2569-1006	Sewalls Development Project Boundary and Location Map

(2) The facilities of five existing hydroelectric developments, Herrings, Deferiet, Kamargo, Black River, and Sewalls Island, as described in the following five paragraphs:

(a) Herrings Development

The Herrings Development consists of: (1) a 140-acre reservoir which, at the normal maximum surface elevation of 680.1 feet U.S. Geological Survey Datum (USGS), has gross storage capacity of 669.4 acre-feet; (2) a 512-foot-wide by 25-foot-high "L"-shaped concrete gravity dam with crest elevation of 679.1 feet, topped with 1-foot-high wooden flashboards; (3) an intake structure, integral with the powerhouse, consisting of (a) a 9-foot-wide stop-log waste sluice; (b) a perpendicular trashrack measuring 101 feet wide by 31 feet high with 0.5-inch-wide bars at 3.5 inches of clear spacing, (c) an 11-foot-wide stop-log waste sluice downstream of the trashracks, and (d) nine 9-foot-wide, 12.5-foot-high motor operated slide gates; (4) a 137-foot-wide, 33-foot-long brick-masonry powerhouse containing three vertical Allis-Chalmers generating units, each rated at 1,800 kW, for a combined nameplate capacity of 5.4 MW, and each with a design head of 19.5 feet and hydraulic capacity of 1,203 cubic feet per second (cfs); (5) a short excavated rock tailrace discharging directly into the Black River; (6) transmission lines consisting of (a) 30, 70, and 108-foot-long leads connecting to a 2.4-kilovolt (kV) powerhouse bus, and (b) three 97-foot-long 2.4-kV lines connected to a 2.4/23-kV step-up transformer; and (7) appurtenant facilities.

(b) Deferiet Development

The Deferiet Development consists of: (1) a 70-acre reservoir which, at the normal maximum surface elevation of 659.0 feet USGS, has gross storage capacity of 405 acre-feet; (2) a dam consisting of (a) a 503-foot-long by 18-foot-high Ambursen dam section, with permanent crest elevation of 656 feet, topped with 3-foot-high wooden flashboards, and (b) a 192-foot-long sluice gate section housing eleven 14-foot-wide stop-log bays; (3) a 180-foot-wide concrete power canal headworks section housing twenty 5-foot-wide by 12.5-foot-high, hand-operated, timber slide gates; (4) a 4,200-foot-long canal that connects the power canal headworks and powerhouse; (5) an intake structure consisting of (a) a 108-foot-wide by 27-foot-high perpendicular trashrack with 0.5-inch-wide bars at 3.5 inches of clear spacing, (b) three steel slide gates, and (c) an 11-foot-wide ice sluice controlled by stop-logs; (6) a 145.5-foot-wide by 92.5-foot-long brick and masonry powerhouse equipped with three vertical Francis generating units, each rated at 3,600 kW, for a combined nameplate capacity of 10.8 MW, and each with a design head of 46 feet, and hydraulic capacity of 1,147 cfs; (7) a 1,400-foot-long excavated rock tailrace; (8) transmission lines consisting of (a) 65-, 45-, and 65-foot-long leads connecting to a 2.4-kV powerhouse bus, (b) 67-, 69-, and 73-foot-long 2.4-kV underground lines connecting to a 2.4/23-kV step-up transformer; and (9) appurtenant facilities.

(c) Kamargo Development

The Kamargo Development consists of: (1) a 40-acre reservoir which, at the normal maximum surface elevation of 563.8 feet USGS, has gross storage capacity of 359.5 acre-feet; (2) a dam consisting of (a) a 647-foot-long by 12-foot-high concrete gravity spillway section, with permanent crest elevation of 561.8 feet, topped with 2-foot-high wooden flashboards, (b) a 150-foot-long non-overflow section and (c) a 131-foot-long power canal headworks structure, housing 14 8-foot-wide by 11-foot-high wooden headgates; (3) a 3,850-foot-long unlined power canal containing a 143-foot-long bulkhead section; (4) a 580-foot-long concrete forebay channel consisting of (a) a 190-foot-long concrete gravity overflow section, (b) a 230-foot-long concrete gravity section topped with 1-foot-high flashboards, and (c) a 160-foot-long side channel spillway section equipped with twelve stop-log-bays; (5) an intake structure consisting of (a) a 66-foot-wide by 28.5-foot-high perpendicular trashrack with 0.5-inch-wide bars at 3.5 inches of clear spacing, (b) a waste sluice, and (c) nine timber gates with stop-log slots; (6) a 97.5-foot-wide by 37-foot-long brick and masonry powerhouse equipped with three vertical Francis generating units, each rated at 1,800 kW, for a combined nameplate capacity of 5.4 MW, and each with a design head of 25 feet, and a hydraulic capacity of

