

112 FERC ¶ 62,187
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Fox Paper Company and N.E.W. Hydro, Inc.

Project No. 7264-010

ORDER ISSUING SUBSEQUENT LICENSE
Minor Project

(August 31, 2005)

INTRODUCTION

1. On January 22, 2003, Fox River Paper Company and N.E.W. Hydro, Inc. (licensee), filed an application for a subsequent minor license pursuant to Part I of the Federal Power Act (FPA)¹ to continue operation and maintenance of the existing 1.19-megawatt (MW) Middle Appleton Dam Hydroelectric Project No. 7264. The project is located on the Lower Fox River in the City of Appleton, Outagamie County, Wisconsin.² The project does not occupy any federal lands. As discussed below, I am issuing a subsequent license for the project.

BACKGROUND

2. The original license for the project, issued July 16, 1985,³ expired on July 1, 2005. Since then, project operation has continued pursuant to Section 9(b) of the Administrative Procedures Act⁴ pending disposition of the relicense application.

3. Public notice of the license application was issued on August 20, 2003, setting October 20, 2003, as the deadline for filing motions to intervene. No motions to intervene were filed.

¹ 16 U.S.C §§ 791a - 825.

² The Middle Appleton Project is located on a stretch of the Lower Fox River found to be a navigable waterway of the United States. *See Geo. A. Whiting Paper Co.*, 33 FPC 335 (1965).

³ 32 FERC ¶ 62,165 (1985).

⁴ 5 U.S.C. § 558 (c).

4. The Commission issued a public notice on August 6, 2004, indicating the project was ready for environmental analysis and soliciting comments, recommendations, terms and conditions, and prescriptions. No entities filed comments in response to the notice.

5. On May 5, 2005, Commission staff made available for public comment an environmental assessment (EA). The National Park Service, U.S. Geological Survey, and U.S. Environmental Protection Agency filed comments on the EA. All comments have been fully considered in determining whether, and under what conditions, to issue this license.

PROJECT DESCRIPTION

6. The Middle Appleton Dam Project consists of the following facilities: (1) a 372-foot-long and 10-foot-high concrete dam, topped with 15 functional and one nonfunctional 20-foot-wide by 10-foot-high Taintor gates; (2) a 35.5-acre reservoir; (3) two power channels, one 500 feet long by 40 feet wide, and another (West's Canal) 1,700 feet long and from 120 feet to 200 feet wide; (4) three powerhouses containing seven turbine generating units with a total installed capacity of 1,190 kilowatts (kW); (5) an existing tailrace; (6) a 0.48-kilovolt generator lead; (7) one 2,000-foot-long, 4.16-kilovolt (kV) transmission line and one 150-foot-long, 0.48-kV transmission line; and (8) appurtenant facilities. The project partially bypasses a 3,300-foot-long stretch of the Lower Fox River. The project is described in greater detail in ordering paragraph (B)(2). The project boundary encloses the dam, reservoir, power channels, and powerhouses.

7. The project operates in a run-of-river mode in accordance with Article 20 of the current license. Flows entering the two most upstream powerhouses through the 500-foot-long upstream power channel are discharged into the Lower Fox River immediately below the Oneida Street Bridge, which is about 100 feet downstream of the dam. Flows can also be released through the dam's Taintor gates into the main body of the river immediately below the project dam. Water diverted for power production at the two upstream powerhouses is discharged into the north side of the river below the dam, and converges with water spilled at the dam about 475 feet downstream of the dam. Water is also diverted through West's Canal into the project's third powerhouse. Water used for power production at the third powerhouse is discharged into an approximately 600-foot-long access canal which converges with the main body of the Lower Fox River about 3,300 feet downstream of the dam. No changes to the existing mode of project operation are proposed.

