

January 27, 2006

**RESPONSE TO COMMENTS ON THE
NOTICE OF COMPLETE APPLICATION
FOR THE NYPA NIAGARA PROJECT
LOCATED IN THE TOWNS OF NIAGARA AND LEWISTON,
NIAGARA COUNTY**

**NYSDEC Project No: 9-2924-00022/0001
Federal Energy Regulatory Commission Project No. 2216**

The New York Power Authority (NYPA), Niagara Power Project has been in operation since 1961 and consists of two river-water intake structures, twin underground concrete conduits, an open forebay, the Lewiston Reservoir, the Lewiston Pump Generating Plant, the Robert Moses Niagara Power Plant and a 35-acre switchyard. The WQC application was submitted to NYSDEC on 18 August 2005 in connection with the filing of an application for the relicensing of the Niagara Power Project with the Federal Energy Regulatory Commission (FERC). The FERC application contains a preliminary draft environmental assessment, as well as the Power Authority's Offer of Settlement which identifies, among other things, eight primary Habitat Improvement Projects, three public access points, a Fish and Wildlife Habitat Enhancement Fund, proposed for inclusion in the FERC license, as well as a land acquisition fund. The Project, as conditioned in the WQC, complies with applicable sections of the Federal Water Pollution Control Act and also will comply with applicable New York State effluent limitations, water quality standards and thermal discharge criteria.

The New York State Department of Environmental Conservation (NYSDEC) published a Notice of Complete Application in the Environmental Notice Bulletin (ENB) on September 28, 2005. The NYSDEC made a determination that the applications were complete and a technical review commenced. The notice was republished in the ENB on October 5, 2005 to correct a reference to compliance with the New York State Historic Preservation Act. Each of the notices indicated that NYSDEC would accept written comments postmarked on or before October 28, 2005. The notice was also published in the Niagara Gazette on October 5, 2005 and in the Buffalo News on October 7, 2005.

Comments were received from the Eastern Niagara Project Power Alliance ("ENPPA") and the Town of Lockport, New York during the comment period. This responsiveness summary is intended to address each comment contained in the letters. However, since both of the letters contained similar or identical comments, this summary has grouped like comments and responded accordingly to each comment instead of responding to each individual comment received.

The comments were grouped into the following nine categories:

1. Applicability of the State Environmental Quality Review Act (SEQRA);
2. Coastal Zone Management;
3. Opportunity for Public Review of Settlement Agreement;
4. Procedural Questions;
5. Water Quality Issues;
6. Increase in Value of Project Power Warrants Additional Mitigation;
7. Inventory of Lands for Surplus;
8. NYPA Control of Boundary Waters; and
9. Habitat Improvement Projects.

The following is a summary of the comments received, and responses to those comments

1. SEQRA Does Not Apply in this Case; SEQRA is Preempted by the Federal Power Act.

Responders state that the draft water quality certificate should be made the subject of an environmental review pursuant to the State Environmental Quality Review Act (“SEQRA”)(ECL Article 8, 6 NYCRR part 617). Responders also state that DEC is in error when finding that the application of SEQRA to this project is wholly preempted because the Federal Energy Regulatory Commission (“FERC”) comprehensively and exclusively regulates the field of hydropower licensing pursuant to the Federal Power Act (“FPA”) (16 USC §791a *et seq.*). Federal and State judicial decisions support this preemptive effect.

The FPA therefore preempts the DEC from conducting a SEQRA environmental impact assessment with respect to NYPA’s certificate application. This is not detrimental to the public interest because FERC conducts an assessment of the environmental impacts of all aspects of NYPA’s federal license application, including effects on water quality, pursuant to the FPA¹ and the National Environmental Policy Act (“NEPA”) (42 USC §4321 *et seq.*).² DEC is not preempted from issuing a water quality certificate because the authority for that stems from other federal legislation, namely the Clean Water Act (33 USC §1251 *et seq.*).

¹ The FPA contains internal provisions for review of the environment of the project, including assurances that the project will adequately protect, mitigate, and enhance fish, wildlife, and recreation. See 16 U.S.C. §§797(e), 803(a), 803(j).

² SEQRA is not a self-generating jurisdictional authority itself. It takes effect by relying on other actions that trigger an agency’s exercise of jurisdiction. Nor does SEQRA have the effect of excluding other environmental assessments. In appropriate areas of State law, the New York State Legislature has provided that other environmental impact reviews supersede but are not offensive to SEQRA legislation. See Public Service Law Article VII, and former Articles VIII and X.

The assessment of environmental impacts attributable to the Niagara project, including impacts to water quality, is performed by FERC within its authority to license federal hydropower projects. FERC employs a NEPA environmental assessment that supersedes the review of environmental impacts pursuant to SEQRA that the Department would otherwise conduct if it had appropriate authority. DEC consistently manages water quality certificate applications concerning hydropower plants in this manner. As a result, DEC does not conduct a SEQRA review, but instead participates fully in the NEPA process as to any §401 certificate application associated with a FERC hydropower license proceeding.