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1,100 cfs; (7) a short excavated rock tailrace discharging directly into the Black River; (8) transmission lines consisting of (a) three 25-foot-long leads connecting to a 2.4-kV powerhouse bus, and (b) three 89-foot-long, 2.4-kV underground lines connecting to a 2.4/23-kV step-up transformer; and (9) appurtenant facilities.

(d) Black River Development

The Black River Development consists of: (1) a 25-acre reservoir which, at normal maximum surface elevation of 536 feet USGS, has gross storage capacity of 128 acre-feet; (2) a 327-foot-long by 16-foot-high horseshoe-shaped dam consisting of (a) a concrete retaining wall abutment, (b) a 36.5-foot-long gated section housing two sluice gates with an abandoned substructure powerhouse, and (c) a 291-foot-long by 25-foot-high concrete gravity spillway, with a permanent crest of 534 feet, topped with 2-foot-high wooden flashboards; (3) an 80-foot-long concrete power canal headworks structure housing twelve 6-foot-wide by 11-foot-high timber slide gates and one 3.5-foot-wide by 11.0-foot-high gate; (4) a 2,250-foot-long power canal composed of a 1,270-foot-long unlined section containing a 250-foot-long side concrete waste weir, and a 980-foot-long concrete-lined section containing a 134-foot-long side concrete waste weir and low-level sluice gate; (5) an intake structure consisting of (a) an 80-foot-wide by 29-foot-high perpendicular trashrack with 0.5-inch-wide bars at 3.5-inches of clear spacing, and (b) nine timber slide gates; (6) a 118-foot-wide by 66-foot-long powerhouse equipped with three vertical Francis generating units, each rated at 2,000 kW, for a combined installed capacity of 6.0 MW and each with a design head of 33 feet, and a hydraulic capacity of 1,067 cfs; (6) a short excavated rock tailrace discharging directly into the Black River; (7) transmission lines consisting of (a) 36-, 65-, and 95-foot-long leads connecting to a 2.4-kV powerhouse bus, and (b) three 88-foot-long, 2.4-kV underground lines connecting to a 2.4/23-kV step-up transformer; and (8) appurtenant facilities.

(e) Sewalls Development

The Sewalls Development consists of: (1) a 4-acre reservoir which, at normal maximum surface elevation of 463.9 feet USGS, has gross storage capacity of 48 acre-feet; (2) a 243-foot-long by 15.5-foot-high concrete gravity dam with a permanent crest elevation of 463.9 feet; (3) a 65.5-foot-long power canal headworks structure housing two 7-foot-wide by 21-foot-high stop-log bays and two 15-foot-wide by 12-foot-high automated steel slide gates; (4) a 400-foot-long by 33-to-35-foot-wide concrete-lined power canal, whose wall, adjacent to the Black River, has a permanent crest elevation of 463 feet and is equipped along its entire length with 2-foot-high flashboards;

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(5) an intake structure, integral with the powerhouse, consisting of (a) a 69-foot-wide by 21-foot-high perpendicular trashrack with 0.5-inch-wide bars at 3.5 inches of clear spacing, (b) a 6-foot-wide waste sluice, (c) a 3-foot-high by 4-foot-wide low-level drain, and (d) four 14-foot-wide by 15-foot-high gate openings for steel slide gates; (6) an 81-foot-wide by 32-foot-long powerhouse equipped with two vertical Allis-Chalmers propeller-type generating units, each rated at 1,000 kW, for a combined installed capacity of 2 MW, a design head of 15.5 feet, and a hydraulic capacity of 900 cfs; (7) a short excavated rock tailrace discharging directly into the Black River; (8) transmission lines consisting of (a) 12- and 47-foot leads connecting to a 2.4-kV powerhouse bus, and (b) two 180-foot-long, 2.4-kV underground lines connecting to a 2.4/23-kV step-up transformer; and (9) appurtenant facilities.