WATER QUALITY CERTIFICATION

8. Under section 401(a) (1) of the Clean Water Act (CWA),⁵ the Commission may not issue a license for a hydroelectric project unless the state water quality certifying agency either has issued a 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 or permit that is issued.⁶

9. The licensee requested a water quality certification (WQC) for the Middle Appleton Dam Project from the Wisconsin Department of Natural Resources (Wisconsin DNR) on July 17, 2002, and on March 17, 2003, Wisconsin DNR issued a WQC that includes seven conditions. The WQC includes conditions for: (1) compliance with all federal, state and local permit requirements; (2) meeting all State of Wisconsin water quality standards applying to this project; (3) operating the project in a run-of-river mode; (4) consultation requirements for proposals for maintenance and repair; (5) allowing Wisconsin DNR to inspect the project to monitor compliance with WQC conditions; (6) seeking review and approval of any significant change to the project; and (7) reopening the license to consider modifications to the license needed to assure compliance with Wisconsin water quality standards. The conditions of the WQC are set forth in Appendix A of this order, and are incorporated in the license by ordering paragraph (E).

SECTION 18 FISHWAY PRESCRIPTIONS

11. Section 18 of the FPA, 16 U.S.C. § 811, provides that the Commission shall require the construction, maintenance, and operation by a licensee of such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate.

12. By letter dated November 2, 2000, Interior requested that the Commission reserve its authority to prescribe fishways. Consistent with Commission policy, Article 401 of this license reserves the Commission's authority to require fishways that may be prescribed by Interior for the Middle Appleton Dam Project.

⁵ 33 U.S.C. § 1341(a) (1).

⁶ 33 U.S.C. § 1341(d).

THREATENED AND ENDANGERED SPECIES

13. Section 7(a)(2) of the Endangered Species Act of 1973 (ESA)⁷ requires federal agencies to ensure that their actions are not likely to jeopardize the continued existence of federally listed threatened and endangered species, or result in the destruction or adverse modification of their designated critical habitat.

14. The threatened bald eagle (*Haliaeetus leucocephalus*) is the only federally listed species known to occur in the project area. In its comments on the application, in a letter dated November 2, 2000, the U.S. Fish and Wildlife Service (FWS), recommended that the licensee prepare a bald eagle management and protection plan (bald eagle plan), and discourage bald eagle use of the project's tail-waters if wintering bald eagles that feed there become contaminated with polychlorinated biphenyls and other pollutants such as mercury and lead.

15. The EA recommended that the licensee develop and prepare a bald eagle plan and cooperate with resource agencies to implement reasonable measures to prevent bald eagles from using the winter, open-water project tail-waters at the project if the contaminant problem develops. In the EA, staff determined that the project, if licensed with these measures, would not be likely to adversely affect the bald eagle. FWS concurred in a letter filed July 20, 2005. Article 402 requires the bald eagle plan and the contamination protection measure.

RECOMMENDATIONS OF FEDERAL AND STATE FISH AND WILDLIFE AGENCIES

16. Section 10(j)(1) of the FPA⁸ requires the Commission, when issuing a license, to include license conditions based on recommendations of federal and state fish and wildlife agencies submitted pursuant to the Fish and Wildlife Coordination Act,⁹ to "adequately and equitably protect, mitigate damages to, and enhance fish and wildlife, including related spawning grounds and their habitat" affected by the project. Neither Interior nor Wisconsin DNR filed section 10(j) recommendations for the project.

⁷ 16 U.S.C. § 1536(a).

⁸ 16 U.S.C. § 803(j)(1).

⁹ 16 U.S.C. § 661 *et seq.*

OTHER ISSUES

A. Project Operation Compliance Monitoring

17. The EA found that monitoring flows and reservoir levels would enable the Commission and the agencies to verify that the project is operating in a run-of-river mode and that aquatic resources at the project are protected during the term of the license. To that end, the EA recommended an operation compliance monitoring plan that includes: a method of documenting run-of-river operation; contingencies for emergencies such as providing downstream flows during power outages; scheduling maintenance drawdowns; and reporting criteria. Accordingly, Article 403 requires an operation compliance monitoring plan.

