

New York State Department of Environmental Conservation
Division of Environmental Permits, 4th Floor
625 Broadway, Albany, New York 12233-1750
Phone: (518) 402-9167 • **FAX:** (518) 402-9168
Website: www.dec.state.ny.us



January 31, 2006

Mr. Keith Silliman, Esq.
Director - Niagara Relicensing
New York Power Authority
30 South Pearl Street
Albany, New York 12207

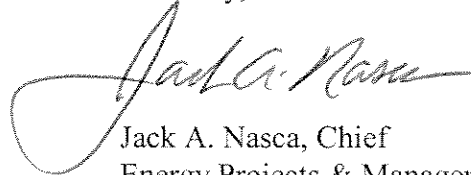
RE: Part 401 Water Quality Certificate; Niagara Relicensing, FERC No. 2216

Dear Mr. Silliman:

In conformance with the requirements of the State Uniform Procedures Act, Article 70 of the Environmental Conservation Law and its implementing regulations 6 NYCRR Part 621, enclosed is the 401 Water Quality Certification for the Niagara Power Project. Also enclosed is the responsiveness summary responding to the permit related questions and general environmental questions raised during the public comment period.

Please read all terms and conditions carefully. If you have any questions regarding the certification or the responsiveness summary please contact me at 518-402-9172.

Sincerely,



Jack A. Nasca, Chief
Energy Projects & Management
Division of Environmental Permits

c: S. Doleski, NYS DEC - Region 9
B. Little, Esq., NYS DEC
R. Biss, NYS DEC - Region 9
Settlement Parties
J. Mills, PH. D., Eastern Niagara Project Power Alliance
D. Seaman, Town of Lockport



-PERMIT
Under the Environmental Conservation Law (ECL)

Certificate Holder and Facility Information

Permit Issued To:
NEW YORK POWER AUTHORITY
30 SOUTH PEARL STREET
ALBANY, NEW YORK 12207
(518) 433-6735

Facility:
NYS NIAGARA POWER PROJECT

NIAGARA COUNTY

Facility Location: in NIAGARA and LEWISTON in NIAGARA COUNTY
Facility Principal Reference Point: NYTM-E: 171.5 NYTM-N: 4784.6

Project Location: The water intakes for the project are located 2.6 miles upstream of the American Falls on the Niagara River. The Lewiston Reservoir, Lewiston Pump Generating Plant, the Robert Moses Niagara Power Plant and associated structures are located in the Town of Lewiston, approximately 10 miles downstream of the American Falls.

Authorized Activity: Operation and maintenance of the NYS Niagara Power Project (FERC No. 2216), a 2,400 MW hydroelectric facility in accordance with the attached conditions.

Permit Authorizations

Water Quality Certification - Under Section 401 - Clean Water Act

Permit ID 9-2924-00022/0001 (FERC No. 2216)

New Permit Effective Date: 1/31/06 Expiration Date: Coincident with expiration date of Federal Energy Regulatory Commission License for FERC Project No. 2216

NYSDEC Approval

By acceptance of this permit, the Certificate Holder agrees that the permit is contingent upon strict compliance with the ECL, all applicable regulations, and all conditions included as part of this permit.

Permit Administrator: WILLIAM R ADRIANCE, Chief Permit Administrator
Address: NYSDEC HEADQUARTERS
625 BROADWAY
ALBANY, NY 12233

Authorized Signature: _____

William R. Adriance

Date: 1/31/06

Distribution List

S. Doleski R. Biss
W. Little Settlement parties



Permit Components

NATURAL RESOURCE PERMIT CONDITIONS

WATER QUALITY CERTIFICATION SPECIFIC CONDITIONS

GENERAL CONDITIONS, APPLY TO ALL AUTHORIZED PERMITS

NOTIFICATION OF OTHER Certificate Holder OBLIGATIONS

Permit Attachments

NATURAL RESOURCE PERMIT CONDITIONS - Apply to the Following Permits: WATER QUALITY CERTIFICATION

- 1. Conformance with Plans** All activities authorized by this permit must be in strict conformance with the approved plans and supporting documentation submitted by the applicant or his agent as part of the permit application for a State Water Quality Certificate dated August 18, 2005. This supporting documentation includes the Relicensing Settlement Agreement Addressing New License Terms and Conditions dated July 18, 2005.
- 2. State Not Liable for Damage** The State of New York shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the State for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage.
- 3. Precautions Against Contamination of Waters** All necessary precautions shall be taken to preclude contamination of any wetland or waterway by suspended solids, sediments, fuels, solvents, lubricants, epoxy coatings, paints, concrete, leachate or any other environmentally deleterious materials associated with the project.
- 4. No Interference with Navigation** There shall be no unreasonable interference with navigation by the work herein authorized.
- 5. State May Require Site Restoration** If upon the expiration or revocation of this permit, any construction hereby authorized has not been completed, the applicant shall, without expense to the State, and to such extent and in such time and manner as the Department of Environmental Conservation ("Department") may with appropriate authority require, remove all or any portion of the uncompleted structure or fill and restore the site to its former condition. No claim shall be made against the State of



New York on account of any such removal or alteration.

