

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Upper Peninsula Power Company

Project No. 1864-019

ORDER ON REHEARING

(Issued February 14, 2005)

1. This order grants in part the U.S. Forest Service's request for rehearing of the new license issued on August 20, 2003, to Upper Peninsula Power Company (UPPCO) for the continued operation and maintenance of its 12-megawatt Bond Falls Hydroelectric Project No. 1864.¹ The project is located partly on Ottawa National Forest lands; the issue on rehearing is whether all of the conditions submitted by the Forest Service are required to be included in the license. This order finds that the license must include those conditions that apply to national forest lands within the project boundary. The order also amends three license articles and requires the filing of revised Exhibit G (project boundary) maps. The order is in the public interest because it clarifies the licensee's obligations under its license.

Background

2. The Bond Falls Project, located on the Ontonagon River in Michigan and Wisconsin, consists of four developments. Bond Falls, Bergland, and Cisco are reservoirs that store and deliver water to the downstream Victoria development, which has the project's only generating facility.²

¹104 FERC ¶ 62,135 (2002). The original license for the project was issued in 1953. 12 FPC 1135. In 1981 the license was amended to include the additional, downstream Victoria development. 14 FERC ¶ 62,274.

²The Victoria development is located on the Ontonagon River's West Branch, downstream of the Bergland development. Water from the Bond Falls development, on the river's Middle Branch, is diverted by canal to the South Branch, which flows into the West Branch. The Cisco development is located on the Cisco Branch, which flows into the South Branch upstream of the West Branch.

3. Section 4(e) of the Federal Power Act (FPA) provides that when the Commission issues a license for a project located “within any [federal] reservation,” which includes national forest lands, the license “shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.”³

4. In this proceeding, the Forest Service submitted 17 conditions under section 4(e). The first four are standard Forest Service conditions, which were included in the new license⁴ and do not concern us further. The remaining 13 conditions contain requirements applicable to one or more of the project’s developments.⁵

5. The new license issued by Commission staff included as mandatory FPA section 4(e) conditions⁶ only seven of the remaining thirteen conditions, and only to the extent those seven conditions applied to the Bond Falls development. To the extent the seven conditions applied to other project lands and facilities, they were not accorded section 4(e) status. The new license also declined to adopt the remaining six conditions under section 4(e). These decisions were based on the finding that the only portion of the project that occupies national forest lands is a part of the Bond Falls development.

6. On rehearing, the Forest Service does not challenge the order’s decision to not adopt, under section 4(e), five of its conditions.⁷ Thus, the issue before us is the order’s

³ See 16 U.S.C. § 797(e).

⁴ See 104 FERC at 64,384.

⁵ The Forest Service’s conditions 5 through 17 reflect provisions of a Settlement Agreement, filed July 11, 2000, that UPPCO entered into with many of the parties to the relicensing proceeding and that the relicense order approved.

⁶ Mandatory here means the Commission’s obligation to include such conditions in any license it issues. It does not refer to a licensee’s compliance obligation, inasmuch as all license conditions (whatever their source) are mandatory as to the licensee.

⁷ These were Condition 7 (fish protection measures at Victoria dam, which does not occupy national forest lands); Condition 14 (setting temperature and dissolved oxygen levels for all bypassed reaches and downstream of the Victoria powerhouse, locations not on national forest lands and not within the project boundary); Condition 15 (requiring UPPCO to endow a fund for mitigation and enhancement measures within the Ontonagon River watershed); Condition 16 (provisions for any future transfer or surrender of the license); and Condition 17 (establishment of a group to coordinate and implement the provisions of the settlement agreement).

treatment of eight of the Forest Service conditions, which we discuss next. We note that the conditions at issue, to the extent they were not included in the license under section 4(e), were nevertheless adopted and made conditions of the license under the public interest standard of section 10(a)(1) of the FPA.⁸

Forest Service's Rehearing Request

A. Extent of Forest Service Authority

7. The eight Forest Service conditions at issue here, all or parts of which were denied section 4(e) status in the relicense order, are summarized as follows:

Condition 5: Specified minimum bypass flows from the Bond Falls, Victoria, and Bergland dams, and specified flows from the Bond Falls canal release structure.

Condition 6: Operational compliance plans for, and maintenance of, USGS gauges downstream of all four developments.

Condition 8: Fish and wildlife mitigation plans for all project lands and waters.

Condition 9: A threatened, endangered, and sensitive species protection plan for all project lands.

Condition 10: Erosion control measures for future construction activities related to project structures.

Condition 11: Compliance with section 106 of the National Historic Preservation Act.

Condition 12: Recreation facilities on licensee-owned project lands.

Condition 13: Reservoir elevation requirements for all four reservoirs and operational requirements for the Victoria powerhouse.

