

144 FERC ¶ 61,212
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Jon Wellinghoff, Chairman;
Philip D. Moeller, John R. Norris,
Cheryl A. LaFleur, and Tony Clark.

New York Power Authority

Project No. 2216-081

ORDER DENYING REQUEST FOR REHEARING AND REQUESTS FOR
IMMEDIATE ACTION

(Issued September 19, 2013)

1. On March 28, 2013, the Niagara Preservation Coalition, Inc. (Coalition) filed a request for rehearing of Commission staff's March 8, 2013 letter (March 2013 letter) to the New York Power Authority (NYPA), the licensee for the Niagara Power Project No. 2216, located in Niagara County, New York, on the Niagara River.¹ The March 2013 letter responded to NYPA's February 8, 2013 prior notice of a proposed conveyance of project lands to Maid of the Mist Corporation (MaidCo) for development of a mooring and winter storage facility for MaidCo's Niagara Falls excursion boats. The March 2013 letter determined that the proposed use is consistent with the project's recreation plan under article 411(d)(6) and that NYPA can grant the proposed conveyance without prior Commission approval. As discussed below, we deny the Coalition's request for rehearing. In addition, we deny the Coalition's requests for immediate action.

¹ On May 1, 2013, NYPA filed a motion for reconsideration of the Commission's April 29, 2013 order tolling the deadline for acting on the Coalition's filing. NYPA argues that there is no basis for the Commission to consider the Coalition's request for reconsideration as a request for rehearing, because the Coalition's request does not comply with the Commission's procedural rehearing requirements in 18 C.F.R. § 385.713 (2013). Moreover, NYPA claims that considering the Coalition's filing as a request for rehearing unjustifiably facilitates the Coalition's exhaustion of administrative remedies. The Commission disagrees. The pleading was styled as a request for reconsideration, but we will exercise our discretion to treat it as a timely request for rehearing of a final decision. *See, e.g., Percheron Power, LLC*, 139 FERC ¶ 61,230, at n.7 (2012). Therefore, NYPA's motion for reconsideration is denied.

Background

2. The Niagara Power Project No. 2216 is located in Niagara County, New York, on the Niagara River, a 35-mile-long waterway that connects Lake Erie and Lake Ontario, and is an international boundary water between the United States and Canada. The project does not occupy federal lands. The project has two developments: the 2,515.5-megawatt (MW) conventional Robert Moses development and the 240-MW Lewiston pumped storage development, for a total installed capacity of 2,755.5 MW. The project boundary encloses all project features, including the Lewiston Reservoir, the forebay, the Robert Moses and Lewiston plants, the conduits, the intake structures, and project-related recreation facilities, approximately one-third of a mile of shoreline near the intake structures, and approximately 8,000 feet of shoreline in the City of Niagara Falls. The boundary encompasses approximately 3,066 acres, including the Lewiston Reservoir.

3. The original license for the project was issued in 1957, with an expiration date of 2007. In 2007, the Commission issued NYPA a new license for the project, with an expiration date of 2057.² Article 411, Use and Occupancy, of the new license provides generally that NYPA has the authority to grant permission for certain types of non-project uses and to convey certain interests in project lands and waters for such non-project uses without prior Commission approval, 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.

4. On February 8, 2013, NYPA filed with the Commission a notice pursuant to license article 411(d) of a proposed conveyance that will enable MaidCo to develop a mooring and winter storage facility for MaidCo's Niagara Falls excursion boats on project lands. NYPA asserted that the proposed facility qualifies for a prior notice procedure under article 411(d), as it will be a marina (article 411(d)(5)) and a recreational development consistent with the approved recreation management plan (article 411(d)(6)).³ NYPA maintained that the facility will provide additional public recreation opportunities and public safety benefits and is not expected to adversely affect cultural, scenic, or environmental values. NYPA also explained that its request for expedited action was necessary to ensure that MaidCo's boats can be safely secured by November 2013 in advance of the winter elements.⁴

² *New York Power Authority*, 118 FERC ¶ 61,206, *reh'g denied and clarification*, 120 FERC ¶ 61,266 (2007).