B. Fox River Cleanup Efforts

18. The EA noted that the project is within the Lower Fox River Superfund site and that sediment removal efforts were to begin in 2004 and continue for six years. The EA found that continued run-of-river operation would not affect the presence or distribution of toxic sediments and that cooperation with EPA could facilitate its removal efforts. In their EA comments, EPA recommended that the licensee allow access to the project to facilitate these clean-up efforts, and schedule project-related activities such that they do not conflict with sediment removal. Although not specific to EPA's concerns, condition D of the WQC requires the licensee to consult with Wisconsin DNR and the Commission on any project maintenance or facility repair work that involves the river or reservoir. Article 404 adds EPA to the entities that need to be consulted and allowed access to the project for such activities.

C. Invasive Species

19. The EA noted that surveys to document the presence of invasive species have not been conducted at the project, but that invasive species such as purple loosestrife, Eurasian milfoil, and zebra mussels are widely distributed in Wisconsin, and can have detrimental effects on wildlife habitat. The EA, therefore, recommended an invasive species monitoring plan to document the distribution and relative abundance of such species at the project. Article 405 requires an invasive species monitoring plan, and if necessary, control measures.

D. Recreation

20. There are currently no project recreation facilities. However, a number of entities, including the State of Wisconsin, City of Appleton, and Lawrence College, provide recreational access to the impoundment, tailwaters, and canoe passage through an existing

lock system. During pre-filing consultation, Interior and Wisconsin DNR requested that the feasibility of providing a canoe portage and tailwater fishing platform at the project be explored. The EA found that providing a canoe portage would enhance the movement of recreational boaters around the project. However, due to topography and the industrial nature of the site, a feasible location for a portage has yet to be identified, although recent filings indicate a route shows promise. The licensee proposes to continue to work with the agencies and City of Appleton in identifying a feasible portage route. The EA recommended, and Article 406 requires, continued consultation on the canoe portage, and, if a feasible route is identified, installation of a portage facility.

21. Regarding a fishing platform, the EA noted that the City of Appleton is not currently encouraging facilities for fishing on the Fox River because of health advisories due to water quality issues, but that additional fishing access may be needed in the future if clean-up efforts result in the lifting of such advisories, and demand for fishing access increases. In their EA comments, the National Park Service recommends, consistent with a licensee proposal, \$10,000 in funding to the City of Appleton for City-identified recreation needs, in lieu of providing the platform. However, because the need for the fishing platform has not been demonstrated, the in-lieu-of funding is not being included in this license. Instead, Article 406 reserves the Commission's authority to require the licensee to provide fishing access if warranted in the future .

E. Cultural Resources

22. On December 30, 1993, the Wisconsin State Historic Preservation Officer, the Michigan State Historic Preservation Officer, the Advisory Council on Historic Preservation, and the Commission, executed a Programmatic Agreement (PA) for managing historic properties that may be affected by relicensing projects in the state of Wisconsin and adjacent portions of Michigan. The PA stipulates that licensees develop a historic resources management plan (HRMP). Article 407 requires implementation of the PA and development of a HRMP. This satisfies the Commission's responsibilities under section 106 of the National Historic Preservation Act.¹⁰

ADMINISTRATIVE CONDITIONS

A. Annual Charges

23. The Commission collects annual charges from licensees for administration of the FPA and to reimburse the United States for the occupancy and use of any federal lands. Article 201 provides for the collection of such funds. Under regulations currently in

¹⁰ 16 U.S.C. § 470(f).

effect, projects with an authorized installed capacity of less than or equal to 1,500 kilowatts, such as this project, are not assessed an annual administrative charge.

B. Exhibit F and G Drawings

24. The exhibit F drawings filed with license application are approved and made part of the license (see ordering paragraph (C)). The Commission requires licensees to file sets of approved project drawings on microfilm and in electronic file format. Article 202 requires the filing of these drawings.

25. The most recent Exhibit G drawing, filed for the relicense application on October 29, 2004: (1) does not show the project transmission lines; (2) does not show contour lines with elevations; and (3) is not stamped by a Registered Land Surveyor. In addition, the project boundary does not enclose a training wall that separates flows released at the dam from flows released through the project's upper two powerhouses, nor does it include the tailwater pool below the dam. Therefore, Article 301 requires the licensee to file revised Exhibit F and G drawings showing these features.

