

76 FERC ¶ 61,055

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Elizabeth Anne Moler, Chair;
Vicky A. Bailey, James J. Hoecker,
William L. Massey, and Donald F. Santa, Jr.

Tomahawk Power and Pulp Company) Project No. 2239-004

ORDER ISSUING NEW LICENSE

(Issued July 18, 1996)

I. INTRODUCTION

Pursuant to Part I of the Federal Power Act (FPA), 16 U.S.C. § 791 et seq., applications for new and subsequent licenses were filed with the Commission for the continued operation and maintenance of nine existing hydroelectric projects and one existing headwaters project, all located within the Wisconsin River Basin. 1/ The Commission's staff identified and evaluated in a Environmental Impact Statement (EIS) environmental resource issues that were jointly related and relevant to the continued operation of each of the projects, including fish entrainment, endangered species, recreation resources, purple loosestrife control, soil erosion control, and cumulative impacts on water quality, fish, flooding, hydrologic flow regulation, and vegetation. The EIS analyzed the effects associated with the issuance of a new or subsequent license for each of the projects and recommended a variety of measures to protect and enhance the environmental resources, which we adopt.

Concurrently with this order, an Order Granting Applications for License (Master Order) is being issued, which addresses matters that are of concern to all of the Wisconsin River projects. That order is incorporated by reference herein. We find that the Wisconsin River projects will be best adapted to

1/ The projects and license applicants are as follows:

Wausau Project No. 1999-004 and Jersey Project No. 2476-001, Wisconsin Public Service Company; Wisconsin River Headwaters Project No. 2113-022, Wisconsin Valley Improvement Company; Rothschild Project No. 2212-001, Weyerhaeuser Company; Kings Dam Project No. 2239-004, Tomahawk Power and Pulp Company; Wisconsin River Division Project No. 2590-001 and Wisconsin Rapids Project No. 2256-001, Consolidated Water Power Company; Centralia Project No. 2255-003, Port Edwards Project No. 2291-001, and Nekoosa Project No. 2292-001, Nekoosa Papers, Inc.

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the comprehensive development of the Wisconsin River Basin. The following discussion pertains to the Kings Dam Project No. 2239.

II. BACKGROUND

Tomahawk Power and Pulp Company (Tomahawk Power) filed an application for a new license pursuant to Section 15 of the Federal Power Act (FPA), 16 U.S.C. §807, for the continued operation and maintenance of the 2,509-kilowatt (kW) Kings Dam Hydroelectric Project, located on the Wisconsin River in Lincoln County, Wisconsin.

The Commission issued the original license for the project to Tomahawk Power on July 1, 1959, 2/ under its jurisdiction over constructed projects situated on navigable waters of the United States. 3/ The license expired on July 31, 1993, and since then Tomahawk Power has operated the project under annual license. 4/

Notice of the application was published, and comments have been received from interested federal, state, and local agencies. Motions to intervene were filed by the U.S. Department of the Interior (Interior), the Wisconsin Department of Natural Resources (Wisconsin DNR), Izaak Walton League of America (Izaak Walton), and Richard F. Morris and were granted. None of the commenting agencies or intervenors expressed opposition to relicensing the project.

The Commission's staff issued a draft environmental impact statement (EIS) for ten projects in the Wisconsin River Basin, including the Kings Dam Project, on February 24, 1995. Numerous comments on the draft EIS were filed, and the Commission's staff considered these comments in preparing the EIS, which was issued on July 5, 1996. The staff also prepared a Safety and Design Assessment, which is available in the Commission's public file for this project.

We have fully considered the motions and comments received from interested agencies and individuals in determining whether, and under what conditions, to issue this license.

2/ 22 FPC 1 (1959).

3/ The pertinent portion of the Wisconsin River, from its source in Lac Vieux Desert to its confluence with the Mississippi 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.

4/ See section 15(a)(1) of the FPA, 16 U.S.C. § 808(a)(1).