³ *See* February 8, 2013 notice at 3-4.

⁴ In the past, MaidCo's winter storage, refueling, and maintenance activities took place at a facility on the Canadian side of the Niagara River owned by the Province of

5. NYPA's notice stated that the proposed facility would be located on approximately 2.9 acres of project lands that are leased by NYPA to the New York State Office of Parks, Recreation, and Historic Preservation (New York Parks) through the Niagara Gorge Discovery Center Agreement (Gorge Agreement). The Gorge Agreement requires approval by NYPA of modifications to existing improvements or additional structures, facilities, and improvements. NYPA proposed to approve the New York Parks' issuance of a land use permit to MaidCo for a term which will end within the term of the current license.

6. The proposed facility would be located in the Niagara River Gorge at the base of the wall marking the site of the former Schoellkopf Power Station No. 3. Most of the Schoellkopf Power Station collapsed in 1956 due to a rockslide and was demolished and removed in the early 1960s;⁵ three structures survive.⁶ The Schoellkopf Power Station site is approximately 1.5 miles downstream from and to the north of the American Falls and 1,600 feet downstream from Rainbow Bridge, which crosses the Niagara River between Niagara Falls, New York and Niagara Falls, Ontario. The site was listed on the

Ontario. MaidCo's license to use the Ontario facility expires on December 31, 2013, and the Province has determined that it will not renew MaidCo's license. *See* February 8, 2013 notice at 1.

⁵ Historically, the Power Station consisted of three hydroelectric powerhouses (3A, 3B, and 3C). Powerhouses 3B and 3C collapsed into the Niagara River in 1956, after which both were demolished. Powerhouse 3A was repaired and operated until 1961 and was demolished in 1962. *See* National Register of Historic Places Registration Form submitted to the National Park Service by the New York State Historic Preservation Officer (SHPO) on December 27, 2012, Attachment A to the Coalition's rehearing request. The form contains an extensive description of the history of the Power Station and the existing site.

⁶ Those structures, identified in the National Register application by the SHPO as contributing structures associated with Powerhouse 3A, include: the stone wall from the base to the lip of the Gorge which encloses the (sealed) penstocks; the abandoned elevator shaft running between the upper and lower levels of the station site; and the tailraces for the powerhouse. New York Parks has determined that these surviving structures have sufficient integrity to represent the earlier history of the site. *See also* March 27, 2013 letter from New York Parks to NYPA (Attachment B to June 27, 2013 answer of NYPA to the Coalition's June 12, 2013 request for immediate action).

National Register of Historic Places on February 20, 2013, under National Register Criterion A for its association with the collapse of powerhouses 3B and 3C in 1956.⁷

7. The proposed facility would consist of:
- (1) a lower platform with outdoor winter storage for two excursion boats and a seasonal floating dock;
 - (2) an upper platform with winter storage for a work boat and a maintenance building;
 - (3) a seasonal floating dock for maintenance and refueling;
 - (4) a new elevator within an existing elevator shaft at the Schoellkopf Power Station site for construction, maintenance, and transporting recreationists to the base of the Gorge;
 - (5) a vertical marine lift to remove the excursion boats from and replace them into the river; and
 - (6) an Americans with Disabilities Act (ADA)-compliant walkway, ramp, and observation deck for use by recreationists during the warm weather recreation season.⁸

8. NYPA maintained in the notice that the facility would result in additional recreational opportunities for the Gorge, consisting of: (1) easier access for recreationists by elevator to the bottom of the Gorge and the hiking trail that passes through the facility site; (2) the ADA-compliant walkway, ramp, and shoreline observation deck allowing recreationists to view the river and the Canadian side of the Gorge; (3) enhanced excursion boat experience from improvements in ticketing and onboard comfort facilities; and (4) improved public safety because the elevator will be available if emergency services are needed in the Gorge.⁹

9. On February 20, 2013, the Coalition filed a motion to intervene and protest in response to NYPA's notice. The Coalition claimed that the proposed conveyance does not fall within the scope of article 411(d), since the proposed facility is neither a marina

⁷ See April 18, 2013 letter from the Coalition to the Federal Advisory Council on Historic Preservation (ACHP), Exh. B, and April 29, 2013 letter from ACHP to Corps.