C. Use and Occupancy of Project Lands and Waters

26. Requiring a licensee to obtain prior Commission approval for every use or occupancy of the project land would be unduly burdensome. Therefore, Article 408 allows the licensee to grant permission, without prior Commission approval, for the use and occupancy of project lands for such minor activities as landscape planting. Such uses must be consistent with the purposes of protecting and enhancing the scenic, recreational, and environmental values of the project.

STATE AND FEDERAL COMPREHENSIVE PLANS

27. Section 10(a)(2)(A) of the FPA¹¹ requires the Commission to consider the extent to which a hydroelectric project is consistent with federal and state comprehensive plans for improving, developing, or conserving waterways affected by the project.¹² Under section 10(a)(2)(A), federal and state agencies filed 69 comprehensive plans that address various resources in Wisconsin. Of these, the staff identified and reviewed 13 comprehensive plans that are relevant to this project.¹³ No conflicts were found.

¹¹ 16 U.S.C. § 803(a)(2)(A).

¹² Comprehensive plans for this purpose are defined at 18 CFR § 2.19 (2005).

¹³ See section IX of the EA.

APPLICANT'S PLANS AND CAPABILITIES

28. In accordance with section 10(a)(2)(C) of the FPA,¹⁴ Commission staff evaluated the licensee's record as a licensee for these areas: (A) compliance history and ability to comply with the new license; (B) safe management, operation, and maintenance of the project; and (C) need for power. I accept the staff's findings in each of the following areas.

A. Compliance history and ability to comply with the subsequent license

29. Commission staff reviewed the licensee's compliance with the terms and conditions of the existing license. Staff finds that the licensee's overall record of making timely filings and compliance with its license is satisfactory. Staff concludes that the licensee has or can acquire the resources and expertise necessary to carry out its plans and comply with all articles and terms and conditions of a subsequent license.

B. Safe management, operation, and maintenance of the project

30. The licensee owns and operates the project, which is classified in accordance with Commission standards as having a low hazard potential rating.

31. Staff has reviewed the licensee's record of management, operation, and maintenance of the project and concludes that the dam and project works are safe, and that the licensee has the ability to manage, operate, and maintain the project safely for future operation. Based on the results of this review, staff conclude that the project would pose no threat to public safety if operated according to the regulations governing hydroelectric licenses.

C. Need for power

32. To assess the need for power, Commission staff looked at the need in the operating region in which the project is located. The Middle Appleton Hydroelectric Project is located in the Mid-America Interconnected Network (MAIN) region of the North American Electric Reliability Council (NERC). NERC annually forecasts electrical supply and demand in the nation and the region for a ten-year period. NERC's recent forecast projected summer peak demands to grow at an annual compound rate of 1.7 percent from 2003 through 2012. Staff conclude that the project's power, low cost, displacement of nonrenewable fossil-fueled generation, and contribution to the region's

¹⁴ 16 U.S.C. §§ 803(a)(2)(C) and 808(a).

diversified generation mix will help meet a need for power in the region.

PROJECT ECONOMICS

33. In determining whether a proposed project will be best adapted to a comprehensive plan for developing a waterway for beneficial public purposes, the Commission considers a number of public interest factors, including the economic benefit of the project power. Under the Commission's approach to evaluating the economics of hydropower projects, as articulated in *Mead Corp.*,¹⁵ the Commission employs an analysis that 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. The estimate helps to support an informed decision concerning what is in the public interest with respect to a proposed license.

34. As proposed by the licensee, the annual cost of the project would be about \$238,000 (27.58 mills/kWh). The annual power value, for the estimated annual generation of 8,635 MWh, would be \$342,000 (39.63 mills/kWh).¹⁶ To determine whether the proposed project is currently economically beneficial, staff subtracts the project's cost from the value of the project's power. Therefore, the net annual benefit would be \$104,000 (12.05 mills/kWh).