8. The Forest Service challenges the decision to apply Conditions 6, 8, 9, 10, 11, 12, and 13 to only the Bond Falls development and to reject Condition 5 (minimum flows) in its entirety. The Forest Service argues that if any portion of the project is on, or may

⁸ 16 U.S.C. § 803(a)(1).

affect,⁹ national forest lands, then all of the project lands and facilities are subject to its mandatory conditioning authority. The Forest Service further contends that, under the Supreme Court's ruling in *Escondido Mutual Water Co. v. La Jolla Band of Mission Indians (Escondido)*,¹⁰ the Commission has no authority to second-guess whether conditions it prescribes are appropriate section 4(e) conditions, and that this role is reserved for the courts. It accordingly asks that we revise the license order to include the above eight conditions as mandatory conditions applicable to all project lands, waters, and facilities.

9. In *Escondido*, the Supreme Court stated as to section 4(e) that:

[n]othing in the section requires the Commission to make findings about, or the Secretary to impose conditions to protect, any reservation other than the one within which project works are located. The section imposes no obligation on the Commission or power upon the Secretary, with respect to reservations that may somehow be affected by, but will contain no part of, the licensed project works.[¹¹]

We read this to mean that we are not required to include in licenses conditions pertaining to reservations that are affected by a project, but contain no project works. Nor may the Forest Service impose conditions on projects or portions of projects that are not located on reservations under its supervision. For this reason, the Forest Service's conditioning authority does not extend to portions of the project that do not occupy, but are merely adjacent to, national forest lands.

⁹ The Forest Service contends that it has riparian lands located downstream of the four project dams that, although not within the project boundary, may be affected by their operations. The Forest Service argues that this gives it the authority to impose mandatory conditions on the dams' operations.

¹⁰ 466 U.S. 765 (1981).

¹¹ 466 U.S. at 780-81. Accordingly, the Court held that a finding that reservations were affected by project works that were not located on them did not give rise to section 4(e) authority.

10. As we stated in *Minnesota Power & Light Company*,¹² “(t)o hold otherwise, would greatly expand Interior’s authority beyond that contemplated by section 4(e): to protect reservations from the impacts of project works located on them.” We do not read the FPA as giving an agency the authority to impose section 4(e) conditions with respect to parts of a project that are located on private lands, over which the United States has no authority and which are not part of any reservation.

B. Project’s Occupancy of National Forest Lands

11. As explained above, the Forest Service’s mandatory conditioning authority does not extend to privately-owned lands or project works on such lands. Therefore, in order to determine the extent to which the Forest Service conditions apply, we must determine the extent and location of Forest Service lands within the Bond Falls Project boundary.

12. The Forest Service points out that the new license understated the extent to which the project occupies lands of the Ottawa National Forest. The Forest Service is correct. Commission staff estimates that there are about 379 acres of national forest land within the project boundary,¹³ not the 73.5 acres stated in the new license.¹⁴ That occupancy is as follows:

¹²72 FERC ¶ 61,028 (1995), *on reh’g*, 75 FERC ¶ 61,131, at 61,448 (1996), *appeal pending sub nom. Minnesota Power & Light Co. v. FERC*, No. 96-1219 (D.C. Cir. appeal docketed June 27, 1996)(in abeyance pending settlement negotiations)(where only a portion of the reservoir is located on a reservation, section 4(e) cannot be used to impose conditions on rest of the project).

¹³ National forest lands constitute about one percent of the project’s total of about 33,600 acres (20,500 acres of which underlie the project’s four reservoirs). These acreages are Commission staff estimates based on the drawings submitted with the Forest Service’s rehearing request. This order requires UPPCO to file for Commission approval project boundary maps to, among other things, clarify the precise acreage and location of those lands.

¹⁴ The 73.5-acre figure was contained in the relicense application. *See* “Application for New License Major Project Existing Dam,” filed December 24, 1987, Volume I, at A-5.

The *Bond Falls development* occupies 74 acres of national forest land, of which 54 acres are adjacent to the reservoir and partially inundated at certain reservoir elevations. Neither the development's dam nor its bypassed reach or canal occupies national forest land.¹⁵

The *Bergland development* occupies about 18 acres of national forest land adjacent to the reservoir and partially inundated at certain reservoir elevations. National forest land does not underlie the development's dam or bypassed reach.

The *Cisco development* occupies about 284 acres of national forest land, some of which are under its constituent lakes and some of which are adjacent to the lakes and partially inundated at certain lake elevations.

The *Victoria development* occupies about 3 acres of a national forest easement¹⁶ downstream of the Victoria dam. Neither the reservoir nor the dam occupies national forest land.

C. Applicability of 4(e) Conditions

13. Appendix A of the relicense order limits the applicability of the Forest Service's Conditions 6, 8, 9, 10, 11, and 13 to national forest lands at the Bond Falls development only, based on the mistaken belief that those lands were the only national forest lands occupied by the project.

14. Several of these conditions require the licensee to prepare plans for fish and wildlife mitigation (Condition 8),¹⁷ protection of threatened and endangered species (Condition 9), and erosion control for future construction activities (Condition 10).¹⁸ Another of the conditions generally requires compliance with section 106 of the National

¹⁵ *Id.*

¹⁶ The easement is part of the North Country National Scenic Trail. For purposes of the FPA, a reservation is lands and interests in lands owned by the United States and held for any public purposes. 16 U.S.C. § 796(2).

