

111 FERC ¶62,099
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Neshkoro Power Associates, LLC

Project No. 12449-000

ORDER ISSUING ORIGINAL LICENSE
(Minor Project)

(April 26, 2005)

INTRODUCTION

1. On February 28, 2003, Neshkoro Power Associates, LLC (Neshkoro) filed an application for an original license pursuant to Part I of the Federal Power Act (FPA)¹ to continue operation and maintenance of the 350-kilowatt (kW) Big Falls Milldam Hydroelectric Project No. 12449. The project is located on the Little Wolf River, a navigable waterway², in the village of Big Falls, in Waupaca County, Wisconsin. The project does not occupy any federal lands. As discussed below, I am issuing an original license for the project. Issuing an original license is in the public interest because it would allow the project to continue generating electric energy to serve growing regional demand while protecting and enhancing environmental, recreational and cultural resources.

BACKGROUND

2. Public notice of the license application was issued on March 12, 2003. No motions to intervene were received.
3. On February 27, 2004, the Commission issued a notice that the project was ready for environmental analysis and soliciting comments, recommendations, and terms and conditions. No comments, recommendations, prescriptions, or terms and conditions were filed.
4. On February 1, 2005, the Commission staff issued for public comment an environmental assessment (EA). No comments were filed.

¹16 U.S.C. §§ 791(a) - 825(r).

²46 FERC ¶ 62,106 (1989), *reh'g denied*, 54 FERC ¶ 61,131 (1991).

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PROJECT DESCRIPTION

5. The Big Falls Milldam Project consists of: a concrete dam topped with a fixed crest ogee spillway with 6-inch flashboards and a single Taintor gate; a 23.27-acre reservoir; a 250-foot-long penstock leading to a powerhouse with an installed capacity of 350 kilowatts (kW); an approximately 250-foot-long bypassed reach; and appurtenant facilities. A more detailed project description is contained in ordering paragraph (B)(1).

6. The Big Falls Milldam Project is operated in a run-of-river mode such that the reservoir elevation is maintained between 901.65 and 902.30 feet mean sea level, providing a 1-inch overflow of the spillway to the bypassed reach. Neshkoro does not propose any new construction or additional capacity at the project.

WATER QUALITY CERTIFICATION

7. Under Section 401(a)(1) of the Clean Water Act (CWA)³ 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 (WQC) 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 1 year. Section 401(d) of the CWA provides that state certification shall become a condition on any federal license or permit that is issued.⁴

8. Neshkoro requested a WQC for the Big Falls Milldam Project from the Wisconsin Department of Natural Resources (DNR) on May 11, 1994. In a letter dated May 31, 1994, Wisconsin DNR waived water quality certification for the project.

COASTAL ZONE MANAGEMENT ACT

9. Under section 307(c)(3)(A) of the Coastal Zone Management Act (CZMA), 16 U.S.C. § 1456(3)(A), the Commission cannot issue a license for a project within or affecting a state's coastal zone unless the state CZMA agency concurs with the state's CZMA program, or the agency's concurrence is conclusively presumed by its failure to act within 180 days of its receipt of the applicant's certification.

³33 U.S.C. § 1341(a)(1).

⁴33 U.S.C. § 1341(d).

10. In the EA, staff determined that the Big Falls Milldam Project is not located within the coastal zone as defined by the Wisconsin state coastal zone management program nor would the project affect coastal resources. Therefore, no consistency certification is required. No comments were filed on the EA.

SECTION 18 FISHWAY PRESCRIPTIONS

11. Section 18 of the FPA⁵ 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. No fishway prescription for this project has been filed, nor has there been any reservation of authority requested.

THREATENED AND ENDANGERED SPECIES

12. Section 7(a) of the Endangered Species Act of 1973 (ESA)⁶ 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.

13. By letter dated May 26, 1993, Interior indicated that the bald eagle (*Haliaeetus leucocephalus*) and Karner blue butterfly (*Lycaeides melissa samuelis*), threatened and endangered species respectively, are or may be present in the concerned area of Waupaca County.⁷ However, because the bald eagle does not currently nest in the vicinity of the project and the habitat adjacent to the project is not Karner blue butterfly habitat, Interior concluded that continued operation of the project would not affect these species. In the EA, staff also found that continued operation of the project would not affect the bald eagle and Karner blue butterfly. Interior did not comment on the EA. Because the project as licensed would have no effect on the bald eagle or the Karner blue butterfly or its habitat, no further section 7 consultation is required.

