

128 FERC ¶ 61,256
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

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

New York State Electric & Gas Corporation

Project No. 2835-031

ORDER DENYING REHEARING

(Issued September 17, 2009)

1. On May 1, 2009, the Chief, Land Resources Branch, Division of Hydropower Administration and Compliance (“Branch Chief”) issued an order¹ modifying New York State Electric & Gas Corporation’s (NYSEG) whitewater access proposal for its Rainbow Falls Project No. 2835, located on the Ausable River in Clinton and Essex Counties, New York. The order requires the licensee to provide whitewater boating access at the project from Memorial Day weekend through October. American Whitewater, the Lake Champlain Chapter of Trout Unlimited (Trout Unlimited), and licensee (NYSEG) have filed separate requests for rehearing of the order.² For the reasons discussed below, the requests for rehearing are denied.

¹ *New York State Electric & Gas Corp.*, 127 FERC ¶ 62,092 (2009) (May 1 Order).

² On June 2, 2009, the Ausable Chasm Company submitted a filing that seeks to rebut many arguments in American Whitewater’s rehearing request. The filing constitutes an answer to a request for rehearing, prohibited under Rule 213 of the Commission’s Rules of Practice and Procedure, 18 C.F.R. § 385.213 (2009), and is therefore rejected. In addition, on May 23, June 15, and June 18, 2009, respectively, Congressman John M. McHugh; New York State Assembly member Janet Duprey; and Town of Chesterfield Supervisor Gerald H. Morrow filed comments reiterating their earlier comments objecting to whitewater access on safety grounds. The arguments raised in all four filings are similar to those made by NYSEG’s rehearing request and are addressed in this order.

BACKGROUND

2. The Rainbow Falls Project is a run-of-river project located immediately upstream of the point where the Ausable River flows into Ausable Chasm, a narrow, steep-walled chasm about two miles long. Immediately downstream from the project's powerhouse, within the upper portion of the chasm and outside the project boundary, the river flows over approximately a dozen falls or rapids providing a half-mile of Class IV (advanced)/V (expert) whitewater boating run.³

3. In 2004, Commission staff issued a new license to NYSEG for the Rainbow Falls Project.⁴ Article 414 of the new license required NYSEG to prepare a study plan, in consultation with government and non-government agencies (including American Whitewater and Trout Unlimited),⁵ to further evaluate the potential for whitewater boating at the project. Commission staff approved the study plan and required NYSEG to conduct an “on-the-water” study using a range of naturally occurring flows and file a report on the results of the study including: (1) a determination of the range of suitable flows in the upper chasm; (2) an estimate of the number of annual boating visits that access to a whitewater access area at the project would attract; (3) a proposal and cost estimate for providing and maintaining access to the upper chasm for whitewater boating that minimizes or avoids potential conflicts with other chasm users; and (4) based on the results of the study, a recommendation on whether, or to what extent, to allow whitewater access at the project.⁶

4. NYSEG performed the required study in 2005 and filed its results with the Commission in 2007.⁷ The study evaluated seven options, ranging from no access to

³ Class II (novice) to III (intermediate) whitewater boating opportunities exist in the middle and lower portions of the chasm, where the Ausable Chasm Company offers boating opportunities to its patrons.

⁴ See *New York State Electric & Gas Co.*, 108 FERC ¶ 62,168 (2004), *order on rehearing*, 109 FERC ¶ 61,360 (2004).

⁵ The other entities to be consulted were the New York State Department of Environmental Conservation, the Adirondack Mountain Club, and the Ausable Chasm Company.

⁶ *New York State Electric & Gas Corp.*, 111 FERC ¶ 62,326 (2005).