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III. PROJECT DESCRIPTION

The existing project consists of a dam, a reservoir with a surface area of 1,420 acres at normal pool elevation, a powerhouse containing four generating units with a total installed capacity of 2,509 kW, and appurtenant facilities. A more detailed project description can be found in ordering paragraph B(2). Tomahawk Power proposes no new capacity and no new construction.

IV. APPLICANT'S PLANS AND CAPABILITIES

In accordance with Sections 10 and 15 of the FPA, 5/ we have evaluated Tomahawk Power's record as a licensee for these areas: (A) conservation efforts; (B) compliance history and ability to comply with the new license; (C) safe management, operation, and maintenance of the project; (D) ability to provide efficient and reliable electric service; (E) need for power; (F) transmission services; (G) cost-effectiveness of plans; and (H) actions affecting the public.

A. Consumption Improvement Program

Tomahawk Power sells all of the power generated at the Kings Dam Project to the Wisconsin Public Service Corporation. In its application, Tomahawk Power states that information on consumption efficiency improvement programs is not applicable. The company has begun a program that increases generating efficiency through the upgrade of its generating equipment. Based on this information, Tomahawk Power is making a good faith effort to conserve electric energy.

B. Compliance History and Ability to Comply with a New License

Tomahawk Power's overall record of making timely filings and compliance with its license is satisfactory. Tomahawk Power has or can acquire 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.

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

Tomahawk Power has historically operated the project in a safe manner. The Commission's Chicago Regional Office inspects the project periodically and prepares operation reports describing its inspection findings. Tomahawk Power's application

5/ 16 U.S.C. §§ 803(a)(2)(C) and 808(a).

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provides for the continuation of its current management, operation, and maintenance methods.

Tomahawk Power's plans are adequate to manage, operate, and maintain the project safely. ^{6/}

D. Ability to Provide Efficient and Reliable Electric Service

Tomahawk Power installed automatic control equipment to control the flow through the dam and the units in operation. Through the use of automated controls, it is better able to provide efficient and reliable service.

In addition, Tomahawk Power has initiated a program to upgrade its generating capacity and add a fourth generator to make better use of the water available. With the additional generator and by upgrading three of its turbines, Tomahawk Power expects to increase generation by an average of 3,695 MWH annually. The equipment upgrades should also decrease downtime for maintenance and repairs, thus providing more reliable service.

Tomahawk Power's plans and abilities are adequate to operate and maintain the project in a manner that would likely provide efficient and reliable electric service to its customers.

E. Need for Power

To assess the need for power, we reviewed Tomahawk's use of the project power to date and in the future, together with that of the operating region in which the project is located.

The Kings Dam Project is located in the Midcontinent Area Power Pool (MAPP) region of the North American Electric Reliability Council (NERC). NERC annually forecasts electrical supply and demand in the nation and the region for a 10-year period. NERC's most recent report ^{7/} on annual supply and demand projections indicates that for the period 1995-2004, loads in the MAPP area will grow faster than planned capacity additions, resulting in decreased reserve margins.

The Kings Dam Project has historically generated an annual average of 10,432 megawatt-hours (MWh) of power. Rehabilitation and improvements now in progress will increase the capability to 14,127 MWh. Power has been and will continue to be sold to the

^{6/} See Safety and Design Assessment for the Kings Dam Project.

^{7/} Electric Supply and Demand 1995-2004, Summary of Electric Utility Supply and Demand Projections (1995).

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Wisconsin Public Service Corporation. In addition, the project displaces nonrenewable fossil-fired generation and contributes to diversification of the generation mix in the MAPP area. We conclude that present and future use of the project's power, its displacement of nonrenewable fossil-fired generation and contribution to a diversified generation mix, and the likelihood of shrinking reserve margins support a finding that the power from the Kings Dam project will help meet a need for power in the MAPP area in the short- and long-terms.

F. Transmission Service

The existing transmission services consist of lines from the powerhouse to the Wisconsin Public Service Company's transmission facilities at the project site. Tomahawk Power has no plans for new transmission services.