⁸ See February 8, 2013 notice at 3.

⁹ *Id.*

nor a recreational development. The Coalition argued that NYPA should not be permitted to classify the entire facility as a recreational development simply because small parts of the facility may be used by recreationists. In addition, the Coalition contended that the site plans show that the facility will necessitate significant impacts to the historically significant surviving structures of the Schoellkopf power station and will destroy the historical character of the site as a whole.

10. On February 21, 2013, NYPA filed an environmental analysis undertaken pursuant to the New York State Environmental Quality Review Act (SEQRA). In its cover letter, NYPA stated that the analysis confirms that the proposed conveyance will not adversely affect cultural, scenic, or environmental values. In addition, NYPA asserted that the facility constructed pursuant to the conveyance will be subject to conditions required by any necessary federal, state, and local permits, and that NYPA continues to engage in outreach, including recent meetings with Indian nations and the State Historic Preservation Office (SHPO), which is an office within New York Parks.

11. On March 8, 2013, the Commission's Office of Energy Projects, Division of Hydropower Administration and Compliance, issued a letter to NYPA, which concurred that the proposed use is consistent with the project's recreation plan under article 411(d)(6) and determined that NYPA may grant the proposed conveyance without prior Commission approval. Commission staff explained that under the Gorge Agreement, the Parks Office has significant control over the use of the project lands it leases from NYPA, which are identified as a project recreation facility under the project's approved recreation plan. Through its execution of a Memorandum of Understanding with NYPA and MaidCo in December 2012, New York Parks has indicated its support for the proposed use. Commission staff further explained that, while the proposed use involves a private business, it would also provide additional public recreational opportunities in the State Park, including ADA access to the observation deck and additional viewing and interpretive opportunities at the lower gorge. In addition, the March 2013 letter found that, based on the environmental analysis provided by NYPA, there would be minimal impacts to the resources in the area.

12. The Coalition filed its request for rehearing on March 28, 2013.¹⁰ The Coalition claims the March 2013 letter ignored the Coalition's February 20, 2013 protest, which demonstrated that the conveyance does not comply with article 411 of NYPA's license. In addition, the Coalition claims that other issues exist with the conveyance, including problems with the environmental analysis submitted by NYPA. On May 16, 2013, the Coalition filed a motion to lodge materials in support of its request for rehearing, which

¹⁰ The Coalition has subsequently filed lawsuits in state and federal court challenging approval of the proposed construction by state and federal agencies.

included an April 29, 2013 letter from the ACHP to the U.S. Army Corps of Engineers (Corps); a February 5, 2013 e-mail from NYPA to MaidCo regarding action items; and documents regarding funds provided by the U.S. Department of the Interior through the Land and Water Conservation Fund (LWCF) to improve the Gorge hiking trail.

13. On June 12, 2013, the Coalition filed a request for immediate action on its rehearing request and for an order directing NYPA to cease all construction activities at the power plant site until NYPA complies with the Unanticipated Discoveries Plan of the Historic Properties Management Plan (HPMP) for the Niagara Project.¹¹ Specifically, the Coalition claims that NYPA has discarded an historic steel beam without following the protocol outlined in the plan. NYPA responded to the Coalition on June 26, 2013, denying the allegations. On July 2, 2013, the Coalition filed a second request for immediate action and temporary suspension of construction pending preparation of an independent archaeological study by NYPA to determine the proper disposition for the remains of the Schoellkopf Power Plant.

Discussion

A. Scope of Article 411(d)

14. The primary issue on rehearing is whether the March 2013 letter erred in determining that the conveyance proposed by NYPA was within the scope of license article 411(d), such that the conveyance could be granted without further Commission approval. As discussed below, we find that the March 2013 letter's determination was reasonable.