The project works generally described above are more specifically shown and described by the following exhibits, which also were included in the application for new license filed on November 29, 1991:

Exhibit A:

The existing mechanical, electrical, and transmission equipment as described on pages A-1 through A-19 of Exhibit A.

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Exhibit F:

The following Exhibit F drawings:

Exhibit	FERC Drawing No.	Description
F-1	2569-1007	Herrings Development General Plan and Details of Dam
F-2	2569-1008	Herrings Development Intake and Powerhouse Plan and Sections
F-3	2569-1009	Deferiet Development General Plan and Details of Dam
F-4	2569-1010	Deferiet Development Intake and Powerhouse Plan and Sections
F-5	2569-1011	Kamargo Development General Plan and Details of Dam and Headgates
F-6	2569-1012	Kamargo Development Headrace, Spillway and Tailrace Plan and Sections
F-7	2569-1013	Kamargo Development Powerhouse Plan and Sections
F-8	2569-1014	Black River Development General Plan & Details of Dam and Upper Forebay
F-9	2569-1015	Black River Development Lower Forebay, Powerhouse & Tailrace Plan and Sections
F-10	2569-1016	Sewalls Development South Channel General Plan and Details of Dam, Headworks and Flume
F-11	2569-1017	Sewalls Development South Channel Powerhouse Plans and Section
F-12	2569-1018	Sewalls Development North Channel General Plan and Details of Dam, Headworks and Flume

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

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

(D) This license is subject to the articles set forth in Form L-3 (October 1975), entitled "Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters of the United States", 54 F.P.C. 1792, 1817-24, and the following additional articles:

Article 201. The licensee shall pay the United States the following annual charges, effective as of the first day of the month in which this license is issued, for the purposes of reimbursing the United States for the costs of administering 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 29,600 kilowatts.

Article 202. 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 extensions 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 203. Pursuant to Section 10(d) of the Federal Power Act, a specified reasonable rate of return upon the net investment in the project shall be used for determining surplus earnings of the project for the establishment and maintenance of amortization reserves. The licensee shall set aside in a project amortization reserve account at the end of each fiscal year one half of the project surplus earnings, if any, in excess of the specified rate of return per annum on the net investment.

To the extent that there is a deficiency of project earnings below the specified rate of return per annum for any fiscal year, the licensee shall deduct the amount of that deficiency from the amount of any surplus earnings subsequently accumulated, until absorbed. The licensee shall set aside one-half of the remaining surplus earnings, if any, cumulatively computed, in the project amortization reserve account. The licensee shall maintain the amounts established in the project amortization reserve account until further order of the Commission.

The specified reasonable rate of return used in computing amortization reserves shall be calculated annually based on

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current capital ratios developed from an average of 13 monthly balances of amounts properly includible in the licensee's long-term debt and proprietary capital accounts as listed in the Commission's Uniform System of Accounts. The cost rate for such ratios shall be the weighted average cost of long-term debt and preferred stock for the year, and the cost of common equity shall be the interest rate on 10-year government bonds (reported as the Treasury Department's 10 year constant maturity series) computed on the monthly average for the year in question plus four percentage points (400 basis points).

Article 301. Within 45 days of the date of license issuance, the licensee shall file an original set and two duplicate sets of aperture cards of the approved drawings. The set of originals must be reproduced on silver or gelatin 35 mm microfilm. The duplicate sets are copies of the originals made on diazo-type microfilm. All microfilm must be mounted on type D (3-1/4" x 7-3/8") aperture cards.

Prior to microfilming, the FERC Drawing Number (2569-1001, -1002, etc.) shall be shown in the margin below the title block of the approved drawing. After mounting, the FERC Drawing Number must be typed on the upper right corner of each aperture card. 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.

The original and one duplicate set of aperture cards must be filed with the Secretary of the Commission. The remaining duplicate set of aperture cards shall be filed with the Commission's New York Regional Office.

Article 302. Within 90 days of completion of construction of the facilities authorized by this license (flow release structure, recreation, etc.) the licensee shall file, for approval, revised Exhibits A, F, and G to show those project facilities as built.

Article 401. Within 90 days of the date of issuance of this license, the licensee shall operate the project so that the water levels at each development's impoundment are maintained no lower than 0.5 foot below the permanent crest of the dam or below the top of the flashboards, when the dam is so equipped. This condition may be temporarily modified if required by operating emergencies beyond the control of the licensee, and for short periods upon mutual agreement between the licensee and the New York State Department of Environmental Conservation (NYSDEC). If the flow is so modified, the licensee shall notify the Commission, the U.S. Fish and Wildlife Service (FWS) and NYSDEC, if not already notified, as soon as possible, but no later than ten days after each such incident.