G. Cost-Effectiveness of Plans

Tomahawk Power plans to continue to operate the dam in a run-of-river mode and to implement various other environmental modifications. This can be achieved in a cost-effective manner.

H. Actions Affecting the Public

Environmental enhancement measures included in this license will result in beneficial changes to the environmental quality of the project area, including aquatic resources, and to public recreation.

V. WATER QUALITY CERTIFICATION

Under Section 401(a)(1) of the Clean Water Act (CWA), ^{8/} 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. ^{9/} On May 16, 1991, Tomahawk Power applied to the Wisconsin DNR for water quality certification for the Kings Dam Project. By letter dated October 15, 1991, the Wisconsin DNR waived the requirement for certification for the continued operation of the Kings Dam Project.

^{8/} 33 U.S.C. § 1341(a)(1).

^{9/} 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.

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VI. SECTION 18 FISHWAY PRESCRIPTION

Section 18 of the FPA 10/ 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. Interior, by letter dated July 27, 1993, requests that its authority to prescribe the construction, operation, and maintenance of fishways pursuant to Section 18 be reserved at this project.

We 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 Secretary's authority to prescribe facilities for fish passage. 11/ Therefore, Article 405 of this license reserves authority to the Commission to require the licensee to construct, operate, and maintain such fishways as may be prescribed by Interior pursuant to Section 18 of the FPA.

VII. RECOMMENDATIONS OF FEDERAL AND STATE FISH AND WILDLIFE AGENCIES

Section 10(j)(1) of the FPA 12/ 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, to "adequately and equitably protect, mitigate damages to, and enhance, fish and wildlife (including related spawning grounds and habitat)" affected by the project. Section 10(j) is further discussed in the Master Order. The Wisconsin DNR and Interior filed several fish and wildlife recommendations. 13/

The license contains conditions consistent with eight recommendations submitted by the Wisconsin DNR and Interior that are subject to the provisions of Section 10(j): (1) providing

10/ 16 U.S.C. § 811.

11/ 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).

12/ 16 U.S.C. § 803(j)(1).

13/ A number of recommendations do not qualify for consideration under section 10(j); these were instead considered under section 10(a)(1), pursuant to which the Commission considers all aspects of the public interest.

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run-of-river operations; (2) prohibiting operation at both the low and high ends of the operating range on a daily basis; (3) modifying run-of-river operation temporarily in case of emergency and coordinating scheduled drawdowns; (4) installing automatic water level recorders; (5) maintaining a daily record of operations; (6) installing a staff gage on the up-stream side of the dam; (7) providing flow continuation during power outages; and (8) providing protection for endangered species.

The following recommendations made by the Wisconsin DNR and Interior are outside of the scope of Section 10(j) in that they involve studies that could have been performed prior to licensing, or do not otherwise qualify as measures to protect, mitigate damages to, or enhance fish and wildlife: 14/

(1) helping to finance and implement the United States Geological Survey (USGS) basin-wide flow monitoring system; (2) establishing a project retirement fund; (3) developing and implementing a downstream fish protection plan; (4) cooperating with agencies on control of purple loosestrife; (5) providing long-term fish and wildlife protection; (6) implementing recreation enhancements; (7) providing recreation review and consultation every 5 years; and (8) retaining all lands within the project boundary for the life of the license. We have, however, considered these recommendations under Section 10(a)(1) of the FPA.

The Commission staff made a preliminary determination that all of the resource agencies' recommendations that are subject to the provisions of Section 10(j) are consistent with the purposes and requirements of Part I of the FPA, and recommended adoption of all of these Section 10(j) recommendations. However, Commission staff concluded that several Section 10(a)(1) recommendations should not be implemented.

In response to these determinations, comment letters were received from the Wisconsin DNR and Interior. On November 2 and 3, 1995, representatives from the Wisconsin DNR and Interior met with Commission staff to resolve Sections 10(j) and 10(a) inconsistencies for the Wisconsin River projects in this proceeding. Representatives from Tomahawk Power did not attend the meeting.

