

UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

New York Power Authority

Project No. 2216-066

ORDER ON OFFER OF SETTLEMENT  
AND ISSUING NEW LICENSE

(Issued March 15, 2007)

**I. Introduction**

1. On August 18, 2005, the New York Power Authority (Power Authority) filed an application for a new license, pursuant to sections 4(e) and 15 of the Federal Power Act (FPA),<sup>1</sup> and the Niagara Redevelopment Act,<sup>2</sup> for the continued operation and maintenance of the 2,755.5-megawatt (MW) Niagara Project No. 2216, located on the Niagara River, in Niagara County, New York.<sup>3</sup>

2. On August 19, 2005, the Power Authority filed an Offer of Settlement (Settlement), signed by itself and most of the major parties to the relicensing proceeding.<sup>4</sup>

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<sup>1</sup> 16 U.S.C. §§ 797(e) and 808 (2000), respectively.

<sup>2</sup> 16 U.S.C. § 836, 836a (2000).

<sup>3</sup>The project is required to be licensed pursuant to section 23(b)(1) of the FPA because it is located on the Niagara River, a navigable waterway of the United States. 19FPC 186 (1958).

<sup>4</sup> The settlement was signed by the Power Authority, United States Department of the Interior (Interior), New York State Department of Environmental Conservation (New York DEC), New York Department of State, New York Office of Parks, Recreation and Historic Preservation (New York Parks), the Niagara Falls Water Board (Water Board), New York Association of Public Power (New York Public Power), Municipal Electric Utility Association (Municipal Electric), New York State Rural Electric Cooperative

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For the reasons discussed below, we approve the settlement and issue a new license for the project.

## **II. Background**

3. The Niagara Project is governed by two treaties with Canada and project-specific legislation. The first treaty, the Boundary Waters Treaty of 1909 between the United States and Canada,<sup>5</sup> established the International Joint Commission, a bi-national agency with the mission of preventing and resolving disputes between the two countries over boundary waters.<sup>6</sup> The second treaty, Niagara River Water Diversion Treaty of 1950 (Diversion Treaty),<sup>7</sup> provides for the equal sharing by the United States and Canada of the waters of the Niagara River for power generation.<sup>8</sup>

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Association (Cooperatives), New York Rivers United, Friends of the Buffalo-Niagara River (Friends), and the Niagara Relicensing Environmental Coalition (Environmental Coalition).

<sup>5</sup> Treaty Between the United States and Great Britain Relating to Boundary Waters Between the United States and Canada, January 11, 1909, 36 Stat. 2448 (1909).

<sup>6</sup> In 1953, the Joint Commission established the International Niagara Board of Control (Control Board) to advise it on issues regarding water levels and flows in the Niagara River. The Joint Commission has also delegated routine management of the river to the Control Board. This includes the regulation of water levels and annual installation of the Lake Erie Niagara Ice Boom, located at the downstream end of Lake Erie and extending from Buffalo across the lake to Canada. These tasks are accomplished by directions to the Power Authority and Ontario Power Generation (Ontario Power operates hydroelectric facilities using Canada's share of the water under the Diversion Treaty). The ice boom is a "joint work" operated and maintained by the Power Authority and Ontario Power.

<sup>7</sup> TIAS 2130, 1 U.S.T. 694 (February 27, 1950).

<sup>8</sup> Article III of the Diversion Treaty defines the amount of Niagara River water available for scenic and power generation purposes. Article IV establishes minimum flows over the falls for specified hours and days throughout the year for scenic purposes at Niagara Falls. Article V provides that flow not reserved for scenic and certain other purposes may be diverted for power generation. Article VI provides that the waters which may be diverted for power generation are divided equally between the United States and Canada.

4. The Niagara Project was specifically authorized by Congress in the Niagara Redevelopment Act of 1957.<sup>9</sup> The Niagara Redevelopment Act directs and authorizes the Commission to issue a license to the Power Authority for a project with the capacity to use all of the United States' share of Niagara River water available for power generation. The Niagara Redevelopment Act provides that the license is to include specific conditions pertaining to distribution of project power, rates, transmission, and other matters. These specified conditions are "in addition to those deemed necessary and required under the terms of the [FPA]."<sup>10</sup>

5. The original license for the Niagara Project was issued to the Power Authority's predecessor, the Power Authority of the State of New York, in 1957 and expires on August 31, 2007.<sup>11</sup>

6. The Power Authority filed its application for new license on August 18, 2005. On October 19, 2005, the Commission issued notice of acceptance of the application and settlement and requesting interventions, protests, comments, final recommendations, and terms, conditions, and prescriptions.<sup>12</sup> Motions to intervene or notices of intervention in the licensing proceeding were filed by a number of entities.<sup>13</sup> Comments on the

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<sup>9</sup> 16 U.S.C. § 836-836a (2000).

<sup>10</sup> 16 U.S.C. § 836(a) and (b) (2000).

<sup>11</sup> *Power Authority of the State of New York*, 19 FPC 186 (1958).

<sup>12</sup> 70 Fed. Reg. 61,798 (Oct. 26, 2005).

<sup>13</sup> Timely motions to intervene or notices of intervention were filed by Allegheny Electric Cooperative, Inc. (Allegheny); City of Buffalo, New York (Buffalo); Chamber of Commerce of the Tonawandas Inc. and the City of North Tonawanda, New York; City of Cleveland, Ohio (Cleveland); County of Westchester and County of Westchester Public Utility Service Agency (Westchester); County of Erie, New York; Connecticut Municipal Electric Energy Cooperative; Eastern Niagara Power Project Alliance (Eastern Niagara Alliance) (a group of school districts and municipalities); Economic Development Group, Inc. (Development Group); New York Public Power; Cooperatives; New York DEC; Pascoag Utility District; Power for Economic Prosperity; Niagara Mohawk Power Corporation; Niagara University; International Brotherhood of Electric Workers, Local 2104; Municipal Electric; Massachusetts Municipal Wholesale Electric Company (MassMunicipal); Massachusetts Department of Telecommunications and Energy (MassDTE); New York State Electric and Gas Corporation (NYSEG) and Rochester Gas and Electric (RG&E) (together, the Upstate Utilities); Rhode Island Public  
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Settlement were filed by several entities.<sup>14</sup> Some intervenors oppose the settlement or otherwise oppose issuance of a license.<sup>15</sup> The Power Authority filed an answer to various protests and comments.<sup>16</sup>

7. On February 6, 2006, the Commission issued a notice that the application was ready for environmental analysis and requesting comments, recommendations,

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Utilities Commission; North Tonawanda City School District; Tonawanda Seneca Nation; Tuscarora Nation; Williamsville Central School District; Niagara Improvement Association; Town of Lewiston, New York; Newfane Central School District; City of Tonawanda School District; Interior; Buffalo Olmstead Parks Conservancy; and Crandall Johnson.

The Commission Secretary granted late-filed motions to intervene by the Niagara Power Coalition, the Public Power Coalition (City of North Tonawanda, City of Tonawanda, Town of Tonawanda, Town of Grand Island, and Town of Amherst) in notices issued February 16 and May 19, 2006, and, by the Upper Mountain Volunteer Fire Co. (Upper Mountain), and City of New York and the New York City Public Utility Service (New York City) on January 12, 2007, respectively.

<sup>14</sup> Comments supporting the August 19, 2005 settlement were filed by Allegheny; Cleveland; Connecticut Municipal Electric Energy Cooperative, Inc.; Lewiston-Porter Central School District; New York Public Power; Cooperatives; Water Board; Municipal Electric; Rhode Island Public Utilities Commission; MassMunicipal; MassDTE; New York DEC; Niagara Power Coalition; Pascoag Utility District; Friends; Interior; and Ronald A. Wakefield.

Comments opposing the August 19, 2005 settlement agreement were filed by Chamber of Commerce of the Tonawandas Inc.; the City of North Tonawanda, New York; and the Eastern Niagara Power Project Alliance.

<sup>15</sup> Niagara Improvement Association, Eastern Niagara Power Project Alliance, City of North Tonawanda and the Chamber of Commerce of the Tonawandas, Inc., Westchester, the City of New York and Public Power Coalition.

<sup>16</sup> See 18 C.F.R. § 385.213(a)(2) (2006). Power Authority's answer to the protests is prohibited unless otherwise ordered by the decisional authority. The Commission will accept such an answer to provide a better understanding of the issues in a proceeding. See, e.g., *South Carolina Electric & Gas Co.*, 109 FERC ¶ 61,234 at P 7 n.19 (2004). We find that to be the case here and will accept Power Authority's answer.

prescriptions, and terms and conditions.<sup>17</sup> Several entities filed comments in response to the notice.<sup>18</sup> On May 22, 2006, the Power Authority filed a response to the comments.

8. On May 26, 2006, the Power Authority filed a settlement agreement between itself and Niagara University, as a supplement to the Settlement Agreement (Niagara Supplement). On June 30, 2006, the Power Authority filed an agreement between itself and the City of Buffalo, New York; Erie County, New York; Buffalo Olmstead Parks Conservancy; and the New York Empire State Development Corporation as a supplement to the Settlement Agreement (Erie/Buffalo Supplement). The Power Authority stated that these supplements concern matters outside the Commission's jurisdiction and were filed for informational purposes only.

9. On July 14, 2006, the Commission issued a Draft Environmental Impact Statement (EIS) for the project pursuant to the National Environmental Policy Act of 1978 (NEPA).<sup>19</sup> Public meetings to receive comments on the Draft EIS were held in Niagara Falls, New York, on August 17, 2006. In response to public notice of the Draft EIS,<sup>20</sup> comments were filed by 29 entities.<sup>21</sup> In addition to these comments, 40 individuals provided oral comments at the public meeting.

10. A final EIS was issued on December 29, 2006. The motions to intervene, comments, and recommendations have been fully considered in determining whether, and under what conditions, to issue this license.

### **III. Procedural Matters**

11. Several intervenors filed comments or protests after September 23, 2005 and before March 23, 2006, that do not include a separate Statement of Issues. The Power Authority requests that we dismiss any issues raised by parties whose pleadings fail to

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<sup>17</sup> 71 Fed. Reg. 7761 (February 14, 2006).

<sup>18</sup> Interior, the Upstate Utilities, Niagara Improvement Association, Eastern Niagara Alliance, Public Power Coalition, and Niagara University.

<sup>19</sup> 42 U.S.C. § 4321, *et seq.* (2000).

<sup>20</sup> 71 Fed. Reg. 41796 (July 24, 2006).

<sup>21</sup> *See* Final EIS at 7-8.

comply with Order No. 663.<sup>22</sup> Given that we have revised Order No. 663 to limit its applicability to requests for rehearing only, we are waiving Rule 203(a)(7) to the extent necessary to accept the pleadings filed during the period of September 23, 2005-March 22, 2006.

12. On January 5, 2006, the Town of Amherst, New York, filed a letter stating that Amherst was not being included in settlement discussions and requested that the Commission require the Power Authority to include it in any such discussions. As a general matter, entities interested in Commission proceedings are free to communicate among themselves in any manner they consider to be appropriate. This includes the conduct of settlement negotiations. While we will consider any issues raised by entities that were not included in settlement negotiations, we cannot control the private conduct of such discussions.

#### **IV. Project Description**

13. The existing Niagara Project is located in Niagara County, New York, on the Niagara River, a 35-mile-long waterway that connects Lake Erie and Lake Ontario and is an international boundary water between the United States and Canada. The project does not occupy federal lands.

14. The project has two developments: the 2,515.5-MW conventional Robert Moses development and the 240-MW Lewiston pumped storage development, for a total installed capacity of 2,755.5 MW.

15. Existing project facilities include: (1) two 700-foot-long intake structures located on the upper Niagara River about 2.6 miles upstream of Niagara Falls; (2) two 4.3-mile-long underground concrete conduits, each measuring 46 feet wide by 66.5 feet high; (3) a 71-acre forebay that serves as the headwater for the Robert Moses plant and the tailwater for the Lewiston plant; (4) the Lewiston Plant, measuring 975 feet long by 240 feet wide by 160 feet high and containing 12 generating units with a combined capacity

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<sup>22</sup> *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663, 70 *Fed. Reg.* 55,723 (September 23, 2005), *FERC Statutes and Regulations* ¶ 31,193 (2005) (to be codified at 18 C.F.R. §§ 385.203(a)(7) and 385.713(c)(2)). Order 663-A, effective March 23, 2006, amended Order No. 663 to limit its applicability to rehearing requests. *Revision of Rules of Practice and Procedure Regarding Issue Identification*, Order No. 663-A, 71 *Fed. Reg.* 14,640 (March 23, 2006), *FERC Statutes and Regulations* ¶ 31, 211 (2006) (codified at 18 C.F.R. §§ 385.203(a)(7) and 385.713(c)(2)).

of 240 MW; (5) the 1,900-acre Lewiston Storage Reservoir at a maximum water surface elevation of 658 feet United States Lake Survey Datum; (6) the Robert Moses plant, including an intake structure measuring 1,100 feet long by 190 feet wide by 100 feet high and containing 13 turbine generating units with a combined capacity of 2,515.5 MW; and (7) a switch yard.<sup>23</sup> A detailed description of the project facilities is contained in Ordering Paragraph (B) below.

16. As noted, the intake structures are located on the upper Niagara River, upstream of the Niagara Falls. River water passes through the intakes into the two underground conduits, which empty into the forebay. From the forebay, water either passes through the Robert Moses plant for power generation, or is pumped via the Lewiston plant, into the Lewiston Reservoir for storage and subsequent release through both developments for power generation to meet peak demands. Generation flows are released back to the Niagara River downstream of Niagara Falls. Power from the project is transmitted directly from the switchyard into the electric grid.

17. Under the current license, the project boundary encloses all project features including the Lewiston Reservoir, the forebay, the Robert Moses and Lewiston Plants, the conduits, the intake structures and project-related recreation facilities, approximately one third of a mile of shoreline near the intake structures, and approximately 8,000 feet of shoreline in the City of Niagara Falls. The boundary encompasses approximately 3,222 acres, including the Lewiston Reservoir. The Power Authority proposes to remove eight parcels of land, totaling approximately 156 acres, from the project boundary.

## V. Settlement

### A. Settlement Agreement

18. The Offer of Settlement includes four separate agreements: (1) Relicensing Settlement Agreement Addressing New License Terms and Conditions (Relicensing Agreement); (2) Host Community Settlement Agreement Addressing Non-License Terms and Conditions (Host Community Agreement); (3) Relicensing Settlement

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<sup>23</sup> In 1989, the Commission approved an upgrade of the 13 generators at the Robert Moses power plant from 145 MW to 193.5 MW each, resulting in that plant's generating capacity increasing to 2,515.5 MW. 46 FERC ¶ 62,322 (1989), *order on appeal*, 48 FERC ¶ 61,074 (1989). In 2001, the Commission approved the removal of the project's Cross-State Line transmission line finding that it no longer qualified as a "primary transmission line" under section 3(11) of the Federal Power Act. 97 FERC ¶ 61,051 (2001).

Agreement Between the Power Authority of the State of New York and the Tuscarora Nation (Tuscarora Agreement); and (4) Relicensing Settlement Agreement Addressing Allocation of Project Power and Energy to Neighboring States (Allocation Agreement) (collectively, the Settlement Agreements).