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If flashboard problems prevent the licensee from maintaining an impoundment within 0.5 foot of the top of the flashboards, the licensee shall so notify the Commission, FWS and NYSDEC. The licensee shall propose remedial action, for Commission approval, together with the comments and recommendations of these agencies on the proposed remedies. The Commission reserves the right to make changes to the proposed remedies.

Whenever, from May 1 through September 30, Black River flows are between 1400 cfs and 1900 cfs, the licensee will use its best efforts to maintain the Herrings Development impoundment level no lower than 0.2 foot below the top of the permanent crest of the dam or the top of the flashboards when installed. Within 60 days following the end of each year, the licensee shall submit to the Commission, FWS, NYSDEC, and the Black River Advisory Council a report on the results of the licensee's attempts to so maintain the Herrings Development impoundment level.

Article 402. Whenever, from May 1 through September 30, Black River flows are below 2,000 cubic feet per second (cfs), the licensee shall operate the Sewalls Development in a run-of-river mode, so that, at any point in time, flows, as measured immediately downstream from the project tailrace approximate the sum of inflows to the project impoundment.

Run-of-river operation at the Sewalls Development may be temporarily modified if required by operating emergencies beyond the licensee's control, and for short periods of time upon mutual agreement between the licensee and the New York State Department of Environmental Conservation (NYSDEC). If the flow is so modified, the licensee shall notify the Commission, the U.S. Fish and Wildlife Service, and NYSDEC, if not already notified, as soon as possible, but no later than ten days after each such incident.

Article 403. The licensee shall install flashboards at each development each year by May 1 or as soon thereafter as safely possible. The licensee shall remove the flashboards in the fall each year as the licensee deems advisable, based on ice conditions.

Article 404. Within 270 days of the date of issuance of this license, the licensee shall provide a continuous flow through the project's five developments of not less than 1,000 cubic feet per second (cfs), except when inflow is less than 1,000 cfs, in which case outflow will be determined by and be equivalent to inflow.

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Article 405. To minimize project impacts on fish moving downstream and to provide year-round flows for the protection and enhancement of fish and invertebrate habitat in the project's bypassed reaches, the licensee shall, after installation of the flow release structures or fish conveyance measures required in Article 406, provide minimum flows as described below.

Herrings: 20 cubic feet per second (cfs) at all times, released through the stop-log section located between the dam and the trashracks.

Deferiet: 45 cfs at all times, through the stop-log ice sluice; additional flows from leakage and from releases over the dam to total 800 cfs during walleye spawning season, which is defined for this purpose as starting on March 15 and continuing through the 30th day after the last of four consecutive days after April 15 when average daily water temperature has reached or exceeded 50 degrees, Fahrenheit; and, during the remainder of the year, additional flows from leakage and from releases over the dam to total 245 cfs. Flows at the end of walleye spawning season shall be ramped down in increments no greater than 200 cfs and at intervals of no less than four hours.

Kamargo: 120 cfs at all times released through a notched section of the dam.

Black River: 80 cfs at all times through a notch in the dam; additional flows through the notch or the stop-log ice sluice to total 300 cfs during walleye spawning season, as defined above. Flows at the end of walleye spawning season shall be ramped down in increments no greater than 75 cfs and at intervals of no less than four hours.

Sewalls: 32 cfs at all times into the North Channel bypassed reach with a minimum of 20 cfs at all times through a notched section of the dam, and the remainder from leakage or other mechanisms; and 137 cfs at all times into the South Channel bypassed reach from leakage or other mechanisms.

These minimum flows may be temporarily modified if required by operating emergencies beyond the control of the licensee, and for short periods upon mutual agreement between the licensee and the New York State Department of Environmental Conservation (NYSDEC). If a flow is so modified, the licensee shall notify the Commission, the Fish and Wildlife Service, and NYSDEC, if not already notified, as soon as possible, but no later than ten days after each such incident.