⁵16 U.S.C. § 811.

⁶16 U.S.C. § 1536(a).

⁷Both species remain listed by Interior as being present in Waupaca County. <http://www.fws.gov/midwest/endangered/lists/wisc-spp.html> (January 26, 2005).

RECOMMEDATIONS OF FEDERAL AND STATE FISH AND WILDLIFE AGENCIES

14. Section 10(j) of the FPA⁸ requires the Commission, when issuing a license, to include conditions based on the recommendations of federal and state fish and wildlife agencies submitted pursuant to the Fish and Wildlife Coordination Act,⁹ for protection and enhancement of fish and wildlife and their habitat affected by the project. Neither Interior nor Wisconsin DNR filed section 10(j) recommendations for the Big Falls Milldam Project.

OTHER ISSUES

A. Project Operation and Compliance Monitoring

15. Neshkoro proposes to continue to operate the project in run-of-river mode such that the reservoir water surface level is maintained between 901.65 and 902.3 feet msl. In addition to operating run-of-river, Neshkoro proposes to provide a 1-inch spill over the flashboards to the bypassed reach, and prepare a compliance monitoring plan in consultation with the Wisconsin DNR. The EA recommends operating in a run-of-river mode with the proposed overflow spill and reservoir level restrictions, and developing and implementing an operation compliance plan. Article 401 and 402 require run-of-river operation and the operation compliance plan, respectively.

B. Recreation

16. The EA found that recreation facilities at the project are meeting current recreation needs. Neshkoro proposes to work cooperatively with federal, state, and local agencies to accommodate recreation demand during the license term. The EA concurs with this approach and recommends that the licensee consult with the U.S. Department of the Interior, Wisconsin DNR, and Waupaca County, in advance of its filing of FERC Form 80 Recreation Reports. Article 403 requires periodic reporting on such consultations.

⁸16 U.S.C. § 803(j)(1).

⁹16 U.S.C. § 661 *et seq.*

C. Statewide Programmatic Agreement

17. 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 projects in the state of Wisconsin and adjacent portions of Michigan. Article 404 requires the PA to be implemented. This satisfies the Commission's responsibilities under Section 106 of the National Historic Preservation Act.¹⁰

ADMINISTRATIVE CONDITIONS

A. Annual Charges

18. The Commission collects annual charges from licensees for administration of the FPA. Article 201 provides for the collection of such funds. However, projects with an authorized installed capacity of less than or equal to 1,500 kW are currently not assessed an annual charge.¹¹ Such is the case for the Big Falls Milldam Project, which has a capacity of 350 kW.

B. Exhibit G Drawings

19. The Exhibit G drawings that were filed with the license application and re-filed on December 11, 2003, do not meet the current Commission requirements for project boundary maps because the project boundary map must: (1) enclose all the principal project works necessary for operation and maintenance of the project within the project boundary line; (2) provide the project's boundary line data in a geo-referenced electronic format; and (3) be stamped by a Registered Land Surveyor. Article 301 requires the licensee to file revised Exhibit G drawings meeting the above requirements pursuant to 18 CFR sections 4.39 and 4.41. Further, the Commission requires licensees to file sets of

¹⁰16 U.S.C. § 470(f).

¹¹On March 15, 1995, the Commission revised its regulations no longer assessing annual charges on minor projects beginning fiscal year October 1, 1994. See Order No. 576 Charges and Fees for Hydroelectric Projects.

approved project drawings on microfilm and in electronic file format. Article 202 requires the filing of these drawings.

C. Headwater Benefits

20. Some projects directly benefit from headwater improvements that were constructed by other licensees, the United States, or permittees. Article 203 requires the licensee to reimburse such entities for their benefits if they were not previously assessed and reimbursed.

D. Use and Occupancy of Project Lands and Waters

21. Requiring a licensee to obtain prior Commission approval for every use or occupancy of project lands and waters would be unduly burdensome. Therefore, Article 405 allows the licensee to grant permission for certain types of use and occupancy of project land and waters and to convey certain interests in project lands and waters for certain types of use and occupancy, without prior Commission approval. Such uses and occupancies must be consistent with the purposes of protecting and enhancing the scenic, recreational, and environmental values of the project.

