

UNITED STATES OF AMERICA 77 FERC ¶ 62,200
FEDERAL ENERGY REGULATORY COMMISSION

N.E.W. Hydro, Inc.

Project No. 2550-002

ORDER ISSUING SUBSEQUENT LICENSE
(Issued December 27, 1996)

Pursuant to Part I of the Federal Power Act (FPA), U.S.C. §§ 791(a)-825(r), N.E.W. Hydro, Inc. (N.E.W. Hydro or licensee) filed an application for a subsequent license 1/ for operation and maintenance of the 400-kilowatt (kW) Weyauwega Hydroelectric Project. The project is located on the Waupaca River in the City of Weyauwega in Waupaca County, Wisconsin. 2/ The project does not occupy any United States lands.

BACKGROUND

The Commission issued an original license for the project to Wisconsin Electric Power Company (Wisconsin Electric) on August 26, 1968. 3/ The current license expired on December 31, 1993, and since then Wisconsin Electric has operated the project under the terms and conditions of the original license.

Notice of the application was published, and comments have been received from interested federal and state agencies. No motions to intervene were received in response to the Public Notice issued by the Commission on September 27, 1993.

The application from N.E.W. Hydro incorporated data gathered by the original licensee, Wisconsin Electric. Wisconsin Electric did not file an application for a subsequent license. The Commission's staff issued the draft environmental assessment (EA) for the project on May 24, 1996. Comments on the draft EA were received from Wisconsin Department of Natural Resources (Wisconsin DNR) on July 3, 1996. All comments were fully considered in determining whether, and under what conditions, to issue this license. The final EA is attached to this license order.

¹A subsequent license is a license issued for a project after the expiration of a minor or minor part license for which Sections 14 and 15 were waived. See 18 C.F.R. 16.2(d) (1994). The minor license first issued for this project, see 36 FPC 413 (1966), waived the application of Sections 14 and 15 of the FPA.

²The pertinent portion of the Waupaca River is a navigable waterway of the United States. Section 23(b) of the FPA, 16 U.S.C. § 817 (b), therefore requires that the project be licensed.

³36 FPC 413(1966).

PROJECT DESCRIPTION

The project consists of a 240-foot-long, steel sheet-pile-faced earth dam with a 50-foot-long spillway section containing three 12-foot-wide by 10-foot-high radial gates and a powerhouse. The project reservoir has a surface area of about 250 acres and a gross storage capacity of about 1,259 acre-feet at the normal pool elevation. The powerhouse contains a single vertical shaft propeller turbine and generator rated at 400 kW.

Before 1992, the project was operated in peaking mode for more than 30 years with no minimum flow requirement. Since 1992, Wisconsin Electric has operated the project in a run-of-river mode. The licensee proposes to continue run-of-river operation.

A more detailed project description is contained in ordering paragraph B(2).

APPLICANT'S PLANS AND CAPABILITIES

Staff evaluated N.E.W. Hydro's record as a licensee in the areas of conservation and compliance history. I accept the staff's findings, as discussed below.

A. Consumption Efficiency Improvement Program

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

N.E.W. has no retail customers. N.E.W. Hydro's only wholesale customer is Wisconsin Electric. Thus, this section does not apply to N.E.W. However, I note that Wisconsin Electric promotes energy conservation among its' customers.

B. Record of Compliance

Staff reviewed N.E.W. Hydro's license application to evaluate its ability to comply with the terms and conditions of a new license.

Although N.E.W. Hydro has no compliance history on this project, the owners of N.E.W. Hydro also own or operate 11 other hydroelectric projects in the Midwest. N.E.W. Hydro employs a staff of trained and experienced professional hydropower engineers, technicians, and plant operators. In consideration of the requirements of the new license, I conclude that N.E.W. Hydro will be able to provide the resources and expertise necessary to carry out its plans and comply with all terms and conditions of the new license and of orders issued thereunder.

WATER QUALITY CERTIFICATION

Under Section 401(a)(1) of the Clean Water Act (CWA), the Commission may not issue a license for a hydroelectric project unless the state certifying agency has either issued water quality certification for the project or has waived certification. 4/ On April 11, 1990, pursuant to Section 401, Wisconsin Electric, as the previous licensee and potential applicant, applied to the Wisconsin DNR for water quality certification. On May 4, 1990, the Wisconsin DNR waived the requirement for certification for the continued operation of the Weyauwega Project.