During the first year after installation of the flow release structures required by Article 406, the licensee shall conduct

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field inspections to evaluate the effects on spawning walleye of the seasonal 200 cfs and 75 cfs ramping regimens at the Deferiet and Black River Developments, respectively. The licensee shall report to the Commission the results of its investigation and whether it recommends any changes in these ramping regimens. The licensee shall prepare this report after consultation with FWS and NYSDEC. The licensee shall include with its report documentation of consultation, copies of agency comments on the licensee's recommendations, and specific descriptions of how the agencies' comments are accommodated by the licensee. The licensee shall allow a minimum of 30 days for the agencies to comment and make their recommendations before 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 406. Within one year of the date of issuance of this license, the licensee shall file, for Commission approval, detailed design drawings of the licensee's proposed flow release structures and fish conveyance measures to provide minimum flows and enable downstream fish passage, together with an implementation schedule. The licensee shall conform the structures and measures with the conditions specified at page 3 of the Settlement Offer filed October 13, 1995. The licensee shall complete installation within two years of Commission approval of the design drawings.

The licensee shall prepare the aforementioned drawings and schedule after consultation with the U.S. Fish and Wildlife Service and the New York Department of Environmental Conservation. The licensee shall include, with the drawings and schedule, documentation of consultation, copies of agency comments and recommendations on the drawings and schedule, after they have been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the licensee's proposed structure and schedule. The licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the drawings and schedule with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the proposed structures, measures and schedule. Construction of the new structures shall not begin until the licensee is notified that the filing is approved. Upon Commission approval, the licensee shall implement the proposal, including any changes required by the Commission.

Article 407. Within one year of the date of issuance of this license, the licensee shall install at each development, and

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make fully calibrated and operational, permanent staff gages to allow measurement of headpond and tailwater elevations to the nearest 0.1 foot. The licensee shall provide access for reading the staff gages to staff and representatives of the U.S. Fish and Wildlife Service and the New York State Department of Environmental Conservation.

Article 408. Within 180 days from the date of issuance of this license, the licensee shall file, for Commission approval, a plan to monitor its compliance with the flow requirements of this license, together with an implementation schedule.

The plan's provisions shall include:

(1) installation and maintenance of a gaging system to measure: (a) stages and flows of the Black River; (b) each development's headpond and tailwaters elevations; and (c) all other project flows including flows through the turbines and any other bypass or diversion flows;

(2) calibration of stage versus discharge ratings when rating changes occur;

(3) a schedule for installing all necessary gages and necessary ancillary equipment and making them operational and fully calibrated within one year of Commission approval of the plan;

(4) provision for contact persons who will be available every day to respond to questions about abnormal flow or impoundment conditions.

The licensee shall prepare the monitoring plan and schedule after consultation with the U.S. Fish and Wildlife Service, the New York State Department of Environmental Conservation, and the Black River Advisory Council. The licensee shall include with the plan and schedule documentation of consultation, copies of comments and recommendations on the completed plan and schedule after they have been prepared and provided to the commenting entities, and specific descriptions of how the entities' comments are accommodated by the plan and schedule. The licensee shall allow a minimum of 30 days for the entities to comment and to make recommendations before filing the plan and schedule with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan and schedule. Upon Commission approval, the licensee shall implement the plan and schedule, including any changes required

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by the Commission. The licensee shall complete implementation of the plan and schedule within one year of Commission approval.

Article 409. Within 180 days of the date of issuance of this license, the licensee shall file, for Commission approval, a plan of its current or proposed practices for keeping accurate and sufficient records of the impoundment elevations and all discharges at the five developments. The plan shall include: the format of the data; the sampling techniques used; the frequency of data collection; and the locations of the data logging equipment. The plan shall provide for prior notification to the Fish and Wildlife Service (FWS), the New York State Department of Environmental Conservation (NYSDEC) and the Black River Advisory Council (Advisory Council) of any changes the licensee proposes to make, in the future, to its methods of data collection, and for filing its revised practices with the Commission for approval. The plan shall also provide for inspection of the records by NYSDEC, FWS, or Advisory Council representatives, within five business days of request for inspection, and for licensee provision of copies of these records to NYSDEC, FWS or Advisory Council representatives within 30 business days of receipt of a written request for copies.

The licensee shall prepare the aforementioned plan after consultation with FWS, NYSDEC, and the Advisory Council. The licensee shall include, with the plan, documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the consulting entities, and specific descriptions of how the entities' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the entities to comment and 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.