⁷ See May 23, 2007 filing and May 25, 2007 supplement.

year-round access.⁸ The study also considered flow preferences and established two flow preference curves: suitable and optimal. The range of suitable flows, i.e., flow levels whose average rating was “marginal to totally acceptable” for whitewater boating, was 200 cubic feet per second (cfs) to 1,400 cfs. The range of optimal flows, i.e., flow levels whose average rating was “moderately acceptable to totally acceptable” for whitewater boating, was 400 cfs to 950 cfs.⁹ Based on the study results, NYSEG recommended that it should not be required to provide access at the project for whitewater boating.

5. Commission staff prepared, and issued for public comment, an environmental assessment (EA) on the licensee’s study results and whitewater access recommendation.¹⁰ In the EA, Commission staff recommended that NYSEG be required to provide year-round whitewater boating access at the project, with certain conditions to address safety/security issues, such as informational and warning signage and modification of existing security measures.

6. Over 100 comments were filed in response to the EA. Most of the comments were from individuals. Some supported whitewater access in the chasm, and others opposed it. Supporters contend that boating in the chasm is not dangerous and would boost the local economy. Those opposed contend the chasm is too dangerous for safe rescue operations and could cause a financial hardship to the local community. American Whitewater and Adirondack Mountain Club filed comments in support of year-round whitewater access, contending that there is no reason to ban or limit such access. NYSEG, Ausable Chasm Company, Clinton County Emergency Services, Upstate New York Tourism Alliance, New York State Assembly member Janet Duprey and the Town of Ausable filed comments opposing whitewater access, particularly during the winter months, based on safety concerns.

7. The May 1 Order directed NYSEG to provide whitewater access during the five-month period each year from Memorial Day weekend through October. The order concluded that optimal flows for whitewater boating are between 400 and 950 cfs, explaining that, during the study period, there was no whitewater boating when flows

⁸ The other options evaluated by the study were to provide access: July through September; June through October; ten weekends, from the last weekend in May to the last weekend in June and the second weekend in September to the second weekend in October; three weekend events, one weekend each in the spring, summer, and fall; and May through October.

⁹ See May 23, 2007 filing at 26-27.

¹⁰ Environmental Assessment issued April 9, 2008.

were above 1,000 cfs.¹¹ A review of average monthly flows from 2001-2007 indicated that most optimal flows (i.e., 400 cfs to 950 cfs) occur from June to March, with flows between 943 and 337 cfs.¹² Average monthly flows in April and May were the highest, ranging from 1,300 to 2,100 cfs.

8. Noting that an area of concern has been the appropriateness of allowing whitewater boating during harsh winter months,¹³ the May 1 Order considered temperature and precipitation data. It calculated average monthly temperatures using data from 1884 through 2008, and found that average temperatures were below freezing from the months of December through March. In addition, the order evaluated monthly average precipitation, including snowfall. The order found that the wettest months in the area are from May through November, and the months with the most snowfall are from December through March.

9. The order found that temperatures below freezing, flows above 1,000 cfs, and heavy snowfall represent winter and flow conditions that are less conducive to whitewater boating and pose a greater safety risk to both participants and rescuers. Further, the order found that it is likely that only a few, if any, boaters would run the chasm under such conditions. In light of this information, the order found that NYSEG should not be required to provide access during winter months. Instead, the order found that providing access from Saturday of Memorial Day weekend through October would meet the majority of demand and provide boaters with a range of optimal flows while further ensuring the safety of rescue personnel and boaters. In addition, the order found that NYSEG's operation and maintenance costs would be significantly reduced compared to providing year-round access.

10. The order addressed NYSEG's contentions, included in its comments on the EA, that year-round access is not supported by precedent, and that the Commission's order in *City of Tacoma, Washington*¹⁴ (Nisqually) supports its position that it should have no obligation to provide any whitewater access. The order explained that, unlike Nisqually, the Rainbow Falls study results show that there is demand for whitewater boating at the site; that access can be provided with specific measures to address safety and security issues; and that the chasm run would provide whitewater boating opportunities during

¹¹ May 1 Order, 127 FERC ¶ 62,092 at P 23.

¹² *Id.* P 23-25.

¹³ *Id.* P 24.