15. In its request for rehearing, the Coalition argues that the March 2013 letter ignored the issues raised in the Coalition's protest, which demonstrated that the proposed conveyance did not comply with license article 411.¹² Specifically, the Coalition asserts

¹¹ See *New York Power Authority*, 126 FERC ¶ 62,184 (2009) (order approving HPMP).

¹² Article 411 is the standard land use article that has been included in federal hydroelectric licenses since 1980. See *Brazos River Authority*, 11 FERC ¶ 61,162 (1980). As explained in the order issuing a new license for the Niagara Project, requiring a licensee to obtain prior Commission approval for every use or occupancy of project land would be unduly burdensome. *New York Power Authority*, 118 FERC ¶ 61,206, at P 96 (2007). The standard land use article allows the licensee to grant permission, without prior Commission approval, for certain uses and occupancies of project lands, which must be consistent with the purposes of protecting and enhancing the scenic, recreational, and environmental values of the project.

that MaidCo's proposed facility does not qualify as one of the types of use and occupancy that do not require Commission approval. We disagree.

16. The March 2013 letter explained that the proposed use would occupy lands currently leased by New York Parks for the Niagara Gorge Discovery Center and portions of associated hiking trails. This facility is identified as a project recreation facility under the project's approved recreation plan. The March 2013 letter found that the proposed use, while it involves a private business, would provide additional public recreational opportunities in the State Park, including ADA access to the observation deck and additional viewing and interpretive opportunities at the lower gorge. In addition, the March 2013 letter stated that the proposed use would be constructed, operated, and maintained through the required agency permits and requirements, including, but not limited to, permits from the Corps, New York Department of Environmental Conservation, and New York Department of State, and under the direct oversight of New York Parks. Finally, the March 2013 letter found that, based on the environmental analysis provided by NYPA, there would be minimal impacts to the resources in the area. Based on this information, Commission staff concurred that the proposed use is consistent with the project's recreation plan under paragraph (d)(6) of article 411, and no further Commission action was necessary.

17. The March 2013 letter further stated that the land use permit must include the conditions contained in paragraph (e)(3) of article 411,¹³ and the use must comply with all required agency permits and approvals. Finally, the letter reminded NYPA that it has the continuing responsibility to supervise and control the proposed site to ensure compliance with the applicable provisions of article 411 and approved HPMP, and to ensure that the construction, operation, and maintenance of the proposed use will occur in a manner that will protect the recreational, scenic, and other environmental values of the project.

18. The Coalition contends that the proposed facility cannot be classified as a "recreational development" under article 411(d)(6), because only a small portion of the

¹³ Subsection (e)(3) requires the licensee to: (1) consult with federal and state fish and wildlife or recreation agencies, as appropriate, and the SHPO; (2) determine that the proposed use is not inconsistent with the recreation plan; and (3) ensure that the proposed use will not (a) endanger health, create a nuisance, or otherwise be incompatible with overall project recreational use; (b) include reasonable precautions to protect the scenic, recreational, and environmental values of the project; and (c) not unduly restrict public access to project waters. In addition, subsection (e)(3) reserves the right of the Commission to require the licensee to take reasonable remedial action for the protection and enhancement of the project's scenic, recreational, and other environmental values.

facility is intended for public access, while the dominant features of the facility, i.e., the storage platform and maintenance building for MaidCo's excursion boats, plus the crane that will raise and lower MaidCo's boats, will not be useable by the public.¹⁴ The Coalition argues that the March 2013 letter erroneously interpreted article 411(d)(6) in asserting that the entire facility may be authorized as a recreational development.

19. Contrary to the Coalition's argument, the March 2013 letter did not assert that the entire proposed facility is a recreational development. Commission staff reasonably found that the facility would provide additional recreational opportunities and was consistent with the project's approved recreation plan and, therefore, was within the scope of article 411(d)(6). The Commission disagrees with the Coalition's assertion that the enhanced public access will be at the expense of the existing parkland and the historic resources at the site. NYPA submitted information, including an environmental analysis, which indicates there will be minimal impacts to the resources in the area. Although NYPA acknowledges there may be potential visual impacts, NYPA has consulted with other agencies, including the SHPO, pursuant to the HPMP to minimize those impacts.¹⁵

20. In addition, contrary to the Coalition's claim, the proposed facility also qualifies as a permitted use under article 411(d)(7). As the Coalition acknowledges, article 411(d)(7) provides that the NYPA may authorize "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

¹⁴ See rehearing request at 3-4.