The Commission reserves the right to require changes to the plan or schedule. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 410. Within one year of the date of issuance of this license, the licensee shall file, for Commission approval, detailed design drawings for the licensee's proposed new trashracks (or equivalent) with 2-inch-clearance bar-spacing, and provision for trashrack overlays having 1-inch-clearance bar-spacing to be placed on the trashracks in the top half of the water column, from May 1 through October 1, and an implementation schedule. This implementation schedule is to be prepared in coordination with a corresponding implementation schedule required by Article 410 of the new license for the Beebee Island

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Project No. 2538. The new trashracks and overlays are to be installed at the five developments of the Black River Project and the Beebee Island Project at the rate of one development every two years, and installation of the required trashracks and overlays at both projects is to be completed within twelve years of the issuance date of the contemporaneous new licenses for both projects.

The licensee shall prepare the aforementioned drawings and schedule after consultation with the U.S. Fish and Wildlife Service and the New York State Department of Environmental Conservation. The licensee shall include with the drawings and schedule documentation of consultation, copies of agency comments and recommendations on the drawings and schedule after they have been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the licensee's proposed structures and schedule. The licensee shall allow a minimum of 30 days for the agencies to comment and 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.

The Commission reserves the right to require changes to the proposed drawings and schedule. Upon Commission approval, the licensee shall implement the proposal, including any changes required by the Commission.

Article 411. Authority is reserved by the Commission to require the licensee to construct, operate, and maintain, or to provide for construction, operation, and maintenance of, such fish passage facilities as may be prescribed by the Secretary of the Interior under Section 18 of the Federal Power Act.

Article 412. Within 90 days from the date of issuance of this license, the licensee shall file for Commission approval a detailed plan for the licensee's participation in and management of the Black River Fund, as set forth at pages A1-1 and A1-2 of the Settlement Offer filed October 13, 1995. On or before October 1 of each year, in accordance with the articles of this license and the Commission's Uniform System of Accounts, the licensee shall file for Commission approval a plan which shows the amount of money that the licensee will spend or contribute to the Black River Fund for the following year, pursuant to the funding provisions set forth in the Settlement Offer. The Commission reserves the right to require changes in the plan. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission. The Commission also reserves the right, after notice and opportunity for hearing, to modify the funding arrangement, including ordering a

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suspension or cessation of contributions and expenditures, should it be necessary or appropriate.

The licensee shall also file, on or before April 1 of each year, a statement for the previous calendar year, in accordance with the articles of this license and the Commission's Uniform System of Accounts, showing the amounts of money the licensee has spent or contributed to the Black River Fund, and the purposes for which these amounts have been spent or contributed. The statement shall be sufficiently detailed to show whether the money has been spent on the purposes approved in the license.

Article 413. Within 180 days of the date of issuance of this license, the licensee shall file, for Commission approval, a detailed plan to construct, operate, and maintain existing and proposed recreational facilities at the project's developments as specified in: (1) item E.5(i)(A) at pages E.5-1 and E.5-2, and item E.5(iv) at pages E.5-11 through E.5-13 in Appendix E of the application for new license filed on November 29, 1991; (2) responses B-17 and B-18 of Responses to Additional Information Request, filed November 30, 1993; and (3) pages 6 through 10, and A-3-1 through A-3-5 of the Settlement Offer filed October 13, 1995. Recreational facilities by development are listed at Table 15 and accompanying Figures 1 through 5 of the Environmental Assessment issued September 27, 1996. The licensee shall file an implementation schedule with the plan.

The recreation plan shall include, but not be limited to:

- (1) improved and expanded river access for fishing and for general recreational use; car-top boat facilities; put-ins and take-outs; parking areas; interpretive signage; portage trails; foot trails; bike trails; fishing areas, picnicking areas; bird-watching areas; scenic viewing areas and overlooks; protective railings, warning signs and boat barriers; access to Poors Island, bicycle storage there, and establishment there of a habitat reserve with interpretative center offering environmental programs;
- (2) final site plans for the facilities;
- (3) identification of any additional lands underlying the new recreational facilities that the licensee recommends be incorporated within the project boundary; and revised Exhibit G maps, for Commission approval, showing the additional lands to be incorporated within the project boundary;
- (4) the name(s) of the entity or entities responsible for operating and maintaining the facilities;

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- (5) a discussion of how the facilities design takes into consideration the guidelines established by the Architectural and Transportation Barriers Compliance Board (36 C.F.R. Part 1191) (1995);
- (6) erosion and sediment control measures and measures for revegetation of disturbed areas to be implemented during and after construction of the new recreational facilities; and
- (7) a schedule for constructing the facilities within one year of Commission approval of the plan.