6. Notification Requirements for Emergencies With the exception of emergency activities in or potentially affecting waters of the State, the Power Authority's activities affecting or having an impact upon waters of the State will comport with the Operating Conditions in Paragraphs 8 and 9, below, except as otherwise provided for in the Relicensing Settlement Agreement Addressing New License Terms and Conditions dated July 18, 2005.

Prior to commencement of emergency activities not otherwise authorized under these conditions, the Power Authority shall notify the Department of the nature of the emergency and the extent to which emergency actions may be required. The Department shall determine whether, and under what conditions, to grant approval. If circumstances require that emergency activities be taken immediately such that prior notice to the Department is not possible, then the Power Authority must notify the Department within 24 hours of discovery of the emergency condition or commencement of the emergency activities, whichever occurs first, and provide a description of the conditions that warrant or warranted immediate action. Such immediate action notice shall be by telephone and a log of the contact provided to the Department indicating time, date, information provided in the contact describing the emergency condition, names and affiliations of persons making contact, the name of the contact at the Department, and, if possible, information on the action taken or anticipated. In either case, notification must be first by telephone to the Regional Permit Administrator (RPA) and Regional Natural Resource Supervisor (RNRS), followed by a written record by certified mail, telegram, or other written form of communication, including fax and electronic mail. This notification must be followed within 3 weeks by submission of the following information:

- _ A description of the action;
- _ Location map and plan of the proposed action; and
- _ Reasons why the situation was an emergency.

All notifications, requests for emergency authorization, and information submitted to support such requests shall be sent to the RPA and RNRS at the addresses listed below.

7. Settlement Agreement This Certification includes and incorporates the provisions of the Relicensing Settlement Agreement Addressing New License Terms and Conditions dated July 18, 2005, and filed with the Federal Energy regulatory Commission on August 18, 2005, to the extent that the agreement pertains to the applicant's compliance with the New York State Water Quality Standards necessary and appropriate for issuance of and compliance with this Certification.

OPERATIONS

8. Water Level Fluctuations The operation of the Project is regulated by the 1950 Treaty Between Canada and the United States of America Concerning the Diversion of the Niagara River and applicable requirements established by the International Joint Commission, the International Niagara Board of Control, the International Niagara Committee or any other international body that has authority over the uses of the Niagara River. The Project is required to be operated in conformance with the 1993 International Niagara Board of Control Directive and the Power Authority shares allocated Niagara River water jointly with Ontario Power Generation. The Power Authority's operation of the Project, including the management and use of Niagara River flows pursuant to International Niagara Board of



Control regulation, must be consistent with New York State effluent limitations, water quality standards, and thermal discharge criteria as set forth in 6 NYCRR Parts 701,702, 703, and 704.

9. Required Ecological Measures To ensure the continued propagation and survival of aquatic and riparian species affected by Project operations and related Project facilities pursuant to 6 NYCRR Sections 701 and 702, the Department determines that granting a certificate under this section requires that the Power Authority create and maintain the following funds for design, construction, implementation and maintenance of certain environmental enhancements to meet the State's Water Quality Standards as they apply to the Project. The Power Authority has committed to providing these funds (as well as various other related commitments made by the Power Authority) and supporting the enhancements as provided for below as part of the Relicensing Settlement Agreement Addressing New License Terms and Conditions.

A. *Habitat Improvement Projects*

In accordance with the requirements of Section 4.1.2 of the Relicensing Settlement Agreement Addressing New License Terms and Conditions, which Section is incorporated by reference herein, the Power Authority shall establish a fund in an amount currently estimated to be \$12,000,000 for the design, construction, operation, maintenance, and monitoring of the following eight Habitat Improvement Projects (HIPs):

- (a) Strawberry Island Wetland Restoration;
- (b) Frog Island Restoration;
- (c) Motor Island Shoreline Protection;
- (d) Beaver Island Wetland Restoration;
- (e) Control of Invasive Species-Buckhorn and Tift Marshes;
- (f) Osprey Nesting;
- (g) Common Tern Nesting; and
- (h) Installation of Fish Habitat/Attraction Structures.

The Department finds that the funds for the above-listed proposed HIPs relate directly to water quality objectives in 6 NYCRR Sections 701 and 702. Accordingly, the Department conditions the granting of this certificate on a requirement that the Power Authority establish the HIPs Fund as provided in subparagraph A.1 above.