SECTION 18 FISHWAY PRESCRIPTION

Section 18 of the FPA provides that the Commission shall require the construction, operation, and maintenance by a licensee of such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce, as appropriate. The Department of the Interior (Interior), by letter dated May 26, 1994, requested that its authority to prescribe the construction, operation, and maintenance of fishways pursuant to Section 18 be reserved at this project.

I recognize that future fish passage needs cannot always be determined at the time of project licensing. The Commission's practice has been to include a license article that reserves the Secretary's authority to prescribe facilities for fish passage. 5/ Therefore, article 404 of this license reserves authority to the Commission to require the licensee to construct, operate, and maintain such fishways as the Secretary of the Interior may prescribe pursuant to Section 18 of the FPA.

RECOMMENDATIONS OF FEDERAL AND STATE FISH AND WILDLIFE AGENCIES

Section 10(j) of the FPA requires the Commission to include license conditions, based on the recommendations of federal and state fish and wildlife agencies, for the protection, mitigation of adverse impacts to, and enhancement of fish and wildlife resources, unless the Commission finds that those recommendations are inconsistent with applicable law. The Wisconsin DNR filed fish and wildlife recommendations by letter dated May 26, 1994.

4/Section 401(a)(1) requires an applicant for a federal license or permit to conduct any activity that may result in any discharge into navigable waters to obtain from the state in which the discharge originates certification that any such discharge will comply with applicable water quality standards.

5/The Commission has specifically sanctioned the reservation of fishway prescription authority at relicensing. See Wisconsin Public Service Corporation, 62 FERC ¶ 61,095 (1993); affirmed, Wisconsin Public Service Corporation v. FERC, 32 F.3d 1165 (1994).

The license contains conditions consistent with six recommendations submitted by the Wisconsin DNR that are subject to the provisions of Section 10(j): (1) provide run-of-river operations (article 401); (2) maintain the reservoir elevation of 770.2 ± 0.25 feet National Geodetic Vertical Datum (NGVD) (article 401); (3) temporarily modify run-of-river operation if required for operating emergencies (article 401); (4) install a staff gage on the upstream side of the project dam (article 402); (5) maintain previously-installed automatic water level recorders (article 402); and (6) provide for continuation of flow during power outages (article 401). The Wisconsin DNR recommendation that the licensee maintain an operations log on a 30-minute basis is partially adopted. The license requires maintaining an operations log on an hourly basis (article 402).

Of the recommendations made by the Wisconsin DNR, seven were determined to be outside of the scope of Section 10(j) of the FPA because they involve studies that could have been performed prior to licensing, or do not otherwise qualify as measures to protect fish and wildlife. Each of these recommendations was considered under Section 10(a)(1) of the FPA. The reasons Staff determined that these recommendations are not valid Section 10(j) measures together with my conclusions whether these recommendations will be required as conditions of the license are provided in the following paragraphs.

The recommendations to notify the Wisconsin DNR at the earliest opportunity, but no later than 24 hours after emergency draw-downs, and consult with and submit a written report to the Wisconsin DNR within 30 days after the emergency draw-down are not specific measures to protect fish and wildlife. Because reservoir draw-downs can adversely affect aquatic life, wildlife, recreation, and water quality, I am adopting these recommendations and requiring such notification, consultation, and reporting to the Wisconsin DNR (article 401) in addition to notification of the Commission as required by standard Commission practice.

The recommendation to notify the Wisconsin DNR 60 days in advance of planned draw-downs is not a specific measure to protect fish and wildlife. I am partially adopting this recommendation by requiring notification 30 days in advance of planned draw-downs (article 403).

The recommendations to construct a marked canoe portage and provide down-stream canoe access are not specific measures to protect fish and wildlife. I am requiring the licensee to provide these recreation facilities (article 407).

The recommendation to perform dam break analysis according to NR 333 of the Wisconsin Administrative Code does not specifically address fish and wildlife resources; further, federal authority preempts state regulations in this area. I conclude that the Commission's dam safety regulations will provide sufficient protective measures; therefore, this measure is not included.