With respect to environmental issues outside the scope of Section 10(j), the following conclusions 15/ were reached

14/ See 18 C.F.R. 4.30(b)(9)(ii) (1994), and Regulations Governing Submittal of Proposed Hydropower License Conditions and other Matters, 56 Fed. Reg. 23,108 (May 20, 1991), III FERC Statutes and Regulations 30,921 (May 8, 1991) (Order No. 533) at pp. 31, 108-10.

15/ These conclusions are further discussed in the Master Order.

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either in the draft EIS or discussed and resolved at the Section 10(j) meeting.

(1) We are not requiring that Tomahawk Power provide funds for basin-wide flow gaging, because the agencies have agreed that Wisconsin Valley Improvement Company (Wisconsin Valley) will maintain a gaging system as part of its headwaters operations. 16/

(2) We are not requiring the establishment of a pre-retirement trust fund for this project. 17/

(3) We conclude that the recommendation for a downstream fish protection plan is inconsistent with Sections 313(b) and 10(a) of the FPA. 18/ However, because we believe it is appropriate that the Commission consider reasonable resource enhancement measures for these projects, we are requiring that Tomahawk Power make an annual expenditure of up to \$3,000 per year (in 1995 dollars), with appropriate consumer price index adjustment, to fund enhancement activities for fishery resources affected by the project.

(4) We are not requiring Tomahawk Power to retain all lands it owns within the project boundary for the life of the license and consult with resource agencies prior to modifying the project boundary. We find that the Commission's standard land use articles and regulations, which require agency consultation before any substantial modification of project lands provide the necessary protection and flexibility. The agencies agreed with this approach at the Section 10(j) meeting. 19/

(5) We are requiring Tomahawk Power to initiate consultation and update its recreation plan as necessary every six years, consistent with the Commission's Form 80 review cycle. At the Section 10(j) meeting, the agencies agreed with this approach.

(6) We conclude that adopting the agencies' recommendations regarding specific recreation facility enhancements, cooperation on purple loosestrife control, and providing long-term fish and

16/ See Section IV.E. of the Master Order.

17/ See Section IV.I. of the Master Order.

18/ See Section IV.A. Master Order.

19/ See EIS Section 5.1.2.

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wildlife protection will be beneficial. Therefore, we will require these measures. 20/

VIII. 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. 21/ Of the comprehensive plans filed with the Commission, the Commission staff identified four that are relevant to the Kings Dam Project. 22/ The project does not conflict with any of these comprehensive plans.

IX. COMPREHENSIVE DEVELOPMENT

In making our comprehensive development determinations under Sections 4(e) and 10(a)(1) of the FPA, we considered the project both with Tomahawk Power's mitigative proposals and with the Commission's mitigative proposals. Based on current economic conditions, the project, if licensed as Tomahawk Power proposes, would produce 13.4 gigawatt-hours (GWh) of energy, at an annual cost of \$40,000 (3.05 mills/kWh) greater than currently available alternative power. If licensed with the Commission's required enhancement measures, the project will produce 13.4 GWh of energy, at an annual cost of \$42,000 (3.19 mills/kWh) greater than currently available alternative power.

The EIS analyzed the effects associated with the issuance of the new license for Project No. 2239. It recommends a number of measures to protect and enhance environmental resources, which we adopt, discussed herein. These measures include: operating the project in run-of-river mode (Article 402); installing automatic water level recorders and maintain daily record of operation (Article 403); installing a staff gage on the upstream wall of the dam (Article 403); contributing \$3,000 (in 1995 dollars), adjusted annually by the previous year's consumer price index, for fisheries enhancement (Article 406); implementing the bald eagle protection plan and preserve supercanopy trees

20/ See EIS Section 5.1.2, Table 5-13.

21/ Comprehensive plans for this purpose are defined at 18 C.F.R. § 2.19 (1992).