¹⁷ Condition 8 also requires a wildlife and land management plan that, by its terms, applies only to "UPPCO owned project lands," and thus is not a mandatory condition.

¹⁸ We have included as conditions of the license similar requirements for licensee-owned project lands.

Historic Preservation Act (Condition 11). We are revising Appendix A to make clear that these conditions apply, not only to national forest lands at the Bond Falls development, but to all such lands occupied by the project.¹⁹

15. Condition 5 establishes minimum instream flows from dams at three of the four developments and from a canal release structure at one of the developments. However, none of these structures (nor any of the related bypass reaches) occupy national forest lands. That being the case, we conclude that the Forest Service is without authority to impose section 4(e) conditions on their operation.

16. Condition 12 applies to project recreation facilities located on “licensee-owned lands.” Thus, the condition, by its terms, excludes Forest Service lands; and therefore is not a 4(e) condition. Condition 12 was erroneously included in Appendix A, and we are now deleting it.

17. Condition 13 establishes reservoir elevation requirements for each of the four project impoundments. Appendix A of the relicense order includes Condition 13, but limits its applicability to the Bond Falls development. On rehearing, we are revising the Appendix to include the requirements for the Cisco and Bergland developments, both of which have Forest Service lands within (or along the shore of) the impoundments that will be flooded at particular elevations. Although only parts of these reservoirs are subject to the Forest Service’s mandatory conditioning authority, it is impossible to attach this condition to those lands without simultaneously imposing it with respect to the entire

¹⁹We are also reinstating the related funding requirements, inasmuch as they are an integral part of these conditions. In addition, we are adding a license article (Article 423) to clarify that, notwithstanding any funding limitations in the settlement agreement, the Commission reserves the right to require the licensee to undertake such measures as may be appropriate and reasonable to implement approved plans.

For ease of administration and compliance, we have prepared a revised Appendix to replace the Appendix A attached to the license order. The new Appendix contains all the mandatory 4(e) conditions. It does not include those conditions (or discreet sections of conditions) that clearly are not mandatory 4(e) conditions. However, in instances where a condition does not lend itself to parsing along these lines, we have included it in its entirety, with the understanding that all of the Forest Service’s section 4(e) conditions apply only to the extent they address forest service lands (or any project works on those lands) occupied by the project.

reservoirs.²⁰ We are not however including the requirements for the Victoria development, because neither the impoundment nor its shoreline occupies Forest Service lands.

18. Condition 6 requires the licensee to prepare an “operation compliance plan” for the project. The plan is to provide for measuring minimum flows, gate openings, headwater elevations, rating curves, and power production in order to ensure compliance with the project operation requirements of the license. To the extent this compliance plan addresses mandatory conditions, it too is a mandatory condition. However, to the extent the plan addresses compliance with non-mandatory license conditions, and does not involve national forest land occupied by the project, it is not a proper mandatory condition. Because the compliance plan is not easy to parse along the above lines, we have included the operation compliance plan requirement in its entirety, with the understanding that only the part of it that addresses compliance with reservoir elevation requirements at the Bond Falls, Bergland, and Cisco developments is accorded section 4(e) status.²¹

19. We reiterate that the Forest Service conditions that we are not required to adopt under FPA section 4(e) are nevertheless included as conditions of the license under the comprehensive development standard of FPA section 10(a)(1). In addition, where we have mandatory conditions that apply only to Forest Service lands, we have included in the license similar conditions that apply to non-Forest Service lands.

Other Matters

A. Project Boundary and Annual Charges

20. FPA section 10(e)(1) requires, among other things, that licensees pay annual charges for the use of federal lands. Since the issuance of the original license in 1953, annual charges have been assessed for the use and occupancy of 73.50 acres of federal lands, a number we now know is incorrect. However, while the maps that Commission staff used are sufficient to determine whether there are Forest Service lands within the various project developments and estimate their acreage, they are not of sufficient detail to determine exact acreage and precise location of Forest Service lands within the project

²⁰ See *Wisconsin Valley Improvement Co. v. FERC*, 236 F.3d 738, 744 (D.C. Cir. 2001).

²¹ We have not included in the Appendix a separate section of Condition 6 that requires the licensee to continue partial funding for a number of USGS gages that are in the vicinity of, but not within, the Bond Falls Project.

boundary. This order therefore requires the licensee to file for Commission approval revised Exhibit G (project boundary) maps in a format that precisely identifies the project's boundary and the Forest Service lands and acres therein.

B. License Articles 402 and 416

21. On September 16, 23, and 26, 2003, respectively, Michigan Department of Natural Resources, Michigan Hydro Relicensing Coalition, and Keweenaw Bay Indian Community filed letters asking the Commission to make clarifying changes to Articles 402 and Article 416 to reflect provisions of the comprehensive settlement agreement approved in the relicense order.²² We are making the requested change to Article 402 by adding a consultation requirement regarding reservoir elevations at the Bergland development.