¹⁴ See Order Approving Whitewater Boating Report, issued November 21, 2002. 101 FERC ¶ 61,198 (2002).

certain times of the year when other whitewater boating resources in the region do not have optimal flows for boating, particularly during the summer months. The order concluded that, in general, providing whitewater access at the project for experienced boaters would not result in significant conflicts between boaters and other recreation users, would not represent prohibitive safety and security risks, and is consistent with project purposes. The order required NYSEG to file an implementation plan, following consultation with certain entities.¹⁵

11. On rehearing, American Whitewater argues that the record lacks substantial evidence to support anything less than year-round access, citing to the EA's recommendation for such access. By contrast, NYSEG argues on rehearing that the record, particularly on the issue of safety, Commission precedent, and NYSEG's authority under standard license Article 18 to limit public access for safety reasons requires a reversal of the May 1 Order to bar any whitewater access.

DISCUSSION

A. The May 1 Order is Supported by Substantial Evidence

12. American Whitewater argues that the record lacks substantial evidence¹⁶ to support a finding in the May 1 Order that is different from staff's recommendation in the EA. We disagree. The purpose of the EA is to evaluate the potential environmental impacts of a proposed action and reasonable alternatives. It is not a decision document. Here, the May 1 order reasonably concluded, after examining the EA and the extensive public comments filed in the proceeding, that likely usage patterns, public safety, and project costs dictated requiring whitewater access during select portions of the year.

¹⁵ While the order lists minimum safety measures to be included in the plan, it is not an exhaustive list. For example, the licensee may develop additional measures, e.g., a memorandum of understanding between it and the whitewater boating community to ensure that boaters meet specified minimum requirements (experience, age, etc.) to run Class IV/V rapids, have the appropriate watercraft and safety equipment, and are fully aware of the risks involved in boating on the subject stretch of the river. Such an agreement may also include a boater-experience certification program and a boater registration process through the licensee's Web site or its local office.

¹⁶ Section 313(b) of the FPA, 16 U.S.C. § 8251(b) (2006), requires Commission findings to be supported by substantial evidence.

13. Next, American Whitewater contends¹⁷ that the order should have used average *daily* flow and temperature data instead of average *monthly* data, and the broader-ranged *suitable* whitewater flows (200 to 1,400 cfs) rather than *optimal* flows (400 to 943 cfs) in determining potential demand for the chasm whitewater run. It asserts that the order's use of monthly and optimal-flow data masked important variability in suitable boating flows, thereby ignoring whitewater demand during the excluded months. It argues that using daily temperatures over the larger range of suitable flows would support year-round access.

14. However, in re-evaluating year-round whitewater access at the project, the May 1 Order not only considered average monthly flow records, temperature, and precipitation data, but also the comments on the EA, including the safety-related comments requesting exclusion of whitewater access during winter months and during periods of high flows, and the whitewater study participant evaluations of whitewater access at the project.

15. While average daily flows and average maximum daily temperatures might better reflect flow and temperature variability than the average monthly data used in the May 1 Order, the order's use of monthly averages and the results of the boater study was reasonable and provided a general picture of whitewater boating potential throughout the year. Moreover, as explained in the May 1 Order, potential whitewater usage was only one of the factors that the order considered. The order balanced many competing interests, including safety to boaters and rescue personnel, potential conflicts between whitewater boaters and other recreational users, and consistency with other project purposes, and arrived at what we believe was a reasonable balance of relevant interests. American Whitewater, on the other hand, focused only on identifying the maximum number of days with whitewater boating potential, and ignored relevant safety, boater survey, and EA comment evidence.¹⁸

16. While there is some risk inherent to whitewater boating, it is not unreasonable for the Commission to require that such risks be appropriately mitigated. Here, the project's whitewater access involves an access point where the downstream advanced/expert run at the top of the chasm is masked by the terrain (i.e., there is a turn in the river just below the access point that prevents boaters from being able to see down the river). Additionally, the steep topography of the terrain (especially during winter precipitation periods) prohibits boaters from scouting the run to determine its "expert boater

¹⁷ American Whitewater's request for rehearing at 11-14.