COMPREHENSIVE PLANS

22. Section 10(a)(2)(A) of the FPA¹² 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.¹³ Under section 10(a)(2)(A), federal and state agencies filed a total of 68 qualifying comprehensive plans of which staff identified eleven plans to be applicable.¹⁴ No conflicts were found.

¹²16 U.S.C. § 803(a)(2)(A).

¹³Comprehensive plans for this purpose are defined at 18 C.F.R. § 2.19 (2004).

¹⁴Wisconsin Department of Natural Resources: (1) Wolf River Basin area wide water quality management plan, January 1980; (2) Wisconsin water quality assessment report to Congress, April 1992; (3) Wisconsin Statewide Comprehensive Outdoor Recreation Plan for 1991-1996, October 1991; (4) Wolf River water quality management plan, April 1991; (5) Wisconsin Peregrine Falcon recovery plan, January 1987; (6) Wisconsin Common Tern recovery plan, June 1988; (7) Wisconsin Red-necked Grebe

APPLICANT'S PLANS AND CAPABILITIES

23. In accordance with sections 10(a)(2)(C) and 15(a) of the FPA,¹⁵ Commission staff evaluated Neshkoro's record as a licensee for these areas: (1) conservation efforts; (2) safe management, operation, and maintenance of the project; and (3) need for power. We accept the staff's findings in each of the following areas.

A. Conservation Efforts

24. Section 10(a)(2)(C) of the FPA requires the Commission 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. Neshkoro sells the project's energy to Waupaca County, Wisconsin, a municipality. Waupaca County promotes conservation of electricity use by its customers.

25. Given the limits of its ability to influence users of the electricity generated by the project, staff conclude that Neshkoro complies with section 10(a)(2)(C) of the FPA.

B. Safe Management, Operation, and Maintenance of the Project

26. Staff have reviewed Neshkoro's management, operation, and maintenance of the Big Falls Milldam Project pursuant to the requirements of 18 C.F.R. Part 12 and the Commission's Engineering Guidelines. The Big Falls Milldam is subject to Part 12 – Safety of Water Power Projects and Project Works, of the Commission's regulations and has been granted an exemption from Part 12 Subpart C, Emergency Action Plan, and Part 12 Subpart D, Inspection by Independent Consultant. Staff conclude that the dams and

recovery plan, June 1988; (8) Wisconsin Forster's Tern recovery plan, 1988-1998, September 1988. Federal: (9) North American waterfowl management plan, U.S. Fish and Wildlife Service and Canadian Wildlife Service, May 1986; (10) The nationwide rivers inventory, National Park Service, January 1982; (11) Fisheries USA: the recreational fisheries policy of the U.S. Fish and Wildlife Service, U.S. Fish and Wildlife Service, undated.

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

other project works are safe, and that there is no reason to believe that Neshkoro cannot continue to safely manage, operate, and maintain these facilities under an original license.

C. Need for Power

27. To assess the need for power, staff looked at the needs in the operating region in which the project is located. The 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 most recent report on annual supply and demand projections indicates that, for the period 1998-2007, total summer demand is projected to increase from 22,158 megawatt hours (MWh) to 26,333 MWh, and winter demand from 20,253 MWh to 23,601 MWh. Independent power producers such as Neshkoro Power Associates are projected to supply about 4,000 MWh of this demand. Staff conclude that the project's power, low cost, displacement of nonrenewable fossil-fired generation, and contribution to the region's diversified generation mix will help meet a need for power in the region.

PROJECT ECONOMICS

28. 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.

29. Under the Commission's approach to evaluating the economics of hydropower projects, as articulated in *Mead Corp.*,¹⁶ 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.

¹⁶72 FERC ¶ 61,027 (1995).

30. As proposed by Neshkoro, the annual cost of the project would be about \$77,600 (51.28 mills/kWh).¹⁷ The annual power value, for the estimated annual generation of 1,513 MWh, would be \$62,240 (41.13 mills/kWh).¹⁸ To determine whether the proposed project is currently economically beneficial, staff subtracts the project's cost from the value of the power the project produces. Thus, the project's power would be about \$15,360 or 10.15 mills/kWh more than currently available alternative power.