22. The entities also request that Article 416 be corrected to add the following statements, which are contained in the settlement: "No new or improved facilities are proposed at this time at Cisco Chain of Lakes. Additional facilities may be developed, if necessary, based on need and funded by the Mitigation Enhancement Fund."²³

23. We however see no need to revise Article 416. The relicense order's finding that no new or improved recreation facilities are now needed at Cisco Chain of Lakes, but may be required at some future time, imposes no obligation in the licensee, and thus need not be included in a license article.²⁴

C. Comments by the Cisco Chain Riparian Owners Association

24. On October 21, 2003, the Cisco Chain Riparian Owners Association (Association) filed a letter expressing its interest in purchasing the Cisco dam. The Association represents 424 property owners along the shoreline of the Cisco Chain of Lakes.

²² See Settlement Agreement, filed July 11, 2000.

²³ See *Id.*, Section 5.3.2.

²⁴ See 104 FERC at 64,358. Should the need arise for recreation development in the future, the Commission has reserved authority, under standard Article 17 of the license, to prescribe, on its own motion, or on the motion of interested Federal and State agencies, reasonable recreational facilities and modifications thereof, after notice and opportunity for a hearing.

25. A provision of the settlement agreement states that UPPCO will attempt, with the settlement team's support, to find a new owner for Cisco Dam in order to allow removal of the dam from the project license.²⁵ In the relicense order's project description of the Cisco development, we discussed this provision and indicated that UPPCO would be required to file a license amendment if it decides to pursue removal of Cisco Dam. The Association's October 21 filing responds to that discussion.

26. By stating what would be required of UPPCO if it pursued removal of Cisco Dam, we were not suggesting that the licensed project is currently configured such that Cisco Dam can, in fact, be severed from the licensed project and sold. The Cisco development is hydraulically connected to the other project developments and has a storage reservoir that contributes to the project. Consequently, it is needed for project operations. In any license amendment application that it may file, UPPCO would have to show that Cisco Dam is no longer needed for project purposes.

D. License Article 408

27. Article 408 requires maintenance of specified dissolved oxygen (DO) levels downstream of the four project reservoirs and the project's powerhouse. We are revising this article to correct the DO level required below the project's powerhouse and to clarify the locations for these measurements.²⁶

The Commission orders:

(A) The request for rehearing filed by the U.S. Forest Service on September 22, 2003, is granted to the extent provided in this order and denied in all other respects.

(B) The attached revised Appendix A replaces the Appendix A to the August 20, 2003 Order approving settlement and issuing new license. The license is subject to the conditions submitted by the U.S. Department of Agriculture, Forest Service, under section 4(e) of the FPA, as those conditions are set forth in revised Appendix A, to the extent those conditions apply to project lands and facilities located on the Forest Service's reservation lands.

(C) Within six months of the issuance date of this order, the licensee shall file, for Commission approval, revised Exhibit G maps, showing the Forest Service lands and exact acreage within the project boundaries of the Bond Falls Project. The revised Exhibit G maps shall conform to the requirements of 18 C.F.R. § 4.41(h) (2004).

²⁵ See Settlement Agreement, Section 3.1.4.3.

²⁶ This clarification reflects the terms of Section 4.1.4 of the Settlement Agreement.

(D) The first sentence of Article 201 is revised by deleting the phrase “effective as of the date of commencement of project construction.”

(E) Paragraph (B) of Article 201 is revised to read:

Recompensing the United States for use, occupancy, and enjoyment of lands other than for transmission line right of way, the acreage to be determined.

(F) The following subpart (3) is added immediately after subpart (2) of Article 402, for the Bergland Development – West Branch Ontonagon River:

(3) Whenever the water surface elevation comes within 0.2 feet above the minimum elevation, the licensee shall initiate consultation with the Bond Falls Project Implementation Team.

(G) The second paragraph of Article 408 of the license is revised to read:

In addition, the licensee shall not cause the dissolved oxygen concentration measured in the Cisco and West Branches of the Ontonagon River immediately downstream of the Cisco, Bergland, and Victoria dams to be less than 5 mg/l. The licensee shall not cause the dissolved oxygen concentration measured in the Middle Branch of the Ontonagon River and in the Roselawn Creek downstream of the Victoria Powerhouse and the Bond Falls Dam to be less than 7 mg/l.

(H) The license is amended to add the following article:

Article 423. Notwithstanding the limitation on expenditures included in this license, the Commission reserves the right to require the licensee to undertake such measures as may be appropriate and reasonable to implement approved plans.

By the Commission.

(S E A L)

Linda Mitry,
Deputy Secretary.

