

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Nora Mead Brownell, and Suedeen G. Kelly.

New York State Electric & Gas Corporation

Project No. 2738-061

ORDER ON REHEARING

(Issued March 16, 2006)

1. This order grants in part and denies in part requests for rehearing of the new license recently issued to New York State Electric & Gas Corporation (NYSEG) for the Saranac River Hydroelectric Project No. 2738.<sup>1</sup> We grant rehearing by removing the requirement for NYSEG to conduct a whitewater boating study and by changing the date for submission of a recreation plan. However, we add a requirement for NYSEG to revisit the whitewater boating issue, in consultation with others, in the future. We decline to remove requirements for NYSEG to provide public access and information for whitewater kayaking, which we find is in the public interest.

**Background**

2. The Saranac River Project is located on the Saranac River in upstate New York. It has four developments. From upstream to downstream, these are High Falls, Cadyville, Mill C, and Kents Falls.

3. On April 5, 2004, NYSEG filed an application for a new license for the project. On January 3, 2005, NYSEG, on behalf of itself and several parties to the proceeding, filed a comprehensive settlement agreement (Settlement).<sup>2</sup> The Clean Water Act<sup>3</sup> water

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<sup>1</sup> *New York State Electric & Gas Company*, 114 FERC ¶ 62,039 (2006).

<sup>2</sup> The Settlement is attached to the license order as Appendix B. 114 FERC ¶ 62,039 at 64,158-62. Parties to the settlement agreement are NYSEG, U.S. Fish and Wildlife Service, New York Department of Environmental Conservation, Adirondack Council, Adirondack Park Agency, New York Rivers United, and New York State Council of Trout Unlimited.

<sup>3</sup> 33 U.S.C. §§ 1251-1376 (2000).

quality certification (certification) issued for the project by the New York Department of Environmental Conservation (New York DEC) includes a provision stating that the certification includes and incorporates the Settlement.<sup>4</sup>

4. On January 19, 2006, the Commission issued NYSEG a new license for the Saranac Project. The license was consistent with the Settlement, except with respect to whitewater boating flows. The order explained that the 1.2-mile-long High Falls bypassed reach contains at least seven significant whitewater features that would be boatable by expert paddlers.<sup>5</sup> After reviewing arguments for and against permitting whitewater boating, the order required NYSEG, in license Article 407,<sup>6</sup> to prepare and file a plan for a three-year study to evaluate the environmental effects of, and demand for, whitewater boating in the High Falls bypassed reach. Article 406, which requires a recreation plan, includes a requirement for the provision to the public of bypassed flow information,<sup>7</sup> which can assist the public in determining when flows may be appropriate for whitewater boating.

5. Timely requests for rehearing were filed by NYSEG, New York DEC, and the U.S. Department of the Interior (Interior). American Whitewater (Whitewater) filed answers to NYSEG, New York DEC, and Interior. New York DEC filed a motion for leave to respond and response to Whitewater. Our Rules of Practice and Procedure prohibit an answer to a request for rehearing, unless otherwise ordered by the decisional authority.<sup>8</sup> Whitewater's answers do not increase our understanding of the issues. They will therefore be rejected, rendering New York DEC's motion moot. Finally, the New York State Council of Trout Unlimited (TU) filed comments in support of Interior's request for rehearing, and the Adirondack Mountain Club (ADK) filed comments opposing the requests for rehearing. These comments are, in essence, an untimely request for rehearing, and will therefore be rejected.

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<sup>4</sup> The certification is attached to the license order as Appendix A. 114 FERC ¶ 62,039 at 64,158-62.

<sup>5</sup> 114 FERC ¶ 62,039 at P 42.

<sup>6</sup> *Id.* at 64,154.

<sup>7</sup> *Id.* at 64,153.

<sup>8</sup> 18 C.F.R. § 385.213(a)(2) (2005).

## **Discussion**

### **A. Article 403**

6. The Settlement and certification require NYSEG to install an automatic release mechanism to ensure base flows at Kents Falls within two years of license issuance, *i.e.*, by January 19, 2008.<sup>9</sup> Article 403, however, requires NYSEG to file a plan for the mechanism within two years of the effective date of the license, *i.e.*, April 13, 2008. Interior notes that this would require the mechanism to be installed about three months before the deadline for submitting the installation plan to the Commission for approval. Interior requests that we cure this inconsistency by changing the deadline for submission of a plan to install the mechanism from two years following license issuance to one year.<sup>10</sup> We agree that this is reasonable and will modify Article 403 accordingly.