Responders cite the School Street case in support of its claim that SEQRA should apply to this matter. However, the preemption of SEQRA has since been confirmed by the Administrative Law Judge's December 23, 2005 Issues Ruling in the *Matter of the Application of Erie Boulevard Hydropower, L.P. for a 401 Water Quality Certification for the School Street Project* (DEC Project No. 4-0103-00027/00001). Responders also cite the Supreme Court's decision in *Public Utility District of Jefferson County and City of Tacoma v. Washington Department of Ecology*, ("Jefferson County") 511 U.S. 700 (May 31, 1994) in support their allegation that SEQRA should apply. However, the decision in *Jefferson County* interprets the applicability and scope of States' authority under §401 of the Clean Water Act, but does not specifically address FPA preemption and so cannot be interpreted to revoke such preemption.

In light of the above, it is clear that SEQRA does not apply by virtue of FPA preemption. *See, Fourth Branch Associates v. NYSDEC*, 146 Misc. 2^d 334, 344 (1989)("[T]he Supreme Court, Albany County (J. Harris), determined that the Department could not implement its certification review to encompass the State Environmental Quality Review Act 'SEQRA review would clearly violate the implicit prohibition of dual control inherent in the Federal Government's preemption of the field.' "); *Long Lake Energy Corporation v. New York State Department of Environmental Conservation*, 164 A.D.2^d 396 (1990); *Matter of deRham v. Diamond*, 32 NY2^d 34, 44 (1973); *Rivers Electric Company, Inc. v. 4.6 Acres of Land in the Town of Catskill*, 731 F. Supp 83, 86 (N.D. N.Y. 1990).

2. Coastal Zone Management.

Responders assert that the water quality certificate application is incomplete because NYPA has not made an application for a certification finding that the project complies with the Coastal Zone Management Program ("CZMP"). NYPA has applied to FERC for federal authorization to continue project operations. Where an applicant in New York State applies to a federal agency for permission to operate, applications for a CZMP compliance certification are made to the New York State Department of State ("DOS"). NYPA filed the Coastal Policy Consistency Statement with DOS and DEC on August 18, 2005.

3. Opportunity for Public Review of Settlement Agreement.

Responders state that the Settlement Agreement between DEC and NYPA, effective July

18, 2005, deprives them of an opportunity to review the conditions in the draft water quality certificate. The Settlement Agreement does not deprive any members of the public of an opportunity to review the draft water quality certificate conditions, or any technical information that supported NYPA's certificate application, during the public comment period provided in the Uniform Procedures Act regulations. *See* 6 NYCRR §§621.4(e), 621.5(d), 621.6(a). The Settlement Agreement became part of the DEC's permitting file and was available for public review on August 19, 2005. The Settlement Agreement constitutes a settlement of issues pertaining to the project as between the limited group of signatories, including DEC, NYPA, the U.S. Fish and Wildlife Service, and others. The public comment period set forth in 6 NYCRR §621.6(a) provides public review of the materials on which DEC Staff rely in draft permit conditions, as well as the conditions themselves. The Uniform Procedures Act regulations also provide that, in order to determine that the matter warrants an adjudicatory hearing, DEC Staff must find that the public comments raise substantive and significant issues relating to any findings or determination that it is required to make. 6 NYCRR §621.7(b). Thus, responders are provided with a standard by which to develop their review and submit their comments in order to seek a hearing.³

This procedure does not require, nor would it be well served by public review and comment on settlement agreements entered into between DEC and applicants. It does present non-settling parties with an opportunity to raise issues about draft certificate conditions that comport with a settlement agreement, which issues may cause a draft certificate to be adjudicated before being made final, modified, or denied. This opportunity is available to responders after DEC enters into a settlement agreement. In this case, DEC is obligated to issue a water quality certificate that is consistent with the Settlement Agreement. This does not preempt the public's subsequent review of and comment on draft certificate conditions; in fact the opportunity to review and comment on draft conditions occurs whether or not DEC enters into a settlement agreement with an applicant.

4. Procedural Questions.

A. Responders assert that issuing a draft water quality certificate based, in part, on a prior settlement agreement with an applicant, is: (a) inconsistent with the procedure adhered to in the School Street matter, and (b) inconsistent with DEC's Organization and Delegation ("O & D") Memorandum #94-13. Neither is correct.

The School Street proceeding is not procedurally analogous to this matter. In the School

³ It bears noting that the Settlement Agreement was in the public domain by no later than August 19, 2005, when NYPA filed it with FERC in support of its license application. The Offer of Settlement also became part of DEC's permitting file on that date and as such, was available for public review during the comment period on the draft 401 WQC. Previously, the water quality certificate, with supporting documentation, was in the public domain, having been filed with DEC on August 18, 2005.