¹⁸ For example, American Whitewater contends that there is no record evidence of safety problems or unusual risks at the project. American Whitewater's rehearing at 15. However, the lack of evidence of specific safety problems could well be explained by NYSEG's long-standing policy of barring public access to the river above the chasm run.

class IV/V” features, which poses a substantial safety risk and one that is exacerbated by cold weather.¹⁹ In that respect, the whitewater run here presents safety-related problems that, while perhaps not unique, nevertheless combine to fully warrant mitigation of boater and rescuer risk that the May 1 Order’s reduction of the whitewater access period provides. Providing an implementation plan to address safety concerns, as recommended in the EA, is not a sufficient remedy in itself to justify year-round whitewater access.

17. Moreover, American Whitewater’s focus on the broader range of *suitable* flows as providing “viable recreation opportunities”²⁰ and a *daily average* temperature cut-off level of 33 degrees as providing “a comfort threshold for many paddlers”²¹ fails to take into consideration other factors, including an analysis of the boater survey results.²² Indeed, contrary to American Whitewater’s arguments, when considering all relevant demand and risk factors, for the seven months excluded from whitewater access, neither average monthly nor average daily temperature or precipitation data or suitable or optimal flow data support expanding whitewater access to any of the seven excluded months. The mean monthly flow for April is 1,920 cfs, and the average mean daily flow records for April ranges from 1,410 to 2,590 cfs. The average, mean monthly flow for May is 1,380 cfs, and the average mean daily flow records for May ranges from 800

¹⁹ As the licensee explains in its Whitewater Access Plan, filed May 23, 2007:

Due to the geographic location of the project (Adirondack Mountains, northern NY), the weather during the [colder] months typically experiences heavy rain, snow, and extreme cold temperature. These conditions, along with mist from the falls, cause heavy ice overhang/buildup within the river gorge, on the face of the cliffs and along the river’s edge. Falling, dislodged and floating ice (from cliff faces, powerhouse roof, falls, etc.) are common occurrences. These snow and ice conditions make access to the river edge treacherous and nearly impossible.

²⁰ American Whitewater’s request for rehearing at 12 and n. 2.

²¹ *Id.* at 14.

²² For example, the study participants were asked in the Overall Evaluation Form how important access to the river for boating would be in the spring, summer, fall, winter, and year round. Of the 22 participants who filled out the form, 17 of them rated winter access as “unimportant” to “slightly important,” and one did not respond to this question. Almost all (19 of the 21 who answered this question) rated summer use as “very important” to “extremely important,” and 13 rated fall use as “very important” to “extremely important.” See May 23, 2007 filing, Whitewater Access Plan, Part 2 of 2, Appendix O, “Data Recorded on Overall Evaluation Forms,” at 1.

to 2,070 cfs. Based on the participant evaluation responses, these flows are well above the highest flow which most participants find acceptable for boating in the Ausable chasm.²³ Therefore, on a “flow basis” alone May and April are properly excluded.

18. For the months of January and February, the mean daily average temperature exceeds the acceptable temperature threshold (33 degrees) less than one-half of the days of each month (11 for January and 13 for February),²⁴ and all of the cold-weather months (November through March) experience substantial snowfall and other precipitation.²⁵ During times when temperatures within the chasm are at or below freezing, and/or precipitation in the form of ice and/or snow is present, there is an increased safety risk to boaters, as well as to emergency rescue personnel. In particular, the steep terrain (particularly during winter precipitation conditions) not only (as noted) hinders boaters’ ability to scout the rapids downstream from the project’s put-in, but also hinders rescuers’ efforts to save boaters that might fall victim to the masked risk of the chasm run’s expert (Class IV/V) conditions. The increased safety risks to boaters and rescuers during the excluded cold-weather months warrant their exclusion from the period of authorized whitewater access. American Whitewater’s arguments for using the more specific temperature and flow data for gauging boater demand and whitewater flow availability do not change this conclusion.