19. By their terms, the individual Settlement Agreements resolve among the settling parties all issues associated with the Niagara Project relicensing. However, only the Relicensing Agreement and the Allocation Agreement include measures proposed to result in license articles. The Host Community Agreement and the Tuscarora Agreement are intended to be private, “off-license” agreements that are not subject to the Commission’s jurisdiction.

### **1. Relicensing Agreement**

20. The Relicensing Agreement was executed by the Power Authority and several federal and state agencies, and non-governmental organizations.<sup>24</sup> Sections 1 through 3 introduce the settlement and provide the general agreement of the parties to the settlement, its purposes and definition of terms. Sections 4, 5, and 6 propose various measures with regard to ecological, recreation, and water quality resources affected by the project, and are described below. The Relicensing Agreement also includes certain off-license settlement agreement provisions.<sup>25</sup> In addition to the resource-specific measures, the parties to the Relicensing Agreement request that the new license include no changes to project operation, adopt the project boundary proposed in the application, and be for a term of 50 years.

#### **a. Fund for Habitat Improvement Projects**

21. Section 4.1.2 provides for eight specific Habitat Improvement Projects (HIPs) in the vicinity of the project to be constructed during the term of the new license.<sup>26</sup> The

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<sup>24</sup> Interior through the U.S. Fish and Wildlife Service, U.S. Bureau of Indian Affairs, and National Park Service; New York DEC; New York Parks; Environmental Coalition; Water Board; New York Public Power; Cooperatives; and Municipal Electric.

<sup>25</sup> The non-license provisions are found in Appendix E to the Relicensing Agreement. They provide for establishment of a Niagara River Greenway Ecological Fund, Land Acquisition Fund for acquisition of land by New York DEC, State Parks Greenway Fund, and a Cayuga Creek Restoration and Feasibility Study.

<sup>26</sup> Relicensing Agreement section 4.1.2. All of the HIPs are to be located outside the existing project boundary, but within the Niagara River basin. The location of the

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agreement provides for the Power Authority to establish a fund in the amount of \$12 million for these HIPs, and to construct the HIPs in accordance with the criteria set forth in the relicensing study entitled “Investigation of Habitat Improvement Projects for the Niagara Power Project” (June 2005)<sup>27</sup> and an implementation schedule appended to the Relicensing Agreement.<sup>28</sup> The Relicensing Agreement provides that construction of the HIPs is to be a one-time obligation, with the intention that the HIPs not result in any expansion of the project boundaries.<sup>29</sup> New York Department of Environmental Conservation (New York DEC) would operate, maintain, and monitor the HIPs. Condition 9(A) of the water quality certification issued for the project by the New York DEC requires that the licensee create and maintain funds for the design of the eight proposed HIPs.

22. HIP funds not expended on construction of the HIPs are proposed to be made available to New York DEC for monitoring, operation, and maintenance of the HIPs, and the Power Authority is committed to providing any additional funds that may be necessary for this purpose.<sup>30</sup> The individual HIPs, all of which are upstream of the project, are:

- Strawberry Island Wetland Restoration – Strawberry Island is located just upstream from Grand Island and is part of Beaver Island State Park. The HIP would include measures to protect shallow water habitat downstream from the island, reduce shoreline erosion, and expand existing wetlands.
- Frog Island Restoration – This HIP would create about 5.5 acres of island surrounded by a U-shaped perimeter of breakwater structures in the approximate vicinity of a historical island complex that was located between Motor and Strawberry Islands.
- Motor Island Shoreline Protection – Motor Island is located near Strawberry

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HIPs is shown on EIS Figures 3-1 and 3-2. *See also* discussion at EIS section 3.3.3.2.

<sup>27</sup> Filed with the Commission on December 30, 2005, Public Information File, Volume 1, CD 2 Public.

<sup>28</sup> Relicensing Agreement, Appendix B.

<sup>29</sup> Explanatory Statement at 7.

<sup>30</sup> Relicensing Agreement section 4.1.2.

Island and is managed by New York DEC for fish and wildlife. This HIP would provide shoreline protection measures, including vegetation enhancement and removal of boat dock facilities to restore the island shoreline and minimize future maintenance.

- Beaver Island Wetland Restoration – Beaver Island State Park is located at the south end of Grand Island. This HIP would restore about 36 acres of historic wetlands that were dredged and filled by removal of fill, site grading, plantings, and invasive species control.
- Control of Invasive Species – Buckhorn and Tiffit Island Marshes – Buckhorn Marsh and Tiffit Island Farm Nature Preserve are located on Buckhorn Island at the north end of Grand Island. This HIP would control exotic and invasive species, particularly purple loosestrife and common reed, which have heavily affected these areas, reducing the diversity of native wetland species.
- Osprey Nesting - The osprey nesting HIP would increase nest site availability for osprey by placement of pole-mounted nesting platforms at riverine and wetland locations, including some of the above-mentioned sites.
- Common Tern Nesting - The common tern nesting HIP would provide nesting habitat for common terns and increase tern productivity by increasing hatching and fledgling success at various locations in the Niagara River corridor. Measures may include adding gravel nesting substrate, removing vegetation, and installing predator exclusion devices, fences, and nesting rafts or barges.
- Installation of Fish Habitat/Attraction Structures - The fish habitat/attraction structures HIP would provide for the installation of large-object cover (*i.e.*, rock piles and boulder fields) structures in deep water areas. This would enhance the limited shelter from high velocity water and thereby provide habitat for fish to shelter and forage.

**b. Fish and Wildlife Habitat Enhancement and Restoration Fund**

23. Section 4.1.3 provides for funding to support future habitat mitigation and enhancement activities in the Niagara River basin. The Fish and Wildlife Habitat Enhancement and Restoration Fund (HERF) would be established in the amount of \$16.2 million, and would be used to address impacts from water level fluctuations attributable in part to project operations. Projects could include HIPs; land acquisition; habitat

research; and fish, wildlife, and indigenous plant restoration. Projects would be selected by an Ecological Standing Committee based on criteria identified in the agreement, and the agreement prohibits the use of HERF monies to replace state-funded environmental programs. The Commission would receive an annual report. Condition 9(B) of the water quality certification requires the licensee to establish this fund.

**c. Ecological Standing Committee**

24. Section 4.1.1 provides for the establishment of the Ecological Standing Committee to facilitate implementation of the HIPs and projects to be funded by the HERF Fund. The members are the Power Authority, New York DEC, U.S. Fish and Wildlife Service (FWS), Seneca Nation of Indians, Tuscarora Nation, Tonawanda Seneca Nation, New York Rivers United, and the Niagara Relicensing Environmental Coalition.

**d. Reporting Requirement for HIPs and HERF**

25. Section 4.1.4 requires the Power Authority to submit an annual report to the Commission including: (1) progress reports on all HIPs and projects funded by the HERF; (2) project-by-project expenditures during the prior year; (3) project-by-project planned expenditures for the current year; (4) updated balance sheets for the funds; and (5) material changes to proposed implementation schedules.<sup>31</sup>

**e. Public Access Improvements**

26. Section 4.2 provides for various improvements in recreational access to the Niagara River. Improvements are to be located at three locations within the project boundary,<sup>32</sup> and include additional parking (including parking for the disabled), improvements to disabled access to existing walkways, and a new pedestrian trail and gravel path. Condition 9(D) of the water quality certification requires the licensee to construct, operate, and maintain these three public access improvements within the project boundary.

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<sup>31</sup> See also Relicensing Agreement Appendix A at A-3.

<sup>32</sup> Upper Mountain Parking Lot/Fishing Access; Robert Moses Fishing Pier Parking Area; and Bulkhead Fence at the Upper River Intakes.

**f. Parks and Recreation Fund**

27. Section 5 provides for a \$9.2 million fund for identified capital improvements to be undertaken by New York Parks at three parks<sup>33</sup> in the project vicinity. Some of these park improvements would be located within the existing project boundary. The Power Authority would submit information on such improvements to the Commission for approval. The Power Authority would also submit annually to the Commission a report of fund expenditures and a progress report on improvements to facilities within the project boundary.

**g. Niagara Falls Water Board Capital Improvement Fund**

28. Section 6 would have the Power Authority establish a Niagara Falls Water Board Capital Improvement Fund in the amount of \$19 million for the purpose of capital improvements to the Water Board's Falls Street Tunnel to help minimize groundwater infiltration into the tunnel in the project area. Groundwater infiltration into the tunnel results, in large part, from the project's power conduit drainage system which directs groundwater flow toward the tunnel. This causes an increase in the amount of water that Niagara Falls must treat before it can be used.<sup>34</sup> The Water Board would manage and administer the fund. The Power Authority would provide annual reports to the Commission on the status of the capital improvements until they are completed.

**h. Proposed Non-License Settlement Provisions**

29. Appendix E of the Relicensing Agreement proposes several off-license obligations that the Power Authority will undertake: establishing a Niagara River Greenway Ecological Fund; establishing a Land Acquisition Fund; establishing a State Parks Greenway Fund; and funding a Cayuga Creek Restoration and Feasibility Study.

**2. Allocation Agreement**

30. As mentioned above, the Niagara Redevelopment Act establishes certain requirements with respect to any license issued by the Commission to the Power Authority for the Niagara Project. With regard to allocation of project power, Niagara Redevelopment Act section 836 provides: (1) that the license shall require the Power Authority to make at least 50 percent of the project power available to public bodies and

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<sup>33</sup> Reservoir State Park, Niagara Gorge, and ArtPark.

<sup>34</sup> See Final EIS at section 3.3.2.2 at 57.

non-profit cooperatives for the purpose of ensuring that the power is sold to consumers at the lowest rates reasonably possible (referred to as “preference power”); and (2) that a reasonable portion (up to 20 percent) of the power that could be allocated as preference power is to be made available for use within neighboring states.<sup>35</sup>

31. The original license implements these requirements by including in the license Articles 20 and 21, which essentially reiterate the statutory requirements.<sup>36</sup> The Allocation Agreement proposes to resolve all power issues pertaining to the neighboring states by incorporating these same articles into the new license, modified only to specifically identify the neighboring states.<sup>37</sup> The Allocation Agreement also includes non-license contractual terms for the sale of power to the neighboring states through September 1, 2025.<sup>38</sup>

### **3. Host Community Agreement**

32. The Host Community Agreement is between the Power Authority, various local governmental units, and the Niagara Power Coalition, an non-governmental

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<sup>35</sup> The Commission has found that the neighboring states are not entitled, as a matter of law, to the full 20 percent of project power subject to the preference provisions (*i.e.*, 10 percent of total project power), but affirmed an administrative law judge’s factual determination that the reasonable portion to which those states are entitled is the statutory maximum. *Massachusetts Municipal Wholesale Electric Co. v. Power Authority of the State of New York*, Opinion No. 229, 30 FERC ¶ 61,323 at 61,645-47 (1985), *reh’g denied*, 32 FERC ¶ 61,194 at 61,445-46 (1985), *appeal dismissed as moot*, *Metropolitan Transit Authority, et al. v. FERC*, 976 F.2d 584, 595 (D.C. Cir. 1986). The matter of what is a reasonable portion with regard to the neighboring states has not been reexamined since Opinion No. 229 was issued.

<sup>36</sup> 19 FPC 186, 193-94.

<sup>37</sup> Our approval of the Allocation Agreement would also resolve the matter of Niagara Redevelopment Act implementation with respect to preference provisions in general. Intervenor other than the neighboring states have filed protests in this regard, which we consider below.

<sup>38</sup> Allocation Agreement, section 4.

organization.<sup>39</sup> It provides for the establishment of a Host Communities Fund, to be allocated among the host communities in percentages set forth in the agreement, conveyance of surplus lands owned by the Power Authority to various host communities, an allocation of project power to the host communities, and establishment of a Greenway Recreation/Tourism Fund for the host communities. None of these provisions of the agreement is intended to be included in the new license.

#### **4. Tuscarora Agreement**

33. The Tuscarora Agreement is between the Power Authority and the Tuscarora Nation (Nation), a federally recognized Indian tribe. The Nation's reservation abuts Lewiston Reservoir. The Tuscarora Agreement provides for: (1) payments to the Nation for unspecified purposes; (2) an allocation of project power; (3) development and maintenance of a new exhibit at the project's visitor center (Power Vista) devoted to the Haudenosaunee people; (4) conveyance to the Nation of land outside the project boundary; (5) conveyance of lands occupied by Lewiston Reservoir that were formerly owned by the Nation to the Nation should those lands no longer be needed for public purposes,<sup>40</sup> and consultation with respect to other property in the vicinity of the project; (6) funding for the Nation's programs and events; (7) the inclusion of a Customary Use Plan that recognizes customary uses of project lands by the Tuscarora People within the Land Management Plan provided for in the Relicensing Agreement; (8) internship and scholarship programs; and other measures.<sup>41</sup> Like the Host Community Agreement, none

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<sup>39</sup> The signatories are Niagara Power Coalition, the City of Niagara Falls, City of Niagara Falls School District, Lewiston-Porter School District, Niagara County, Niagara Wheatfield School District, Town of Lewiston, and Town of Niagara.

<sup>40</sup> The agreement recognizes that Commission approval is required for the conveyance of any lands within the project boundary. *See* Tuscarora Agreement, section 6.2.

<sup>41</sup> In addition to their agreement, the Tuscarora Nation and Power Authority cooperated on a research effort that resulted in an oral history report that documents, through interviews, how the Niagara Project has affected Tuscarora tribal members. The oral history report was filed with the Commission on January 10, 2007.

of the Tuscarora Agreement's provisions is intended to be included in the new license.<sup>42</sup> However, as discussed below we will require that the Power Vista exhibit be included in the project's recreation plan.

#### **5. First Supplement to Settlement Agreement-Niagara University**

34. The Niagara Supplement provides for the Power Authority to: (1) establish a University Capital Fund (Capital Fund) with a value of \$9.5 million; (2) establish a Landscape Development Fund (Landscape Fund) with a value of \$1.0 million; (3) convey a 24-acre parcel of non-project land to the University; and (4) make available to the University 3 MW of firm Niagara Project power during the term of the license. The Niagara Supplement does not purport to address an identified project impact; rather, it "primarily reflects the Power Authority's desire, as a corporate municipality and political subdivision of the State of New York, to support the communities within which the project is located." None of the provisions of the agreement is intended to be included in the new license.<sup>43</sup>

#### **6. Second Supplement to Settlement Agreement-Erie/Buffalo Agreement**

35. The Erie/Buffalo Supplement provides for the Power Authority to: (1) establish and fund during the term of the license an Erie County Greenway Fund (Greenway Fund); (2) establish and fund during the term of the license a Buffalo Waterfront Development Fund (Waterfront Development Fund); and (3) consult with the New York State Erie Canal Harbor Development Corporation, fund a feasibility study, and seek to obtain a new location for storage and maintenance of the ice boom, facilities which are currently located upstream of the project

36. As with the Niagara Supplement, the Erie/Buffalo Supplement does not purport to address an identified project impact; rather, it "primarily reflects the Power Authority's

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<sup>42</sup> Section 2.2.1 of the Tuscarora Agreement states that only the license terms and conditions set out in section 3 constitute its complete and final recommendations for inclusion in the license.