22/ State Comprehensive Outdoor Recreation Plan, 1985 and 1991, Wisconsin DNR; Wisconsin Water Quality: Report to Congress, 1986 and 1992, Wisconsin DNR; Upper Wisconsin River Northern Sub-Basin Water Quality Management Plan, 1992, Wisconsin DNR; and North American Waterfowl Plan, 1986, Interior and Canadian Wildlife Service.

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(Article 408); cooperating with agencies on purple loosestrife control (Article 407); and submitting a recreation plan to include provisions for implementing recreation enhancements and conducting six year recreation reviews with agencies (Article 410).

Based on our review and evaluation of the existing Kings Dam Project, agency recommendations, and the alternatives documented in the EIS prepared in this proceeding, we find that the Kings Dam Project, with our mitigative and enhancement measures, will be best adapted to comprehensive development of the Wisconsin River for all beneficial public uses.

X. SUMMARY

The EIS issued for this project 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. Analysis of related issues is provided in the Safety and Design Assessment prepared for this project.

The Commission orders:

(A) This license is issued to Tomahawk Power and Pulp Company, for a period of 30 years, effective the first day of the month in which this order is issued, to operate and maintain the Kings Dam 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 July 31, 1991:

<u>Exhibit</u>	<u>FERC No. 2239-</u>	<u>Showing</u>
G (Sheet G-1)	1	Project area
G (Sheet G-2)	2	Project boundary
G (Sheet G-3)	3	Project boundary
G (Sheet G-4)	4	Tailwater soundings
G (Sheet G-5)	5	Headwater soundings
G (Sheet G-6)	6	Fee lands
G (Sheet G-7)	7	Flowage rights

(2) The project works consisting of: (1) a dam that comprises (a) a 1,190-foot-long earth dike flanking the concrete structures, (b) a reinforced concrete spillway containing three, 20-foot-wide by 25-foot-high steel radial gates, and (c) a reinforced-concrete powerhouse; (2) a

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reservoir (Lake Alice) with a surface area of 1,420 acres at the normal project headwater elevation of 1,458.4 feet National Geodetic Vertical Datum (NGVD) and a total storage capacity of 18,200 acre-feet; (3) a powerhouse containing (a) three horizontal Francis turbines rated at 1,035, 1,035, and 900 horsepower (hp) respectively, and one vertical Francis turbine rated at 420 hp, and (b) three horizontal generators rated at 746, 812, and 790 kilowatts (kW) respectively, and one vertical generator rated at 312 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 July 31, 1991:

The dam, spillway, powerhouse, project reservoir, generating equipment, and additional appurtenant equipment as described on pages A-1 through A-4.

Exhibit F--The following Exhibit F drawings filed July 31, 1991:

<u>Exhibit</u>	<u>FERC No. 2239-</u>	<u>Showing</u>
F (Sheet F-1)	1	Powerhouse section
F (Sheet F-2)	2	Powerhouse plan
F (Sheet F-3)	3	Project area
F (Sheet F-4)	4	Plan and sections
F (Sheet F-5)	5	Upper/lower decks
F (Sheet F-6)	6	Sections and details
F (Sheet F-7)	7	General plan
F (Sheet F-8)	8	Spillway section
F (Sheet F-9)	9	Powerhouse 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) This license is subject to the articles set forth in Form L-3 (October 1975), entitled "Terms and Conditions of License for Constructed Major Project Affecting Navigable Waters of the United States," and the following additional articles:

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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 purposes 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 2,509 kilowatts.

Article 202. If the Licensee's project was directly benefitted by the construction work of another Licensee, a permittee, or the United States on a storage reservoir or other headwater improvement during the term of the original license (including extensions of that term by annual licenses), and if those headwater benefits were not previously assessed and reimbursed to the owner of the headwater improvement, the Licensee shall reimburse the owner of the headwater improvement for those benefits, at such time as they are assessed, in the same manner as for benefits received during the term of this new license.