B. *Fish and Wildlife Habitat Enhancement and Restoration Fund*

In accordance with the requirements of Section 4.1.3 of the Relicensing Settlement Agreement Addressing New License Terms and Conditions, which Section is incorporated by reference herein, the Power Authority shall establish a Fish and Wildlife Habitat Enhancement and Restoration Fund (HERF) in the amount of \$16,179,645 (NPV 2007) for future HIPs, land acquisition, habitat improvement, habitat research, fish, wildlife, and indigenous plant species restoration, and stewardship activities within the Niagara River Basin. The Department finds that the HERF is directly associated with the water quality objectives in 6 NYCRR Sections 701 and 702. Accordingly, the Department conditions the granting of this certificate on a requirement that the Power Authority establish a HERF Fund.



C. *Land Acquisition Fund*

(1) In accordance with the requirements of Section 2 of Appendix E of the Relicensing Settlement Agreement Addressing New License Terms and Conditions, which Section is incorporated by reference herein, the Power Authority shall establish a Land Acquisition Fund in the amount of \$1,000,000 (NPV 2007) for the Department's land acquisition and conservation activities. The Department finds that the Land Acquisition Fund is directly associated with the water quality objectives in 6 NYCRR Sections 701 and 702. Accordingly, the Department conditions the granting of this certificate on a requirement that the Power Authority establish a Land Acquisition Fund.

D. *Public Access Improvements.*

To maximize public access at the Project, the Power Authority will construct, operate and maintain the three (3) public access improvements within the Project boundary, set forth below, for the life of the New License. Within twelve (12) months after the effective date of the New License, the Power Authority shall submit for approval by the Department a Proposed Plan for the design, construction, operation and maintenance of the three public access projects, consistent with applicable security and safety requirements. The Department will determine whether to approve the Power Authority's Proposed Plan within a reasonable period of time. The Power Authority will commence construction of the public access improvements no sooner than twenty-four (24) months following the effective date of the New License, and no later than six (6) months after the Department approves the Power Authority's timely submission of a proposed Plan.

(1) Upper Mountain Parking Lot/Fishing Access: The Power Authority shall construct: (a) a parking area for sixteen vehicles; (b) a gravel trail across the Niagara Mohawk Power Company transmission right-of-way for pedestrian use; and (c) a gravel path to traverse the reservoir dike in an area located on the northwest side of Lewiston Reservoir near the Upper Mountain Fire Company Station. The Power Authority also shall implement measures, including the placement of signage and large boulders, to discourage vehicle access and use of the Upper Mountain gravel trail.

(2) Robert Moses Fishing Pier Parking Area: Adjacent to the main gate of the Robert Moses Niagara Power Plant, the Power Authority shall provide for up to six (6) additional angled parking spaces at the Robert Moses Fishing Pier parking area.

(3) Bulkhead Fence at the Upper River Intakes: At the Project's intake structure area, the Power Authority shall; (1) resurface the asphalt in the parking lot and along the walkways; (2) in compliance with the Americans With Disabilities Act ("ADA"), designate parking spaces and install curb cuts to allow access to walkways; and (3) install a removable 7-foot chain link fence parallel to the retaining wall approximately twenty-five (25) feet from the Niagara River's edge. The fence will be installed when icebreakers are dry-docked for repairs; at all other times, the fence will be removed and stored to provide unimpeded access to the Niagara River along the intake structure bulkhead railing.



10. License Term. The Department includes a fifty (50) license year term as a condition of this certificate.

11. Stormwater SPDES All activities requiring the disturbance of greater than one acre must obtain coverage under the SPDES General Permit for Stormwater Discharges from Construction Activities (GP-02-01).

WATER QUALITY CERTIFICATION SPECIFIC CONDITIONS

1. Water Quality Certification The Department hereby certifies:

The Department has reviewed the Application for New License for Major Project – Existing Dam (Application), which the New York Power Authority (Power Authority) filed with the Federal Energy Regulatory Commission (FERC or the Commission) for the Niagara Power Project, FERC Project No. 2216 (Project) and submitted as part of its Request for Water Quality Certification (Request). The 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 funds. The Department also has reviewed the Power Authority's Request; the administrative record before the Federal Energy Regulatory Commission established to date; and all other available pertinent information, including licensing studies conducted as part of the alternative licensing process and undertaken in support of the Application, the Project's Public Information file, and public correspondence regarding the Application.

Based upon the review of this information, which is incorporated into the administrative record for this Request, the Project, as conditioned below, complies with Sections 301, 302, 303, 306, and 307 of the Federal Water Pollution Control Act as amended and as implemented by the limitations, standards, and criteria of the state statutory and regulatory requirements set forth in 6 NYCRR Section 608.9(a). The Project, as conditioned, also will comply with applicable New York State effluent limitations, water quality standards and thermal discharge criteria, as applicable, as set forth in 6 NYCRR Parts 701, 702, 703, and 704.