19. Noting that the May 1 Order’s reduction of the whitewater access period was in part based on the costs to NYSEG, American Whitewater contends that the order does not explain why the costs associated with year-round access are no longer reasonable.²⁶ The answer is simple: the potential costs to the licensee, while not determinative, are a

²³ While boaters participated in events on June 25, July 24, September 24, with flow ranges from 173- 576 cfs, boaters declined to participate in two other study events on July 10 and October 22 with higher flow levels of 1, 020 to 2,820 cfs, flows in the suitable range recommended by American Whitewater but exceeding the optimal range used in the May 1 Order. *See* May 23, 2007 filing, Whitewater Access Plan, Part 1 of 2, at 35-36.

²⁴ *See* American Whitewater’s request for rehearing at 14.

²⁵ According to the May 1 Order, 127 FERC ¶ 62,092 at 64,285-86, the average monthly snowfall in the area during the cold-weather months between 1998 and 2008 ranged from a low of 4.38 inches in November to a high of 21.22 inches in December. Average monthly snowfall in January, February, and March was between 18 and 21 inches.

²⁶ American Whitewater’s request for rehearing at 18-20.

factor to be considered.²⁷ Here, the cost of providing whitewater access during the winter months when boater safety risks are greater would likely be proportionately higher as well, while at the same time there would be less whitewater boating demand.

20. American Whitewater contends that the May 1 Order's reduction of the whitewater access period fails to meet the Commission's obligation under FPA section 10(a)(1) to ensure that the project, as licensed will be "best adapted to a comprehensive plan for improving or developing a waterway...", especially in light of the unique features of the chasm's whitewater run. However, as explained above, in reducing the whitewater access period, the May 1 Order appropriately balanced the relevant factors of safety and recreation, and the result clearly meets the comprehensive development/public interest requirements of FPA section 10(a)(1), as well as the related public safety requirements of standard license Article 18 and FPA section 10(c).²⁸

21. American Whitewater contends that the May 1 Order fails to comply with the Commission's recreation policy set forth in section 2.7 of the Commission's regulations.²⁹ It argues that the May 1 Order erroneously assumes that the policy requires recreation public access to meet a majority of public demand, which it asserts is inconsistent with the recreation policy requirement for the "ultimate development of recreational opportunities."

22. However, the extent of a licensee's obligation to provide public access for recreational purposes at any particular project is based on the Commission's judgment as to what is reasonable in light of the facts present in that case.³⁰ The requirement to

²⁷ The April 9, 2008 EA (table 2) found that the year-round whitewater access and the reduced five-month access produced annual maintenance costs, respectively, of \$28,150 and \$12,900.

²⁸ See *Montana Power Co.*, 70 FERC ¶ 61,298 (1995) (authorizing, subject to safety restrictions, limited seaplane use of a licensed project reservoir that is also used by recreational boaters). The order also summarized the basis of our authority in such matters, including the comprehensive development requirements of FPA section 10(a)(1); the related public safety requirements of standard license Article 18 (see the analysis of the requirements of license Article 18, *infra*); and FPA section 10(c), 16 U.S.C. § 803(c) (2006), which requires ensuring that "the licensee shall ... conform to such rules and regulations as the Commission may from time to time prescribe for the protection of life, health, and property." *Id.* at 61,882-83.

²⁹ 18 C.F.R. § 2.7 (2009).

³⁰ See, e.g., *Georgia Power Co.*, 31 FERC ¶ 61,014, at 61,027 (1985).

provide for the “ultimate development of recreational opportunities” does not mean, as American Whitewater implies, that the whitewater access must be required to meet all demand, regardless of the safety risks involved.