Appendix A (revised February 2005)**Final Terms and Conditions for License
Necessary for the Protection and Utilization of the Ottawa National Forest****in Conjunction with the Application for License for FERC Project No. 1864, Bond
Falls (Upper Peninsula Power Co.).**

Submitted by: USDA Forest Service, Eastern Region, Milwaukee, Wisconsin, 53203.
Randy Moore, Regional Forester. (414) 297-3170.
August, 2002

1. General

The Forest Service provides the following final 4(e) conditions for the Bond Falls Hydroelectric Project, FERC No. 1864. In accordance with 18 CFR 4.34(b)(1)(i), the Forest Service is providing these final conditions pending the outcome of any administrative appeals or litigation. These conditions reflect terms of the Settlement Agreement (June, 2000). License articles contained in the Commission's Standard Form L-5, issued by Order No. 540, dated October 31, 1972 (revised October 1975), cover general requirements that the Secretary of Agriculture, acting by and through the Forest Service, considers necessary for the adequate protection and utilization of the land and resources of the Ottawa National Forest. For the purposes of section 4(e) of the Federal Power Act (16 USC 797(e)), the purposes for which the National Forest System Lands were created or acquired shall be the protection and utilization of those resources enumerated in the Organic Administration Act of 1897 (30 Stat. 11), the Multiple Use/Sustained Yield Act of 1960 (90 Stat. 2949), the National Forest Management Act of 1976 (90 Stat. 2949), and any other law specifically establishing a unit of the National Forest System or prescribing the management thereof (such as the Wilderness Act or the Wild and Scenic Rivers Act), as such laws may be amended from time to time, and as implemented by regulations and approved Forest Plans, prepared in accordance with the National Forest Management Act. Therefore, pursuant to section 4(e) of the Federal Power Act, the following conditions covering specific requirements for the protection and utilization of National Forest System lands shall also be included in any license issued.

1.1 Abbreviations and Definitions**1.1.1 Abbreviations**

| | |
|-----|-----------------------------------|
| ADA | - Americans with Disabilities Act |
| C | - Degrees Centigrade |
| CFS | - Cubic Feet per Second |
| CFR | - Code of Federal Regulations |

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|---------|-----------------------------------------------------------------------------|
| CPI | - Consumer Price Index |
| CZM (P) | - Coastal Zone Management (Program) |
| DO | - Dissolved Oxygen |
| DOI | - U.S. Department of the Interior |
| DLC | - Division of Licensing and Compliance |
| EPA | - U.S. Environmental Protection Agency |
| F | - Degrees Fahrenheit |
| FERC | - Federal Energy Regulatory Commission |
| FPA | - Federal Power Act |
| FWS | - United States Department of Interior F ish and Wildlife Service |
| KBIC | - Keweenaw Bay Indian Community |
| MDEQ | - Michigan Department of Environmental Quality |
| MDNR | - Michigan Department of Natural Resources |
| mg/kg | - Milligrams per Kilogram |
| mg/l | - Milligrams per Liter |
| MHRC | - Michigan Hydro Relicensing Coalition |
| MPSC | - Michigan Public Service Commission |
| MSL | - Mean Sea Level |
| NGO | - Non-Governmental Organization |
| NGVD | - Surface Water Quality Division |
| T/E/S | - Threatened/Endangered/Sensitive |
| UPPCO | - Upper Peninsula Power Company |
| USFS | - United States Department of Agriculture F orest Service |
| USGS | - United States Geological Survey |
| WDNR | - Wisconsin Department of Natural Resources |

1.1.2 Definitions

Day defined, for operational purposes, as a 24-hour period, midnight to midnight.

Ex officio advisory member defined as an organization that participates in the settlement implementation process but does not have voting rights.

Licensee Upper Peninsula Power Company (UPPCO).

Maximum flow defined as the highest hourly flow for the day.

Michigan Hydro Relicensing Coalition a coalition of Michigan conservation organizations that include the Anglers of the Au Sable, Michigan United Conservation Clubs, Michigan Council of Trout Unlimited and Great Lakes Council of the Federation of Fly Fishers.

Minimum flow defined as the lowest allowable hourly flow at any facility.

Parties defined to be Upper Peninsula Power Company, United States Department of the Interior-Fish and Wildlife Service, United States Department of Agriculture-Forest Service, Michigan Department of Natural Resources, Michigan Department of Environmental Quality, Michigan Department of Attorney General, Wisconsin Department of Natural Resources, Keweenaw Bay Indian Community, the Michigan Hydro Relicensing Coalition, American Rivers and American Whitewater Affiliation.

Project the Bond Falls Hydroelectric Project (FERC Project No. 1864), which includes four dams, covered under this Settlement. The dams are Bond Falls Dam, Cisco Dam, Bergland Dam and Victoria Dam.

Resource Agencies are the Wisconsin Department of Natural Resources, Michigan Department of Natural Resources, Michigan Department of Environmental Quality, United States Department of Interior Fish and Wildlife Service, Keweenaw Bay Indian Community, and United States Department of Agriculture Forest Service.

Riparian Lands are lands adjacent to a watercourse.

Section 18 of the Federal Power Act the section of the Federal Power Act that refers to the reservation of authority to the Secretary of the Department of the Interior to prescribe fishways.

Settlement or Settlement Agreement defined as the Bond Falls Settlement Agreement.

Team the Settlement Implementation Team as provided for in section 9 including representatives of UPPCO, MDNR, WDNR, FWS, USFS, KBIC and ex officio advisory members.

Upper Peninsula Power Company or UPPCO means the company, its subsidiary and any affiliated companies and/or parent.