The recommendation to prepare an upstream fish passage plan is not a specific measure to protect fish and wildlife would require a study that could have been conducted during the license application process. Additionally, at this time there is no substantial evidence to support a requirement for up-stream passage at the Weyauwega Project. Therefore, I am not requiring that this plan be implemented as a condition of the license.

The recommendation to reserve Wisconsin DNR authority to require fish passage facilities is not a specific measure to protect fish and wildlife. At the appropriate time, the Wisconsin DNR can use the standard reopener article for requesting future fish passage facilities.

The recommendation that the license include the standard fish and wildlife reopener is not a specific measure to protect fish and wildlife. The standard reopener is included in the license.

In addition to the above recommendations, the Wisconsin DNR requested, by letter dated July 3, 1996, that the license include an article requiring the licensee to provide the Wisconsin DNR with a copy of any application to transfer the license. This requirement is included in a license article (article 408).

COMPREHENSIVE PLANS

Section 10(a)(2)(A) of the FPA 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. 6/ Under Section 10(a)(2)(A), federal and state agencies filed 70 comprehensive plans that address various resources in Wisconsin. Of these, the Commission staff identified and reviewed eight plans that are relevant to the Weyauwega Project. 7/ The project does not conflict with any of these comprehensive plans.

6/Comprehensive plans for this purpose are defined at 18 C.F.R. § 2.19 (1995).

7/State Comprehensive Outdoor Recreation Plan, 1991, Wisconsin Department of Natural Resources; Wisconsin Water Quality: Report to Congress, 1986, Wisconsin Department of Natural Resources; Wolf River Basin Areawide Water Quality Management Plan, 1980, Wisconsin Department of Natural Resources; Wolf River Water Quality Management Plan, 1991, Wisconsin Department of Natural Resources; North American Wildlife Plan, 1986, Interior and Canadian Wildlife Service; North American Waterfowl Plan, 1986, Interior and Canadian Wildlife Service; Recreational Fisheries Policy, Interior; and Nationwide Rivers Inventory, 1982, National Park Service.

COMPREHENSIVE DEVELOPMENT

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

Two alternatives for the project were evaluated in the EA: the project as proposed by N.E.W. Hydro; and the no-action alternative. We conclude that N.E.W. Hydro's proposal is the best adapted plan to comprehensive development of the waterway for beneficial public uses.

Based on current economic conditions, without future escalation or inflation, the Weyauwega Project, if licensed in accordance with the conditions adopted herein (which are the same as N.E.W. Hydro proposes), would provide an installed capacity of 400 kW and produce an average of about 390 Megawatt-hours (MWh) of energy, at an annual cost of about \$32,900 (84.4 mills/kWh). This is about \$26,600 (68.1 mills/kWh) more than the current cost of an equivalent amount of capacity and energy using alternative power sources, which would cost about \$6,300 annually (16.3 mills/kWh).

Our evaluation of the economics of the proposed project and the no-action alternative shows that both the proposed project and the no-action alternative would cost more than the currently available alternative power; however, it is N.E.W. Hydro which must make the business decision whether to pursue the license in view of what appear to be the net economic costs of the project. As the Commission explained in Mead, supra, 8/, our economic analyses are necessarily inexact, and project economics are only one of the many public interest factors we consider in determining whether or not, and under what conditions, to issue a license. Based on the record in this proceeding, I conclude that it is in the public interest to license the project, conditioned as appropriate under Section 10(a)(1) of the FPA, and leave to N.E.W. Hydro the decision of whether to continue operating the existing project in light of the economic analysis set forth herein.

The EA analyzed the effects associated with the issuance of a subsequent license for Project No. 2550. In the EA, staff recommends a number of measures to protect and enhance environmental

resources, which I adopt, as discussed herein. These measures include: (1) operating the project in a run-of-river mode (article 401); (2) maintaining reservoir at normal pool elevation of 770.2 ± 0.25 feet NGVD (article 401); (3) maintaining computerized flow and generation control, remote monitoring and override control, and continuous recording reservoir water level recorders (article 402); (4) maintaining daily records of operation (article 402); (5) installing a staff gage on the upstream wall of the dam (article 402); (6) filing a reservoir draw-down plan (article 403); (7) reserving Interior's authority to prescribe the construction, operation, and maintenance of fishways pursuant to Section 18 of the FPA (article 404); (8) identifying the extent of purple loosestrife in project waters (article 405); (9) determining the eligibility of the existing project facilities for listing on the National Register of Historic Places (article 406); and (10) constructing a canoe portage and put-in site downstream of the dam (article 407).