<sup>43</sup> Niagara Supplement explanatory statement at 1.

desire, as a corporate municipal instrumentality and political subdivision of the State of New York, to support communities near the Niagara Project.” None of the provisions is intended to be included in the new license.<sup>44</sup>

37. The Greenway Fund would impact the Niagara River waterfront downstream from the project and outside of the project boundary. The Waterfront Development Fund would similarly be used to support economic development and other activities along the Buffalo waterfront outside of the project boundary. The ice boom has never been a project facility and its storage and maintenance facilities are not within the project boundary.

## **VI. Water Quality Certification**

38. Under section 401(a)(1) of the Clean Water Act (CWA),<sup>45</sup> the Commission may not issue a license authorizing the construction or operation of a hydroelectric project unless the state water quality certifying agency either has issued water quality certification for the project or has waived certification by failing to act on a request for certification within a reasonable period of time, not to exceed one year. Section 401(d) of the CWA provides that the certification shall become a condition of any federal license that authorizes construction or operation of the project.<sup>46</sup>

39. On August 18, 2005, the Power Authority applied to the New York DEC for water quality certification for the Niagara Project. On January 31, 2006, New York DEC issued a water quality certification for the Niagara Project that includes conditions which are set forth in Appendix A of this order and incorporated into the license (see ordering paragraph D). The certification conditions include four project-specific “Ecological Conditions” numbered 9(A) through 9(D) which require certain provisions of the Relicensing Agreement, including the HIPs, HERF, Public Access Improvements, and the Land Acquisition Fund. Article 401 requires documentation that these measures have been completed.

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<sup>44</sup> Erie/Buffalo Supplement explanatory statement at 1.

<sup>45</sup> 33 U.S.C. § 1341(a)(1) (2000).

<sup>46</sup> 33 U.S.C. § 1341(d) (2000).



**VII. Coastal Zone Consistency Certification**

40. Under section 307(c)(3)(A) of the Coastal Zone Management Act (CZMA),<sup>47</sup> the Commission cannot issue a license for a project within or affecting a state's coastal zone unless the state CZMA agency concurs with the license applicant's certification of consistency with the state's CZMA program, or the agency's concurrence is conclusively presumed by its failure to act within 180 days of its receipt of the applicant's certification.

41. By letter dated February 17, 2006, the New York Department of State (New York DOS) issued to the Power Authority the final determination of consistency with the New York State Coastal Management Program, subject to the condition that the Ecological Standing Committee include a representative of New York DOS. By letter filed February 27, 2006, the Power Authority agreed to this condition. We direct the Power Authority to invite New York DOS to participate in the Ecological Standing Committee in Article 410.

**VIII. Section 18 Fishway Prescriptions**

42. Section 18 of the FPA,<sup>48</sup> states that the Commission shall require construction, maintenance, and operation by a licensee of such fishways as the Secretaries of Commerce or the Interior may prescribe. The Commission's policy is to reserve such authority in a license upon the request of either designated Secretary.

43. In response to the notice requesting final recommendations, terms, and conditions, Interior filed a reservation of the Secretary's authority to prescribe fishways during the term of the license. Article 403 of this license reserves the Commission's authority to require fishways that may be prescribed by Interior for the Niagara Project.

**IX. Threatened and Endangered Species**

44. Section 7(a)(2) of the Endangered Species Act of 1973 (ESA)<sup>49</sup> requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of

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<sup>47</sup> 16 U.S.C. § 1456(c)(3)(A) (2000).

<sup>48</sup> 16 U.S.C. § 811 (2000).

<sup>49</sup> 16 U.S.C. § 1536(a)(2) (2000).

federally listed threatened and endangered species, or result in destruction or adverse modification of designated critical habitat. The only federally listed species known to occur in the project area is the bald eagle.

45. By letter filed September 15, 2006, Interior stated that it concurred with the staff determination in the EIS that relicensing the project would not be likely to adversely affect the federally threatened bald eagle.

#### **X. National Historic Preservation Act**

46. Under section 106 of the National Historic Preservation Act (NHPA)<sup>50</sup> and its implementing regulations,<sup>51</sup> federal agencies must take into account the effect of any proposed undertaking on properties listed or eligible for listing in the National Register (defined as historic properties) and afford the Advisory Council on Historic Preservation (Advisory Council) a reasonable opportunity to comment on the undertaking. This generally requires the Commission to consult with the State Historic Preservation Officer (SHPO) to determine whether and how a proposed action may affect historic properties, and to seek ways to avoid or minimize any adverse effects.

47. To satisfy these responsibilities, the Commission executed a Programmatic Agreement (PA) with the New York State Historic Preservation Officer and the Advisory Council and invited the Power Authority, Seneca Nation of Indians, Tuscarora Nation, and Tonawanda Seneca Nation to concur with the stipulations of the PA.<sup>52</sup> The Power Authority concurred. The PA requires the licensee to prepare and implement a Historic Properties Management Plan (HPMP) for the term of any new license issued for this project. Execution and subsequent implementation of the PA demonstrates the Commission's compliance with section 106 of the NHPA. Article 406 requires the licensee to implement the PA and to file the HPMP with the Commission within one year of license issuance.

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<sup>50</sup> 16 U.S.C. § 470, *et seq.* (2000).

<sup>51</sup> 36 C.F.R. Part 800 (2006).

<sup>52</sup> 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 Issuing a License to the New York Power Authority for the Continued Operation and Maintenance of the Niagara Project in Niagara County, New York (FERC No. 2216) executed on January 25, 2007.

## **XI. Recommendations of Federal And State Fish and Wildlife Agencies**

48. Section 10(j)(1) of the FPA<sup>53</sup> requires the Commission, when issuing a license, to include conditions based on the recommendations of federal and state fish and wildlife agencies submitted pursuant to the Fish and Wildlife Coordination Act,<sup>54</sup> to “adequately and equitably protect, mitigate damages to, and enhance fish and wildlife (including related spawning grounds and habitat)” affected by the project.

49. In response to the February 7, 2006 notice that the project was ready for environmental analysis, Interior filed 9 section 10(j) recommendations on March 24, 2006. The recommendations included the eight habitat improvement projects (HIPs) and the habitat enhancement and restoration fund (HERF). Staff recommended in the EIS that all eight of the HIPs be included in this license. Staff concluded that the HERF was outside the scope of 10(j) and should not be included in this license because it was not a specific fish and wildlife measure, but rather an open-ended funding mechanism for non-specified projects. However, the section 10(j) recommendations are included in the New York DEC’s water quality certification. Therefore, all nine of Interior’s recommendations, including the HERF, are required by this license. The requirements of section 10(j) have therefore been satisfied.

## **XII. Discussion of Settlement Provisions**

50. The Commission looks with favor on settlements in licensing cases. When parties are able to reach settlements, it can save time and money, avoid the need for protracted litigation, promote the development of positive relationships among entities who may be working together during the course of a license term, and give the Commission, as it acts on license and exemption applications, a clear sense as to the parties’ views on the issues presented in each settled case.<sup>55</sup> At the same time, the Commission cannot automatically accept all settlements, or all provisions of settlements. Section 10(a)(1) of the FPA requires that the Commission determine that any licensed project is “best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of waterpower development, for the adequate protection, mitigation, and enhancement of

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<sup>53</sup>16 U.S.C. § 803(j)(1) (2000).

<sup>54</sup> 16 U.S.C. § 661, *et seq.* (2000).

<sup>55</sup> *Settlements in Hydropower Licensing Proceedings under Part I of the Federal Power Act*, 116 FERC ¶ 61,270 at P 2-12 (2006).

fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes referred to in section 4(e).” Consequently, in reviewing settlements, the Commission looks not only to the wishes of the settling parties, but also at the greater public interest, and whether settlement proposals meet the comprehensive development/equal consideration standard.

**A. Licensee Obligations and Project Boundary**

51. Project boundaries are used to designate the geographic extent of the lands, waters, works, and facilities that the license identifies as comprising the licensed project and for which the licensee must hold the rights necessary to carry out project purposes.<sup>56</sup> A project boundary does not change property rights, nor does the conveyance of a property right change a project boundary.<sup>57</sup> If a licensee wishes to remove lands from a project - *i.e.*, from the Commission's regulatory control as defined in the project license - it files an application to delete the lands from the license and from the project boundary.<sup>58</sup>

52. Any application to remove lands from a project boundary will be approved only if the Commission determines that the land is no longer necessary or appropriate for project purposes; that is, that all project purposes will continue to be satisfied in the absence of the lands at issue. If the Commission deletes a parcel of land from the project and its boundary, the Commission is placing that land outside of its jurisdiction and regulatory reach. As a consequence, it can neither impose nor enforce any conditions on that removal, including any covenants running with the land.

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<sup>56</sup> The current regulations stipulate a project boundary no more than 200 feet from the exterior margin of reservoirs, but make an exception where additional lands are "necessary for project purposes, such as recreation, shoreline control, or protection of environmental resources." 18 C.F.R. § 4.41(h)(2)(i)(B) (2006).

<sup>57</sup> *See, e.g., Niagara Mohawk Power Corp.*, 77 FERC ¶ 61,306 (1996). Property rights are governed by state law, whereas project boundaries are determined by the Commission.

<sup>58</sup> These are applications to amend the license by revising the license's description of project lands and the exhibits showing the project works and (if applicable) boundaries (both referenced in a license's ordering paragraphs). *See* 18 C.F.R. §§ 4.200 - 4.202 (2006).

53. As noted above, the current license boundary encloses all the project features including the Lewiston Reservoir, the forebay, both the Robert Moses and Lewiston Plants, the conduits, the intake structures, approximately one third of a mile of shoreline near the intake structures, and approximately 8,000 feet of shoreline in the City of Niagara Falls. The boundary encompasses approximately 3,222 acres.

54. The Power Authority proposes to remove eight parcels of land, totaling approximately 156 acres, from the project boundary because “the parcels are not needed for any hydropower-related operation or maintenance purposes.”<sup>59</sup> None of the eight parcels, except Area 6, appears to be needed for recreational access or for other project purposes, including operation and maintenance of the project.<sup>60</sup>

55. Area 6, which encompasses 98.2 acres, is situated in the bypassed reach between the intake towers and the tailrace. The area provides for public access to the bypassed reach of the Niagara River with views of Horseshoe Falls and the river. Keeping Area 6 in the project boundary would allow the Commission to ensure continued public access during a new license term. Thus, this license requires that Area 6 remain in the project boundary. The Power Authority filed exhibit G drawings that excluded all eight parcels. We are, therefore, not approving the exhibit G drawings. Instead, Article 203 requires the Power Authority to file revised Exhibit G drawings that include Area 6.

## **B. HIPs**

56. The Relicensing Agreement provides for the Power Authority, using money from the HIPs Fund, to construct the HIPs consistent with the proposed implementation schedule set forth in Appendix B of the Relicensing Agreement. It also provides that construction of the HIPs is a “one-time obligation occurring outside of the FERC Project

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<sup>59</sup> The Power Authority’s Preliminary draft EA at 4-81.

<sup>60</sup> As noted in the Final EIS at 136-37, Area 1 (2.0 acres) is currently part of an old road system that was used to access a former chemical plant, with no recreation facilities. Area 2 (1.0 acre) consists of a cemetery. Area 3 (1.9 acres) has no recreation facilities and there is no formal use of this area. Area 4 (14.9 acres) includes a non-project transmission corridor. Area 5 (36.0 acres) is owned by the City of Niagara Falls and contains a portion of the Hyde Park Golf Course. Area 7 (0.4 acres) includes a parking lot, but there are no recreation facilities. Area 8 (1.5 acres) consists of three parcels. A portion of the area is currently used as a parking lot which is associated with a private business. There are no project-related recreation facilities located on these parcels.

Boundary,”<sup>61</sup> and that monitoring, operation and maintenance, shall be undertaken by New York DEC, using monies from the HIPs Fund. It further provides that “[s]hould the cost of the HIPs exceed the amount in the HIPs Fund, [the Power Authority] will cover additional expenses.”<sup>62</sup>

57. The EIS found that the eight HIPs would enhance resources that are affected, either directly or indirectly, by project operation and recommended they be included in a new license. Because construction of the HIPs is a one-time measure that is the responsibility of the licensee and will not require Commission oversight throughout the life of the license, we will not require the HIPs to be included within the project boundary. However, we have not concluded, nor have we been asked by the parties to do so, that maintenance of the HIPs should be required of the Power Authority. Were we to find such maintenance should be required, we would be determining that there is a need for ongoing license activities with respect to the projects and would need to consider them project works that must be included in the project boundary. Since we are not reaching these conclusions, we will not include in the license a requirement that the Power Authority transfer unused funds to New York DEC, but understand that the parties may choose to do so as an off-license matter. Article 401 requires the Power Authority to provide documentation of the construction of the HIPs which is a requirement of the certification.

### C. **HERF**

58. The Relicensing Agreement provides for the Power Authority to establish the HERF for future habitat mitigation and enhancement activities in the Niagara River basin. HERF projects would be selected by an Ecological Standing Committee based on criteria identified in the agreement. The EIS did not recommend inclusion of the HERF in a new license because it is an open-ended funding mechanism for unidentified projects

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<sup>61</sup> Relicensing Agreement section 4.1.2.

<sup>62</sup> *Id.* Construction, operation, and maintenance of the HIPs are to be carried out under the “guidance” of the Ecological Standing Committee. The functions of the Ecological Standing Committee include “organization and administration of the” HIPs and HERF Funds. The Ecological Standing Committee is also to have an Executive Committee, consisting of one representative from each of Power Authority, New York DEC, and FWS, which is to make decisions by consensus in the absence of consensus among the Ecological Standing Committee as a whole. Power Authority is also to serve as the Ecological Standing Committee coordinator. Relicensing Agreement Section 4.1.1.

that may not address a project-affected resource. Nevertheless, the HERF is a requirement of the certification, and Article 401 requires the Power Authority to document that it has been established.

**D. Niagara Falls Water Board Falls Street Tunnel Remediation**

59. The Relicensing Agreement provides for the Power Authority to establish a Niagara Falls Water Board Capital Improvement Fund for capital improvements to minimize groundwater infiltration into the City of Niagara Falls' Falls Street Tunnel in the area of the project's underground conduits. It also provides that the fund will be managed and administered by the Water Board and sets out the type of improvements it could include.

60. The EIS found that operation of the project causes an increase in groundwater infiltration into the Falls Street Tunnel which significantly increases the City's water treatment costs.<sup>63</sup> Therefore, we are requiring the Power Authority to document that the measures to minimize groundwater infiltration into the Falls Street Tunnel described in section 6.1 of the Relicensing Agreement have been completed. The Power Authority may choose to accomplish this by providing funds that are to be managed and administered by the Water Board, but the Power Authority is ultimately responsible for compliance with this requirement.

61. The EIS noted that, in addition to the anticipated benefit of reducing the City's water treatment costs, there could be certain adverse consequences from the tunnel improvements such as hampering clean-up efforts at nearby hazardous waste sites.<sup>64</sup> If during the license term, it appears that the tunnel repair work is causing adverse impacts, we may require further measures.