Article 203. Pursuant to Section 10(d) of the FPA, specified reasonable rate of return upon the net investment in the project shall be used for determining surplus earnings of the project for the establishment and maintenance of amortization reserves. The Licensee shall set aside in a project amortization reserve account at the end of each fiscal year one-half of the project surplus earnings, if any, in excess of the specified rate of return per annum on the net investment.

To the extent that there is a deficiency of project earnings below the specified rate of return per annum for any fiscal year, the Licensee shall deduct the amount of that deficiency from the amount of any surplus earnings subsequently accumulated, until absorbed. The Licensee shall set aside one-half of the remaining surplus earnings, if any, cumulatively computed, in the project amortization reserve account. The Licensee shall maintain the amounts established in the project amortization reserve account until further order of the Commission.

The specified reasonable rate of return used in computing amortization reserves shall be calculated annually based on current capital ratios developed from an average of 13 monthly balances of amounts properly includible in the Licensee's long-term debt and proprietary capital accounts as listed in the Commission's Uniform System of Accounts. The cost rate for such ratios shall be the weighted average cost of long-term debt and preferred stock for the year, and the cost of common equity shall be the interest rate on 10-year government bonds (reported as the Treasury Department's 10-year constant maturity series) computed on the monthly average for the year in question plus 4 percentage points (400 basis points).

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Article 401. At least 90 days before the scheduled start of any land-disturbing or land-clearing activities, the Licensee shall file with the Commission, for approval, a plan to control dust and erosion, to stabilize slopes, and to minimize the quantity of sediment and other potential air or water pollutants likely to result from site access, project construction, spoil disposal, and project operation.

The erosion control plan(s) shall be based on actual-site geological, soil, and groundwater conditions and on project design, and shall include, at a minimum, the following four items:

- (1) a description of the actual site conditions;
- (2) measures proposed to control erosion, to prevent slope instability, and to minimize the quantity of sediment resulting from project construction and operation;
- (3) detailed descriptions, functional design drawings, and specific topographic locations of all control measures; and
- (4) a specific implementation schedule and details for monitoring and maintenance programs for project construction and operation.

The Licensee shall prepare the plan(s) after consultation with U.S. Fish and Wildlife Service, Wisconsin Department of Natural Resources, and appropriate federal and state soil conservation agencies. 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 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 geological, soil, and groundwater conditions at the site.

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

Article 402. The Licensee shall operate the project in a run-of-river mode for the protection of fish spawning in the project impoundment, riparian vegetation below the project, and

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recreational opportunities in the project impoundment on the Wisconsin River. 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 between a minimum of 1,458.3 feet and a maximum of 1,458.9 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, and U.S. Fish and Wildlife Service. If the operation is so modified, the Licensee shall notify the Commission as soon as possible, but no later than ten 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 Department of Natural Resources and U.S. Fish and Wildlife Service within 24 hours. In the case of project shut-down, the Licensee shall pass river inflow through the project instantaneously, or within a few minutes.

Article 403. Within 90 days of license issuance, 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 402. The plan, at a minimum, shall include these measures:

- (1) install, calibrate, and maintain a staff gage in the project impoundment with the prescribed operating levels clearly marked;
- (2) install, calibrate, and maintain automatic water level sensors to record continuous headwater and tailwater 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

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- (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 and the Wisconsin Department of Natural Resources upon receiving a written request for such information.

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 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 an agency's 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 404. At least 90 days before reservoir drawdown, the Licensee shall file with the Commission, for approval, a reservoir drawdown plan. The purpose of the drawdown plan is to minimize the impact of any project maintenance requiring a reservoir drawdown on aquatic resources in the project impoundment and downstream of the project. The plan shall include: (1) a schedule for implementation; (2) documentation of consultation concerning the development and implementation of the plan; (3) documentation on planned reservoir drawdowns; and (4) agency comments, and the Licensee's response to agency comments.

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.