The Project has 39 point source discharges that are regulated under Section 304 of the Clean Water Act through the State Pollution Discharge Elimination System (SPDES) (permit No. NY-0000736, effective as of January 1, 2005), which supports the State's efforts in managing the water quality in Project waters.

This Water Quality Certification is issued solely for the purposes of Section 401 of the Federal Water Pollution Control Act (33 USC 1341), as amended.



GENERAL CONDITIONS - Apply to ALL Authorized Permits:

1. Facility Inspection by the Department The permitted site or facility, including relevant records, is subject to inspection at reasonable hours and intervals by an authorized representative of the Department of Environmental Conservation (the Department) to determine whether the Certificate Holder is complying with this certification and the ECL. Such representative may order the work suspended pursuant to ECL 71-0301 and SAPA 401(3).

The Certificate Holder shall provide a person to accompany the Department's representative during an inspection to the permit area when requested by the Department.

A copy of this certification and the FERC license, including all maps, drawings and special conditions, must be available for inspection by the Department at all times at the project site or facility. Failure to produce a copy of the permit upon request by a Department representative is a violation of this permit.

2. Relationship of this Permit to Other Department Orders and Determinations Unless expressly provided for by the Department, issuance of this permit does not modify, supersede or rescind any order or determination previously issued by the Department or any of the terms, conditions or requirements contained in such order or determination.

3. Applications for Permit Renewals or Modifications The Certificate Holder must submit a separate written application to the Department for renewal, modification or transfer of this permit. Such application must include any forms or supplemental information the Department requires. Any renewal, modification or transfer granted by the Department must be in writing.

4. Department Contacts. All contacts with the concerning this certificate, including submission of the information required by the above Natural Resource Permit Conditions and all applications for permit modification or renewal are to be submitted to:

NYSDEC - Region 9 Headquarters
Regional Permit Administrator
Division of Environmental Permits
270 Michigan Avenue
Buffalo, N.Y. 14203-2999

NYSDEC - Region 9 Sub-office
Natural Resource Supervisor
Division of Fish and Wildlife
182 East Union Street
Allegany, N.Y. 14706

5. Permit Modifications, Suspensions and Revocations by the Department The Department reserves the right to exercise all available authority to modify, suspend or revoke this permit. The grounds for modification, suspension or revocation include:

- a. materially false or inaccurate statements in the permit application or supporting papers;
- b. failure by the Certificate Holder to comply with any terms or conditions of the permit;
- c. exceeding the scope of the project as described in the permit application;



- d. newly discovered material information or a material change in environmental conditions, relevant technology or applicable law or regulations since the issuance of the existing permit;
- e. noncompliance with previously issued permit conditions, orders of the commissioner, any provisions of the Environmental Conservation Law or regulations of the Department related to the permitted activity.

6. Permit Transfers Permits are transferrable unless specifically prohibited by statute, regulation or another permit condition. Applications for permit transfer should be submitted prior to actual transfer of ownership.

NOTIFICATION OF OTHER CERTIFICATE HOLDER OBLIGATIONS

Item A: Certificate Holder Accepts Legal Responsibility and Agrees to Indemnification

The Certificate Holder expressly agrees to indemnify and hold harmless the Department of Environmental Conservation of the State of New York, its representatives, employees, and agents ("DEC") for all claims, suits, actions, and damages, to the extent attributable to the Certificate Holder's acts or omissions in connection with the Certificate Holder's undertaking of activities in connection with, or operation and maintenance of, the facility or facilities authorized by the permit whether in compliance or not in compliance with the terms and conditions of the permit. This indemnification does not extend to any claims, suits, actions, or damages to the extent attributable to DEC's own negligent or intentional acts or omissions, or to any claims, suits, or actions naming the DEC and arising under article 78 of the New York Civil Practice Laws and Rules or any citizen suit or civil rights provision under federal or state laws.

Item B: Certificate Holder's Contractors to Comply with Permit

The Certificate Holder is responsible for informing its independent contractors, employees, agents and assigns of their responsibility to comply with this permit, including all special conditions while acting as the Certificate Holder's agent with respect to the permitted activities, and such persons shall be subject to the same sanctions for violations of the Environmental Conservation Law as those prescribed for the Certificate Holder.

Item C: Certificate Holder Responsible for Obtaining Other Required Permits

The Certificate Holder is responsible for obtaining any other permits, approvals, lands, easements and rights-of-way that may be required to carry out the activities that are authorized by this permit.

Item D: No Right to Trespass or Interfere with Riparian Rights

This permit does not convey to the Certificate Holder any right to trespass upon the lands or interfere with the riparian rights of others in order to perform the permitted work nor does it authorize the impairment of any rights, title, or interest in real or personal property held or vested in a person not a party to the permit.