35. If licensed as proposed by the applicant and with the staff-recommended measures, including the mandatory water quality certification conditions, the project would produce an average of 8,635 MWh of energy annually at the cost of \$239,000 or 27.73 mills/kWh. The annual value of the project's power would be the same at \$342,000 or 39.63 mills/kWh. Therefore, in the first year of operation, the project would have a net benefit of \$103,000 (11.90 mills/kWh).

36. 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 capacity 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

¹⁵ 72 FERC ¶ 61,027 (1995).

¹⁶ The value of power was estimated from the Energy Information Administration, Supplement to the Annual Energy Outlook 2004 at www.eia.doe.gov.

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.

COMPREHENSIVE DEVELOPMENT

37. Sections 4(e) and 10(a) of the FPA,¹⁷ require the Commission, in acting on license applications, to give equal consideration to the developmental and environmental uses of the waterway on which a project is located. 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.

38. The EA for the Middle Appleton Dam Project 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 would be safe if operated and maintained in accordance with the requirements of this license.

39. Based on my independent review and evaluation of the Middle Appleton Dam Project, recommendations from the resource agencies and other stakeholders, and the no-action alternative, as documented in the EA, I have selected the project, with the WQC conditions and with the additional staff-recommended measures, and I find that it is best adapted to a comprehensive plan for improving or developing the Lower Fox River.

40. I select this alternative because: (1) issuance of a subsequent license would serve to maintain a beneficial, dependable, and an inexpensive source of electric energy; (2) the required environmental measures would protect and enhance fish and wildlife resources, water quality, recreational resources and historic properties; and (3) the 1.19-MW of electric energy generated from a renewable resource would continue to offset the use of fossil-fueled, steam-electric generating plants, thereby conserving nonrenewable resources and reducing atmospheric pollution.

LICENSE TERM

41. 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. The amount of

¹⁷ 16 U.S.C. §§ 797(e) and 803(a)(1).

proposed new investment in environmental measures for this project is relatively minor. Therefore, I will issue the license for a term of 30 years.

The Director orders:

(A) This license is issued to Fox River Paper Company and N.E.W. Hydro, Inc. (licensee) for a period of 30 years, effective the first day of the month in which this order is issued, to operate and maintain the Middle Appleton Dam Project. This license is subject to the terms and conditions of the Federal Power Act (FPA), which is incorporated by reference as part of this license, and subject to the regulations the Commission issues under the provisions of the FPA.

(B) The project consists of:

(1) The following sections of Exhibit F filed on January 22, 2003:

<u>Exhibit F Drawings</u>	<u>FERC No. 7264-010</u>	<u>Showing</u>
Sheet No. 1 of 10	1001	Plan View of Dam and Downstream Elevation
Sheet No. 2 of 10	1002	Cross Sections of Dam
Sheet No. 3 of 10	1003	Mill No. 1 Powerhouse
Sheet No. 4 of 10	1004	Mill No. 1 Powerhouse Cross Sections
Sheet No. 5 of 10	1005	Mill No. 2 Powerhouse Plan and Section
Sheet No. 6 of 10	1006	Mill No. 2 Powerhouse Cross Section
Sheet No. 7 of 10	1007	Mill No. 2 Powerhouse Elevation
Sheet No. 8 of 10	1008	Mill No. 3 Powerhouse Plan and Elevation
Sheet No. 9 of 10	1009	Mill No. 3 Powerhouse Cross Section
Sheet No. 10 of 10	1010	West's Canal and Grand Chute Island Section

(2) Project works consisting of: (1) a 372-foot-long by 20-foot-high dam, topped with fifteen functional and one non-functional, 20-foot-wide by 10-foot-high steel Taintor gates; (2) a 35.5-acre reservoir with a storage capacity of about 195 acre-feet; (3) two power channels, one 500 feet long by 40 feet wide, and another (West's Canal) 1,700 feet long and from 120 feet to 200 feet wide; (4) three powerhouses containing two 240-kW turbine generators, four 140-kW turbine generators, and one 150-kW turbine generator, respectively for a total of 7 turbine generators and a total installed capacity of 1,190-kW; (5) one 2,000-foot-long, 4.16-kilovolt (kV) transmission line connecting to a 150-foot-long, 0.48-kV transmission line; (6) an approximately 475-foot-long tailwater retaining wall; and (7) appurtenant facilities.