B. Neither License Article 18 Nor the Nisqually Order Requires a Bar to Whitewater Access

23. NYSEG contends that standard license Article 18 and the Commission’s Nisqually order support NYSEG’s position that whitewater access must not be required.³¹ It notes that Article 18 allows NYSEG to “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.” NYSEG argues that it has made an adequate showing, supported by emergency personnel, that public access is not necessary. In support, it notes the location of the access point, which masks the view down the river, and the risk posed by the whitewater run and the inability of boaters to scout the run.

24. As noted, it is the Commission's policy with respect to recreational development at licensed projects to "seek, within its authority, the ultimate development of [recreational] resources, consistent with the needs of the area to the extent that such development is not inconsistent with the primary purpose of the project."³² Further, standard license Article 18, included in the license for the Rainbow Falls Project,³³ states that:

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.

³¹ NYSEG’s request for rehearing at 7.

³² 18 C.F.R. § 2.7 (2009). This statement of policy was promulgated by Order No. 313, 34 F.P.C. 1546 (1965).

³³ See Ordering Paragraph (E), *New York State Electric & Gas Co.*, 108 FERC ¶ 62,168, at 64,303 (2004), incorporating by reference Form L-3 (October 1975), entitled "Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters of the United States."

To this end, the Commission requires licensees to make reasonable expenditures to develop and maintain suitable recreational facilities and to provide for adequate public access to project facilities and waters.

25. A licensee's authority under standard Article 18 to reserve project property from public access "for the protection of life, health, and property" must be exercised consistent with its obligations to develop recreation facilities, and to allow free public access for recreational purposes, at a licensed project.³⁴ The Commission does not promulgate specific standards regarding what recreational and other public uses of project lands and waters a licensee must allow or may restrict. Rather, in the first instance the licensee develops a plan for the appropriate public use of project lands and waters, subject to amendment by the Commission. When, as in this case, a dispute arises over the necessity of a licensee's restrictions on public access in the interest of safety, it is our role to resolve that dispute.³⁵

26. As noted, all whitewater boating poses some risk, including the risk that rescue may be required. The fact that there may be risk involved with whitewater boating or other recreational activities does not obviate a licensee's responsibility to provide recreational opportunities in accordance with area needs.³⁶ Here, the risk posed by the chasm run, especially in relation to likely demand, is not the same throughout the year. As noted, cold weather (when, in any case, demand is expected to be reduced) significantly increases risk. Thus, the May 1 Order excluded cold weather months from the access period. On the other hand, the May 1 Order found that, on balance, given the unique features presented by the chasm run, the apparent demand by experienced boaters for access to the run during the warmer, drier months, and the ability to adequately mitigate the risk by imposing appropriate safety requirements, NYSEG should provide access to the river for part of the year. We agree: an absolute bar to boater access at the project would not have fulfilled NYSEG's responsibility to provide reasonable recreational access at the project.

27. Contrary to NYSEG's contentions, the Nisqually order does not require an absolute bar to whitewater access here. In Nisqually,³⁷ we concluded that:

³⁴ See, e.g., *Mirant NY-Gen LLC*, 111 FERC ¶ 61,077 (2005).

³⁵ See, e.g., *Montana Power Co.*, 70 FERC ¶ 61,298, at 61,883 (1995).

³⁶ See, e.g., *Public Utility District No. 1 of Chelan County, Washington*, 119 FERC ¶ 61,055, at P 10 (2007).

³⁷ 101 FERC ¶ 61,198 at P 18.

Given that there has not been extensive use of the whitewater boating opportunities at the Nisqually Project, that there are comparable whitewater runs available in Washington State, that the whitewater events have proven to be significantly more expensive than originally expected, and that responding to whitewater boating incidents has placed a heavy burden on local rescue agencies, we will accept Tacoma's final report, and will not require additional whitewater boating releases at the Nisqually Project.