### **B. Articles 406 and 407**

7. Article 407 requires the whitewater boating study to begin in the first boating season after the minimum flows are established, *i.e.*, the summer of 2007. The purpose of the study would be to determine the impacts, if any, of scheduled whitewater flow releases for kayaking on aquatic life in the High Falls bypassed reach, actions to mitigate any such impacts, and the demand for kayaking in that reach. New York DEC, NYSEG, and Interior seek rehearing regarding this provision.

#### **1. Consistency with Water Quality Certification**

8. New York DEC requests that Article 407 be removed from the license because it conflicts directly with the certification.<sup>11</sup> Specifically, section 3.8(e) of the Settlement, which is incorporated into the certification, provides that “the Licensee shall not be required by this Settlement Agreement to supply whitewater releases within or downstream of the Saranac River Project.”<sup>12</sup> New York DEC reads this language to

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<sup>9</sup> See Settlement section 3.3 and certification section B.6.

<sup>10</sup> Interior rehearing request at 1-2.

<sup>11</sup> Water quality certification conditions supercede conflicting provisions of a Commission license. *Puget Sound Power & Light Co.*, 64 FERC ¶ 61,045 at 61,372 (1993); *City of New Martinsville, WV*, 57 FERC ¶ 61,033 (1991).

<sup>12</sup> 114 FERC ¶ 62,039 at 64,162.

prohibit the Commission from requiring any whitewater boating study requiring releases in excess of the prescribed minimum flows.<sup>13</sup>

9. Although neither the certification nor the Settlement on their face prohibit flows in excess of the minimum flows for whitewater boating purposes, New York DEC explains that the purpose of the minimum flows is to restore the aquatic ecosystem of the bypassed reach by creating habitat for a macroinvertebrate population that will attract and establish a salmonid fishery at this location, and that requiring non-natural (*i.e.*, scheduled) whitewater flows above the minimum flows will interfere with that purpose.<sup>14</sup>

10. We find New York DEC's argument regarding the requirements of the certification to be persuasive. New York DEC has clarified on rehearing that the prohibition on requiring flows for whitewater kayaking is not simply an accommodation it has reached with NYSEG (which we might have concluded was an undue interference with our Federal Power Act mandate to issue licenses that promote the comprehensive development of waterways), but rather relates directly to the designated uses of the Saranac River that New York DEC seeks to protect in its certification. We will therefore remove the study requirement from Article 407. However, as discussed below, we are including a revised Article 407 which requires NYSEG, when the bypassed reach has had time to adjust to the new minimum flow regime, to consult with New York DEC and others on conducting the whitewater boating study at that time.

## **2. Future Whitewater Flow Study**

11. Although we are removing the requirement to study potential impacts of whitewater boating releases, we are not convinced that scheduled whitewater releases would necessarily harm the aquatic resources of the bypassed reach. In this regard, Commission staff evaluated in the EA the monthly flow duration curves and mean daily stream flows for the project for recent years. Data from recent years show that spill flows into the bypassed reach exceeding the level at which the boating study would have been conducted (250 cfs) already occur several times during the June 1 to October 31 period, so that the aquatic community in the bypassed reach should already be accustomed to such events. Under the new flow regime, moreover, the difference between such flow levels and the minimum flow will be diminished (*e.g.*, the difference between 250 cfs and 25 cfs, versus 250 cfs and 50 or 75 cfs), and scheduled releases, unlike natural spill flows,

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<sup>13</sup> New York DEC rehearing request at 4-5. NYSEG also makes this argument. NYSEG rehearing request at 8.

<sup>14</sup> New York DEC rehearing request at 3, 6-7.

can be ramped up and down to minimize or prevent the dislodging, sweeping downstream, or stranding of fish.

12. We therefore will require NYSEG to consult with New York DEC, American Whitewater, and others regarding the desirability of conducting such a study in the future. Interior, supported by New York DEC<sup>15</sup> and NYSEG,<sup>16</sup> contends that any such study should be initiated only after the aquatic community in the bypassed reach has had time to adjust to the new flow regime. We agree, and also agree that Interior's proposal to allow three years for this purpose is reasonable. We will therefore defer the requirement for NYSEG to consult further on this matter until three years after the new flow regime takes effect.<sup>17</sup>

### 3. Public Safety

13. Article 406 requires NYSEG to provide bypassed reach flow information to the public by internet or telephone, and reference marks in the High Falls bypassed reach.<sup>18</sup> NYSEG opposes these or any other measures in the license that would enable kayaking in the High Falls bypassed reach on the basis that it poses unreasonable safety risks. In brief, it contends that the run is suitable only for a very few expert paddlers, access for possible rescue operations is very difficult and could endanger rescuers, and access at this project is not needed because there are many other whitewater boating sites available in New York and the project region. It adds that making flow information public will invite

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<sup>15</sup> *Id.* at 7-9.