The licensee shall use consistent design themes in path widths, signage typeface, colors, and the like to make apparent that the recreation features are components of an integrated system.

The licensee shall prepare the plan and schedule after consultation with: the U.S. Fish and Wildlife Service, the U.S. National Park Service, the New York State Department of Environmental Conservation; the New York State Office of Parks, Recreation and Historic Preservation; Jefferson County; the communities where the recreational features are located; and the Black River Advisory Council.

The licensee shall include with the plan and schedule, documentation of consultation, copies of consulting entity comments and recommendations on the completed plan and schedule after they have been prepared and provided to the entities and specific descriptions of how the entities' comments are accommodated by the plan and schedule. The licensee shall allow a minimum of 30 days for the entities to comment and to make recommendations before filing the plan and schedule with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan and schedule. No ground 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 and schedule, including any changes required by the Commission. Within 90 days after completion of construction, the licensee shall file as-built drawings of the recreation facilities with the Commission.

Article 414. The licensee shall paint or finish all new and replacement fencing, including support structures, in a dark brown-green color. Existing fencing will be finished to the same

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color when maintenance includes painting or refinishing, as will outbuildings and other improvements to existing structures.

Article 415. The licensee shall maintain the existing woodland buffer areas along the five developments' shorelines, and shall provide visual screens or buffers for the new access road and parking area to be constructed at the Deferiet Development.

At least 90 days before the start of any land disturbing or land clearing activities for the Deferiet Development's new access road and parking area, the licensee shall file, for Commission approval, detailed design drawings of the screens or buffers and the parking area, with description of materials to be used, and a schedule for their construction and maintenance.

The licensee shall prepare the aforementioned drawings, materials description, and schedule after consultation with the appropriate federal and state soil conservation, water quality, and fish and wildlife agencies. The licensee shall include, with the drawings, materials description and schedule, documentation of consultation, copies of agency comments and recommendations on the drawings, materials descriptions, and schedule, after they have been prepared and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated. The licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the drawings, materials description and schedule with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the drawings, materials description, and schedule. No land disturbing or land clearing activities shall begin until the licensee is notified by the Commission that its proposal is approved. Upon approval by the Commission, the licensee shall implement the plan, including any changes required by the Commission.

Article 416. 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 Licenses Issuing to the Niagara Mohawk Power Corporation, Beebee Island Corporation, or Moreau Manufacturing Corporation for the Continued Operation of Fourteen Hydroelectric Power Projects in Upstate New York", executed on

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July 19, 1996, 52/ including but not limited to the Cultural Resource Management Plan (CRMP) for the project. In the event that the Programmatic Agreement is terminated, the licensee shall implement the provisions of its approved CRMP. The Commission reserves the authority to require changes to the CRMP at any time during the term of the license. If the Programmatic Agreement is terminated prior to Commission approval of the CRMP, the licensee shall obtain approval from the Commission 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 417. (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 or 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

52/ The Programmatic Agreement was supplemented by the Commission's letter of December 1, 1996, which added Appendix A. II.

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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 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 or roads where 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;

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(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 (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

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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 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 the 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 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; 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.

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(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.

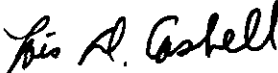
(g) The authority granted to the licensee under this article shall not apply to any part of the public lands and reservations of the United States included within the project boundary.

(E) 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.

(F) 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 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)


Lois D. Cashell,
Secretary.

Appendix

Water Quality Certification Conditions
for the Black River Project No. 2569

New York State Department of Environmental Conservation
 Division of Regulatory Services
 November 3, 1995

The Department of Environmental Conservation (the Department) hereby certifies that, based on our review of all pertinent information presented by Niagara Mohawk Power Corporation (NMPC) in its application for federal licenses for the Black River and Beebee Island Hydroelectric Projects and the Settlement Agreement dated September 14, 1995, NMPC has provided reasonable assurance that the subject Projects will comply with all applicable effluent standards, standards of performance and other state statutes, regulations and criteria applicable to the affected waterbody as required by the State regulatory provisions implementing Section 401 of the Federal Water Pollution Control Act.