Street case, DEC, the applicant, Erie Boulevard Hydropower, and others, were participants in an on-going adjudicatory proceeding that had been suspended at the issues conference stage since 1994. That is not the case here; a notice of hearing has not been issued nor was an issues conference convened (or any subsequent component of a hearing).

Because participants in the School Street proceeding were already in the midst of the issues conference, it was incumbent upon them to present the settlement to the Administrative Law Judge, pursuant to O & D Memorandum #94-13. Because a proceeding has not been convened with respect to NYPA's water quality certificate application, the requirements of O & D Memorandum #94-13 are not invoked. By its own terms, O & D Memorandum #94-13 only applies where a proceeding has been commenced: "In order to expedite the decision-making process, where a permit application has been referred for an adjudicatory hearing and the parties reach a stipulation which resolves any or all of the issues in dispute" (Emphasis supplied.) *O & D Memorandum #94-13*, p. 1. The O & D Memorandum also states that "Where the parties reach a stipulation that resolves some, but not all, of the disputed issues, the signed stipulation and any stipulated permit conditions must be submitted as part of the hearing record." *Id.*, p. 2. In this case, where there has not been a referral to hearing, the O & D Memorandum does not apply.

Lastly, note that responders' legal arguments and concerns do not amount to "substantive and significant issues" as that term is defined in the Uniform Hearing Regulations promulgated at 6 NYCRR §624.4©). Argumentative and conclusory statements or concerns do not contribute factual, substantive material to the record for raising or determining issues and will not support a conclusion that an issue is raised for adjudication.

B. ENPPA states that it is unaware of any other situation where a water quality certificate incorporated terms of a settlement agreement without first appointing an Administrative Law Judge. On several occasions DEC has issued draft water quality certificates for hydropower facilities, based on underlying settlement agreements, without referring the matter to a hearing. A few examples are the Erie Boulevard Hydropower, LP, Piercefield Project and Macomb Project (Settlement Agreement dated August 19, 2003), the New York Electric and Gas Corporation Saranac River Hydroelectric Project (Settlement Agreement dated November 2004), the New York Power Authority St. Lawrence River Hydroelectric Project (Settlement Agreement dated January 15, 2003). In each of these cases, DEC issued draft water quality certificates that were based, at least in part, on settlement agreements with the applicant.

C. Responders allege that DEC's obligations under the Settlement Agreement will "preclude the Department from exercising its discretionary authority to seek modifications to the license and project through standard license reopeners." This allegation is a legal argument regarding DEC's role pursuant to the Settlement Agreement that does not raise a substantive and significant issue that might be considered for adjudication. Instead, it raises a concern about a possible future event and is therefore also speculative. It cannot predict with any certainty that such an event will occur, nor does it indicate whether its future occurrence would have any

substantive and significant effect on the draft certificate.

FERC is obligated, pursuant to NEPA, to complete an EIS process before issuing a license to NYPA for the Niagara project. If the EIS contains or is supported by information that warrants a reassessment of the draft certificate conditions, DEC will still be able to conduct that reassessment and, if appropriate, modify the certificate to address the additional information. In other words, the fact that FERC has not completed the EIS process is not an impediment to DEC's issuance of the water quality certificate because DEC can modify the certificate until the time FERC issues a final license.

D. Responders assert that DEC should not have issued the draft water quality certificate because FERC has yet to issue a notice indicating that the application is ready for environmental analysis, or issued a notice of the availability of a draft environmental impact statement.

The draft water quality certificate represents DEC's judgment regarding the conditions that the applicant will need to comply with to meet State water quality standards. The draft certificate is based in part on the studies conducted by NYPA pursuant to the Alternative Licensing Process proceedings, which studies reflect the environmental issues identified by all participants, including DEC and other state and federal environmental agencies. DEC and other agencies and stakeholders participated in creating the scope of those studies and also reviewed the study results. The PDEA, prepared by NYPA, assesses the studies and the respective mitigation proposals developed to address such impacts as shoreline erosion.

On November 7, 2005, FERC issued Notice of Intent to prepare an Environmental Impact Statement for the project. FERC will utilize the PDEA submitted by NYPA as it prepares a draft Environmental Impact Statement and a final Environmental Impact Statement. FERC is obligated pursuant to NEPA to complete the EIS process before issuing a license to NYPA for the Niagara project. If the EIS contains or is supported by information that warrants a reassessment of the draft certificate conditions, DEC will still be able to conduct that reassessment and, if appropriate, modify the certificate to address the additional information. In other words, the fact that FERC has not completed the EIS process is not an impediment to DEC's issuance of the water quality certificate because DEC can modify the certificate until the time FERC issues a final license.