2. Standard Forest Service Provisions

2.1 *Condition No. 1* Modification of USDA Forest Service Conditions as a Result of Agency Administrative Appeals Process

Upon completion of the USDA Forest Service administrative appeals process at 36 Code of Federal Regulations (CFR) Part 215 or litigation, the Chief of the USDA Forest Service or the Secretary of Agriculture may direct that the terms and conditions submitted herein be modified. Therefore, the USDA Forest Service reserves the right to modify the terms and conditions submitted herein if so directed.

2.2 *Condition No. 2 - Compliance with USDA Regulations and Other Laws*

The Licensee shall comply with the regulations of the Department of Agriculture and all Federal, State, county, and municipal laws, ordinances, or regulations in regard to the area or operations covered by this license, to the extent federal law does not preempt ordinances or regulations.

2.3 Condition No. 3 - Habitat and Ground-Disturbing Activities on National Forest System Lands

The Licensee shall prepare site-specific plans, in consultation with USDA Forest Service, for all habitat and ground-disturbing activities on National Forest System Lands. The Licensee shall comply with USDA Forest Service sensitive species and integrated weed management guidelines and protocols in developing and executing such plans. The Licensee shall not file any such plans with the Commission or commence any such activities without approval from the USDA Forest Service.

2.4 Condition No. 4 - Changes to As-Licensed Project Works and Operations on National Forest System Lands

The Licensee shall consult with the USDA Forest Service regarding any proposed changes to as-licensed project works or operations on National Forest System Lands. The Licensee shall not commence or implement any changes to as-licensed project works or operations on National Forest System Lands without approval from the USDA Forest Service.

3. Additional Provisions

3.1 Condition No. 5 - Instream Flow Requirements [Condition deleted]

3.2 Condition No. 6 - Guaranteed Priority Flow Bypass Device and Gauging

3.2.1 Operation Compliance Plan

UPPCO shall within six months of license issuance develop and implement an operation compliance plan for the Bond Falls Project, in consultation with the Team. This plan shall include the following:

- The methodology for providing USGS-equivalent data for Middle Branch minimum flows and Bond Falls Canal flows using a combination of recorded gate openings, headwater elevations and verified gate rating curves developed by UPPCO in consultation with the Team. USGS-equivalent data means data of approximately the same quality as USGS reservoir elevation or discharge data, using similar measurement methods to those of the USGS.
- Provisions to record gate opening changes will be recorded by UPPCO each time a gate is changed.
- Provisions to continuously monitor Bond Falls Flowage and Victoria Reservoir headwater elevations.
- Provision to provide the Team a table of discharges for each dam at each gate opening and headwater elevation for the easy interpretation of compliance data.

- The methodology to provide USGS-equivalent data for all other sites, including Victoria Dam bypassed river channel, Victoria powerhouse tailwater, Lake Gogebic, Cisco Lake and Cisco Branch of the Ontonagon River.
- A three year test period to determine if UPPCO can demonstrate compliance using gate openings, headwater elevations, verified rating curves and power production.
- Provisions for UPPCO to contract with USGS to verify gate openings, headwater elevations and gate rating curves at Bond Falls semi-annually or at a frequency recommended by USGS for the initial three year period after license issuance. If USGS is unavailable, then an equivalent contractor can be used in consultation with the Team.
- The frequency of data recording for all sites and format of compliance reports following the recommendations of the Team.
- Provisions to provide compliance reports required by the FERC to the Team for project operations review.

3.2.2 USGS Gauging Stations [Section deleted]

3.3 *Condition No. 7* **Fish Screens and Passage Structures** [Condition deleted]

3.4 *Condition No. 8* **Fish and Wildlife Mitigation Plan**

3.4.1 Nuisance Plant Control

UPPCO shall, after consultation with the Team, file within 6 months of licensure for the FERC approval a nuisance plant plan for all four UPPCO impoundment. Funding for the implementation of this plan shall be from the Mitigation Enhancement Fund described in section 7 of the Settlement Agreement, filed July 11, 2000.

3.4.2 Woody Debris Transport and Management

UPPCO shall, after consultation with the Team, file within 6 months of licensure for the FERC approval a wood debris transport and management plan for all four UPPCO dams. The plan shall provide for the reasonable transport of vegetative material over the project dams. The extent of vegetative material that would be passed and the procedures for passing vegetative material shall be included in the plan and will depend on dam configuration, downstream hazards, cost of handling and ability of the downstream reach to transport the debris.

3.4.3 Wild Rice Restoration

The Team shall consider the restoration and enhancement of wild rice in Bond Falls Flowage, Cisco Lake, Lake Gogebic and Victoria Reservoir. If wild rice restoration and

enhancement is determined to be feasible and desirable, it shall be funded by the Mitigation Enhancement Fund [section 7 of the Settlement Agreement, filed July 11, 2000].

3.4.4 Wildlife Protection and Enhancement

3.4.4.1 Project Lands

All lands currently included within the Bond Falls Project boundaries shall remain within the project boundaries under the new license. The existing project boundaries, as so modified, are deemed to be sufficient for all regulatory purposes, and UPPCO shall have no obligation to expand the project boundaries beyond those previously established in the current FERC license. Use and occupancy of UPPCO lands within the Bond Falls Project area and project waters shall conform to the appropriate standard FERC land use license article.