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Article 405. The Commission reserves the authority to require the Licensee to construct, operate, and maintain or to provide for the construction, maintenance, and operation of such fishways as may be prescribed by the Secretary of the U.S. Department of the Interior.

Article 406. The Licensee, after consulting with the Wisconsin Department of Natural Resources and the U.S. Fish and Wildlife Service, shall develop fisheries resource plans and implementation schedules to address turbine-induced impacts on fish at the Kings Dam Project, using the funds described in the following paragraph. Within 180 days from the date of issuance of this license, and every ten years thereafter, the Licensee shall file a fisheries resource plan and implementation schedule for Commission approval. The plan shall describe specific activities to be undertaken and contain provisions to monitor the success of these measures. The Licensee shall allow at least 30 days for agency comment prior to filing the plan with the Commission. The plan shall include any comments received from the consulted agencies on the proposed plan, and a description of how the agency comments are accommodated by the developed plan. The Commission reserves the right to modify the proposed plan and schedule. Upon Commission approval, the Licensee shall implement the plan, including any changes required by the Commission.

By January 1 of each year following the issuance of this license, the Licensee shall provide up to \$3,000 in 1995 dollars, adjusted annually by the previous year's consumer price index (CPI), to finance fisheries resource plans.

The Commission reserves the right to: (1) require the Licensee to assess the applicability of new technology regarding cost-effective measures for reducing turbine-induced mortality or injury at the Kings Dam Project; (2) require the installation of fish protection at the Kings Dam Project in lieu of other proposed measures, should fish protection be feasible; and (3) after notice and opportunity for comment, modify or eliminate the compensatory measures and their funding, should it be necessary or appropriate.

Article 407. Within 180 days after the date of issuance of this license, the Licensee shall, in consultation with the U. S. Fish and Wildlife Service, and the Wisconsin Department of Natural Resources, develop a plan to monitor purple loosestrife (Lythrum salicaria) in project waters. The plan shall include, but is not limited to: (a) the method of monitoring, (b) the frequency of monitoring, and (c) documentation of transmission of monitoring data to the U.S. Fish and Wildlife Service, and the Wisconsin Department of Natural Resources. The plan shall be filed with the Commission for approval. If at any time during the period of the license, the U.S. Fish and Wildlife Service and the Wisconsin Department of Natural Resources deem it necessary

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to control or eliminate purple loosestrife, the Licensee shall cooperate in this measure. The Commission reserves the right to require changes in the plan.

The Licensee shall include documentation of consultation with the U.S. Fish and Wildlife Service and the Wisconsin Department of Natural Resources before preparing the plan, copies of the agencies' 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 were accommodated by the plan. The Licensee shall allow a minimum of 30 days for the agencies to comment and to make recommendations prior to 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 408. Within one year of license issuance, the Licensee shall file with the Commission, for approval, a final plan to protect the bald eagle (*Haliaeetus leucocephalus*) in the project area.

The bald eagle protection plan shall also be updated and re-filed with the Commission every 5 years. The original and updated plans shall include, but not be limited to, the following:

- (1) measures to protect existing habitat in the project area, including protection of necessary supercanopy trees;
- (2) plans to control public access to project lands if eagle nesting begins;
- (3) measures to protect winter roosting or feeding sites identified in the future from adverse human disturbance;
- (4) measures to limit the use of herbicides and pesticides on project lands;
- (5) the estimated cost of the proposed enhancement and protection measures (implementation and maintenance) and provisions for funding the proposed measures; and
- (6) a schedule for implementing the plan.