E. Responders fault DEC for determining the application complete when the application only references the Settlement Agreement. Responders may be stating that they believe the Settlement Agreement should have been attached to the draft certificate as an appendix; if so, that is not clearly stated. This is apparently offered for the inference that DEC Staff did not review the Settlement Agreement prior to issuing the draft water quality certificate. The Notice of Complete Application, dated September 30, 2005, states that the water quality certificate application included a preliminary draft environmental assessment (prepared by NYPA for FERC), and the Offer of Settlement, which includes the Settlement Agreement entered

into between NYPA, DEC and others. As part of the application materials, the Settlement Agreement was reviewed by DEC Staff prior to making a decision on whether to issue a draft certificate with specific conditions. DEC Staff also received the three other settlement agreements related to this matter but did not review them for purposes of drafting the draft water quality certificate because those other settlements did not address matters germane to a determination of conditions needed for assuring compliance with New York State water quality standards.

The record in this instance differs dramatically from those in other hydropower relicensing proceedings where post-License filing settlement discussions were held, following the initial denial of 401WQC requests (Niagara Mohawk's Class of 1993, including School Street) and after issues conferences had been convened. Note, however, that for relicensing the NYPA- St. Lawrence project, a "preliminary" DEIS was filed with the license application in October of 2001, after an extensive Cooperative Consultation Process. The 401WQC was issued by DEC in March 2003, and the DEIS was issued by FERC in June 2003, with the 401WQC attached as an exhibit. The FEIS was issued by FERC just a few weeks before the licensing order.

Those circumstances are analogous to the Niagara project process, where NYPA completed a preliminary draft environmental assessment ("PDEA") in August 2005, before it filed its water quality certificate application, that assessed the environmental impacts attributed to the Niagara project. NYPA filed the PDEA as a component of making its license application to FERC, consistent with FERC's requirements for consistency with environmental assessments conducted pursuant to the National Environmental Policy Act (42 USC §4321 *et seq.*).

F. Completeness Determination does Not Require a SEQRA Finding of Significance.

Responders are concerned that the Department failed to make a finding of completeness and issue a draft environmental impact statement when issuing the draft water quality certificate. However, this project is not subject to the requirements of SEQRA (see above) and, consequently DEC does not need to complete an environmental assessment form, make a determination of significance (positive or negative), define the type of action contemplated (Type I, unlisted, Type II, exempt, or excluded), or issue a draft environmental impact statement prior to issuing a draft water quality certificate.⁴ 6 NYCRR §§621.3(a)(6) and 621.5(d)(5). Furthermore, the requirements for a complete project application set forth in 6 NYCRR §621.4(e) have been

⁴ The SEQRA Type II classification found in DEC's Notice of Complete Application is appropriate as an indication of the way DEC's computerized application tracking system designates certain applications. The tracking system provides only three options: Type I, Unlisted, or Type II. Type II is the option that is sufficiently analogous to FERC's preemption of SEQRA for the review of federal hydropower projects. The tracking system does not constitute a jurisdictional statement by DEC; rather, it is a form of public notification for facilitating comment on applications.

satisfied in this instance. As a result, responders do not present a valid claim that an issue arises from these circumstances. Additionally, DEC regulations do not permit questions of completeness to be adjudicated. 6 NYCRR §§624.4(c)(7).

5. Water Quality Issues. Responders raise a number of specific concerns with regard to water quality; each is addressed separately, below.

A. Responders opine that “the diversion of large quantities of water will result in flow fluctuation in local water bodies” and that such fluctuations “may have serious environmental impacts.” In 2003, issues associated with the impacts of water level fluctuations to aquatic and terrestrial habitats and surface water quality in the main-stem Niagara River and its tributaries were identified by participants in the Alternative Licensing Process (“ALP”) (which included state and federal resource agencies, municipalities, environmental groups, and individual citizens). Stakeholders developed and approved the following studies, which NYPA then conducted:⁵

- o Effect of Water Level and Flow Fluctuations on Aquatic and Terrestrial Habitat
- o Niagara River Water Level and Flow Fluctuation Study Final Report, including the Upper Niagara River Tributary Backwater Study
- o Assessment of the Potential Effects of Water Level And Flow Fluctuations and Land Management Practices on Rare, Threatened, and Endangered Species and Significant Occurrences of Natural Communities at the Niagara Power Project, Phases I and II
- o Determine if Water Level Fluctuations in Lewiston Reservoir Increase Mercury that is Bioavailable
- o Surface Water Quality of the Niagara River and its U.S. Tributaries
- o Describe Niagara River Aquatic and Terrestrial Habitat Between the NYPA Intakes and NYPA Tailrace (U.S. side)
- o Fish Entrainment and Mortality Study
- o Ecological Condition of Gill, Fish, and Cayuga Creeks
- o Mapping of Aquatic and Riparian Habitats of Ellicott and Tonawanda Creeks
- o Tributaries to Tonawanda Creek and Mapping of Submerged Aquatic Vegetation in Lewiston Reservoir
- o Occurrences of Rare, Threatened, and Endangered Mussel Species in the Vicinity of the Niagara Power Project
- o Surveys of Winter Habitat for Native Mussels in Niagara River Tributaries

⁵ The last four studies were conducted by NYPA without stakeholder input the scope of service; however, stakeholders had the opportunity to review the results of the draft studies but did not provide comments.