62. As with the HIPS, because this is a one-time measure and will not require Commission oversight throughout the life of the license, we will not require the Fall Street Tunnel to be put within the project boundary. Consistent with the Relicensing Agreement, Article 402 requires annual reporting on the status of the tunnel work until the work has been completed, and reserves the Commission's authority to require further measures if the tunnel work has unanticipated adverse impacts.

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<sup>63</sup> EIS at 57.

<sup>64</sup> *Id.*

**E. Parks and Recreation Fund and Recreation Plan**

63. In addition to the public access improvements described under section 4.2 of the Relicensing Agreement which includes additional parking, walkways, and access improvements for the disabled at three sites within the project boundary, section 5.1. provides for a Parks and Recreation Fund in the amount of \$9,260,000 for capital improvements to be undertaken at recreation facilities located at various locations in the project vicinity. Not all of the affected facilities are within the project boundary.

64. The EIS recommends the proposed recreation improvements that would occur within the project boundary because they would enhance recreational opportunities at the project, but did not recommend adding additional land to the project for recreation. Therefore, we will not make the Power Authority responsible under the license for improving facilities outside the project boundary, although we understand that it has agreed to do so. We will, however, make the Power Authority responsible for improvements to the facilities within the project boundary. If the Power Authority chooses to do this by providing a fund to be used by New York Parks for improving the facilities, it may. Article 404 requires a recreation plan for the proposed improvements to recreation facilities within the project boundary. We note, however, that the approximate dollar figure in the settlement applicable to these improvements is only an approximation, and that the Power Authority is required to undertake the improvements notwithstanding that the actual cost may exceed this estimate.<sup>65</sup> Article 409 reserves the Commission's right to require the licensee to undertake such measures as may be appropriate and reasonable to implement approved measures.

65. The Power Authority in its agreement with the Tuscarora Nation proposes, among other things, to develop, implement, and maintain a new exhibit at the project's existing Power Vista Visitor Center. The exhibit would be devoted to the Haudenosaunee people and their associations with the project. The Power Authority would contribute up to \$150,000 (NPV 2007) for the development and implementation of the exhibit and would be responsible for ongoing maintenance of the exhibit. The agreement states that the provision to provide the exhibit would not be a license requirement. However, the Power Vista Visitor Center in which the exhibit will be displayed is a project recreation facility and the exhibit will promote cultural resources, which is a project purpose. Thus, this license requires that the proposed exhibit be included in the recreation plan.

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<sup>65</sup> See *Virginia Electric Power Company*, 110 FERC ¶ 61,241 at P 10 (2005).



**F. Land Management Plan**

66. Under the Relicensing Agreement, the Power Authority proposes a project land management plan that would include policies and guidelines for: (1) road maintenance practices, (2) vegetation management, (3) invasive species control, (4) nuisance wildlife, (5) use of project lands, (6) aesthetic enhancements, and (7) provision for a customary use plan for the people of the Tuscarora Nation.

67. Having a land management plan for the project would avoid misunderstandings about how project lands are to be managed and provide a coordinated approach to all land management-related activities. Article 405 requires the land management plan.

**G. Power Allocation**

68. As noted above, Niagara Redevelopment Act section 836<sup>66</sup> authorizes and directs the Commission to issue a license to the Power Authority for the construction and operation of a project with the electric generation capacity to use all of the United States' share of the Niagara River water available for power generation. It requires the Commission to include among the license conditions, in addition to those deemed necessary and required under the terms of the FPA, provisions to:

- Assure that at least 50 percent of the project power is available primarily for the benefit of consumers, particularly domestic and rural consumers, and to make such power available at the lowest rates reasonably possible to encourage the widest possible use, and to give preference to public bodies and nonprofit cooperatives within economic transmission distance.
- Make a reasonable portion of the project power subject to the preference provisions of paragraph (1) available for use within reasonable economic transmission distance in neighboring States up to 20 percent of the project power subject to such preference provisions.

69. As noted above, the original license implements these requirements by including in the license Articles 20 and 21, which essentially replicate the statutory requirements. The Allocation Agreement proposes to preserve the *status quo* with respect to this issue by including Articles 20 and 21 in the new license, modified only by specific identification of the neighboring states.

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<sup>66</sup> 16 U.S.C. § 836 (2000).

70. Concerns have been raised as to the instate portion of the allocation. New York State Electric and Gas Company (NYSEG) and Rochester Gas and Electric Company (RG&E) (the Upstate Utilities) purchase 175 MW of firm and 185 MW of peaking power from the project under contracts that expire on the same date the original license expires, August 31, 2007.<sup>67</sup> They state that the loss of this power would have substantial negative effects on the upstate region in general and on their residential customers in particular, in the form of higher rates for service.<sup>68</sup> The Power Authority's application includes no specific proposal for the allocation of this power during the term of a new license, stating only that it will be "in accordance with applicable state and federal requirements."<sup>69</sup>

71. Westchester and New York City (the Downstate Parties) currently do not receive power from the Niagara Project. They argue that the current power allocation is unfair to residential customers of downstate utilities, and that there is a continued need for the provision of lower-cost power to commercial customers throughout New York.<sup>70</sup>

72. The Power Authority responds that although neither the Upstate Utilities nor Downstate Parties allege that the Power Authority is in violation of the Niagara Redevelopment Act's preference requirements, these entities seek to have the Commission reallocate project power; an issue more appropriately addressed under state law. It states that the federal mandate with respect to allocation of power is limited to the requirement for the Power Authority to provide at least 50 percent of project power to public bodies and non-profit cooperatives, and 20 percent of the preference power to neighboring states. It states that neither the Upstate Utilities nor Downstate Parties are "public bodies" or "non-profit cooperatives," *i.e.*, preference power customers within the

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<sup>67</sup> NYSEG purchases 110 MW of firm power and 150 MW of peaking power. RG&E purchases 65 MW of firm power and 35 MW of peaking power.

<sup>68</sup> Comments of NYSEG and RG&E in opposition to application for new license, filed December 16, 2005 at 7-10 and Attachments 1, Report by Concentric Energy Advisors and 2, Report by Economic Management Consulting Group, LLC (Upstate Utilities comments).

<sup>69</sup> Application at B-25.

<sup>70</sup> Motion to intervene filed by Westchester and the County of Westchester Public Utility Service Agency on December 16, 2005, at 4-7. Motion to intervene and protest filed by NYC and the New York City Public Utility Service on December 19, 2005, at 3-5.

meaning of the Niagara Redevelopment Act.<sup>71</sup> The Power Authority concludes that the Commission should apply its general policy against allocating project power in the absence of a specific statutory directive to do so.<sup>72</sup>

73. As the Power Authority states, in the absence of a statutory directive to the contrary, it is our policy not to require specific allocation of power from licensed projects, but to leave those matters to private contract and, as appropriate, state regulation.<sup>73</sup> We therefore conclude that it is in the public interest to approve the Allocation Agreement and include these articles (Articles 407 and 408) in the new license issued herein.<sup>74</sup> In this regard, we put the parties on notice that our doing so in no way limits our obligations or authorities under the Niagara Redevelopment Act or modifies the Commission's prior orders interpreting the Niagara Redevelopment Act.<sup>75</sup>

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<sup>71</sup> Power Authority Answer at 5-6, *citing Allegheny Electric Cooperative, Inc. v. FERC*, 992 F.2d 73, 82 (2<sup>nd</sup> Cir. 1990), *cert. denied*, 502 U.S. 810 (1991).

<sup>72</sup> *See Power Authority of the State of New York*, 109 FERC ¶ 61,092 at P 3; 12 (2004); and *Power Authority of the State of New York*, 105 FERC ¶ 61,102 at P 117 (2003).

<sup>73</sup> “It has . . . been the practice of this Commission and the predecessor Federal Power Commission (FPC) since the issuance of licenses began in 1920 to leave the disposition of project power in the hands of the licensee, which is responsible for the construction, operation, and maintenance of the project, unless Congress has made a legislative directive to the contrary.” *See Power Authority of the State of New York; Massachusetts Municipal Wholesale Electric Company v. Power Authority of the State of New York*, 109 FERC ¶ 61,092 at P 3 (2004).

<sup>74</sup> Articles 20 and 21 have been renumbered as Articles 407 and 408, respectively.

<sup>75</sup> We also note that section 4 of the Allocation Agreement provides, as a non-license contractual term, for the execution of new power sales agreements between the Power Authority and the neighboring states. This section correctly includes a statement that nothing in the Allocation Agreement shall be construed as conferring, foreclosing, or otherwise defining the jurisdiction or authority of the Commission to construe or otherwise enforce these contracts.

### **XIII. Other Issues**

#### **A. Treaty and Project Operation**

74. As noted above, the Diversion Treaty provides for the equal sharing by the United States and Canada of the waters of the Niagara River for power generation. Ordering paragraph A authorizes the licensee to divert water for power purposes as permitted under the Diversion Treaty.

#### **B. Land Acquisition Fund**

75. The Relicensing Agreement provides that the Power Authority will establish a fund to be used to acquire certain unidentified parcels of land to be identified by the New York DEC. This measure was not intended by the settling parties to be included in the new license. The EIS did not recommend this measure because the settlement provides no guidance on what parcels might be provided through the fund and, therefore, no connection could be drawn between this funding and a project purpose. However, despite the intent of the settling parties, this measure is a condition of the certification and Article 401 requires documentation that the fund has been established.

#### **C. Intervenor Issues**

76. Several intervenors raised concerns regarding certain aspects of the project which are discussed below.

##### **1. Gill Creek Fish Passage**

77. Mr. Crandall Johnson, in his motion to intervene and comments on the draft EIS, requests that the issue of upstream fish passage on Gill Creek be considered.<sup>76</sup> Eastern Niagara Alliance, in its motion to intervene expresses concern that the construction of the Niagara Project altered Gill Creek and other creeks that once were populated with significant numbers and sizes of fish, turtle, and eels important to local Native Americans. Eastern Niagara Alliance is particularly concerned that “annual runs of fish, eels, and egg laying turtles have ceased in Gill Creek.” Eastern Niagara Alliance, in its comments on the draft EIS, adds that Gill Creek, in combination with other creeks in the area such as Fish Creek, provided a natural passageway around Niagara Falls for eels and reptiles before the Niagara Project was constructed.

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<sup>76</sup> Motion to intervene and comment filed by Mr. Johnson on December 19, 2005, and comment letter filed on September 19, 2006.

78. Portions of both Gill and Fish Creeks were relocated to accommodate the construction of Lewiston Reservoir and those portions of the creeks have a more channelized shape compared to what would have been the natural shape of the channels prior to project construction. However, the EIS notes that there is a non-project dam (Hyde Park Dam) near the mouth of Gill Creek that impedes the upstream and downstream movement of fish and fragments fish habitat between upper and lower Gill Creek and the Niagara River.<sup>77</sup> In addition to Hyde Park Dam, the record indicates that there are two culverts and four small “check dams” that are barriers to upstream fish passage on Gill Creek. Therefore, if upstream fish access to Gill Creek is an issue, it is not an issue related to continued operation of the Niagara Project.

79. Regarding fish passage around Niagara Falls via a combination of Fish and Gill Creeks, no information has been provided that would verify that prior to project construction fish or eels used Gill Creek in combination with other creeks to navigate around Niagara Falls. Even if we were to assume a natural passageway existed prior to project construction, the major barrier to fish passage on the Niagara River is Niagara Falls. If there was a potential natural passageway as Eastern Niagara Alliance theorizes, whatever passage occurred was likely incidental rather than deliberate on the part of the aquatic organisms achieving passage via that route. This is because Fish and Gill Creeks flow in different directions toward the Lower and Upper Niagara reaches, respectively, and would have provided an inefficient and unlikely passage route. It is more likely that fish and other aquatic organisms used both creeks as spawning and/or nursery habitat and returned to the Niagara River from the creek they ascended, thereby accomplishing their life history requirements while never passing over or around Niagara Falls.

## **2. Upper Mountain Volunteer Fire Company Response**

80. Upper Mountain Volunteer Fire Company (Upper Mountain) states that the project occupies more than 2,400 acres of land within the Town of Lewiston, in areas where Upper Mountain is the first responder. Upper Mountain states that it raised public safety issues during the licensing process, including terrorism, fire response, loss of generation, inadequacy of training and equipment, water rescue, dam failure, reservoir access, and flooding, but that these issues have not been addressed.

81. It is our policy to address matters dealing with dam and project safety throughout the license term in a proactive manner and not just during licensing. This policy is reflected in our dam and project safety regulations,<sup>78</sup> which require every licensee to have

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<sup>77</sup> Final EIS at 84.

<sup>78</sup> 18 C.F.R. Part 12 (2006).

an emergency action plan (EAP), developed in consultation with appropriate federal, state, and local agencies responsible for public health and safety. Project facilities are regularly inspected by Commission staff, and staff has delegated authority<sup>79</sup> to require licensees to make repairs and take any related actions for the purpose of maintaining the safety and adequacy of the project works, make or modify EAPs, and have project works inspected by independent consultants.

82. The Commission has already addressed the issues raised by Upper Mountain. Staff from the Commission's New York Regional Office (NYRO) met with members of Upper Mountain on April 26 and July 11, 2005. Following those meetings, Upper Mountain filed letters with NYRO further expressing its concerns.<sup>80</sup> NYRO staff responded by explaining further the requirement of the Commission's regulations pertaining to public safety in relation to the project, annual testing of the Power Authority's EAP and employee training,<sup>81</sup> the parameters of the EAP and the role of the local emergency response system to public safety incidents, the actions required of the Power Authority to protect public safety at project facilities, and actions taken to protect the project facilities and the public from a potential terrorist attack.<sup>82</sup> Staff also discussed the Power Authority's membership in the Niagara County Local Emergency Planning Committee (Local Planning Committee) and the support provided by the Power Authority to local emergency responders in the form of funding, training, and donations of specialized equipment.<sup>83</sup>

83. We affirm the NYRO staff's conclusion that the Power Authority has taken sufficient measures for public safety. Both the Power Authority and Upper Mountain are members of Local Planning Committee which, in cooperation with the Niagara County

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<sup>79</sup> 18 C.F.R. § 375.314(g) (2006).

<sup>80</sup> Letters from John C. Matinchock, Assistant Chief EMS, Upper Mountain, to New York Regional Engineer, dated February 1 and 16, 2006.

<sup>81</sup> Power Authority's EAP was most recently tested and approved in November 2006.

<sup>82</sup> Letter from Charles Goggins, NYRO, to William Justyk, issued June 14, 2006.

<sup>83</sup> See letters from James Volkosh, Director of Emergency Services, Niagara County Fire Coordinator & Emergency Services Office, and Norman Pearson, Chairman, Niagara County LEPC, to Commission Secretary Magalie R. Salas, filed August 30 and September 1, 2005, respectively.

Emergency Management Office, has produced Emergency Management and Strategic Security Plans for the county which takes into consideration the needs and interests of all emergency responders in the county.<sup>84</sup> The record demonstrates that Upper Mountain's needs and interests were given appropriate consideration.