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

Exhibit A: Pages A-1 through A-5 filed on January 22, 2003.

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

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

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

(E) This license is subject to the conditions submitted by the Wisconsin Department of Natural Resources (Wisconsin DNR) pursuant to section 401 of the Clean Water Act (CWA), as those conditions are set forth in the Appendix to this order.

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

Article 201. Administrative Annual Charges. The licensee shall pay the United States the following annual charges, effective the first day of the month in which this license is issued:

For the purposes 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 provisions of the Commission's regulations in effect from time to time. The authorized installed capacity for that purpose is 1,190 kilowatts. Under the regulations currently in effect, projects with authorized installed capacity of less than or equal to 1,500 kilowatts will not be assessed annual charges.

Article 202. Exhibit Drawings. Within 45 days of the date of issuance of the license, the licensee shall file the approved exhibit 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 Drawing Number (e.g., P-1234-1001 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 (e.g., 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 Chicago 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 Chicago Regional Office. Exhibit F drawings must be identified as (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 [e.g., 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 301. Exhibit F and G Drawings. Within 90 days of license issuance, the licensee shall file an Exhibit F and revised Exhibit G drawing as described in this order that meet the requirements of 18 CFR §§ 4.39 and 4.41 (2005). The Exhibit F drawing shall include the approximately 476-foot-long training wall located in the tailwaters of the dam. The Exhibit G drawing shall enclose and show the project transmission lines, and the tailwater pool below the dam, including the tailwater training wall.

Article 401. Reservation of Authority to Prescribe Fishways. Authority is reserved by the Commission to require the licensee to construct, operate, and maintain, or to provide for construction, operation, and maintenance of, such fish passage facilities as may be prescribed by the Secretary of the U.S. Department of the Interior under section 18 of the Federal Power Act.

Article 402. Bald Eagle Management and Protection Plan. Within six months of license issuance, the licensee shall file for Commission approval a plan to protect bald eagle and their habitat at the project. The plan shall be prepared after consultation with the Wisconsin Department of Natural Resources (Wisconsin DNR) and the U.S. Fish and Wildlife Service (FWS).

The plan shall be consistent with the bald eagle management guidelines of the Wisconsin DNR and the FWS and shall include, at a minimum, the following:

1. reasonable measures to prevent bald eagles from using the winter, open-water project tail waters if a contaminant (i.e., polychlorinated biphenyls and other pollutants, such as mercury and lead) problem develops in bald eagles feeding in the tail waters;
2. guidelines for managing vegetation and ground disturbing activities;
3. a provision for review, consultation, and revision of the plan as needed every five years through the license period.

The license shall include with the bald eagle management and protection plan documentation of agency consultation, including copies of agency comments and recommendations on the plan, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the agencies to comment and make recommendations, before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. The plan shall not be implemented until the licensee is notified that the plan is approved. Upon

approval, the licensee shall implement the plan according to the approved schedule, including any changes required by the Commission.

Article 403. *Operation Compliance Monitoring Plan.* Within six months of license issuance, the licensee shall file for Commission approval an operation compliance monitoring plan that has been prepared in consultation with Wisconsin Department of Natural Resources and the U.S. Fish and Wildlife Service. The plan shall include how compliance with the run-of-the-river operation mode required under water quality certificate Condition C in the appendix to this order will be documented by the licensee, including measuring inflows and outflows from the project and how this information will be provided to the resource agencies, if requested. Also, the plan shall include documentation of agency consultation, including copies of agency comments and recommendations on the plan, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for agencies to comment and make recommendations, before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

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

Article 404. *Consultation on Maintenance Activities.* In addition to the consultation with the Wisconsin Department of Natural Resources (Wisconsin DNR) required under Condition D in appendix to this order, the licensee shall, when planning project maintenance, repairs, or reservoir drawdowns with the potential to disturb river or reservoir sediments at the project, consult with the U.S. Environmental Protection Agency (EPA). Prior to commencing such activities, the licensee shall file documentation of consultation with the agencies, copies of all agency comments and verification on how the agencies' comments are addressed. The licensee shall allow a minimum of 30 days for the agencies to comment and make recommendations. If the licensee does not adopt a recommendation the filing shall include the licensee's reasons, based on project-specific information. The licensee shall not commence such maintenance activities until notified by the Commission that the activity is approved. Once such activities are approved, the licensee shall allow EPA access to the project to observe the activity.