31. If licensed as proposed by Neshkoro, and with additional staff-recommended measures, the Big Falls Milldam Project would produce an average of 1,513 MWh of energy annually at a cost of about \$78,010 (51.55 mills/kWh). The annual value of the project's power would be about \$62,240 (41.13 mills/kWh). Thus the project's power would cost about \$15,770 or 10.42 mills/kWh more than currently available alternative power.

32. Our evaluation of the economics of the proposed action and the proposed action with additional staff-recommended measures shows in each analysis that project energy would cost more than alternative energy. However, project economics is only one of the many public interest factors that are considered in determining whether or not to issue a license, and operation may be desirable for other than economic reasons. For example, other public interest factors are to: (a) diversify the mix of energy sources in the area; (b) promote local employment; and (c) provide a fixed-cost source of power and reduce contract needs. Ultimately, the applicant must decide if it is in their best interest to accept the license and operate the project.

33. In analyzing public interest factors, the Commission takes into account that hydroelectric projects offer unique operational benefits to the electric utility system (ancillary benefits). These benefits include their value as almost instantaneous load-following response to dampen voltage and frequency instability on the transmission system, system-power-factor-correction through condensing operations, and a source of

¹⁷The economic analysis was revised to reflect the estimated reduced annual cost for Neshkoro to periodically consult with the resource agencies and Waupaca County and to file a report on the recreation use of the Big Falls Milldam Project area.

¹⁸Our estimate of the cost of alternative power is based on the Energy Information Administration's (EIA) reference case estimate of average real fossil fuel costs for electric utilities, as published by EIA in their Annual Energy Outlook for 2004 and its supplemental data on the EIA Internet Homepage.

power available to help in quickly putting fossil-fuel based generating stations back on line following a major utility system or regional blackout.

34. Ancillary services are now mostly priced at rates that recover only the cost of providing the electric service at issue, which do not resemble the prices that would occur in competitive markets. As competitive markets for ancillary services begin to develop, the ability of hydro projects to provide ancillary services to the system will increase the benefits of the project. The Big Falls Milldam Project is located in the region served by the Midwest Independent System Operator (Midwest ISO). Midwest ISO serves the electrical transmission needs of much of the Midwest, but does not yet operate centralized spot markets for energy or ancillary services (www.midwestiso.org).

COMPREHENSIVE DEVELOPMENT

35. Sections 4(e) and 10(a) of the FPA,¹⁹ respectively, require the Commission to give equal consideration to power development purposes and to the purposes of energy conservation, the protection, mitigation of damage to, and enhancement of fish and wildlife, the protection of recreational opportunities, and the preservation of other aspects of environmental quality. Any license issued shall be such as in the Commission's judgment would 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.

36. The EA for the Big Falls Milldam 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.

37. Based on my independent review and evaluation of the Big Falls Milldam Project, and the no-action alternative, as documented in the EA, I have selected the Big Falls Milldam Project, with the staff-recommended measures, and find that it is best adapted to a comprehensive plan for improving or developing the Little Wolf River.

¹⁹16 U.S.C. §§ 797(e) and 803(a)(1).

38. I selected this alternative because: (1) issuance of an original license would serve to maintain a beneficial and dependable 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 350 kW of electric energy generated from renewable resources would continue to offset the use of fossil-fueled, steam-electric generating plants, thereby conserving nonrenewable resources and reducing atmospheric pollution.

LICENSE TERM

Section 6 of the FPA,²⁰ provides that any original license shall be issued for a term not exceeding 50 years. The Commission's general policy is to establish 30-year terms for projects with little or no redevelopment, new construction, new capacity, or environmental mitigation and enhancement measures; 40-year terms for projects with a moderate amount of such activities; and 50-year terms for projects with extensive measures.²¹ This license will have a term of 30 years, because there is no new development and there are no extensive mitigation or enhancement measures.

The Director orders:

(A) This license is issued to Neshkoro Power Associates, LLC (licensee), effective the first day of the month in which this order is issued, for a period of 30 years, to operate and maintain the Big Falls Milldam 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 the Commission issues under the provisions of the FPA.