3.4.4.2 Buffer Zone [section deleted].

3.4.4.3 Wildlife and Land Management Plan [section deleted]

3.5 Condition No. 9 Threatened, Endangered, and Sensitive Species Plan

3.5.1 Project Land Management

Project lands shall be managed in accordance with appropriate threatened, endangered, and sensitive species management guidelines as detailed below.

3.5.2 Annual Meetings Regarding Threatened, Endangered and Sensitive Species

Annual meetings shall be held by the Team to discuss land management issues that may impact threatened, endangered and sensitive species management. The meetings will be scheduled to occur not later than 45 days after the Resource Agencies have received updated information from the annual bald eagle nest surveys. The meetings will address implementation of the threatened and endangered species management guidelines during the following year.

3.5.3 Funding

All direct measures determined by the Team to be appropriate for the protection, mitigation and enhancement of threatened, endangered and sensitive species shall be funded by the Mitigation Enhancement Fund [section 7 of the Settlement Agreement, filed July 11, 2000].

3.5.4 Bald Eagle Protection and Management

3.5.4.1 Wildlife and Land Management Plan Consistency

UPPCO's Wildlife and Land Management Plan shall follow Federal and State bald eagle management guidelines. Direct measures determined by the Team to be necessary to implement the bald eagle management guidelines shall be funded by the Mitigation Enhancement Fund [section 7 of the Settlement Agreement, filed July 11, 2000].

3.5.4.2 Flight Reimbursement

MDNR or WDNR, as appropriate, shall at the discretion of the Team be reimbursed for flight time over the project boundary for the purpose of identifying bald eagle nest locations up to 50 percent of the total costs per year. Bald eagle flights and signage for eagles shall be funded by the Mitigation Enhancement Fund [section 7 of the Settlement Agreement, filed July 11, 2000].

3.5.5 Gray Wolf Protection and Management

UPPCO's Wildlife and Land Management Plan shall be consistent with the MDNR wolf management guidelines and the Ottawa National Forest Land Management Plan guidelines for the protection of gray wolf den sites, along with any future USFWS or WDNR guidelines, as appropriate. UPPCO shall discuss with the Team any planned construction of new roads on UPPCO-owned project lands. Direct measures determined by the Team to be necessary to implement the gray wolf management guidelines shall be funded by the Mitigation Enhancement Fund [section 7 of the Settlement Agreement, filed July 11, 2000].

3.5.6 Common Loon Protection and Mitigation

3.5.6.1 Common Loon Habitat Protection

UPPCO's land management plan shall limit camping to UPPCO designated locations on Bond Falls Project lands for enhancing loon nesting potential. UPPCO shall provide information to campers regarding islands not open to camping and promptly report known violation to the local law enforcement personnel. Boaters and campers shall be informed (through signage or other means) of laws and regulations related to protecting loons.

3.5.6.2 Common Loon Habitat Enhancement

Contour maps shall be developed for Bond Falls Flowage and Victoria Reservoir to provide for the proper siting of the loon nesting structures and to provide information to support other aspects of the Settlement Agreement. Two common loon nesting structures shall be installed on Bond Falls Flowage and one loon nesting structure shall be installed on Victoria Reservoir.

3.5.6.3 Funding

All loon nesting structures, signage and hydrographic mapping shall be funded by the Mitigation Enhancement Fund [section 7 of the Settlement Agreement, filed July 11, 2000].

3.5.7 Osprey Protection and Management

3.5.7.1 Wildlife and Land Management Plan Consistency

UPPCO's Wildlife and Land Management Plan shall be consistent with USFS osprey management guidelines along with any future WDNR or MDNR osprey management guidelines.

3.5.7.2 Osprey Habitat Enhancement

One osprey nesting platform shall be constructed on each of Bond Falls Flowage, Lake Gogebic and Victoria Reservoir using Mitigation Enhancement Fund monies [section 7 of the Settlement Agreement, filed July 11, 2000].

3.5.7.3 Funding

Direct measures determined by the Team to be necessary to implement the osprey management guidelines shall be funded by the Mitigation Enhancement Fund [section 7 of the Settlement Agreement, filed July 11, 2000].

3.6 Condition No. 10 ~~B~~Erosion Control Measures Plan

UPPCO shall be responsible for developing and implementing soil erosion control plans and measures for future construction activities related to project structures. Any other soil erosion control planning or mitigation, including stream or reservoir bank rehabilitation and Lake Gogebic shoreline protection, shall be funded by the Mitigation Enhancement Fund [section 7 of the Settlement Agreement, filed July 11, 2000]. Appropriate soil erosion control measures shall also be part of any construction funded by the Mitigation Enhancement Fund [section 7 of the Settlement Agreement, filed July 11, 2000].

3.7 Condition No. 11 ~~B~~Cultural Resources Protection

3.7.1 Responsibility

UPPCO shall be responsible for compliance with section 106 of the National Historic Preservation Act, including all State Historic Preservation Officer requirements.