Article 405. *Invasive Species.* Within six months of issuance of this order, the licensee shall file for Commission approval a plan to monitor project waters for invasive species, such as purple loosestrife (*Lythrum salicaria*), Eurasian water-milfoil (*Myriophyllum spicatum*), and zebra mussels (*Dreissena polymorpha*) at the project. The plan shall be prepared after consultation with the Wisconsin Department of Natural

Resources (Wisconsin DNR) and the U.S. Fish and Wildlife Service (FWS). The plan shall include, but not be limited to, the following: (1) a description of the monitoring method; (2) frequency of monitoring; (3) a schedule for filing monitoring reports with Wisconsin DNR, FWS, and the Commission; and (4) a description of and implementation schedule for providing public information about the species.

The licensee shall include with the plan documentation of agency consultation, copies of comments and recommendations on the plan after it has been developed and provided to the agencies, and specific descriptions of how the agencies' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

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

If at any time during the term of the license, the Wisconsin DNR and FWS demonstrate invasive species are significantly affecting fish and wildlife populations at the project and that control measures are needed, and the Commission agrees with those determinations, the Commission reserves authority to require the licensee to cooperate with the Wisconsin DNR and FWS to undertake reasonable measures to control or eliminate the invasive species in project area.

Article 406. Recreation Reports. Within one year of license issuance, the licensee shall file a report that has been prepared in consultation with the Wisconsin Department of Natural Resources, City of Appleton, Wisconsin, and the U.S. National Park Service on the feasibility of providing a canoe portage at the project. The report shall include: (1) a description of the status of the licensee's efforts at identifying a feasible portage location; (2) a plan for providing the canoe portage, including signage, if a feasible location has been identified; and (3) a revised Exhibit G map showing any proposed recreation facilities.

The licensee shall include with the reports documentation of agency consultation on the need for and identification of feasible facility locations, copies of all agency comments and verification on how the agencies' comments are addressed in the reports. The licensee shall allow a minimum of 30 days for the agencies to comment and make recommendations before filing the reports 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 any recreation plan filed pursuant to the report and to require additional recreational access if warranted in the future. Any such recreation plan shall not be implemented until the licensee is notified that the plan is approved. Upon approval, the licensee shall implement the plan according to the approved schedule, including any changes required by the Commission.

Article 407. Historic Properties Management Plan. The licensee shall file with the Commission an historic properties management plan (HPMP) for the project, prepared in accordance with the “Programmatic Agreement Among the Federal Energy Regulatory Commission, The Advisory Council on Historic Preservation, and the State of Wisconsin, State Historic Preservation Officer, and the State of Michigan, State Historic Preservation Officer, For Managing Historic Properties That May Be Affected By New and Amended Licenses Issuing For The Continued Operation of Existing Hydroelectric Projects in the State of Wisconsin and Adjacent Portions of the State of Michigan”, executed on December 30, 1993. In the event that the Programmatic Agreement (PA) is terminated, the licensee shall implement the provisions of the HPMP. The Commission reserves the authority to require changes to the HPMP at any time during the term of the license. If the PA is terminated prior to Commission approval of the HPMP, the licensee shall obtain approval before engaging in any ground-disturbing activities or taking any other action that may affect any historic properties within the project area of potential effect.