(B) The project consists of:

(1) Project works consisting of: (1) a 256-foot-long by 18-foot-high dam, topped with a 76-foot long fixed crest ogee spillway with 6-inch flashboards and one 16-foot-wide Taintor gate; (2) a 23.27-acre reservoir with a negligible gross storage capacity at a normal elevation of 901.65 feet msl; (3) a 7-foot-diameter by 250-foot-long penstock

²⁰16 U.S.C. § 799.

²¹See *Consumers Power Company*, 68 FERC ¶ 61,077 at 61,383-84 (1994).

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leading to; (4) a powerhouse containing one vertical-shaft Francis turbine-generator with an installed generating capacity of 350 kW; and (5) appurtenant facilities.

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

Exhibit A: Pages A-1 and A-7 filed on February 28, 2003.

Exhibit F: The following revised Exhibit F filed February 28, 2003:

<u>Exhibit F Drawings</u>	<u>FERC No. 12449-</u>	<u>Description</u>
Figure F-1	1	Powerhouse Cross-Section/Plan View
Figure F-2	2	Dam Cross-Section/Plan View

(2) 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.

(C) The Exhibits A and F 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 Act 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. *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 FPA, 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 350 kW. Under the regulations currently in effect, projects with authorized installed capacity of less than or equal to 1,500 kW will not be assessed an annual charge after September 30, 1994.

Article 202. *Exhibit Drawings.* Within 45 days of license issuance, 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-# 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, G-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. The drawings must be identified as (CEII) material under 18 CFR § 388.113(c). Exhibit G drawings must be identified as (NIP) material under 18 CFR § 388.112. 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-#, G-1, Project Boundary, MM-DD-YYYY.TIF]. Electronic drawings shall meet the following format specification:

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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

Each Exhibit G drawing that includes the project boundary must contain a minimum of three known reference points, arranged in a triangular format. The latitude and longitude coordinates, or state plane coordinates, of each reference point must be shown and identified on the drawing. In addition, each project boundary drawing shall be stamped by a registered land surveyor.

c) The licensee shall file three separate sets of the project boundary data in a geo-referenced vector electronic file format (such as ArcView shape files, GeoMedia files, MapInfo files, or any similar format) with the Secretary of the Commission, ATTN: OEP/DHAC. The file name shall include: FERC Project Number, data description, date of this license, and file extension [e.g., P-1234, boundary vector data, MM-DD-YYYY.SHP]. The geo-referenced electronic boundary data file must be positionally accurate to ± 40 feet in order to comply with National Map Accuracy Standards for maps at a 1:24,000 scale. A single electronic boundary data file is preferred and must contain all reference points shown on the individual project boundary drawings. The latitude and longitude coordinates, or state plane coordinates of each reference point must be shown. The data must include a separate text file describing the map projection used (i.e., UTM, State Plane, Decimal Degrees, etc), the map datum (i.e., North American 27, North American 83, etc.), and the units of measurement (i.e., feet, meters, miles, etc.). The text file name shall include: FERC Project Number, data description, date of this license, and file extension [e.g., P-1234, boundary metadata, MM-DD-YYYY.TXT].

Article 203. Headwater Benefits. If the licensee’s project was directly benefited by the construction work of another licensee, a permittee, or the United States on a storage reservoir or other headwater improvement during the term of the original license (including extensions of that term by original licenses), and if those headwater benefits were not previously assessed and reimbursed to the owner of the headwater improvement, the licensee shall reimburse the owner of the headwater improvement for those benefits, at such time as they are assessed, in the same manner as for benefits received during the term of this new license. The benefits will be assessed in accordance with Part 11, Subpart B, of the Commission’s regulations.

Article 301. Exhibit G Drawings. Within 30 days of license issuance, the licensee shall file for Commission approval, revised Exhibit G drawings enclosing all the principal project works necessary for operation and maintenance of the project within the project boundary line. The revised drawings shall also provide the project's boundary line data in a geo-referenced electronic format, and be stamped by a Registered Land Surveyor pursuant to 18 CFR sections 4.39 and 4.41.

Article 401. Run-of-River Operation. The licensee shall operate the project in a run-of-river mode, including provisions to provide a 1-inch spill over the flashboards to the bypassed reach, and maintain the project reservoir water level between 901.65 and 902.30 mean sea level for the protection of aquatic resources in the reservoir and downstream of the project.