Based on review of the agency and public comments filed on the project, review of the environmental and economic effects of the proposed project and its alternatives, and analysis pursuant to Sections 4(e) and 10(a)(1), I find that the Weyauwega Project, with the required protective and enhancement measures, will be best adapted to the comprehensive development of the Waupaca River for all beneficial public uses.

TERM OF THE LICENSE

Section 15(e) of the FPA 9/ specifies that any new license issued shall be for a term which the Commission determines to be in the public interest, but not less than 30 years nor more than 50 years from the date on which the license is issued. We apply this provision to subsequent licenses as well. Commission policy establishes 30-year terms for projects with little or no proposed redevelopment, new construction, new capacity, or environmental mitigative and enhancement measures; 40-year terms for projects with a moderate amount of proposed redevelopment, new construction, new capacity or mitigative and enhancement measures; and 50-year terms for projects with proposed extensive redevelopment, new construction, new capacity, or mitigative and enhancement measures.

N.E.W. Hydro proposes no redevelopment of existing project facilities, little new construction, and no change in project capacity.

In light of the relatively modest environmental protection and enhancement being required, the subsequent license for the Weyauwega Hydroelectric Project will be for a term of 30 years.

SUMMARY OF FINDINGS

9/ 16 U.S.C. § 808(e).

The EA includes background information, analysis of impacts, and support for related license articles. The design of this project is consistent with engineering safety standards. The project will be safe if operated and maintained in accordance with the requirements of this license.

The Director orders:

(A) This license is issued to N.E.W. Hydro, Inc., for a period of 30 years, effective the first day of the month in which this order is issued, to operate and maintain the Weyauwega Hydroelectric Project. This license is subject to the terms and conditions of the FPA, which is incorporated by reference as part of this license, and subject to the regulations that the Commission issues under the provisions of the FPA.

(B) The project consists of:

- (1) All lands, to the extent of the licensee's interests in those lands, shown by Exhibit G, filed on August 16, 1993:

<u>Exhibit</u>	<u>FERC No. 2550-</u>	<u>Showing</u>
G (Sheet 1)	2	Project reservoir and Hydroelectric plant

- (2) The project works consisting of: (1) a 240-foot-long dam that comprises (from west to east) (a) a 90-foot-long steel sheet-pile-faced earth section, (b) a 50-foot-long spillway section containing three 12-foot-wide by 10-foot-high radial gates, (c) a 29-foot-wide powerhouse, (d) and a 71-foot-long, steel sheet-pile-faced earth section; (2) a reservoir with a surface area of about 250 acres and a gross storage capacity of about 1,259 acre-feet at the normal pool elevation of 770.2 feet NGVD; (3) a powerhouse containing (a) one Allis-Chalmers vertical shaft propeller turbine rated at 600 horsepower, and (b) one Allis-Chalmers vertical generator rated at 400 kW; and (4) 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--The following sections of Exhibit A filed August 16, 1993:

The dam, spillway, powerhouse, project reservoir, generating equipment, and additional appurtenant equipment as described on pages A-1 through A-6.

Exhibit F--The following Exhibit F drawings filed August 16, 1993:

<u>Exhibit</u>	<u>FERC No. 2550-</u>	<u>Showing</u>
F (Sheet 1)	1	General layout,

spillway section, and
powerhouse elevation and
section

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

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

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

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

(E) This license is subject to the articles set forth in Form L-9 (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. 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 costs of administering Part I of the Federal Power Act, a reasonable amount as determined in accordance with the provisions of the Commission's regulations in effect from time to time. The authorized installed capacity for that purpose is 400 kilowatts. Under regulations currently in effect, projects with authorized installed capacity of less than or equal to 1,500 kilowatts are not assessed an annual administrative charge.