The results of all these studies were assessed in the PDEA for the Niagara Project. With respect to impacts to aquatic and terrestrial habitats, it was determined that operation of the Project, through water level fluctuations and the alteration of Fish and Gill Creeks when Lewiston Reservoir was constructed contributes to impacts to aquatic (PDEA at 4-34 through 4-39) and terrestrial habitats (PDEA at 4-54 through 4-61). Additionally, some fish are entrained at the Project intakes although the number is thought to be small (PDEA at 4-32 through 4-34). To mitigate these impacts, NYPA proposed the establishment of two (2) funds: a Fish and Wildlife Habitat Enhancement and Restoration Fund of \$16,180,000 (NPV 2007) and a Habitat Improvement Projects fund of \$12,000,000 (NPV 2007) to benefit aquatic and terrestrial habitats and associated flora and fauna in the Niagara River Corridor. These funds were incorporated into the Settlement Agreement and the draft water quality certificate to address the identified impacts.

Surface Water Quality: With respect to surface water quality, it was determined there would be no new impacts associated with the Power Authority's operation of the Project (PDEA at 4-7 through 4-15).

Responders point to the Town of Amherst's October 13, 2005 comments, filed with FERC, as proof supporting their claim that project operations have an environmental impact on the Niagara River and its tributaries. Amherst acknowledges that there are a number of influences on water level fluctuations in Tonowanda and Ellicott Creeks. Furthermore, the relicensing studies point out that operation of the project has a negligible influence on the fluctuations.⁶ The studies of these two tributaries found that Project operations would not have an adverse impact on water quality; nor does the Project significantly affect stream flow or water velocity. Note that, by letter dated December 7, 2005, FERC responded to the Town of Amherst's contention, "NYPA has already studied this issue and has adequately addressed the causes, magnitude, and scope of the project's effect on water level fluctuations and water quality in these creeks. Therefore, at this time, we are not requesting the applicant to perform additional studies to address this issue."

Responders have not specified whether or how the results of these studies, or any other information, would support a claim that the NYPA project would fail to meet state water quality standards or the conditions in the draft certificate. Nor do responders point to any evidence demonstrating that compliance with the draft certificate would fail to measure up to State water quality standards.

B. Mercury Bio-availability in Lewiston Reservoir: With respect to mercury bioavailability, the study Determine if Water Level Fluctuations in Lewiston Reservoir Increase Mercury that is Bioavailable found that it is unlikely that the drawdown in the reservoir would be a significant factor in enhancing the bioaccumulation of mercury in fish in the reservoir (PDEA

⁶ These studies were the *Niagara River Water Level and Flow Fluctuation Study*, and the *Surface Water Quality of the Niagara River and its U.S. Tributaries Study*, and the *Upper Niagara River Tributary Backwater Study*.

at 4-13). Responders fail to point to countervailing facts or circumstances that would possibly support a claim that the project, as conditioned by the draft certificate, would not meet State water quality standards. Nor do responders point to any requirements that would warrant revisiting the draft conditions as currently written.

C. Transfer of Project Lands: Responders do not identify how NYPA's transfer of project lands will affect water quality. Responders' concerns in this regard are conclusory and unsupported by an offer of proof. DEC Staff are unable to identify with sufficient specificity what effect, if any, NYPA land transfers would have on the draft water quality certificate conditions or NYPA's ability to comply with those conditions. Any change in current usage of lands would be subject to applicable local zoning/permitting and state and federal permitting.

D. Supersaturation of atmospheric gases in the lower Niagara River: NYPA studied supersaturation of atmospheric gases in the lower Niagara River, river water temperature, and sedimentation in Lewiston Reservoir. As with the other studies, the issues were identified by ALP stakeholders in 2003 and the following studies were conducted to address these issues:

1. Water Temperatures of the Niagara River and its U.S. Tributaries
2. Determine if Project Operation Results in Supersaturation of Atmospheric Gases in Lower Niagara River
3. Extent of Sedimentation and Quality of Sediment in the Lewiston Reservoir and Forebay

Supersaturation, water temperatures and sedimentation, were assessed in the PDEA. It was determined there would be no new impacts on water quality associated with NYPA's operation of the Project (PDEA at 4-12 and PDEA at 4-5). Responders' concerns about supersaturation, river temperature, and sedimentation in Lewiston Reservoir are expressed in a conclusory manner and fail to provide actual factual or scientific support for the proposition that the conclusions in the above studies and PDEA are inadequate.