<sup>16</sup> NYSEG rehearing request at 7-8.

<sup>17</sup> Interior also contends that any study of the effects of scheduled whitewater releases should be deferred an additional two years while detailed baseline studies of the bypassed reach's aquatic biota are conducted. Interior rehearing request at 3-4. We disagree. Our intention was only to study the potential for fish stranding and displacement and macroinvertebrate drift. That can be readily accomplished by sampling before, during, and after any potential scheduled releases.

<sup>18</sup> NYSEG erroneously assumes that we are requiring access to the High Falls bypassed reach only if the Article 407 study results in whitewater flow release requirements. In fact, our decision that whitewater kayakers and others should have access to this area is independent of whether NYSEG is required to make releases into the bypassed reach for kayaking. That, indeed, is the reason for the public information requirements in Article 406.

unskilled or uninformed boaters to attempt to navigate the High Falls bypassed reach, which could result in injury or death, and thereby place NYSEG in peril, presumably in the form of a lawsuit.<sup>19</sup>

14. These arguments were considered and rejected in the EA and license order,<sup>20</sup> which acknowledge that the upper portion of the bypassed reach is suitable only for expert kayakers, some portaging is necessary, and the terrain in some places could make rescue operations difficult or impossible. While boating in general, and whitewater boating in particular, has inherent risks, this does not override the value of these activities as public recreation.<sup>21</sup>

15. Making flow information public will assist kayakers in deciding whether to attempt this run. Moreover, in addition to making the flow information public, we will add Article 410 requiring NYSEG to post appropriate signs at the High Falls Dam and Kents Falls access points or other likely points of entry indicating the difficulty level of the run and that it should be attempted only by experienced kayakers. It is also appropriate to include such warnings on any website or telephone line providing flow information for the bypassed reach. Other sources of site-specific information on boating conditions and hazards are also likely to be developed over time after the bypassed reach becomes available for recreation. For instance, American Whitewater's website includes detailed information on whitewater reaches of many rivers, including hazard warnings,<sup>22</sup> as well as thousands of easily searched photographs of river sections and whitewater features.

16. NYSEG also contends that placing and maintaining reference marks would be overly burdensome and may pose a safety hazard because they would be located on rocks in the river bed that are subject to movement over time.<sup>23</sup> Placing reference marks on

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<sup>19</sup> NYSEG rehearing request at 3-6.

<sup>20</sup> 114 FERC ¶ 62,039 at P 53; EA at 40-41, 47.

<sup>21</sup> *See, e.g., New York State Electric & Gas Corp.*, 109 FERC ¶ 61,360 at P 2-18 (2004); *Tacoma Public Utilities*, 78 FERC ¶ 62,170 at 64,611-3 (1997).

<sup>22</sup> *See, e.g.,* the description of the Moshier Section of New York's Beaver River, a Class IV-V reach for which boating releases are required by a Commission-issued license. <http://www.americanwhitewater.org/content/River/state/NW>.

<sup>23</sup> NYSEG rehearing request at 12-13.

stable surfaces at likely access points should require minimal burden and expense and pose no safety hazard.

17. NYSEG seeks clarification that the requirement to provide bypassed reach flow information to the public applies only to the High Falls bypassed reach, because the only reason to provide any streamflow information to the public is for whitewater boating purposes.<sup>24</sup> We deny this request. Streamflow information may also be useful to persons other than kayakers, including fishermen and hikers using the bypassed reach areas. Indeed, the license contemplates access to these areas by paddlers, fishermen, and hikers.<sup>25</sup> We here affirm in Article 410 that the flow data is to be made available for both the High Falls and Kents Falls bypassed reaches.

18. Finally, NYSEG requests that any whitewater boating flow study include a description of the demand for kayaker access to the High Falls bypassed reach as a study parameter.<sup>26</sup> We agree, and note in this regard NYSEG's suggestion that there is no demand for kayaker access to the High Falls bypassed reach.<sup>27</sup> That is hardly surprising, in light of the facts that the access point at High Falls dam is posted "no trespassing," the minimum flow requirements keep flows below boatable levels unless the project is spilling, and there is no public information on when the project is spilling or how much. Thus, any evaluation of the demand for kayaker access to the High Falls bypassed reach should be conducted after appropriate signage is installed and flow information made available to the public. Since we are moving back the date for any future whitewater flow release study by at least three years, the stream flow and signage requirements of Article 410 should be implemented before that time.