Article 401. The licensee shall operate the project in a run-of-river mode for the protection of fish, riparian vegetation, and recreational opportunities upstream and downstream of the dam. The licensee shall at all times act to minimize the fluctuation of the reservoir surface elevation by maintaining a discharge from the project so that, at any point in time, flows, as measured immediately downstream from the project tailrace, approximate the sum of inflows to the project reservoir.

To ensure run-of-river operation, the licensee shall maintain a reservoir water surface elevation of 770.2 ± 0.25 feet National Geodetic Vertical Datum (NGVD) as measured immediately upstream from the project dam.

Run-of-river operation and reservoir water surface elevations may be temporarily modified if required by operating emergencies beyond the control of the licensee, including flood and ice conditions, and for short periods, upon mutual agreement among the licensee, the Wisconsin Department of Natural Resources (Wisconsin DNR), and the U.S. Fish and Wildlife Service (FWS). If the operation is so modified, the licensee shall notify the Commission as soon as possible, but no later than 10 days after each such incident. If run-of-river operation and reservoir water surface elevation are modified due to an emergency, the licensee shall notify the Wisconsin DNR at the earliest opportunity, but no later than 24 hours after the emergency, consult with the Wisconsin DNR, and file a written report with the Wisconsin DNR and FWS within 30 days after each such incident. At a minimum, the written report should describe the emergency draw-down, action taken, remedial measures proposed, and measures proposed to prevent reoccurrence. In the case of project shut-down, the licensee shall pass river inflow through the project instantaneously, or within a few minutes.

Article 402. Within 90 days from the issuance date of this license, the licensee shall file with the Commission, for approval, an operational compliance plan to document compliance with the run-of-river operation and reservoir elevation range specified by article 401. The plan, at a minimum, shall include these measures:

- (1) install, calibrate, and maintain a staff gage in the project reservoir with the prescribed operating levels clearly marked;
- (2) calibrate and maintain automatic water level sensors to record hourly headwater and tail water elevation;
- (3) maintain records of turbine operations, including turbine start-up and shut-down times;
- (4) maintain records of hourly headwater and tailwater elevations;
- (5) maintain records of hourly flow releases from the powerhouse and spillway; and
- (6) document frequency of reporting, emergency procedures, procedures during power outages, and maintenance schedules.

The licensee shall provide these data to the U.S. Fish and Wildlife Service (FWS) and the Wisconsin Department of Natural Resources (Wisconsin DNR) upon receiving a written request for such information.

The licensee shall prepare the plan after consultation with the FWS and the Wisconsin DNR. The licensee shall include with the plan documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the 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 make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall state 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.

Article 403. At least 30 days before a planned reservoir draw-down, the licensee shall file with the Commission, for approval, a reservoir draw-down plan. The purpose of the draw-down plan is to minimize the impact of any project maintenance draw-down on aquatic resources in the project reservoir and downstream of the project. The plan shall include: (1) a schedule for implementation; and (2) documentation of consultation concerning the development and implementation of the plan.

The licensee shall prepare the plan after consultation with the U.S. Fish and Wildlife Service and the Wisconsin Department of Natural Resources. The licensee shall include with the plan copies of comments and recommendations on the completed plan after it has been prepared 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.

Article 404. The Commission reserves the authority to require the licensee to construct, operate, and maintain or to provide for the construction, operation, and maintenance of such fishways as may be prescribed by the Secretary of the U.S. Department of the Interior.

Article 405. Within 180 days after the date of issuance of this license, the licensee shall conduct an inventory and prepare a report identifying the extent of purple loosestrife (*Lythrum salicaria*) in project waters. The report shall be filed with the Commission, the U.S. Fish and Wildlife Service, and the Wisconsin Department of Natural Resources.

Article 406. The licensee shall implement the "Programmatic Agreement Among the Federal Energy Regulatory Commission, the Advisory Council on Historic Preservation, 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, including, but not limited to, the Historic Resources Management Plan (HRMP) for the project. In the event the Programmatic Agreement is terminated, the licensee shall implement the provisions of its approved HRMP. The Commission reserves the authority to require changes to the HRMP at any time during the term of the license. If the Programmatic Agreement is terminated prior to Commission approval of the HRMP, the licensee shall obtain Commission approval 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. Within one year of the issuance date of this license, the licensee shall file with the Commission, for approval, a recreation plan to implement new recreation facilities and improvements.