¹⁵ See, e.g., March 27, 2013 letter from New York Parks to NYPA at 2 (Attachment B to NYPA's June 27, 2013 answer to the Coalition's request for immediate action). In that letter, the SHPO concurred with NYPA's finding under the HPMP that the action will have no adverse effect on the involved historic resources. The SHPO explained that the facility will be placed within an isolated portion of the Niagara Reservation, which will help screen the limited viewing potential. In addition, design efforts that include muted color choices and appropriate materials will also help to minimize potential visual impacts. The SHPO further found that the new facility does not remove or destroy the remnants of the Schoellkopf Power Plant, which will remain in situ largely beneath a protective base to be built over the existing slabs for the new use. The SHPO stated: "The new facility does not directly or indirectly affect the understanding or the history of this site or lessen its historic values." Similarly, the April 29, 2013 letter from the ACHP to the Corps (Exhibit B to the Coalition's May 16, 2013 motion to lodge), states that reasonable resolution of adverse effects will be achieved based on the following mitigating conditions: use of compatible colors and types of building materials, lighting, site burial, and development of public interpretation.

more than 50 total acres of project lands for each project development are conveyed under this clause (d)(7) in any calendar year. In this instance, the amount of land in the proposed conveyance is less than five acres. Moreover, the land conveyed is located more than 75 feet from project waters at normal surface elevation. The Coalition asserts that the land conveyed is less than 75 feet above project waters and that riprap and retaining walls are planned in the water.¹⁶ The “waters” referred to by the Coalition is the Niagara River. However, the Niagara River is not “project water,” but is instead outside the boundary of the project.¹⁷ The project waters, i.e., those located within the boundary of the project, which include the forebay and the Lewiston Reservoir, are more than 75 feet horizontally from the land that will be conveyed to MaidCo.¹⁸

21. Thus, the proposed non-project use of the land falls within the scope of article 411(d), as both recreational development and other covered uses.

B. Other Issues

22. The Coalition argues that the March 2013 letter ignored several other concerns raised in the Coalition’s protest. For example, the Coalition claims that the Commission erred in authorizing the construction of new structures on land that requires environmental remediation, based on a soil analysis report conducted by the Coalition. The Coalition also asserts that the March 2013 letter should have required a Spill Control and Countermeasures Plan for fuel storage at the site. In addition, the Coalition argues that the March 2013 letter should have required NYPA and MaidCo to provide additional information regarding the impact of the facility on a threatened plant species, Smooth Cliffbrake, which has been identified in certain locations along the cliff face adjacent to the facility. Finally, the Coalition claims that the March 2013 letter ignored the Coalition’s concerns that the proposed facility will detract from the scenic beauty, and harm the public’s enjoyment of, the area.

23. None of these concerns was ignored in the March 2013 letter. The standard land use article contains conditions that are designed to ensure that any authorized use or conveyance permitted under the article is consistent with the project license and the

¹⁶ See rehearing request at 7.

¹⁷ Other licenses have substituted the phrase “project reservoir” for “project waters” in the standard land use article, which indicates that “reservoir” and “waters” are interchangeable terms. See, e.g., *South Carolina Electric & Gas Co.*, 137 FERC ¶ 62,217, at Ordering Paragraph (B) (2011).