### **3. Upstream concerns**

84. Public Power Coalition and two of its members individually raise concerns regarding the project's effect on flooding, water fluctuations, sedimentation and erosion, and wastewater treatment.<sup>85</sup>

85. The EIS notes that erosion in the upper and lower Niagara River is caused by a variety of factors including: water level fluctuations from U.S. and Canadian power generation; flow surges from Lake Erie; precipitation patterns; and wind, ice, and water levels in Lakes Erie and Ontario.<sup>86</sup> The primary erosional forces, however, are waves caused by wind and boating traffic as well as river currents. The final EIS acknowledges that water level fluctuations can influence erosion rates, and the project plays a part in influencing water level fluctuations.<sup>87</sup> However, water level fluctuations upstream of the project average less than 1.5-feet per day. The EIS reasons that, assuming the project causes 50 percent of this fluctuation, less than a foot of fluctuation would be attributed to project operation and that such a small level of fluctuation borders on insignificant.<sup>88</sup> We agree.

### **4. Taxes**

86. Eastern Niagara Alliance and several school districts argue that the project has an effect on their communities because, as a tax exempt entity, the Power Authority does not

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<sup>84</sup> See Pearson letter, n.83 above.

<sup>85</sup> Motion for leave to intervene and comments filed by Public Power Coalition on April 10, 2006, at 16-21; motion to intervene filed by the Chamber of Commerce of the Tonwandas, Inc. and the City of North Tonawanda, New York, on December 19, 2005; comment letter filed by the Town of Amherst on January 5, 2006.

<sup>86</sup> Final EIS at 148.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

pay taxes on its property. They note that the Power Authority, in its settlement agreement, is providing funds to certain communities and school districts and that they will be disadvantaged by this. They ask that the Commission require the Power Authority to make payments in lieu of taxes.<sup>89</sup>

87. Under New York State law, the Power Authority (as a municipality) is exempt from state and local property taxes, and if the assessed value of project lands were taxed, project property taxes would be over \$50 million.<sup>90</sup> However, the tax impacts of a hydroelectric project are a matter of state law, and are not within our jurisdiction.<sup>91</sup>

## 5. Local Economy

88. Several entities assert that revenues from the project should be used to ameliorate the impacts of the local industrial and economic downturn over the last four decades. They contend that this issue is linked to the project because the low-cost power from the project attracted businesses that have since closed, in some instances leaving behind significant environmental damage.<sup>92</sup>

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<sup>89</sup> Motion to intervene, protest and comment filed by Eastern Niagara Alliance on December 19, 2005, at 4; motion to intervene filed by the North Tonawanda City School District on December 19, 2005; motion to intervene filed by the City of Tonawanda School District on October 12, 2005; motion to intervene filed by the Williamsville Central School District on November 30, 2005; motion to intervene and settlement comment filed by Newfane Central School District on December 19, 2005.

<sup>90</sup> Final EIS at 142.

<sup>91</sup> See e.g., *City of Tacoma*, 84 FERC ¶ 61,037 at p. 61,142, *reh'g denied*, 85 FERC ¶ 61,020 (1998) (declining to require licensee to compensate county for lost tax revenues); *FPL Energy Maine Hydro, LLC*, 106 FERC ¶ 61,038 at P58 (2004) (rejecting request that local government be compensated for loss of future tax revenues upon cessation of operations of project).

<sup>92</sup> Motion to intervene filed by Development Group on December 15, 2005; motion to intervene, protest and comment filed by Eastern Niagara Alliance on December 19, 2005, at 4-8; and comment letter filed by Niagara Improvement Association on April 17, 2006;



89. The EIS found that the decisions made by the businesses that have used project power were not project effects.<sup>93</sup> It is our responsibility to ensure that licensed projects are best adapted to the comprehensive development of affected waterways.<sup>94</sup> Moreover, even if we considered them to be project effects, impacts such as those alleged here are too remote and speculative for us to conclude that we should impose license measures with respect to them. The economic and environmental impacts of businesses that may have used project power are the responsibility of those entities, and not of the project.

## 6. Additional Generation

90. Eastern Niagara Alliance argues that the project should be required to increase its capacity and generation.<sup>95</sup> It argues that the Power Authority's position that there is no need for additional hydropower from the project ignores the fact that lower cost hydropower can be used to stimulate the local economies.

91. As noted above, the Niagara Redevelopment Act authorized the construction of a hydroelectric project which would utilize all of the United States' share of the amount of water in the Niagara River made available for power redevelopment under the Diversion Treaty. The original license issued for the project noted that it was properly sized to use the water resources available. Those water resources have not changed. The project's capacity has increased through the upgrades to the Robert Moses plant authorized by the Commission on December 21, 1993, recently completed. Each of the 13 units was upgraded from the original 150 MW to 193.5 MW. The capacity of the overall Niagara Project is designed to use the flows authorized for diversion in accordance with the Niagara Redevelopment Act, and the 1950 Treaty as authorized by the International Joint Commission. Therefore, the Niagara Project is properly sized to utilize the available water resources.

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<sup>93</sup> Final EIS at 148-50. To the extent the parties are seeking damages for prior actions, the Commission is without authority to award damages. *See City of Tacoma*, 84 FERC ¶ 61,107 at p. 61,562 (1998), *order on reh'g*, 86 FERC ¶ 61,311 at p. 62,100 (1999).

<sup>94</sup> *See* FPA section 10(a)(1), 16 U.S.C. § 803(a)(1)(2000).

<sup>95</sup> Motion to intervene, protest and comment filed by Eastern Niagara Alliance on December 19, 2005, at 14-15.

**XIV. Administrative Conditions**

**A. Annual Charges**

92. The Commission collects annual charges from licensees for administration of the FPA. Article 201 provides for the collection of funds for this purpose.

**B. Exhibit F Drawings**

93. The Commission requires licensees to file sets of approved project drawings on microfilm and in electronic file format. The exhibit F drawings filed with the license application are approved and made part of this license. Article 202 requires the filing of these drawings.

**C. Exhibit G Drawings**

94. As noted above, the Exhibit G drawings that were filed with the license application do not include one area deemed necessary for project purposes. Article 203 requires the Power Authority to file revised Exhibit G drawings. The Exhibit G drawings filed on August 18, 2005 are not approved and are not made part of the license (see ordering paragraph (C)).

**D. Headwater Benefits**

95. Some projects directly benefit from headwater improvements that were constructed by other licensees, the United States, or permittees. Article 204 requires the licensee to reimburse such entities for these benefits if they were not previously assessed and reimbursed.

**E. Use and Occupancy of Project Lands and Waters**

96. Requiring a licensee to obtain prior Commission approval for every use or occupancy of project land would be unduly burdensome. Therefore, Article 410 allows the licensee to grant permission, without prior Commission approval, for the use and occupancy of project lands for minor activities such as landscape planting. Such use must be consistent with the purposes of protecting and enhancing the scenic, recreational, and environmental values of the project.

**XV. State and Federal Comprehensive Plans**

97. Section 10(a)(2)(A) of the FPA<sup>96</sup> requires the Commission to consider the extent to which a project is consistent with federal or state comprehensive plans for improving, developing, or conserving a waterway or waterways affected by the project.<sup>97</sup> Under section 10(a)(2)(A), federal and state agencies filed 20 comprehensive plans that address various resources in New York. Of those, staff identified and reviewed one federal and two state comprehensive plans that are relevant to this project.<sup>98</sup> No conflicts were found.

**XVI. Applicant's Plans and Capabilities**

98. In accordance with sections 10(a)(2)(C) and 15(a) of the FPA,<sup>99</sup> Commission staff evaluated the Power Authority's record as licensee with respect to the following: (A) conservation efforts; (B) compliance history and ability to comply with the new license; (C) safe management, operation, and maintenance of the project; (D) ability to provide efficient and reliable electric service; (E) need for power; (F) transmission service; (G) cost effectiveness of plans; and (H) actions affecting the public. We accept the staff's findings in each of the following areas.

**A. Conservation Efforts**

99. Section 10(a)(2)(C) of the FPA<sup>100</sup> requires the Commission to consider the applicant's electricity consumption improvement program, 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

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<sup>96</sup>16 U.S.C. § 803(a)(2) (2000).

<sup>97</sup>Comprehensive plans are defined at 18 C.F.R. § 2.19 (2006).

<sup>98</sup>The applicable federal plan is: U.S. Fish and Wildlife Service, Niagara River Corridor Important Bird Area Conservation Plan. 2002. The New York plans are the Statewide Comprehensive Outdoor Recreation Plan, People, resources, recreation. 1983, and New York State Department of Environmental Conservation, Niagara River Remedial Action Plan. 1994.

<sup>99</sup> 16 U.S.C. §§ 803(a)(2)(C) and 808(a) (2000).

<sup>100</sup> 16 U.S.C. § 803(a)(2)(C) (2000).

requirements of state regulatory authorities. Section 16.10 of the Commission's regulations requires an applicant for a new license to include in its application a discussion of its record in encouraging energy conservation. Because the Power Authority primarily sells project power to municipally-owned electrical systems, rural electric cooperatives, private utilities, and neighboring states its ability to influence end-users is limited. However, our review of the Power Authority's filing under section 16.10 indicates that the Power Authority supports a variety of energy conservation programs in New York State including a high-efficiency lighting program, an electrotechnologies program, and a public housing appliance replacement program. We conclude that the Power Authority is making a reasonable effort in encouraging energy conservation.

**B. Compliance History and Ability to Comply with the New License**

100. Based on a review of the Power Authority's compliance with the terms and conditions of the existing license, we find that the Power Authority's overall record of making timely filings and compliance with its license is satisfactory. Therefore, staff believes that the Power Authority can satisfy the conditions of a new license.

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

101. We have reviewed the Power Authority's management, operation, and maintenance of the Niagara Project pursuant to the requirements of 18 C.F.R. Part 12 and the Commission's Engineering Guidelines and periodic Independent Consultant's Safety Reports. We conclude that the dams and other project works are safe, and find that there is no reason to believe that the Power Authority cannot continue to safely manage, operate, and maintain these facilities under a new license.

**D. Ability to Provide Efficient and Reliable Electric Service**

102. We have reviewed the Power Authority's plans and its ability to operate and maintain the project in a manner most likely to provide efficient and reliable electric service. Our review indicates that the Power Authority regularly inspects the project turbine generator units to ensure they continue to perform in an optimal manner, schedules maintenance to minimize effects on energy production, and since the project has been in operation, has undertaken several initiatives to ensure the project is able to operate reliably into the future. We conclude that the Power Authority is capable of operating the project to provide efficient and reliable electric service in the future.

**E. Need for Power**

103. To assess the need for power, we looked at the needs in the operating region in which the project is located. The Niagara Project is located in the Northeast Power Coordinating Council (NPCC) region of the North American Electric Reliability Council (NERC). According to NERC, the peak demand for the NPCC area is projected to grow at an average annual compound rate of 2.28 percent over the 10-year planning period from 2004 through 2014. We conclude that the project's power, low cost, displacement of nonrenewable fossil-fired generation, and contribution to the region's diversified generation mix will help meet the need for power in the region.

**F. Transmission Services**

104. FPA section 15(a)(1)(3)(A) requires that the Commission consider existing and planned transmission services of the applicant. The project switchyard transmits project power directly to the regional grid. This project has no transmission lines.

**G. Cost Effectiveness of Plans**

105. The Power Authority is not proposing any capacity increase at the Niagara Project beyond the generator upgrades approved in 1989 which are now complete. Based on the available flow, staff would not expect additional capacity to be cost effective at this site. Staff concludes that the project, as presently configured and as operated according to this order, is consistent with environmental considerations, and fully develops the economical hydropower potential of the site in a cost-effective manner.

**H. Actions Affecting the Public**

106. The Power Authority provided extensive opportunity for public involvement in the development of its application for a new license for the Niagara Project. During the previous license period, the Power Authority provided employment opportunities and attracted those interested in various forms of recreation. The Power Authority uses the project to help meet regional power needs.

**XVII. Project Economics**

107. In determining whether to issue a new license for an existing hydroelectric project, the Commission considers a number of public interest factors, including the economic benefit of project power. Under the Commission's approach to evaluating the economics

of hydropower projects, as articulated in *Mead*,<sup>101</sup> the Commission uses current costs to compare the costs of the project and likely alternative power, with no forecasts concerning potential future inflation, escalation, or deflation beyond the license issuance date. The basic purpose of the Commission's economic analysis is to provide a general estimate of the potential power benefits and the costs of a project, and of reasonable alternatives to project power. This estimate helps to support an informed decision concerning what is in the public interest with respect to a proposed license.

108. As proposed by the Power Authority, consistent with the Settlement and with the mandatory and certification conditions and as licensed herein, the annual cost of operating the Niagara Project is \$133,475,511, or \$9.74/MWh. The proposed project would generate an estimated average of 13,700,000 MWh of energy annually. When we multiply our estimate of average annual generation by the alternative power cost of \$49.09/MWh,<sup>102</sup> we get a total value of the project's power of \$672,533,000 in 2006 dollars. To determine whether the proposed project is currently economically beneficial, we subtract the project's cost from the value of the project's power. Therefore, in the first year of operation, the project would cost \$539,057,489, or \$39.35/MWh, less than the likely alternative cost of power.

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

### **XVIII. Comprehensive Development**

110. Sections 4(e) and 10(a)(1) of the FPA<sup>103</sup> require the Commission to give equal consideration to the power 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

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<sup>101</sup> *Mead Corp.*, 72 FERC ¶ 61,027 (1995).

<sup>102</sup> The alternative power cost is based on information in Energy Information Administration, Annual Energy Outlook 2006.

<sup>103</sup> 16 U.S.C. §§ 797(e) and 803(a)(1) (2000), respectively.

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 all beneficial public uses. The decision to license this project, and the terms and conditions included herein, reflect such consideration.

111. The EIS for the Niagara Project, as supplemented by this order, contains background information, analysis of effects, support for related license articles, and the basis for a finding that the project will not result in any major, long-term adverse environmental effects. The project will be safe if operated and maintained in accordance with the requirements of this license.

112. Based on staff's independent review and evaluation of the project, recommendations from the resource agencies and other stakeholders, and the no-action alternative, as documented in the EIS and supplemented herein, we are selecting the proposed project, with the staff-recommended measures, as best adapted to a comprehensive plan for improving or developing the Niagara River. We have selected this alternative because: (1) issuance of a new license will serve to maintain a beneficial, dependable, and inexpensive source of electric energy; (2) the required measures will protect and enhance fish and wildlife resources, water quality, recreational resources and historic properties; and (3) the 2,755.5 MW of electric energy generated from a renewable resource would continue to offset fossil-fueled generation, thereby conserving nonrenewable resources and reducing atmospheric pollution.

### **XIX. License Term**

113. Section 15(e) of the FPA,<sup>104</sup> provides that any new license issued shall be for a term that the Commission determines to be in the public interest, but not less than 30 years or more than 50 years. The Commission's general policy is to establish 30-year terms for projects with little or no redevelopment, new construction, new capacity, or environmental mitigation and enhancement measures; 40-year terms for projects with a moderate amount of such activities; and 50-year terms for projects with extensive measures. This license authorizes new environmental mitigation and enhancement measures that warrant a license term of 50 years. Because the term of the current license does not expire until August 31, 2007, this license order is not effective until September 1, 2007.

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<sup>104</sup>16 U.S.C. § 808(e) (2000).