By contrast, as noted, the Rainbow Falls whitewater study showed that there is a significant demand for whitewater access to the chasm run and that the chasm run will provide whitewater boating opportunities during certain times of the year when other whitewater boating resources in the region do not have optimal flows for boating, particularly during the summer months.

28. Accordingly, we affirm the May 1 Order's requirement for a five-month whitewater access period.

C. Consultation Requirement

29. The May 1 Order requires NYSEG to prepare, for Commission approval, a plan for the facilities to be installed at the whitewater access point. The plan must include, among other things, improvements to provide safe access and entry into the water at the put-in site, appropriate safety and information signage, new or modified security improvements, and a small parking area. NYSEG must prepare the plan in consultation with the New York State Office of Parks, Recreation, and Historical Preservation; American Whitewater; and Adirondack Mountain Club (a group that supports a variety of recreation opportunities and access, including boating).

30. On rehearing, Trout Unlimited seeks modification of the May 1 Order to include it as an entity to be consulted on the access plan, based on the fact that Trout Unlimited was a consulting entity for the whitewater study that was the subject of the May 1 Order. Trout Unlimited notes that other entities consulted on the whitewater study (i.e., American Whitewater and Adirondack Mountain Club) are also to be consulted on the whitewater plan.

31. One aspect of the whitewater study was to “determine the effects, if any, that Upper Chasm boating would have on other recreational users of the Ausable Chasm and the Ausable River downstream.”³⁸ Recognizing that Trout Unlimited could provide

³⁸ *New York State Electric & Gas Co.*, 108 FERC ¶ 62,168, at 64,307 (2004).

useful information bearing on the issue of conflicts with other river users, such as downstream anglers, the Commission added Trout Unlimited as an entity to be consulted on the whitewater study.³⁹ However, the plan required by the May 1 Order relates mainly to the facilities and signage to be constructed at the whitewater access point, and does not impact fishery interests, regarding which Trout Unlimited's expertise might be of assistance. Accordingly, we deny Trout Unlimited's request for rehearing.

D. Comprehensive Plans under Section 10(a)(2) of the FPA

32. American Whitewater argues that the May 1 Order failed to comply with section 10(a)(2) of the FPA⁴⁰ because it did not consider the extent to which the project is consistent with the New York Statewide Comprehensive Outdoor Recreation Plan (SCORP) (2009-2013).⁴¹ However, section 10(a)(2) by its terms requires that the Commission consider a project's consistency with state and federal comprehensive plans in deciding whether, or under what conditions, to issue a license,⁴² and its application is confined to licensing actions. It does not apply to the consideration of post-licensing compliance matters.⁴³ We accordingly deny rehearing on this issue.

The Commission orders:

(A) The letter filed June 2, 2009, by the Ausable Chasm Company is rejected, as described in this order.

(B) The request for rehearing, filed May 27, 2009, by the Lake Champlain Chapter of Trout Unlimited is denied.

³⁹ *New York State Electric & Gas Corp.*, 109 FERC ¶ 61,360, at P 18 (2004).

⁴⁰ 16 U.S.C. § 803(a)(2) (2006).

⁴¹ See <http://nysparks.state.ny.us/agency/scorp>. SCORP, issued periodically by the New York State Office of Parks, Recreation, and Historic Preservation, provides statewide policy direction to fulfill the agency's recreation and preservation mandate.

⁴² Section 10(a)(2) is prefaced with the direction that "All licenses issued under this Part shall be on the following conditions... ." Indeed, the 2004 relicense order for the Rainbow Falls Project considered the project's consistency with an earlier version of the SCORP. See *New York State Electric & Gas Co.*, 108 FERC ¶ 62,168, at P 40 (2004).

⁴³ Nonetheless, Commission staff reviewed the requirements of the May 1 Order and found no inconsistencies between the order and SCORP. We adopt staff's conclusion.

(C) The request for rehearing filed, June 1, 2009, by New York State Electric and Gas Corporation is denied.

(D) The request for rehearing filed, June 1, 2009, by American Whitewater is denied.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.