This certification is issued pursuant to Section 401 of the Federal Water Pollution Control Act, 33 U.S.C. 1341. The Department makes this certification provided that the attached standard conditions are met, as well as the terms and conditions of the attached Settlement Agreement signed by the Department, NMPC, Beebee Island Corporation, the U.S. Fish and Wildlife Service, the National Park Service, New York Rivers United, the Adirondack Mountain Club, the National Audubon Society, the American Whitewater Affiliation, American Rivers, the New York State Conservation Council, the New York State Council of Trout Unlimited, and the National Heritage Institute. The terms and conditions of this settlement describe the operations of the five developments comprising the Black River Project and the one development of the Beebee Island Project located in the Towns of Champion, Wilna, Rutland, and Leray, the Villages of Black River and Deferiet, and the City of Watertown, Jefferson County.

The Department reserves the right to reconsider the entire Certification if there is a significant change in the scope of the proposal or the project license, or in the event the referenced application or Settlement Agreement are further amended.

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION
 STANDARD WATER QUALITY CONDITIONS

A. OVERSIGHT AND ADMINISTRATION

1. Inspections: The projects, including relevant records, are subject to inspection at reasonable hours and intervals, upon reasonable notice to the certificate holder, by an authorized representative of the

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Department to determine whether the certificate holder is complying with this certification. A copy of this certification, including all referenced maps, drawings, and special conditions, must be available for inspection by the Department during such inspections at the project.

B. PROJECT MAINTENANCE AND CONSTRUCTION

2. Maintenance Dredging: The certificate holder shall curtail generation and install stoplogs or otherwise shut off flow through the turbine(s) prior to commencing any maintenance dredging activities in any intake/forebay area.
3. Sediment Analysis and Disposal: The certificate holder must sample any sediments to be disturbed or removed from the projects' waters and test them for contaminants. Sampling and testing shall be accomplished according to a protocol submitted to and approved by the Department beforehand. Prior to dredging or other excavation, the certificate holder must secure Department approval for all disposal locations for any contaminated sediments to be removed from the project waters.
4. Erosion and Sediment Control: Prior to commencing activities which could adversely affect water quality, the certificate holder must receive Department approval of an Erosion and Sediment Control Plan. This plan must be submitted at least 60 days before the intended date for commencing work. Actions undertaken in response to an emergency and governed by the procedures contained in 6 NYCRR Section 621.12 are exempt from this condition. At minimum, the certificate holder must:
 - a. isolate instream 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.
 - b. avoid using heavy construction equipment below the mean high water line of the river until the work area is protected by an approved structure and dewatered.
 - c. stabilize any disturbed banks by grading to an appropriate slope, followed by armoring or

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vegetating as appropriate, to prevent erosion and sedimentation into the waterbody.

- d. minimize soil disturbance, provide appropriate grading and temporary and permanent revegetation of stockpiles and other disturbed areas to minimize erosion/sedimentation potential.
 - e. install and maintain, in a fully functional condition, effective erosion control measures on the downslope of all disturbed areas before commencing any other soil disturbing activities.
 - f. protect all waters from contamination by deleterious materials such as wet concrete, gasoline, solvents, epoxy resins or other materials used in construction, maintenance and operation of the project.
 - g. 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.
 - h. ensure that all temporary fill and other materials placed in the waters of the river are completely removed promptly upon completion of construction unless otherwise directed by the Department.
5. Placement of cofferdams, construction of temporary access roads or ramps, or other temporary structures which encroach upon the bed or banks of the river: The design of all such structures will be developed in accordance with Condition #4 (above).
6. Maintenance of River Flow: During all periods of construction, the certificate holder shall maintain adequate flows immediately downstream of worksites to ensure that the water quality standards established for the water body are met.
7. Turbidity Monitoring: During all periods of construction, the certificate holder will 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, to the extent practicable; and if not practicable, then at the nearest point beyond 100 feet downstream, but in no event beyond 200 feet downstream from the turbidity source. If at any time, turbidity measurements from the downstream locations

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exceed the measurements from the locations upstream of the work areas, certificate holder specifically agrees to immediately take all action necessary to identify the activities causing the turbidity and to correct the situation.

8. Notifications: At least two (2) weeks prior to commencing any work subject to conditions 2 through 7 of this certificate the certificate holder shall provide written notification to:

Chief, Project Management Section
New York State Department of Environmental
Conservation, Division of Regulatory Services
50 Wolf Road, Room 538
Albany New York 12233-1750

Document Content(s)

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