The Commission orders:

(A) This license is issued to the New York Power Authority (Licensee) for a period of 50 years, effective September 1, 2007, to operate and maintain the Niagara Project No. 2216. 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. The licensee is authorized to divert water for power purposes in the United States under the terms of the 1950 treaty between the United States and Canada.

(B) The project consists of:

(1) All lands, to the extent of the licensee’s interests in these lands, described in the project description and the project boundary discussion of this order.

(2) Project works consisting of: (1) two 700-foot-long intake structures located on the upper Niagara River about 2.6 miles upstream from the American Falls; (2) two 4.3-mile-long concrete underground water supply conduits, each measuring 46 feet wide by 66.5 feet high; (3) a 4,200-foot-long, 500-foot-wide and 71-foot-deep forebay with a volume of 2 billion gallons; (4) the Lewiston Pump-Generating Plant, measuring 975 feet long by 240 feet wide by 160 feet high containing 12 francis-type pump-turbines connecting to motor generator units rated at 37,500 horsepower as a motor and 20 MW as a generator, with a combined capacity of 240 MW; (5) the 1,900-acre Lewiston Reservoir at a maximum water surface elevation of 658 feet United States Lake Survey Datum and a usable storage capacity of 69,500 acre-feet; (6) the Robert Moses Niagara power plant, including an intake structure, measuring 1,100 feet long by 190 feet wide by 100 feet high and containing 13 generating units rated at a combined capacity of 2,515.5 MW; (7) a 35-acre switch yard; and (8) appurtenant facilities.

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

Exhibit A: Pages A-1 through A-31, filed on August 18, 2005.

The following exhibit F drawings filed on August 18, 2005:

<u>Exhibit F Drawings</u>	<u>FERC No. 2216-</u>	<u>Description</u>
1	1001	Project Site Plan



<u>Exhibit F Drawings</u>	<u>FERC No. 2216-</u>	<u>Description</u>
2	1002	Waterways Plan and Profile
3	1003	Waterways Intake Structure
4	1004	Waterways Intake Gate Structures
5	1005	Robert Moses Niagara Power Plant Plan
6	1006	Robert Moses Niagara Power Plant Downstream and Upstream Elevations
7	1007	Robert Moses Niagara Power Plant Cross Section
8	1008	Robert Moses Niagara Power Plant Generator and Transformer structure
9	1009	Lewiston Pump-Generating Plant Plan and Downstream Elevation
10	1010	Lewiston Pump-Generating Plant Plan and Section
11	1011	Lewiston Reservoir and Dike Plan and Section

(C) The Exhibits F described above are approved and made part of the license. The Exhibit G drawings filed August 18, 2005 do not show a parcel needed for project purposes and are, therefore, not approved.

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

(E) This license is subject to the articles set forth in Form L-3 (published at 54 FPC 1817-24 (1975)), "Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters of the United States," as reproduced at the end of this order, and the following additional articles:

Article 201. Administrative Annual Charges. The licensee shall pay the United States an annual charge effective the first day of the month in which this license is issued, for the purpose of reimbursing the United States for the Commission's administrative costs, pursuant to Part I of the Federal Power Act, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time. The authorized installed capacity for that purpose is 2,755,500 kilowatts.

Article 202. Exhibit F Drawings. Within 45 days of the date of issuance of this license, the licensee shall file the approved exhibit F drawings in aperture card and electronic file formats.

(a) Three sets of the approved exhibit drawings shall be reproduced on silver or gelatin 35mm microfilm. All microfilm shall be mounted on type D (3-1/4" X 7-3/8") aperture cards. Prior to microfilming, the FERC Project Drawing Number (*i.e.*, P-1234-#### through P-1234-####) shall be shown in the margin below the title block of the approved drawing. After mounting, the FERC Drawing Number shall be typed on the upper right corner of each aperture card. Additionally, the Project Number, FERC Exhibit (*i.e.*, F-1, etc.), Drawing Title, and date of this license shall be typed on the upper left corner of each aperture card.

Two of the sets of aperture cards shall be filed with the Secretary of the Commission, ATTN: OEP/DHAC. The third set shall be filed with the Commission's Division of Dam Safety and Inspections New York Regional Office.

(b) The licensee shall file two separate sets of exhibit drawings in electronic raster format with the Secretary of the Commission, ATTN: OEP/DHAC. A third set shall be filed with the Commission's Division of Dam Safety and Inspections New York Regional Office. Exhibit F drawings must be identified as critical energy infrastructure information (CEII) material under 18 CFR §388.113(c). Each drawing must be a separate electronic file, and the file name shall include: FERC Project-Drawing Number,

FERC Exhibit, Drawing Title, date of this license, and file extension in the following format [P-1234-####, F-1, Description, MM-DD-YYYY.TIF]. Electronic drawings shall meet the following format specification:

IMAGERY - black & white raster file

FILE TYPE – Tagged Image File Format, (TIFF) CCITT Group 4

RESOLUTION – 300 dpi desired, (200 dpi min)

DRAWING SIZE FORMAT – 24” X 36” (min), 28” X 40” (max)

FILE SIZE – less than 1 MB desired

Article 203. Exhibit G Drawings. Within 45 days of the effective date of this license, the licensee shall file, for Commission approval, revised exhibit G drawings that show Area 6 (as described in the Application for New License, Volume 1, section 4.1.6.2, August 2005) within the project boundary. The exhibit G drawings shall comply with sections 4.39 and 4.41 of the Commission’s regulations, 18 C.F.R. §§ 4.39 and 4.41 (2006).

Article 204. Headwater Benefits. If the licensee's project was directly benefitted by the construction work of another licensee, a permittee, or the United States on a storage reservoir or other headwater improvement during the term of the original license (including extension of that term by annual licenses), and if those headwater benefits were not previously assessed and reimbursed to the owner of the headwater improvement, the licensee shall reimburse the owner of the headwater improvement for those benefits, at such time as they are assessed, in the same manner as for benefits received during the term of this new license.

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

Article 401. Commission Reporting. The New York Department of Environmental Conservation water quality certification issued January 31, 2006, contains conditions that require the licensee to implement certain measures of the Relicensing Agreement filed August 19, 2005. The licensee shall file with the Commission documentation that these measures have been completed according to the schedule set forth below.

Condition No. (appendix A of this license order)	Measure (Relicensing Agreement Section)	Documentation Due
9.A	Establish Habitat Improvement Project (HIP) Fund (4.1.2)	Within 120 days of the effective date of this license
9.A(a)	Strawberry Island restoration (4.1.2, Appendix B)	Within 30 days of completion
9.A(b)	Frog Island restoration (4.1.2, Appendix B)	Within 30 days of completion
9.A(c)	Motor Island shoreline (4.1.2, Appendix B) protection	Within 30 days of completion
9.A(d)	Beaver Island wetland (4.1.2, Appendix B) restoration	Within 30 days of completion
9.A(e)	Invasive species control at Buckhorn and Tiff Marshes (4.1.2, Appendix B)	Within 30 days of completion
9.A(f)	Osprey nesting structures (4.1.2, Appendix B)	Within 30 days of completion
9.A(g)	Common tern nesting sites (4.1.2, Appendix B)	Within 30 days of completion
9.A(h)	Fish habitat structures (4.1.2, Appendix B)	Within 30 days of completion
9.B	Establish Habitat Enhancement and Restoration Fund (4.1.3)	Within 120 days of the effective date of this license
9.C	Establish Land Acquisition Fund (Appendix E)	Within 120 days of the effective date of this license

Article 402. Capital Improvement Fund. Within 90 days of the effective date of this license, the licensee shall file documentation that it has established the Niagara Falls Water Board Capital Improvement Fund as described in section 6 of the Relicensing Agreement filed August 19, 2005 for the purpose of facilitating improvements to the City

of Niagara Falls, Falls Street Tunnel. In addition, the licensee shall provide annual reports to the Commission on the status of the tunnel improvements until such time as the improvements are completed at which time the licensee shall file documentation that the work has been completed. The Commission reserves authority to require additional measures, if the tunnel work has unanticipated adverse effects.

Article 403. Reservation of Authority - Fishways. Pursuant to section 18 of the Federal Power Act, authority is reserved to the Commission to require the licensee to construct, operate, and maintain, or provide for the construction, operation, and maintenance, of such fishways as may be prescribed by the Secretary of the Interior.

Article 404. Recreation Management. Within one year of the effective date of this license, the licensee shall file with the Commission, for approval, a recreation plan for the project for the existing recreation facilities and proposed recreational enhancements located within the project boundary as agreed to in the Relicensing Agreement and required by Water Quality Certification Condition (9)(D) including the tribal exhibit at the Power Vista Visitor Center pursuant to the agreement between the Tuscarora Nation and the licensee. The recreation plan shall include, as a minimum: (a) design drawings and a proposed implementation schedule for the recreational enhancements, including those that will be funded by the Parks and Recreation Fund; (b) soil erosion and sedimentation control measures; (c) a map showing the upgraded or new facilities in relation to the project boundary and existing recreation facilities; (d) a discussion of how each project recreation facility will be operated and maintained during the term of the license; and (e) a discussion of reasonable and prudent measures, developed in consultation with the Tuscarora Nation, to reduce and prevent, as practicable possible, trespass on Nation lands by users of the project's recreational facilities.

The recreation plan shall be prepared in consultation with the U.S. Fish and Wildlife Service; National Park Service; New York State Department of Environmental Conservation; New York State Office of Parks, Recreation and Historic Preservation; and Tuscarora Nation. The licensee shall include with the recreation plan documentation of consultation, copies of comments and recommendations on the completed plan after it has prepared and provide to the U.S. Fish and Wildlife Service; National Park Service; New York State Department of Environmental Conservation; New York State Office of Parks, Recreation and Historic Preservation; and Tuscarora Nation, Niagara Relicensing Environmental Coalition, and specific descriptions of how their comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the entities to comment before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensees' reasons, based on project-specific information.

The Commission reserves the right to require changes to the recreation plan. Implementation of the recreation plan shall not begin until plan is approved by the Commission. Upon Commission approval, the licensee shall implement the recreation plan, including any changes required by the Commission.

Article 405. Land Management Plan. Within one year of the effective date of this license, the licensee shall file with the Commission for approval, a management plan for project lands. The land management plan shall identify and explain the policies, standards, guidelines, and land use designations used to enhance safety and protect and manage environmental resources, public use, aesthetics, and Tuscarora Nation customary uses. In preparing the land management plan the licensee shall consult with the U.S. Fish and Wildlife Service, National Park Service, New York State Department of Environmental Conservation, New York State Office of Parks, Recreation, and Historic Resources, Tuscarora Nation, Niagara Relicensing Environmental Coalition, and adjacent landowners.

The licensee shall include with the land management plan documentation of consultation, copies of comments and recommendations on the completed plan after it has prepared and provide to the U.S. Fish and Wildlife Service; National Park Service; New York State Department of Environmental Conservation; New York State Office of Parks, Recreation and Historic Preservation; Tuscarora Nation; and adjacent landowners, and specific descriptions of how their comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the entities to comment 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 land management plan. Implementation of the land management plan shall not begin until plan is approved by the Commission. Upon Commission approval, the licensee shall implement the land management plan, including any changes required by the Commission.

Article 406. Historic Properties. The licensee shall implement the *Programmatic Agreement Among the Federal Energy Regulatory Commission, the Advisory Council on Historic Preservation, and the New York State Historic Preservation Officer for Managing Historic Properties that may be Affected by Issuing a License to the New York Power Authority for the Continued Operation and Maintenance of the Niagara Project in Niagara County, New York*, (FERC No. 2216) executed on January 25, 2007 for the project. Pursuant to the requirements of this Programmatic Agreement, the licensee shall file, for Commission approval, an Historic Properties Management Plan (HPMP) within one year of the effective date of this license. In the event that the Programmatic Agreement is terminated, the licensee shall implement the provisions of the approved HPMP. The Commission reserves the authority to require changes to the HPMP at any

time during the term of the license. If the Programmatic Agreement is terminated prior to Commission approval of the HPMP, the licensee shall obtain approval from the Commission and New York State Historic Preservation Officer, 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 407. *Allocation of Project Power – Preference Provisions.* In order to assure that at least 50 per centum of the project power shall be available for sale and distribution primarily for the benefit of the people as consumers, particularly domestic and rural consumers, to whom such power shall be made available at the lowest rates reasonably possible and in such manner as to encourage the widest possible use, the licensee in disposing of 50 percent of the project power shall give preference and priority to public bodies and non-profit cooperatives within economic transmission distance. In any case in which project power subject to the preference provisions of this Article is sold to utility companies organized and administered for profit, the licensee shall make flexible arrangements and contracts providing for the withdrawal upon reasonable notice and fair terms of enough power to meet the reasonably foreseeable needs of the preference customers.

Article 408. *Allocation of Project Power – Neighboring States.* The licensee shall make a reasonable portion of the project power subject to the preference provisions of Article 407 available for use within reasonable economic transmission distance in neighboring States, defined herein as the State of Connecticut, Commonwealth of Massachusetts, State of New Jersey, State of Ohio, Commonwealth of Pennsylvania, State of Rhode Island, and State of Vermont, but this Article shall not be construed to require more than 20 per centum of the project power subject to such preference provisions to be made available for use in such States. The licensee shall cooperate with the appropriate agencies in such States to ensure compliance with this requirement. In the event of disagreement between the licensee and the power marketing agencies of any such States, the Federal Energy Regulatory Commission may, after public hearings, determine and fix the applicable portion of power to be made available and the terms applicable thereto: Provided, That if any such State shall have designated a bargaining agency for the procurement of such power on behalf of such State, the licensee shall deal only with such agency in that State. The arrangements made by the licensee for the sale of power to or in such States shall include observance of the preferences in Article 407.

Article 409. *Limits on Expenditures.* Notwithstanding the limitation on expenditures included in this license, the Commission reserves the right to require the licensee to undertake such measures as may be appropriate and reasonable to implement approved plans.

Article 410. Ecological Standing Committee Participation. The licensee shall invite the New York Department of State to participate in the Ecological Standing Committee to be formed pursuant to section 4.1.1 of the Relicensing Agreement filed August 19, 2005.

Article 411. Use and Occupancy. (a) In accordance with the provisions of this article, the licensee shall have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain types of use and occupancy, without prior Commission approval. The licensee may exercise the authority only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project. For those purposes, the licensee shall also have continuing responsibility to supervise and control the use and occupancies for which it grants permission, and to monitor the use of and ensure compliance with the covenants of the instrument of conveyance for, any interests that it has conveyed, under this article.

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

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

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

To the extent feasible and desirable to protect and enhance the project's scenic, recreational, and other environmental values, the licensee shall require multiple use and occupancy of facilities for access to project lands or waters. The licensee shall also ensure, to the satisfaction of the Commission's authorized representative, that the use and



occupancies for which it grants permission are maintained in good repair and comply with applicable state and local health and safety requirements. Before granting permission for construction of bulkheads or retaining walls, the licensee shall:

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

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

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

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

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

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

- (1) construction of new bridges or roads for which all necessary state and federal approvals have been obtained;
- (2) sewer or effluent lines that discharge into project waters, for which all necessary federal and state water quality certification or permits have been obtained;
- (3) other pipelines that cross project lands or waters but do not discharge into project waters;
- (4) non-project overhead electric transmission lines that require erection of support structures within the project boundary, for which all necessary federal and state approvals have been obtained.
- (5) private or public marines that can accommodate no more than 10 watercraft at a time and are located at least one-half mile (measured over project waters) from any other private or public marina;
- (6) recreational development consistent with an approved Exhibit R or approved report on recreational resources of an Exhibit E; and
- (7) other uses, if; (i) the amount of land conveyed for a particular use is five acres or less; (ii) all of the land conveyed is located at least 75 feet, measured horizontally, from project waters at normal surface elevation; and (iii) no more than 50 total acres of project lands for each project development are conveyed under this clause (d)(7) in any calendar year.