E. Ice Boom: The ice boom is not a FERC-regulated project structure and therefore was not assessed in the PDEA. For the same reason, it is not part of the application for a water quality certificate. ALP stakeholders identified issues associated with the Ice Boom and developed and approved an issue sheet and scope of services for the study Determine if the Ice Boom has Climatic, Aquatic, Land Management, or Aesthetic Effects. The results of the study showed there is no substantial evidence of any adverse impacts associated with the ice boom. Responders have not provided any offer of proof to demonstrate a nexus between the Ice Boom and the project, or with respect to draft certificate conditions designed to protect water quality.

F. Shoreline Erosion: ALP stakeholders identified issues associated with shoreline erosion and developed and approved an issue sheet and scope of services for the study Shoreline Erosion and Sedimentation Assessment Study Upstream and Downstream of the Power Project. Shoreline erosion was assessed in the PDEA. It was determined that operation of the Project

contributes to erosion in the Niagara River through water level fluctuations (PDEA at 4-5 through 4-6). To mitigate these impacts, NYPA proposed the establishment of two (2) funds: a Fish and Wildlife Habitat Enhancement and Restoration Fund of \$16,180,000 (NPV 2007) and a Habitat Improvement Projects fund of \$12,000,000 (NPV 2007). Some of the projects constructed from these funds would enhance geological and soils resources and would develop a more stable shoreline. These funds were incorporated into the Settlement Agreement and the draft water quality certificate.

Responders' concerns for shoreline erosion are articulated in a conclusory manner, without factual support. Absent an offer of proof as to the relevance of any additional review of the subject, and identification of how the conditions in the present draft certificate are inadequate to require compliance with State water quality standards, these concerns do not rise to the level of substantive and significant issues.

G. Bird Mortality associated with transmission lines: ALP stakeholders identified issues associated with and approved an issue sheet and scope of services for the study Estimates of Bird Mortality Associated with Transmission Lines and Estimates of Bird Mortality Associated with Transmission Lines, and Fall Addendum. Bird mortality was not assessed in the PDEA, however, the results of the study indicate that high voltage transmission lines within the Niagara Power Project relicensing study area do not seem to be substantial sources of bird mortality. Responders have not provided any factual support for a nexus between the subject of bird mortality due to transmission lines and the draft water quality certificate. Responders' comments identify the matter in a conclusory manner but fail to show whether it has any import as to NYPA's ability to comply with the draft certificate conditions or State water quality standards generally.

H. Aesthetic Impacts: ALP stakeholders identified issues associated with aesthetics and developed and approved an issue sheet and scope of services for the study Visual Assessment. Aesthetics was assessed in the PDEA. It was determined that existing Project operations can affect visual aesthetics (PDEA at 4-86 through 4-87). To mitigate these impacts, the Power Authority proposed the development of a land management plan that would include aesthetic enhancements. Responders have not identified any nexus between their concern for aesthetic impacts and the conditions in the draft water quality certificate or the application of State water quality standards to this project.

I. Recreational Facilities: Responders have not identified how their concern for recreational facilities, presumably a concern for more and/or better facilities, pertains to the draft water quality certificate conditions or NYPA's ability to comply with such conditions and State water quality standards. It is possible that the Responders perceive it can raise this subject because it believes, erroneously, SEQRA should apply to the review of the water quality certificate application. In that case, the matter should be raised to FERC as a subject with potential environmental consequences that can be reviewed pursuant to NEPA.

ALP stakeholders identified issues associated with recreational use and facilities and developed and approved issue sheets and scopes of services for the following studies:

1. Recreational Facility Use and Capacity Investigation
2. Addendum to the Recreational Facility Use and Capacity Investigation
3. Recreation Facility Rehabilitation Assessment
4. Recreation Needs Assessment

The results of these studies were assessed in the PDEA. With respect to use and capacity, recreation facilities in the area are being used at levels below their design capacity. Some of the facilities studied though, needed some level of rehabilitation. Studies also determined the presence of the Project impacts recreational access to the lower Niagara River through the disruption of the great Gorge Railway right of way hiking trail (PDEA at 4-72). To mitigate these impacts, the Power Authority proposed the establishment a Parks and Recreation Fund of \$9,260,000 (NPV 2007), the construction of numerous public access improvements at facilities inside the Project boundary, and the development of a comprehensive recreation plan for recreational facilities within the Project boundary. Appropriately, these improvements are not associated with the draft water quality certificate. These new facilities and funds will enhance recreational access, use, and opportunities at the Project and along the Niagara River Corridor.