Run-of-river operation, overflow spill, and reservoir water level restrictions may be temporarily modified if required by operating emergencies beyond the control of the licensee, and for short periods upon mutual agreement between the licensee and the Wisconsin Department of Natural Resources. If the flow or the reservoir water levels are so modified, the licensee shall notify the Commission as soon as possible, but no later than 10 days after each such incident.

Article 402. Compliance Monitoring Plan. Within six months of license issuance, the licensee shall file for Commission approval, a plan to monitor compliance with run-of-river operation, reservoir water surface elevations, and the bypassed reach spill required by Article 401. The plan shall be prepared after consultation with the Wisconsin Department of Natural Resources (DNR) and U.S. Department of the Interior (Interior).

The compliance monitoring plan shall include provisions to monitor: (1) run-of-river operation; (2) overflow spill; and (3) reservoir water surface elevations. The plan shall include: (1) identification of the location of the headwater staff gage; (2) the frequency of reporting the daily operation log of water levels to the Interior and Wisconsin DNR; (3) provisions to file annual reports of all summary data which shall also be provided to the Interior and Wisconsin DNR; and (4) a schedule for implementing the monitoring plan after approval by the Commission.

The licensee shall include with the compliance monitoring plan documentation of agency consultations, including copies of agency comments and recommendations on the draft 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 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. The final compliance monitoring 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. Recreation. Every 6 years during the term of the license, concurrently with the filing of the FERC Form 80 (see 18 CFR 8.11), the licensee, after consultation with the Wisconsin Department of Natural Resources, U.S. Department of the Interior, and Waupaca County, shall file a report on public access. Consultation with the above entities shall be conducted at least 60 days prior to filing the report.

The report shall include:

- (1) a discussion of the adequacy of public recreational access facilities at the project to meet recreation demand;
- (2) if there is a need for additional facilities at the project, a recreation plan proposed by the licensee to accommodate such needs;
- (3) documentation of agency consultation and agency comments on the report after it has been prepared and provided to the agencies; and
- (4) specific descriptions of how the agencies' comments are addressed in the report.

The licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations prior to filing the report with the Commission.

Article 404. Programmatic Agreement. Upon the issuance date of this license, the licensee shall implement 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, including but not limited to filing, within one year of the issuance date of this license, a Historic Resources Management Plan (HRMP). In the event that the Programmatic Agreement (PA) is terminated, the licensee shall continue to 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.

Article 405. Use and Occupancy. (a) In accordance with the provisions of this article, the licensee shall have the authority to grant permission for certain types of use and occupancy of project lands and waters and to convey certain interests in project lands and waters for certain types of use and occupancy, without prior Commission approval. The licensee may exercise the authority only if the proposed use and occupancy is consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project. For those purposes, the licensee shall also have continuing responsibility to supervise and control the use and occupancies, for which it grants permission, and to monitor the use of, and ensure compliance with the covenants of the instrument of conveyance for, any interests that it has conveyed under this article. If a permitted use and occupancy violates any condition 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 types 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 water craft 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) non-project overhead electric transmission lines that do not require erection of support structures within the project boundary; (7) submarine, overhead, or underground major telephone distribution cables or major electric distribution lines (69-kV or less); and (8) water intake or pumping facilities that do not extract more than one million gallons per day from a project reservoir. No later than January 31 of each year, the licensee shall file three copies of a report briefly describing for each conveyance made under this paragraph (c) during the prior calendar year, the type of interest conveyed, the location of the lands subject to the conveyance, and the nature of the use for which the interest was conveyed.

(d) The licensee may convey fee title to, easements or rights-of-way across, or leases of project lands for: (1) construction of new bridges or roads for which all necessary state and federal approvals have been obtained; (2) sewer or effluent lines that discharge into project waters, for which all necessary federal and state water quality certification or permits have been obtained; (3) other pipelines that cross project lands or waters but do not discharge into project waters; (4) non-project overhead electric transmission lines that require erection of support structures within the project boundary, for which all necessary federal and state approvals have been obtained; (5) private or public marinas that can accommodate no more than 10 water craft 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 file a letter with 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 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.

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

(G) This order is issued under authority delegated to the Director and 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