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

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

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

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

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

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

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

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

(F) 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.

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

By the Commission.

( S E A L )

Philis J. Posey,  
Acting Secretary.

**Form L-3**  
(October, 1975)

**FEDERAL ENERGY REGULATORY COMMISSION  
TERMS AND CONDITIONS OF LICENSE FOR CONSTRUCTED  
MAJOR PROJECT AFFECTING NAVIGABLE  
WATERS OF THE UNITED STATES**

**Article 1.** The entire project, as described in this order of the Commission, shall be subject to all of the provisions, terms, and conditions of the license.

**Article 2.** No substantial change shall be made in the maps, plans, specifications, and statements described and designated as exhibits and approved by the Commission in its order as a part of the license until such change shall have been approved by the Commission: Provided, however, That if the Licensee or the Commission deems it necessary or desirable that said approved exhibits, or any of them, be changed, there shall be submitted to the Commission for approval a revised, or additional exhibit or exhibits covering the proposed changes which, upon approval by the Commission, shall become a part of the license and shall supersede, in whole or in part, such exhibit or exhibits theretofore made a part of the license as may be specified by the Commission.

**Article 3.** The project area and project works shall be in substantial conformity with the approved exhibits referred to in Article 2 herein or as changed in accordance with the provisions of said article. Except when emergency shall require for the protection of navigation, life, health, or property, there shall not be made without prior approval of the Commission any substantial alteration or addition not in conformity with the approved plans to any dam or other project works under the license or any substantial use of project lands and waters not authorized herein; and any emergency alteration, addition, or use so made shall thereafter be subject to such modification and change as the Commission may direct. Minor changes in project works, or in uses of project lands and waters, or divergence from such approved exhibits may be made if such changes will not result in a decrease in efficiency, in a material increase in cost, in an adverse environmental impact, or in impairment of the general scheme of development; but any of such minor changes made without the prior approval of the Commission, which in its judgment have produced or will produce any of such results, shall be subject to such alteration as the Commission may direct.

**Article 4.** The project, including its operation and maintenance and any work incidental to additions or alterations authorized by the Commission, whether or not conducted upon lands of the United States, shall be subject to the inspection and

supervision of the Regional Engineer, Federal Energy Regulatory Commission, in the region wherein the project is located, or of such other officer or agent as the Commission may designate, who shall be the authorized representative of the Commission for such purposes. The Licensee shall cooperate fully with said representative and shall furnish him such information as he may require concerning the operation and maintenance of the project, and any such alterations thereto, and shall notify him of the date upon which work with respect to any alteration will begin, as far in advance thereof as said representative may reasonably specify, and shall notify him promptly in writing of any suspension of work for a period of more than one week, and of its resumption and completion. The Licensee shall submit to said representative a detailed program of inspection by the Licensee that will provide for an adequate and qualified inspection force for construction of any such alterations to the project. Construction of said alterations or any feature thereof shall not be initiated until the program of inspection for the alterations or any feature thereof has been approved by said representative. The Licensee shall allow said representative and other officers or employees of the United States, showing proper credentials, free and unrestricted access to, through, and across the project lands and project works in the performance of their official duties. The Licensee shall comply with such rules and regulations of general or special applicability as the Commission may prescribe from time to time for the protection of life, health, or property.

**Article 5.** The Licensee, within five years from the date of issuance of the license, shall acquire title in fee or the right to use in perpetuity all lands, other than lands of the United States, necessary or appropriate for the construction maintenance, and operation of the project. The Licensee or its successors and assigns shall, during the period of the license, retain the possession of all project property covered by the license as issued or as later amended, including the project area, the project works, and all franchises, easements, water rights, and rights or occupancy and use; and none of such properties shall be voluntarily sold, leased, transferred, abandoned, or otherwise disposed of without the prior written approval of the Commission, except that the Licensee may lease or otherwise dispose of interests in project lands or property without specific written approval of the Commission pursuant to the then current regulations of the Commission. The provisions of this article are not intended to prevent the abandonment or the retirement from service of structures, equipment, or other project works in connection with replacements thereof when they become obsolete, inadequate, or inefficient for further service due to wear and tear; and mortgage or trust deeds or judicial sales made thereunder, or tax sales, shall not be deemed voluntary transfers within the meaning of this article.

**Article 6.** In the event the project is taken over by the United States upon the termination of the license as provided in section 14 of the Federal Power Act, or is

transferred to a new licensee or to a nonpower licensee under the provisions of section 15 of said Act, the Licensee, its successors and assigns shall be responsible for, and shall make good any defect of title to, or of right of occupancy and use in, any of such project property that is necessary or appropriate or valuable and serviceable in the maintenance and operation of the project, and shall pay and discharge, or shall assume responsibility for payment and discharge of, all liens or encumbrances upon the project or project property created by the Licensee or created or incurred after the issuance of the license: Provided, That the provisions of this article are not intended to require the Licensee, for the purpose of transferring the project to the United States or to a new licensee, to acquire any different title to, or right of occupancy and use in, any of such project property than was necessary to acquire for its own purposes as the Licensee.

**Article 7.** The actual legitimate original cost of the project, and of any addition thereto or betterment thereof, shall be determined by the Commission in accordance with the Federal Power Act and the Commission's Rules and Regulations thereunder.

**Article 8.** The Licensee shall install and thereafter maintain gages and stream-gaging stations for the purpose of determining the stage and flow of the stream or streams on which the project is located, the amount of water held in and withdrawn from storage, and the effective head on the turbines; shall provide for the required reading of such gages and for the adequate rating of such stations; and shall install and maintain standard meters adequate for the determination of the amount of electric energy generated by the project works. The number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, shall at all times be satisfactory to the Commission or its authorized representative. The Commission reserves the right, after notice and opportunity for hearing, to require such alterations in the number, character, and location of gages, meters, or other measuring devices, and the method of operation thereof, as are necessary to secure adequate determinations. The installation of gages, the rating of said stream or streams, and the determination of the flow thereof, shall be under the supervision of, or in cooperation with, the District Engineer of the United States Geological Survey having charge of stream-gaging operations in the region of the project, and the Licensee shall advance to the United States Geological Survey the amount of funds estimated to be necessary for such supervision, or cooperation for such periods as may mutually agreed upon. The Licensee shall keep accurate and sufficient records of the foregoing determinations to the satisfaction of the Commission, and shall make return of such records annually at such time and in such form as the Commission may prescribe.

**Article 9.** The Licensee shall, after notice and opportunity for hearing, install additional capacity or make other changes in the project as directed by the Commission, to the extent that it is economically sound and in the public interest to do so.

**Article 10.** The Licensee shall, after notice and opportunity for hearing, coordinate the operation of the project, electrically and hydraulically, with such other projects or power systems and in such manner as the Commission any direct in the interest of power and other beneficial public uses of water resources, and on such conditions concerning the equitable sharing of benefits by the Licensee as the Commission may order.

**Article 11.** Whenever the Licensee is directly benefited by the construction work of another licensee, a permittee, or the United States on a storage reservoir or other headwater improvement, the Licensee shall reimburse the owner of the headwater improvement for such part of the annual charges for interest, maintenance, and depreciation thereof as the Commission shall determine to be equitable, and shall pay to the United States the cost of making such determination as fixed by the Commission. For benefits provided by a storage reservoir or other headwater improvement of the United States, the Licensee shall pay to the Commission the amounts for which it is billed from time to time for such headwater benefits and for the cost of making the determinations pursuant to the then current regulations of the Commission under the Federal Power Act.

**Article 12.** The United States specifically retains and safeguards the right to use water in such amount, to be determined by the Secretary of the Army, as may be necessary for the purposes of navigation on the navigable waterway affected; and the operations of the Licensee, so far as they affect the use, storage and discharge from storage of waters affected by the license, shall at all times be controlled by such reasonable rules and regulations as the Secretary of the Army may prescribe in the interest of navigation, and as the Commission may prescribe for the protection of life, health, and property, and in the interest of the fullest practicable conservation and utilization of such waters for power purposes and for other beneficial public uses, including recreational purposes, and the Licensee shall release water from the project reservoir at such rate in cubic feet per second, or such volume in acre-feet per specified period of time, as the Secretary of the Army may prescribe in the interest of navigation, or as the Commission may prescribe for the other purposes hereinbefore mentioned.

**Article 13.** On the application of any person, association, corporation, Federal agency, State or municipality, the Licensee shall permit such reasonable use of its reservoir or other project properties, including works, lands and water rights, or parts thereof, as may be ordered by the Commission, after notice and opportunity for hearing, in the interests of comprehensive development of the waterway or waterways involved and the conservation and utilization of the water resources of the region for water supply or for the purposes of steam-electric, irrigation, industrial, municipal or similar uses. The Licensee shall receive reasonable compensation for use of its reservoir or



other project properties or parts thereof for such purposes, to include at least full reimbursement for any damages or expenses which the joint use causes the Licensee to incur. Any such compensation shall be fixed by the Commission either by approval of an agreement between the Licensee and the party or parties benefiting or after notice and opportunity for hearing. Applications shall contain information in sufficient detail to afford a full understanding of the proposed use, including satisfactory evidence that the applicant possesses necessary water rights pursuant to applicable State law, or a showing of cause why such evidence cannot concurrently be submitted, and a statement as to the relationship of the proposed use to any State or municipal plans or orders which may have been adopted with respect to the use of such waters.

**Article 14.** In the construction or maintenance of the project works, the Licensee shall place and maintain suitable structures and devices to reduce to a reasonable degree the liability of contact between its transmission lines and telegraph, telephone and other signal wires or power transmission lines constructed prior to its transmission lines and not owned by the Licensee, and shall also place and maintain suitable structures and devices to reduce to a reasonable degree the liability of any structures or wires falling or obstructing traffic or endangering life. None of the provisions of this article are intended to relieve the Licensee from any responsibility or requirement which may be imposed by any other lawful authority for avoiding or eliminating inductive interference.

**Article 15.** The Licensee shall, for the conservation and development of fish and wildlife resources, construct, maintain, and operate, or arrange for the construction, maintenance, and operation of such reasonable facilities, and comply with such reasonable modifications of the project structures and operation, as may be ordered by the Commission upon its own motion or upon the recommendation of the Secretary of the Interior or the fish and wildlife agency or agencies of any State in which the project or a part thereof is located, after notice and opportunity for hearing.

**Article 16.** Whenever the United States shall desire, in connection with the project, to construct fish and wildlife facilities or to improve the existing fish and wildlife facilities at its own expense, the Licensee shall permit the United States or its designated agency to use, free of cost, such of the Licensee's lands and interests in lands, reservoirs, waterways and project works as may be reasonably required to complete such facilities or such improvements thereof. In addition, after notice and opportunity for hearing, the Licensee shall modify the project operation as may be reasonably prescribed by the Commission in order to permit the maintenance and operation of the fish and wildlife facilities constructed or improved by the United States under the provisions of this article.

This article shall not be interpreted to place any obligation on the United States to construct or improve fish and wildlife facilities or to relieve the Licensee of any obligation under this license.

**Article 17.** The Licensee shall construct, maintain, and operate, or shall arrange for the construction, maintenance, and operation of such reasonable recreational facilities, including modifications thereto, such as access roads, wharves, launching ramps, beaches, picnic and camping areas, sanitary facilities, and utilities, giving consideration to the needs of the physically handicapped, and shall comply with such reasonable modifications of the project, as may be prescribed hereafter by the Commission during the term of this license upon its own motion or upon the recommendation of the Secretary of the Interior or other interested Federal or State agencies, after notice and opportunity for hearing.

**Article 18.** So far as is consistent with proper operation of the project, the Licensee shall allow the public free access, to a reasonable extent, to project waters and adjacent project lands owned by the Licensee for the purpose of full public utilization of such lands and waters for navigation and for outdoor recreational purposes, including fishing and hunting: Provided, That the Licensee may reserve from public access such portions of the project waters, adjacent lands, and project facilities as may be necessary for the protection of life, health, and property.

**Article 19.** In the construction, maintenance, or operation of the project, the Licensee shall be responsible for, and shall take reasonable measures to prevent, soil erosion on lands adjacent to streams or other waters, stream sedimentation, and any form of water or air pollution. The Commission, upon request or upon its own motion, may order the Licensee to take such measures as the Commission finds to be necessary for these purposes, after notice and opportunity for hearing.

**Article 20.** The Licensee shall clear and keep clear to an adequate width lands along open conduits and shall dispose of all temporary structures, unused timber, brush, refuse, or other material unnecessary for the purposes of the project which results from the clearing of lands or from the maintenance or alteration of the project works. In addition, all trees along the periphery of project reservoirs which may die during operations of the project shall be removed. All clearing of the lands and disposal of the unnecessary material shall be done with due diligence and to the satisfaction of the authorized representative of the Commission and in accordance with appropriate Federal, State, and local statutes and regulations.

**Article 21.** Material may be dredged or excavated from, or placed as fill in, project lands and/or waters only in the prosecution of work specifically authorized under the license; in the maintenance of the project; or after obtaining Commission approval, as appropriate. Any such material shall be removed and/or deposited in such manner as to reasonably preserve the environmental values of the project and so as not to interfere with traffic on land or water. Dredging and filling in a navigable water of the United States shall also be done to the satisfaction of the District Engineer, Department of the Army, in charge of the locality.

**Article 22.** Whenever the United States shall desire to construct, complete, or improve navigation facilities in connection with the project, the Licensee shall convey to the United States, free of cost, such of its lands and rights-of-way and such rights of passage through its dams or other structures, and shall permit such control of its pools, as may be required to complete and maintain such navigation facilities.

**Article 23.** The operation of any navigation facilities which may be constructed as a part of, or in connection with, any dam or diversion structure constituting a part of the project works shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including control of the level of the pool caused by such dam or diversion structure, as may be made from time to time by the Secretary of the Army.

**Article 24.** The Licensee shall furnish power free of cost to the United States for the operation and maintenance of navigation facilities in the vicinity of the project at the voltage and frequency required by such facilities and at a point adjacent thereto, whether said facilities are constructed by the Licensee or by the United States.

**Article 25.** The Licensee shall construct, maintain, and operate at its own expense such lights and other signals for the protection of navigation as may be directed by the Secretary of the Department in which the Coast Guard is operating.