The recreation plan filed pursuant to this article shall provide for implementing the specific recreation facilities and activities listed below:

- (1) construction of a marked canoe portage;
- (2) construction of a canoe put-in site downstream of the dam;
- (3) consultation with government officials (local, county, and state) and adjacent landowners regarding blending the new facilities with the surrounding environment and minimizing erosion and its adverse effects both during and after construction of the new facilities; and
- (4) operation and maintenance of the new facilities.

The Commission reserves the right to require changes to the recreation plan. No land-disturbing or land-clearing activities for recreational facilities shall begin until the licensee is notified that the plan is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

Article 408. Any application for transfer of license filed with the Commission for this project, shall include proof of service of a copy of that application on the Wisconsin Department of Natural Resources and the U.S. Department of Interior.

Article 409. (a) In accordance with the provisions of this article, the licensee shall have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain types of use and occupancy, without prior Commission approval. The licensee may exercise the authority only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other

environmental values of the project. For those purposes, the licensee shall also have continuing responsibility to supervise and control the use and occupancies for which it grants permission, and to monitor the use of, and ensure compliance with the covenants of the instrument of conveyance for, any interests that it has conveyed, under this article. If a permitted use and occupancy violates any condition of this article or any other condition imposed by the licensee for protection and enhancement of the project's scenic, recreational, or other environmental values, or if a covenant of a conveyance made under the authority of this article is violated, the licensee shall take any lawful action necessary to correct the violation. For a permitted use or occupancy, that action includes, if necessary, canceling the permission to use and occupy the project lands and waters and requiring the removal of any noncomplying 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) noncommercial 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 its standards, guidelines, and procedures for implementing this paragraph (b) and to require modification of those standards, guidelines, or procedures.

(c) The licensee may convey easements or rights-of-way across, or leases of, project lands for: (1) replacement, expansion, realignment, or maintenance of bridges or roads where all necessary state and federal approvals have been obtained; (2) storm drains and water mains; (3) sewers that do not discharge into project waters; (4) minor access roads; (5) telephone, gas, and electric utility

distribution lines; (6) nonproject 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) nonproject overhead electric transmission lines that require erection of support structures within the project boundary, for which all necessary federal and state approvals have been obtained; (5) private or public marinas that can accommodate no more than 10 watercraft at a time and are located at least one-half mile (measured over project waters) from any other private or public marina; (6) recreational development consistent with an approved Exhibit R or approved report on recreational resources of an Exhibit E; and (7) other uses, if: (i) the amount of land conveyed for a particular use is five acres or less; (ii) all of the land conveyed is located at least 75 feet, measured horizontally, from project waters at normal surface elevation; and (iii) no more than 50 total acres of project lands for each project development are conveyed under this clause (d)(7) in any calendar year. At least 60 days before conveying any interest in project lands under this paragraph (d), the licensee must submit a letter to the Director, Office of Hydropower Licensing, stating its intent to convey the interest and briefly describing the type of interest and location of the lands to be conveyed (a marked Exhibit G or K map may be used), the nature of the proposed use, the identity of any federal or state agency official consulted, and any federal or state approvals required for the proposed use. Unless the Director, within 45 days from the filing date, requires the licensee to file an application for prior approval, the licensee may convey the intended interest at the end of 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 changed to exclude land conveyed under this article only upon approval of revised Exhibit G or K drawings (project boundary maps) reflecting exclusion of that land. Lands conveyed under this article will be excluded from the project only upon a determination that the lands are not necessary for project purposes, such as operation and maintenance, flowage, recreation, public access, protection of environmental resources, and shoreline control, including shoreline aesthetic values. Absent extraordinary circumstances, proposals to exclude lands conveyed under this article from the project shall be consolidated for consideration when revised Exhibit G or K drawings would be filed for approval for other purposes.

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

(E) The licensee shall serve copies of any Commission filing required by this order on any entity specified in this order to be consulted on matters related to that filing. Proof of service on these entities must accompany the filing with the Commission.

(F) This order is issued under authority delegated to the Director and constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days of the date of this order, pursuant to 18 C.F.R. §§ 385.713. The filing of a request for rehearing does not operate as a stay of the effective date of this order 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 order.

John H. Clements
Director, Office of
Hydropower Licensing