The Commission orders:

(A) The reply comments of American Whitewater filed on February 22, 2006, the comments of the New York State Council of Trout Unlimited filed on February 24, 2006, and the comments of Adirondack Mountain Club filed on March 2, 2006, in this proceeding are hereby rejected.

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<sup>24</sup> NYSEG rehearing request at 6, 9-10.

<sup>25</sup> See Article 406 and Settlement Section 3.8(c).

<sup>26</sup> NYSEG rehearing request at 8.

<sup>27</sup> NYSEG rehearing request at 8-9.

(B) Article 403 of the license for the Saranac River Project No. 2738 is amended by replacing the word “two” in the first sentence of said article with the word “one.”

(C) Article 406 of the license for the Saranac River Project No. 2738 is amended by replacing the first two paragraphs with the following:

Article 406. Recreation Plan. Within two years of the effective date of this license, the licensee shall file for Commission approval, a recreation plan to implement the recreation-related measures required by condition D.23 of the water quality certification in Appendix A and section 3.8 of Appendix B of this order. The plan shall be prepared in consultation with the Adirondack Council, New York Rivers United, National Park Service, New York Department of Environmental Conservation, U.S. Fish and Wildlife Service, American Whitewater Affiliation, Adirondack Mountain Club, New York State Council of Trout Unlimited, Adirondack Park Agency, and Northern Forest Canoe Trail Organization.

The recreation plan shall include, at a minimum: (1) design drawings for the existing recreation facilities and those proposed in the Settlement; (2) a schedule of the times and days recreation facilities are to be open and available for public use; (3) a protocol for notifying the Commission when recreation measures are curtailed or suspended in the event of operating emergencies; and (4) provisions for developing and maintaining a snowmobile trail on project land between Sand Road and the Saranac River, as shown on Exhibit R-2, of additional information filed May 19, 2005, that would connect to an existing trail.

(D) Article 407 of the license for the Saranac River Project No. 2738 is amended by replacing the text with the following:

Article 407. Whitewater Boating and Biological Monitoring Plan. No later than January 31, 2010, the licensee shall file a report with the Commission regarding the feasibility and usefulness of a study of the effects of scheduled flow releases for whitewater boating on the aquatic resources of the High Falls bypassed reach, and on the demand for whitewater kayaking in that reach. The report shall be developed in consultation with the New York Department of Environmental Conservation, U.S. Fish and Wildlife Service, Trout Unlimited, American Whitewater, Adirondack Mountain Club, and the Adirondack Park Agency. The report shall include documentation of the consultation, copies of the comments and recommendations of the consulted entities, and the licensee’s analysis of

the comments and recommendations. The licensee shall allow a minimum of 30 days for the consulted entities to comment. If the licensee does not adopt a recommendation, the report shall include the licensee's reasons.

(E) A new Article 410 is added to the license, to read as follows:

*Article 410. Signage and Flow Information Plan.* Within six months of the effective date of this license, the licensee shall file for Commission approval, a signage and flow information plan. The plan shall be prepared in consultation with the Adirondack Council, New York Rivers United, National Park Service, New York Department of Environmental Conservation, U.S. Fish and Wildlife Service, American Whitewater, Adirondack Mountain Club, New York State Council of Trout Unlimited, Adirondack Park Agency, and Northern Forest Canoe Trail Organization.

The Plan shall include, at a minimum: (1) a signage program to be implemented no later than January 21, 2007, that directs the public to recreation opportunities (including whitewater boating in the High Falls and Kents Falls bypassed reaches) and provides safety information; (2) a procedure for providing bypassed reach flow information to the public by internet or telephone that could include data from existing gages or other sources, as well as providing reference marks in the High Falls and Kents Falls bypassed reaches so recreation users can verify current flow conditions to be implemented no later than January 31, 2007.

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 consulted entities, and specific descriptions of how the consulted entities' comments are accommodated by the plan. The license shall allow a minimum of 30 days for the consulted entities to comment and 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 site-specific information.

The Commission reserves the right to require changes to the plan. The plan shall not be implemented until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee shall implement the plan, including any changes require by the Commission.

(F) The requests of the United States Department of the Interior, New York State Department of Environmental Conservation, and New York State Electric & Gas Corporation filed February 14, 17, and 21, respectively, for rehearing of the January 19, 2006, order issuing a new license for the Saranac River Project No. 2738, are hereby granted to the extent set forth in ordering paragraphs (B), (C), (D), and (E) above.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.