**Article 26.** If the Licensee shall cause or suffer essential project property to be removed or destroyed or to become unfit for use, without adequate replacement, or shall abandon or discontinue good faith operation of the project or refuse or neglect to comply with the terms of the license and the lawful orders of the Commission mailed to the record address of the Licensee or its agent, the Commission will deem it to be the intent of the Licensee to surrender the license. The Commission, after notice and opportunity for hearing, may require the Licensee to remove any or all structures, equipment and power lines within the project boundary and to take any such other action necessary to restore the project waters, lands, and facilities remaining within the project boundary to a condition satisfactory to the United States agency having jurisdiction over its lands or the

Commission's authorized representative, as appropriate, or to provide for the continued operation and maintenance of nonpower facilities and fulfill such other obligations under the license as the Commission may prescribe. In addition, the Commission in its discretion, after notice and opportunity for hearing, may also agree to the surrender of the license when the Commission, for the reasons recited herein, deems it to be the intent of the Licensee to surrender the license.

**Article 27.** The right of the Licensee and of its successors and assigns to use or occupy waters over which the United States has jurisdiction, or lands of the United States under the license, for the purpose of maintaining the project works or otherwise, shall absolutely cease at the end of the license period, unless the Licensee has obtained a new license pursuant to the then existing laws and regulations, or an annual license under the terms and conditions of this license.

**Article 28.** The terms and conditions expressly set forth in the license shall not be construed as impairing any terms and conditions of the Federal Power Act which are not expressly set forth herein.

## APPENDIX A

WATER QUALITY CERTIFICATION  
Permit ID 9-2924-00022/0001 (FERC No. 2216)  
Issued January 31, 2006

### NATURAL RESOURCE PERMIT CONDITIONS:

- 1. Conformance with Plans.** All activities authorized by this permit must be in strict conformance with the approved plans and supporting documentation submitted by the applicant or his agent as part of the permit application for a State Water Quality Certificate dated August 18, 2005. This supporting documentation includes the Relicensing Settlement Agreement Addressing New License Terms and Conditions dated July 18, 2005.
- 2. State Not Liable for Damage.** The State of New York shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the State for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from such damage.
- 3. Precautions Against Contamination of Waters.** All necessary precautions shall be taken to preclude contamination of any wetland or waterway by suspended solids, sediments, fuels, solvents, lubricants, epoxy coatings, paints, concrete, leachate or any other environmentally deleterious materials associated with the project.
- 4. No Interference with Navigation.** There shall be no unreasonable interference with navigation by the work herein authorized.
- 5. State May Require Site Restoration.** If upon the expiration or revocation of this permit, any construction hereby authorized has not been completed, the applicant shall, without expense to the State, and to such extent and in such time and manner as the Department of Environmental Conservation (“Department”) may with appropriate authority require, remove all or any portion of the uncompleted structure or fill and restore the site to its former condition. No claim shall be made against the State of New York on account of any such removal or alteration.

**6. Notification Requirements for Emergencies.** With the exception of emergency activities in or potentially affecting waters of the State, the Power Authority's activities affecting or having an impact upon waters of the State will comport with the Operating Conditions in Paragraphs 8 and 9, below, except as otherwise provided for in the Relicensing Settlement Agreement Addressing New License Terms and Conditions dated July 18, 2005.

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

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

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

**7. Settlement Agreement.** This Certification includes and incorporates the provisions of the Relicensing Settlement Agreement Addressing New License Terms and Conditions dated July 18, 2005, and filed with the Federal Energy Regulatory Commission on August 18, 2005, to the extent that the agreement pertains to the applicant's compliance with the New York State Water Quality Standards necessary and appropriate for issuance of and compliance with this Certification.

## **OPERATIONS**

**8. Water Level Fluctuations.** The operation of the Project is regulated by the 1950 Treaty Between Canada and the United States of America Concerning the Diversion of the Niagara River and applicable requirements established by the International Joint Commission, the International Niagara Board of Control, and the International Niagara Committee or any other international body that has authority over the uses of the Niagara River. The Project is required to be operated in conformance with the 1993 International Niagara Board of Control Directive and the Power Authority shares allocated Niagara River water jointly with Ontario Power Generation. The Power Authority's operation of the Project, including the management and use of Niagara River flows pursuant to International Niagara Board of Control regulation, must be consistent with New York State effluent limitations, water quality standards, and thermal discharge criteria as set forth in 6 NYCRR Parts 701, 702, 703, and 704.

**9. Required Ecological Measures.** To ensure the continued propagation and survival of aquatic and riparian species affected by Project operations and related project facilities pursuant to 6 NYCRR sections 701 and 702, the Department determines that granting a certificate under this section requires that the Power Authority create and maintain the following funds for design, construction, implementation and maintenance of certain environmental enhancements to meet the State's Water Quality Standards as they apply to the Project. The Power Authority has committed to providing these funds (as well as various other related commitments made by the Power Authority) and supporting the enhancements as provided for below as part of the Relicensing Settlement Agreement Addressing New License Terms and Conditions.

### **A. Habitat Improvement Projects**

In accordance with the requirements of section 4.1.2 of the Relicensing Settlement Agreement Addressing New License Terms and Conditions, which section is incorporated by reference herein, the Power Authority shall establish a fund in an amount currently estimated to be \$12,000,000 for the design, construction, operation, maintenance, and monitoring of the following eight Habitat Improvement Projects (HIPs):

- (a) Strawberry Island Wetland Restoration;
- (b) Frog Island Restoration;
- (c) Motor Island Shoreline Protection;
- (d) Beaver Island Wetland Restoration;
- (e) Control of Invasive Species – Buckthorn and Tiffth Marshes;
- (f) Osprey Nesting;

- (g) Common Term Nesting; and
- (h) Installation of Fish Habitat/Attraction Structures.

The Department finds that the funds for the above-listed proposed HIPs relate directly to water quality objectives in 6 NYCRR sections 701 and 702. Accordingly, the Department conditions the granting of this certificate on a requirement that the Power Authority establish the HIPs Fund as provided in subparagraph A.1 above.

### **B. Fish and Wildlife Habitat Enhancement and Restoration Fund**

In accordance with the requirements of section 4.1.3 of the Relicensing Settlement Agreement Addressing New License Terms and Conditions, which section is incorporated by reference herein, the Power Authority shall establish a Fish and Wildlife Habitat Enhancement and Restoration Fund (HERF) in the amount of \$16,179,645 (NPV 2007) for future HIPs, land acquisition, habitat improvement, habitat research, fish, wildlife, and indigenous plant species restoration, and stewardship activities within the Niagara River Basin. The Department finds that the HERF is directly associated with the water quality objectives in 6 NYCRR sections 701 and 702. Accordingly, the Department conditions the granting of this certificate on a requirement that the Power Authority establish a HERF Fund.

### **C. Land Acquisition Fund**

In accordance with the requirements of section 2 of Appendix E of the Relicensing Settlement Agreement Addressing New License Terms and Conditions, which section is incorporated by reference herein, the Power Authority shall establish a Land Acquisition Fund in the amount of \$1,000,000 (NPV 2007) for the Department's land acquisition and conservation activities. The Department finds that the Land Acquisition Fund is directly associated with the water quality objectives in 6 NYCRR sections 701 and 702. Accordingly, the Department conditions the granting of this certificate on a requirement that the Power Authority establish a Land Acquisition Fund.

### **D. Public Access Improvements**

To maximize public access at the Project, the Power Authority will construct, operate and maintain the three (3) public access improvements within the Project Boundary, set forth below, for the life of the New License. Within twelve (12) months after the effective date of the New License, the Power Authority shall submit for approval by the Department a Proposed Plan for the design, construction, and operation and maintenance of the three public access projects, consistent with applicable security and safety requirements. The Department will determine whether to approve the Power Authority's Proposed Plan within a reasonable period of time. The Power Authority will commence construction of



the public access improvements no sooner than twenty-four (24) months following the effective date of the New License, and no later than six (6) months after the Department approves the Power Authority's timely submission of a Proposed Plan.

(1) Upper Mountain Parking Lot/Fishing Access: The Power Authority shall construct: (a) a parting area for sixteen vehicles; (b) a gravel trail across the Niagara Mohawk Power Company transmission line right-of-way for pedestrian use; and (c) a gravel path to traverse the reservoir dike in an area located on the northwest side of Lewiston Reservoir near the Upper Mountain Upper Mountain Station. The Power Authority also shall implement measures, including the placement of signage and large boulders, to discourage vehicle access and use of the Upper Mountain gravel trail.

(2) Robert Moses Fishing Pier Parking Area: Adjacent to the main gate of the Robert Moses Niagara Power Plant, the Power Authority shall provide for up to six (6) additional angled parking spaces at the Robert Moses Fishing Pier parking area.

(3) Bulkhead Fence at the Upper River Intakes: At the Project's intake structure area, the Power Authority shall: (1) resurface the asphalt in the parking lot and along the walkways; (2) in compliance with the Americans with Disabilities Act ("ADA"), designate parking spaces and install curb cuts to allow access to walkway; and (3) install a removable 7-foot-chain link fence parallel to the retaining wall approximately twenty-five (25) feet from the Niagara River's edge. The fence will be installed when icebreakers are dry-docked for repairs; at all other times, the fence will be removed and stored to provide unimpeded access to the Niagara River along the intake structure bulkhead railing.

**10. License Term.** The Department includes a fifty (50) year license term as a condition of this certificate.

**11. Stormwater SPDES.** All activities requiring the disturbance of greater than one acre must obtain coverage under the SPDES General Permit for Stormwater Discharge from Construction Activities (GP-02-01).

## WATER QUALITY CERTIFICATION SPECIFIC CONDITIONS

**1. Water Quality Certification.** The Department hereby certifies:

The Department has reviewed the application for New License for Major Project – Existing Dam (Application), which the New York Power Authority (Power Authority) filed with the Federal Energy Regulatory Commission (FERC or the Commission) for the Niagara Power Project, FERC Project No. 2216 (Project) and submitted as part of its

Request for Water Quality Certification (Request). The Application contains a preliminary draft environmental assessment, as well as the Power Authority's Offer of Settlement, which identifies, among other things, eight primary Habitat Improvement Projects, three public access points, a Fish and Wildlife Habitat Enhancement Fund, proposed for inclusion in the FERC license, as well as a land acquisition fund. The Department has also reviewed the Power Authority's Request, the administrative record before the Federal Energy Regulatory Commission established to date; and all other available pertinent information, including licensing studies conducted as part of the ALP and undertaken in support of the Application, the Project's Public Information file, and public correspondence regarding the Application.

Based upon the review of this information, which is incorporated into the administrative record for this Request, the Project, as conditioned below, complies with sections 301, 302, 303, 306, and 307 of the Federal Water Pollution Control Act, as amended and as implemented by the limitations, standards, and criteria of the state statutory and regulatory requirements set forth in 6 NYCRR section 608.9(a). The Project, as conditioned, will also comply with applicable New York State effluent limitations, water quality standards and thermal discharge criteria, as applicable, as set forth in 6 NYCRR Parts 701, 702, 703, and 704.

The Project has 39 point source discharges that are regulated under section 304 of the Clean Water Act through the State Pollution Discharge Elimination System (SPDES) (Permit No. NY-0000736, effective as of January 1, 2005), which supports the State's efforts in managing the water quality in Project waters.

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

**General Conditions:**

**1. Facility Inspection by the Department.** The permitted site or facility, including relevant records, is subject to inspection at reasonable hours and intervals by an authorized representative of the Department of Environmental Conservation (the Department) to determine whether the Certificate Holder is complying with this certification and the Environmental Conservation Law (ECL). Such representative may order the work suspended pursuant to ECL 71-0301 and SAPA 401(3).

The Certificate Holder shall provide a person to accompany the Department's representative during an inspection to the permit area when requested by the Department.

A copy of this certification and the FERC license, including all maps, drawings and

special conditions, must be available for inspection by the Department at all times and the project site or facility. Failure to produce a copy of the permit upon request by a Department representative is a violation of this permit.

**2. Relationship of this Permit to Other Departmental Orders and Determinations.**

Unless expressly provided for by the Department, issuance of this permit does not modify, supersede, or rescind any order or determination previously used by the Department or any of the terms, conditions or requirements contained in any such order or determination.

**3. Applications for Permit Renewals or Modifications.** The Certificate Holder must submit a separate written application to the Department for renewal, modification or transfer of this permit. Such application must include any forms or supplemental information the Department requires. Any renewal, modification or transfer granted by the Department must be in writing.

**4. Department Contacts.** All contacts with the Department concerning this certificate, including submission of information required by the above Natural Resource Permit Conditions and all applications for permit modification or renewal are to be submitted to:

New York DEC – Region 9 Headquarters  
9 Sub-office  
Regional Permit Administrator  
Division of Environmental Permits  
270 Michigan Avenue  
Buffalo, New York. 14203-2999

New York DEC – Region  
Natural Resource Supervisor  
Division of Fish and Wildlife  
182 East Union Street  
Allegany, New York 14706

**5. Permit Modifications, Suspensions and Revocations by the Department.** The Department reserves the right to exercise all available authority to modify, suspend or revoke this permit. The grounds for modification, suspension or revocation include:

- a. Materially false or inaccurate statements in the permit application or supporting papers;
- b. Failure by the Certificate Holder to comply with any terms or conditions of the permit;
- c. Exceeding the scope of the project as described in the permit application;

- d. Newly discovered material information or a material change in the environmental conditions, relevant technology or applicable law or regulations since the issuance of the existing permit;
- e. Noncompliance with previously issued permit conditions, orders of the commissioner, any provisions of the Environmental Conservation Law or regulations of the Department related to the permitted activity.

**6. Permit Transfers.** Permits are transferable unless specifically prohibited by statute, regulation or another permit condition. Applications for permit transfer should be submitted prior to actual transfer of ownership.

## **NOTIFICATION OF OTHER CERTIFICATE HOLDER OBLIGATIONS**

### **Item A: Certificate Holder Accepts Legal Responsibility and Agrees to Indemnification.**

The Certificate Holder expressly agrees to indemnify and hold harmless the Department of Environmental Conservation of the State of New York, its representatives, employees, and agents (“DECX”) for all claims, suits, actions and damages, to the extent attributable to the Certificate Holder’s acts or omissions in connection with the Certificate Holder’s undertaking of activities in connection with, or operation and maintenance of, the facility or facilities authorized by the permit whether compliance or not in compliance with the terms and conditions of the permit. This indemnification does not extend to any claims, suits, actions or damages to the extent attributable to the DEC’s own negligent or intentional acts or omission, or to any claims, suits or actions naming the DEC and arising under Article 78 of the New York Civil Practice Laws and Rules or any citizen suit or civil rights provision under federal or state laws.

### **Item B: Certificate Holder’s Contractors to Comply with Permit.**

The Certificate Holder is responsible for informing its independent contractors, employees, agents and assigns of their responsibility to comply with this permit, including all special conditions, while acting as the Certificate Holder’s agent with respect to permitted activity’s, and such persons shall be subject to the same sanctions for violations of the Environmental Conservation Law as those prescribed for the Certificate Holder.

### **Item C: Certificate Holder Responsible for Obtaining Other Required Permits.**

The Certificate Holder is responsible for obtaining any other permits, approvals, lands, easements and rights-of-way that may be required to carry out the activities that are authorized by this permit.

**Item D: No Right to Trespass or Interfere with Riparian Rights.**

This permit does not convey to the Certificate Holder any right to trespass upon the lands or interfere with the riparian rights of others in order to perform the permitted work, nor does it authorize the impairment of any rights, title, or interest in real or personal property held or vested in a person not a party to the permit.