3.8 Condition No. 12 ~~B~~Recreation Plan [Condition deleted]

3.9 Condition No. 13 ~~B~~Storage Reservoir Operation Plan

3.9.1 Bond Falls Dam and Flowage

3.9.1.1. Bond Falls Flowage Target Elevations

During normal project operation, UPPCO will make a good faith effort to meet or exceed the following end-of-month target elevations (local datum) at Bond Falls Flowage:

| | |
|-----------|------------|
| January | 136.0 feet |
| February | 134.0 feet |
| March | 132.5 feet |
| April | 136.0 feet |
| May | 139.0 feet |
| June | 137.5 feet |
| July | 136.5 feet |
| August | 135.0 feet |
| September | 135.0 feet |
| October | 138.0 feet |
| November | 138.0 feet |
| December | 137.0 feet |

3.9.1.2 Bond Falls Flowage Minimum End-of-Month Headwater Elevations

UPPCO shall maintain the following minimum end-of-month elevations at Bond Falls Flowage except during dry water years as defined in Condition No. 5 above:

| | |
|-----------|-------------|
| January | 135.0 feet |
| February | 133.0 feet |
| March | 132.0 feet |
| April | 135.0 feet |
| May | 138.0 feet |
| June | 137.0 feet |
| July | 136.0 feet |
| August | 134.5 feet |
| September | 134.5 feet |
| October | 134.0 feet |
| November | 134.0 feet |
| December | 136.0 feet. |

The first three (3) years of the license term shall serve as a trial period to determine whether these target elevations can be attained without unduly affecting project operations. After the first three years, the USDA Forest Service as a part of the Team will assess the viability of these target elevations. Changes to the operating criteria may be made with the agreement of the Team.

3.9.1.3 Winter Bond Falls Flowage Elevations

UPPCO shall maintain the Bond Falls Flowage elevation between 132 and 140 feet local datum (1,467.9 to 1,475.9 feet mean sea level [MSL]) from February 1 through April 30.

3.9.1.4 Open Water Season Bond Falls Flowage Elevations

UPPCO shall maintain the Bond Falls Flowage elevation between 134 and 140 feet local datum (1,469.9 to 1,475.9 feet MSL) from May 1 through January 31.

3.9.2 Victoria Dam and Impoundment [section deleted]

3.9.3 Lake Gogebic and Bergland Dam

3.9.3.1 Reservoir Elevation Limits

UPPCO shall operate Bergland Dam to maintain Lake Gogebic within the following limits:

- September 15 through February 29 1,293.7 to 1,295.7 feet MSL
- March 1 through March 31 1,293.7 to 1,294.7 feet MSL
- April 1 through April 24 1,293.7 to 1,296.2 feet MSL
- April 25 through June 10 1,295.7 to 1,296.2 feet MSL
- June 11 through September 14 1,295.2 to 1,296.2 feet MSL.

3.9.3.2 Lake Gogebic Target Elevations

During normal project operation, UPPCO will make a good faith effort to meet as a minimum the following end-of-month target elevations at Lake Gogebic:

- January 1,293.9 feet MSL
- February 1,293.9 feet MSL
- March 1,294.2 feet MSL
- April 1,295.9 feet MSL
- May 1,295.9 feet MSL
- June 1,295.7 feet MSL
- July 1,295.7 feet MSL
- August 1,295.7 feet MSL
- September 1,295.7 feet MSL
- October 1,294.7 feet MSL
- November 1,294.2 feet MSL
- December 1,294.2 feet MSL

3.9.4 Cisco Dam and the Cisco Chain of Lakes

3.9.4.1 Lake Elevation Limits

UPPCO shall maintain Cisco Lake elevation at or above 1,683.0 feet MSL at all times. The lake elevation shall be targeted between 1683.4 and 1683.9 feet MSL.

3.9.4.2 Cisco Dam Operation

UPPCO shall develop and implement a Cisco Dam Operation Plan in consultation with the Team within 6 months of the issuance of the FERC license for the project. This plan will provide for the maintenance of lake elevations as detailed in section 3.1.4.1. UPPCO shall operate Cisco Dam in a manner to attempt to attenuate fluctuations in flows to the river.

3.9.4.3 Cisco Dam Ownership and Operation Under Any New Owner

UPPCO will attempt, with the Team's support, to find a new owner for Cisco Dam in order to allow it to be removed from the Bond Falls Project license. Any new owner shall be required to operate the dam according to the Operation Plan developed by the Team. If Cisco Dam is removed from the license and operated by a new owner, UPPCO shall install and finance up to \$75,000 (in December 1998 dollars adjusted for CPI-0.5%) for a 75-foot-long spillway structure with a small adjustable spill area or another acceptable engineering design for very high-flow periods to allow dam operation as established in the Operating Plan.

3.9.5 Emergencies Beyond UPPCO's Control

The above operating criteria and conditions may be temporarily modified for emergency conditions beyond UPPCO's control.

3.10 Condition No. 14 ~~B~~Water Quality [Condition deleted]

3.11 Condition No. 15 ~~B~~Mitigation and Enhancement Fund [Condition deleted]

3.12 Condition No. 16 ~~B~~Future Dam Responsibility [Condition deleted]

3.13 Condition No. 17 ~~B~~Implementation and Oversight [Condition deleted]