J. Socioeconomic impacts associated with host communities: Responders have not identified whether this concern has any nexus with NYPA's ability to meet State water quality standards or the conditions in DEC's draft water quality certificate. Responders' concern appears to be more whether the NEPA environmental review appropriately considers impacts to host communities and their residents. This may pertain to the sufficiency of FERC's NEPA review but does not pertain to an examination of whether NYPA's project will meet State water quality standards as required by the draft certificate conditions.

ALP stakeholders identified issues associated with socioeconomic effects on the host communities and developed and approved an issue sheet and scope of services for the study The Past, Present, and Future Socioeconomic Effects of the Niagara Power Project. Socioeconomics was assessed in the PDEA. It was determined there would be no negative effects on socioeconomic resources. Moreover, the proposed action is expected to have a positive effect on water quality, fish and wildlife populations, vegetation, land management, cultural resources, and economic conditions in the vicinity of the Project (PDEA at 4-88).

K. Power allocation: The subject of NYPA's allocation of the power generated at this project has no nexus with the State's water quality standards. Responders do not offer any rationale that would connect power allocation with the draft certificate conditions, their concern is conclusory and not based on any factual proof that warrants reconsideration of the draft certificate conditions or NYPA's ability to comply with those conditions. Moreover, responders fail to express any alternative conditions that would address their concerns.

L. Certificate Term: Responders question the “legality” of including a fifty year license term as a condition of the certificate. The purpose of this condition is to make the certificate coterminous with the FERC license, which in the past was for fifty years and is likely to be so in the future. Responders do not support their concern with any indication that the draft condition would prevent NYPA from meeting any draft certificate conditions or State water quality standards. Their concern is conclusory and speculative, without any legal or factual support and therefore does not meet the requirements of a substantive and significant issue.

6. Increase in Value of Project Power Warrants Additional Mitigation.

Responders opine that the “value of the Project’s power has increased substantially during and since the relicensing and certificate application’s preparation and submission. Such increases are expected to continue and the impacts of these increases, as the means for additional mitigation, especially of adverse socioeconomic impacts, are economical, feasible and readily available.” Responders do not offer any evidence of the relative value of the project’s generation capacity or the supposed “increase” of its value since the application was filed. Nor is there anything specific in their concern for additional mitigation. As such, the matter lacks sufficient specificity to support a mitigation strategy for any particular media, such as aquatic or terrestrial habitat. Furthermore, this comment lacks sufficient specificity to allow DEC staff to determine whether or how this concern pertains to NYPA’s ability to comply with State water quality standards and the draft certificate conditions.

Given the focus on socioeconomic matters toward the end of the comment, it is assumed that this comment is offered in support of imposing SEQRA on this review. Socioeconomic concerns do not relate to State water quality standards. As explained above, SEQRA is preempted in this case and therefore does not apply to this review. In the alternative, responders could offer this comment to FERC in the course of commenting on the NEPA draft environmental assessment, which has not yet been released for public comment.

7. Inventory of Lands for Surplus.

The responders state that a certificate condition should be imposed requiring that NYPA inventory properties associated with power generation and transmission and that surplus lands be removed from the project in order to return said lands to productive use and to the tax rolls. Responders do not identify how this proposal relates to compliance with State water quality standards or whether, if addressed as articulated, it could affect the text of the conditions in the draft water quality certificate. It appears to be an expression of a general concern for the productive use of lands presently under title to NYPA. This is inadequate to raise a substantive and significant issue.

8. NYPA Control of Boundary Waters.

Responders suggest that NYPA or DEC determine “what waters used or affected by the

project's operation are boundary waters or treaty waters and whether they are or should be subject to the control of NYPA." This suggestion does not pertain to any particular State water quality standard, nor do the responders state that the draft certificate is deficient because this task has not been completed as part of the certificate application. There is every likelihood that the subject matter itself is not pertinent to the project license application pending before FERC. If so, it would likely be within the purview of FERC for purposes of determining whether the project should continue to operate under a federal license. If the subject somehow pertains to NYPA's right to continue to hold a license, responders have not demonstrated whether it has relevance to the draft water quality certificate or warrants review for purposes of NYPA's compliance with State water quality standards. In other words, the comment does not pertain to compliance with State water quality standards.

9. Habitat Improvement Projects.

Responders raise a concern that: (a) the habitat improvement projects are not clearly defined, (b) the construction time is lengthy, and ©) DEC should not bear future costs for operating and maintaining the enhancements.

(a) The Settlement Agreement provides for the construction, operation and maintenance of the eight habitat improvement projects ("HIPs") enumerated in §4.1.2. Once these HIPS are articulated in the final water quality certificate, the FERC license will incorporate the HIP provisions of the Settlement Agreement. The HIPs Fund is sufficient to cover ongoing operation and maintenance costs and, should the cost of the HIPs exceed the amount in the HIPs Fund, the Power Authority will cover additional expenses.