¹⁸ There is no indication that NYPA will convey more than 50 total acres of project lands for the proposed use in calendar year 2013.

protection of the project's recreational, scenic, and environmental values.¹⁹ The article also reserves the Commission's right to require the licensee to take remedial action to protect those values. NYPA's prior notice complied with the requirements in the standard land use article and was supplemented by the SEQRA analysis, which addressed all of the concerns in the Coalition's protest. Based on these submissions, Commission staff reasonably concluded that the proposed use is consistent with the project's recreation plan and that there would be minimal impacts to the resources in the area. The March 2013 letter also directed NYPA to include the conditions contained in subsection (e)(3) of article 411 and to comply with all required agency permits and approvals. Finally, the March 2013 letter reminded NYPA of its continuing responsibility to ensure compliance with the standard land use article and the approved HPMP and protection of the recreational, scenic, and other environmental values of the project.

24. In addition to the concerns raised in its protest, the Coalition claims that it has since identified other problems with the conveyance. Specifically, the Coalition asserts that NYPA failed to consult with the appropriate federal and state agencies regarding the impacts to the Schoellkopf Power Plant Site and has failed to demonstrate that it will ensure that MaidCo will mitigate impacts to the site. The Coalition also argues that the Commission erroneously relied on the SEQRA and must prepare an environmental impact statement. In addition, the Coalition contends that the conveyance may result in the unlawful conversion of federally-funded parkland in violation of the LWCF.

25. The Commission is not persuaded that any of the alleged flaws in the conveyance require further action on the Commission's part. The evidence in the record demonstrates that NYPA has consulted with the SHPO, other agencies, and Indian tribes in compliance with the HPMP and has proposed appropriate mitigative measures for the potential impacts to the resources in the area. As discussed above, the proposed use meets the requirements in the standard land use article for conveyance without prior Commission approval. Therefore, the Commission is not required to prepare an environmental impact statement in this situation.²⁰ To the extent the Coalition asserts that the SEQRA process is inconsistent with state law, those issues are more appropriately addressed in a state forum. With regard to the LWCF, it is not clear from the alleged facts that any violation has occurred; the Coalition itself asserts only that the conveyance "may" result in the

¹⁹ See, e.g., *South Carolina Electric & Gas Co.*, 137 FERC ¶ 62,217, at P 3 (2011).

²⁰ See *Brazos River Authority*, 11 FERC ¶ 61,162, at 61,347 (1980) (license amendment order authorizing licensee to allow certain uses of project lands without prior Commission approval is not a major federal action significantly affecting the quality of the human environment).

unlawful conversion of federally-funded parkland. In any event, as the state liaison for the LWCF, New York Parks is the appropriate decisionmaker as to whether any conversion will occur in this instance.²¹ No further action is required by the Commission.

C. Requests for Immediate Action

26. On June 12, 2013, the Coalition filed a letter with the Commission alleging that NYPA had breached its obligations under the Unanticipated Discoveries Plan of the HPMP and requesting that the Commission act immediately on the Coalition's pending request for rehearing. The Coalition further requested the Commission to direct NYPA to cease all construction activity immediately until the proper measures required by the Unanticipated Discoveries Plan are implemented, which includes an archaeological evaluation of the project site and its ruins pursuant to an EIS. More specifically, the Coalition claims that historic ruins of the power plant (specifically, a steel beam) are not being preserved, but discarded for off-site disposal.

27. NYPA filed an answer to the Coalition's letter on June 27, 2013, which asserted that NYPA was in full compliance with the Unanticipated Discoveries Plan. NYPA asserted that the steel beam cited by the Coalition has no archaeological resource value and its discovery was not unanticipated.²² NYPA stated that the three structures that were determined by the SHPO to survive with sufficient integrity to represent the history of the site are being preserved in place.²³ NYPA contends that the buildings or remaining debris at the site do not have sufficiently distinctive architecture or engineering to be eligible for listing in the National Register.²⁴ Moreover, NYPA and New York Parks have never proposed to preserve the non-National Register-eligible remnants in place.²⁵

²¹ See *City of Watertown, New York*, 71 FERC ¶ 62,193, at 64,372 (1995).

²² See Affidavit of Robert F. Panepinto, NYPA's Agency Preservation Officer, Attachment A to NYPA's answer.