The Licensee shall prepare the plan and plan updates in consultation with the U.S. Fish and Wildlife Service and the

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Wisconsin Department of Natural Resources. The Licensee shall include with the original and updated plans documentation of consultation, copies of comments and recommendations on the completed plan after it has been prepared and provided to the agency, and specific descriptions of how the agency's comments and recommendations are accommodated by the plan. The Licensee shall allow a minimum of 30 days for the agency 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 409. 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 for the project. In the event that the Programmatic Agreement is terminated, the Licensee shall implement the provisions of its approved Historic Resources Management Plan. The Commission reserves the authority to require changes to the Historic Resources Management Plan at any time during the term of the license. If the Programmatic Agreement is terminated prior to Commission approval of the Historic Resources Management Plan, 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 410. Within one year of license issuance, the Licensee shall file with the Commission, for approval, a Recreation Plan describing existing recreation facilities, evaluating whether the existing recreation facilities are meeting public recreation needs, and proposing specific recreation improvements to address the need for new public recreation facilities and improvements at the project. The Recreation Plan shall provide for implementing specific new recreation facilities and improvements as already agreed to by the Licensee in consultation with federal and state fish and wildlife agencies, and other providers of public recreation at the project. These specific agreed-upon recreation facilities and improvements are described below. The Recreation Plan shall be consistent with

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the protection of federal and state-listed threatened and endangered species.

The Licensee shall also file with the Commission, for approval, reports updating the Recreation Plan consistent with every sixth year due date in the Form 80 reporting cycle, for the term of the license, pursuant to Part 8 of the Commission's regulations. The first such update report will be due April 1, 2003. The update reports shall identify changes to the Recreation Plan.

The Recreation Plan and update reports shall include, at a minimum, the following:

- (1) the type and estimated amount of public and private recreation use at the project;
- (2) a discussion of the adequacy of existing recreation improvements to meet existing and future public recreation demand;
- (3) final site plans for proposed new recreation facilities, if any, to be funded in part or in whole by the Licensee;
- (4) a discussion of how existing and proposed facilities consider the needs of persons with disabilities;
- (5) an identification of the entity or entities responsible for the construction, operation, and maintenance of existing or proposed facilities and, if this is not the Licensee, documentation of the Licensee's construction, operation, and maintenance agreement with the entity or entities;
- (6) the implementation schedule for proposed new recreation improvements; and
- (7) documentation of consultation.

The Licensee shall prepare the Recreation Plan and update reports in consultation with the Wisconsin Department of Natural Resources, the U.S. Fish and Wildlife Service, affected citizens organizations, other providers of public recreation at the project, and local agencies having land management or planning/zoning authority in the area. The Licensee shall make the Recreation Plan and update reports available to consulting entities for comment at least 30 days prior to filing the Recreation Plan and update reports with the Commission for approval. The Licensee's documentation of consultation shall include copies of the consulted entities' comments and recommendations on the completed plan or plan updates and a

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discussion of how the entities' comments are specifically accommodated by the Recreation Plan or update reports. If the Licensee does not adopt a recommendation made by one of the consulted entities, the Licensee shall include the Licensee's reasons, based on project-specific information.

The Recreation Plan filed pursuant to this article shall provide for implementing the specific recreation facilities and improvements described below:

- (1) relocation and enhancement of the canoe portage on the north side of the reservoir, including moving the canoe take-out area to a location outside of the high current area, constructing a log ramp to facilitate take-out, and relocating two boulders within the take-out location;
- (2) installation of a barrier-free fishing pier on the south side of the tailrace;
- (3) consultation with the Commission, local agencies with planning/recreation jurisdiction, and Richard Morris (citizen) to identify locations where boating hazards exist, and develop a plan for either removing stumps or placing warning buoys;
- (4) development of an informational brochure for distribution to the public that explains the recreation facilities on Lake Alice; and
- (5) consultation with government officials (local, county, or state) with oversight over roadway signage issues to determine appropriate locations for installing directional signage to project facilities.

The Commission reserves the right to require changes to the Recreation Plan and update reports. 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 411. (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

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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)

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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.

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(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

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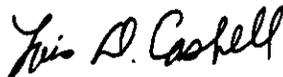
reservations of the United States included within the project boundary.

(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 final unless a request for rehearing by the Commission is filed within 30 days of the date of this order, pursuant to 18 C.F.R. Section 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.

By the Commission.

(S E A L)



Lois D. Cashell,
Secretary.

Document Content(s)

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