Section 4.1.2 of the Settlement Agreement provides that the Ecological Standing Committee ("ESC") (created in §4.1.1 of the Settlement Agreement) will provide guidance for the construction, operation, maintenance and monitoring of the HIPs. The ESC is supported by guiding criteria (§4.1.3(d)) that will take into account the fact that excess HIPs funds (if any) should continue to be directed toward NYPA's compliance with water quality standards. Those guiding criteria contain certain considerations that are relevant to this question, including, but not limited to:

- projects that address a demonstrated Project impact
- projects that preserve RTE (rare, threatened or endangered) species
- projects with a strong scientific foundation
- projects that achieve multiple ecological goals
- projects consistent with applicable local, State, and Federal resource management plans

Section 4.1.2 also states the degree of flexibility allowed for funding of the HIPs: if the estimated cost for implementing a HIP is too great, the excess funds can be transferred from to another HIP, or from the HIPs fund to the Fish and Wildlife Habitat Enhancement and

Restoration Fund (§4.1.3). In either case, the funds will continue to be administered by DEC to enhance the project area in fulfillment of the water quality certificate.

Responders fail to take into account that habitat improvement projects were extensively studied in the study The Investigation of Habitat Improvement Projects for the Niagara Power Project. Seventeen potential projects were originally identified for that inquiry, as recommended by U.S. Fish and Wildlife Service and DEC Staff experts. From this list of seventeen, a final group of eight was selected and then incorporated into the Settlement Agreement. The Department reserved discretion to modify or cancel a HIP in order to be able to react appropriately should pre-construction design work show that a particular HIP is wholly or partially infeasible. The final feasibility of any particular project cannot be assessed until after NYPA obtains its license from FERC.

In this regard, DEC is concerned not only with engineering feasibility of a particular HIP, but also with its effectiveness as an enhancement or mitigation. For instance, location, design and enumeration of fish attraction structures may warrant pilot test projects for effectiveness testing and to understand the probability of success for the target species. The discretion and flexibility provided by this condition actually guarantees that the HIPs funds will be directed toward beneficial projects and heightens the likelihood of success of the environmental projects.

The above demonstrates that the descriptions of the eight HIPs is more than adequate. It also illustrates why greater details regarding HIPs design would not serve the public interest; rather, it would artificially constrain DEC Staff's efforts to ensure compliance with State water quality standards.

(b) Responders criticize "the proposed length of time for construction (see Appendix B to Relicensing Settlement)" of the HIPs. Appendix B, the "Proposed HIPs Implementation Schedule, is not overly lengthy. Recall that, if FERC issues a license for the Niagara Project, it will be effective starting in September 2007. In a phased sequence, planning and administration (e.g., other permits) for HIPs will begin almost immediately, occurring from 2008 - 20012. Pre-construction monitoring, inventories, or site selection will occur from 2008 - 2013; construction and implementation will occur from 2008 - 2015.

Responders do not state why this phased schedule raises a concern, other than to say it is a "lengthy time table". To the contrary, it is an ambitious schedule. Construction will start on one HIP within one year after the anticipated time for FERC to issue the license. Half of the HIPs will be constructed within five years after licensing. The other half will be constructed within two-to-three years more. Responders fail to supply any support for the claim that this schedule is "lengthy", otherwise inappropriate, or that it does not comply with the conditions of the water quality certificate or the State's water quality standards. As such, it is unsupported and conclusory. Such claims cannot constitute a substantive and significant issue.

(c) Responders assert that future operations and maintenance costs will be borne by

DEC “for periods of 45 years or more in most instances”. This statement is erroneous. NYPA will fund the operations and maintenance of the HIPs as a component of its FERC license obligations.

(d) Responders assert that the plan to construct six more angled parking spaces at the Project gate is too flexible and needs to be amended to require that a certain number of spaces comply with the Americans with Disabilities Act (“ADA”). Responders do not define the phrase “too flexible”; however, the siting and number of parking spaces takes into account actual available space at the gate and is limited by NYPA’s Homeland Security obligations. Homeland Security obligations are dictated by the Department of Homeland Security and FERC. DEC requested additional spaces but acknowledged that the federal authorities presented countervailing needs.

These six parking spaces are separate from the eight HIPs. The spaces will be ADA compliant; however, compliance with ADA access provisions is not a requirement of any State water quality standard.

CONCLUSION.

Responders’ concerns are addressed by the existing record in support of the draft water quality certificate or are not relevant to the Department’s review of the application. These concerns, as represented in their submissions, do not raise substantive and significant issues. They have not identified in what way, if at all, the conditions of the draft certificate will not meet State water quality standards, or that NYPA will not be able to comply with the conditions or State water quality standards. In addition, responders have not shown that their concerns would result in the denial or modification of the draft permit, or the addition of significant new certificate conditions, consequently an adjudicatory hearing is not warranted.