²³ As stated above, the three structures are: (1) the stone wall concealing the Powerhouse 3A penstocks; (2) the elevator shaft running between the upper and lower levels of the station site; and (3) the tailraces for Powerhouse 3A, which have been filled in, but remain otherwise intact. See March 27, 2013 letter from New York Parks to NYPA, Attachment B to NYPA's answer.

²⁴ See Affidavit of John Bonafide, New York Parks, ¶¶ 6-7, Attachment C to NYPA's answer.

²⁵ NYPA answer at 4.

Finally, NYPA states that it has fulfilled its responsibilities under the Unanticipated Discoveries Plan by recovering not only potentially National Register-eligible objects, but also other objects that may be of historical interest, especially those related to the production of electric power and to human activity, such as tools. As such items are uncovered during construction, the location is noted and the object is photographed before being taken into storage so that it can be examined by qualified persons and an appropriate disposition can be made.²⁶

28. On July 2, 2013, the Coalition filed a second request for immediate action. The Coalition asserts that NYPA has taken inconsistent positions regarding the removal of remains of the power plant site. The Coalition further contends that the project should be temporarily stopped pursuant to the Unanticipated Discoveries Plan so that NYPA can prepare an archaeological study that involves New York Parks and an independent archaeologist in the decision making process as to what remains are historically significant and should be saved.²⁷

29. The Commission denies the Coalition's request for immediate action. Since this order denies the Coalition's rehearing request, the Coalition's request to issue a decision on the rehearing request is moot. Moreover, based on the evidence in the record, it does not appear that NYPA has violated the Unanticipated Discoveries Plan. As outlined in the affidavits submitted by NYPA, NYPA has instructed the general contractor and outside construction and engineering consultants about the requirements of the Unanticipated Discoveries Plan. As required by the plan, if any unanticipated objects are encountered during excavation or construction, construction work must stop and NYPA must be notified. NYPA will then arrange for an archaeologist to go to the construction site to examine the potential resource. In addition to instructing them on NYPA's obligations with respect to potentially National Register eligible objects, NYPA has informed the general contractor and outside consultants of NYPA's interest in recovering other objects that may be of historical interest.

30. According to NYPA, on May 6, 2013, its Agency Preservation Officer designee, Mr. Robert F. Panepinto, was on site monitoring compliance with the Unanticipated Discoveries Plan when an employee of the general contractor showed Mr. Panepinto the column identified by the Coalition.²⁸ Mr. Panepinto identified the column as a structural

²⁶ See Affidavit of Robert F. Panepinto at ¶ 19, Attachment D to NYPA's answer, and Attachment A thereto.

²⁷ See July 2, 2013 second request for immediate action at 2-3.

²⁸ See Affidavit of Robert F. Panepinto at ¶ 11, Attachment A to NYPA's answer.

element of Powerhouse 3A and determined that it was not an unanticipated discovery, nor did it have any archaeological significance.²⁹

31. The Coalition appears to interpret the Unanticipated Discoveries Plan as requiring immediate work stoppage and evaluation by a professional archaeologist for potential eligibility for listing in the National Register for all remains encountered during excavation or construction. However, this is not an accurate description of the plan requirements. The plan does not require that this protocol be followed unless the project supervisor believes that the discovery is an archaeological resource.³⁰ In this instance, the agency preservation officer designee was on site and was shown a column by construction personnel. The agency preservation officer designee identified the column as an object that was known prior to construction and was not an archaeological resource. Therefore, NYPA was not required to follow the protocol in the Unanticipated Discoveries Plan. In addition, the Coalition asserts that the Unanticipated Discoveries Plan requires that an archaeological study be performed documenting all of the remains at the site. However, there is no such requirement in the plan. Thus, there appears to be no basis for requiring NYPA to suspend construction.

The Commission orders:

(A) The request for rehearing filed by the Niagara Preservation Coalition on March 28, 2013, is denied.

(B) The Coalition's requests for immediate action filed on June 12, 2013, and July 2, 2013, are denied.

By the Commission.

(S E A L)

Kimberly D. Bose,

²⁹ *Id.*

³⁰ *Id.*, Exhibit A.

Secretary.