Article 408. 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 are 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 occupancy for which it grants permission, and to monitor the use of, and ensure compliance with the covenants of the instrument of conveyance for, any interests that it has conveyed, under this article. If a permitted use and occupancy violates any condition of this article or any other condition imposed by the licensee for protection and enhancement of the project's scenic, recreational, or other environmental values, or if a covenant of a conveyance made under the authority of this article is violated, the licensee shall take any lawful action necessary to correct the violation. For a permitted use or occupancy, that action includes, if necessary, canceling the permission to use and occupy the project lands and waters and requiring the removal of any non-complying structures and facilities.

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

(1) landscape plantings; (2) non-commercial piers, landings, boat docks, or similar structures and facilities that can accommodate no more than 10 watercraft at a time and where said facility is intended to serve single-family type dwellings; (3) embankments, bulkheads, retaining walls, or similar structures for erosion control to protect the existing shoreline; and (4) food plots and other wildlife enhancements. 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 impoundment shoreline. To implement this paragraph (b), the licensee may, among other things, establish a program for issuing permits for the specified types of use and occupancy of project lands and waters, which may be subject to the payment of a reasonable fee to cover the licensee's costs of administering the permit program. The Commission reserves the right to require the licensee to file a description of its standards, guidelines, and procedures for implementing this paragraph (b) and to require modification of those standards, guidelines, or procedures.

(c) The licensee may convey easements or rights-of-way across, or leases of, project lands for: (1) replacement, expansion, realignment, or maintenance of bridges or roads where all necessary state and 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 impoundment. 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 approvals have been obtained; (2) sewer or effluent lines that discharge into project waters, for which all necessary 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 and state approvals have been obtained; (5) private or public marinas that can accommodate no more than 10 watercraft at a time and are located at least one-half mile (measured over project waters) from any other private or public marina; (6) recreational development consistent with an approved Exhibit R or approved report on recreational resources of an Exhibit E; and (7) other uses, if: (i) the amount of land conveyed for a particular use is 5 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 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 paragraphs (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 shall occur in a manner that shall 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 changed to exclude land conveyed under this article only upon approval of revised Exhibit G drawings (project boundary maps) reflecting exclusion of that land. Lands conveyed under this article shall be excluded from the project only upon a determination that the lands are not necessary for project purposes, such as operation and maintenance, flowage, recreation, public access, protection of environmental resources, and shoreline control, including shoreline aesthetic values. Absent extraordinary circumstances, proposals to exclude lands conveyed under this article from the project shall be consolidated for consideration when revised Exhibit G 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.

(G) 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 the filing. Proof of service on these entities must accompany the filing with the Commission

(H) This order is final unless a request for rehearing is filed within 30 days from the date of its issuance, as provided in section 313(a) of the FPA. The filing of a request for rehearing does not operate as a stay of the effective date of this 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 of this order shall constitute acceptance of this license.

J. Mark Robinson
Director
Office of Energy Projects

APPENDIX

WISCONSIN DEPARTMENT OF NATURAL RESOURCES
WATER QUALITY CERTIFICATION UNDER
SECTION 401 OF THE CLEAN WATER ACT

On February 19, 2003, the Wisconsin Department of Natural Resources (WDNR) granted water quality certification (WQC) under section 401 of the Clean Water Act to Fox River Paper Company and N.E.W. Hydro, Inc., Wisconsin Companies, for the Middle Appleton Dam Hydroelectric Project with the following conditions:

- A. The applicants shall comply with all federal, state and local permit requirements.
- B. The applicants shall meet State of Wisconsin water quality standards applying to this project. As with all other affected operations, the applicants are required to meet any revised state water quality standards.
- C. The applicants must operate the Middle Appleton Project in a run-of-the-river mode.
- D. Any proposals for project maintenance or repair work involving the river, including reservoir draw-downs to facilitate repair/maintenance work, shall be filed with FERC after consultation with the Department.
- E. The applicants shall allow the Department to inspect the project area at any time upon reasonable notification to monitor compliance with certification conditions.
- F. Any change to the project that would have a significant or material effect on the findings, conclusions, or conditions of this certification, including project operation, must be submitted to the Department for review and written approval.
- G. The Department may request, at any time, that FERC reopen the license to consider modifications to the license necessary to assure compliance with Wisconsin water quality standards.