

127 FERC ¶ 62, 092  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

New York State Electric & Gas Corporation

Project No. 2835-026

ORDER MODIFYING WHITEWATER ACCESS PROPOSAL

(Issued May 01, 2009)

1. On May 23, 2007, as supplemented May 25, 2007, the New York State Electric & Gas Corporation (NYSEG or licensee), filed a whitewater access proposal pursuant to Article 414 of the project license for the Rainbow Falls Hydroelectric Project (FERC No. 2835). The Commission issued the license to NYSEG on August 18, 2004.<sup>1</sup> The project is located on the Ausable River in Clinton and Essex Counties, New York.

**BACKGROUND**

2. The Rainbow Falls Project is a run-of-river project located immediately upstream of the point where the Ausable River flows into Ausable Chasm (chasm); a narrow, steep-walled chasm about two miles long. Immediately downstream from the project's powerhouse, and outside the project boundary, the river flows over approximately a dozen falls or rapids within the upper portion of the chasm, providing a half-mile of Class IV/V whitewater boating run.<sup>2</sup> Class II to III whitewater boating opportunities exist in

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<sup>1</sup> See Order Issuing New License, 108 FERC ¶ 62,168 (2004), and Order On Rehearing issued December 22, 2004, 109 FERC ¶ 61,360 (2004).

<sup>2</sup> See American Whitewater's Web site, which sets forth the International Scale of River Difficulty, American version. <http://www.americanwhitewater.org/archive/safety/safety.html>. Briefly, whitewater (either an individual rapid, or the entire river) is classed in six categories from Class I (the easiest and safest) to Class VI (the most difficult and most dangerous). The Classes reflect both the technical difficulty and the danger associated with a rapid. Class I -- Easy. Fast-moving water with riffles and small waves, few obstructions. Class II -- Novice. Straightforward rapids with wide, clear channels that are evident without scouting. Occasional maneuvering may be required. Class III -- Intermediate. Rapids with moderate, irregular waves that may be difficult to avoid and that can swamp an open canoe. Complex maneuvers in fast current and good boat control

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the middle and lower portions of the chasm. During the relicensing proceeding, the Commission determined that whitewater boating in the upper chasm is feasible, but required additional analysis of the issue.

3. License Article 414 required NYSEG to prepare a study plan, in consultation with the New York State Department of Environmental Conservation (New York DEC), the Adirondack Mountain Club (Adirondack), American Whitewater, the Lake Champlain Chapter of Trout Unlimited (TU), and Ausable Chasm Company (Ausable) for further evaluation of the potential for whitewater boating at the project, and to evaluate the contentious issues raised during relicensing. On June 24, 2005, the Commission approved the study plan and required, among other things, the licensee to file a report on the results of the study that includes: (1) an estimate of the potential demand for whitewater boating in the upper chasm in terms of annual visits; (2) a proposal and cost estimate for providing and maintaining access to the upper chasm for whitewater boating that minimizes or avoids potential conflicts with other chasm users; and (3) a proposal to limit, continue, or not allow whitewater access at the project based on the results of the study. As further discussed below, the licensee completed the approved study plan and filed the results, with the Commission, including its proposal on whitewater access at the project.

### **DESCRIPTION OF STUDY RESULTS AND ACCESS PROPOSAL**

4. The licensee's filing describes the study methods used for evaluating whitewater access at the project, the results of the study events, and a discussion of its findings and recommendations. The report evaluates: (1) feasibility; (2) safety; (3) range of suitable flows; (4) demand; (5) carrying capacity; and (6) effects on other users. The filing also contains a list of references and multiple appendices. The appendices include copies of various participant evaluation forms, cost estimates, video and photographs of whitewater study events, and provides documentation of agency consultation.

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in tight passages or around ledges are often required. Class IV -- Advanced . Intense, powerful but predictable rapids requiring precise boat handling in turbulent water. Rapids may require "must" moves above dangerous hazards. Class V -- Expert. Extremely long, obstructed, or very violent rapids which expose a paddler to added risk. Drops may contain large, unavoidable waves and holes or steep, congested chutes with complex, demanding routes. Rapids may continue for long distances between pools, demanding a high level of fitness. What eddies exist may be small, turbulent, or difficult to reach. Class VI -- Extreme and Exploratory. These runs have almost never been attempted and often exemplify the extremes of difficulty, unpredictability, and danger.

5. Based on its analysis, the licensee recommends prohibiting public whitewater boating access to the Ausable River through its project (option 1). NYSEG states this recommendation is based on the relatively low demand for whitewater boating in the study area, high initial and long-term recurring costs required for providing access, liability concerns, and safety concerns for boaters and other river users in the study area. In addition to its proposal (option 1), the licensee considered six other options for providing whitewater access at the project. These seven options provide access to varying degrees, and varying capital and maintenance costs.

6. Specifically, option 1 would restrict all public access to the project; option 2 would provide annual access from July 1 to September 30 (92 days); option 3 would provide annual access from June 1 (may include Memorial Day weekend) to October 31 (122 days); option 4 would provide 10 weekends of access per year from the last weekend in May to the last weekend in June and the second weekend in September to the second weekend in October; option 5 would provide three weekends of annual access (one weekend in the spring, summer and fall); option 6 would provide annual access per year from May 1 to October 31 (184 days); and option 7 would provide 365 days of unrestricted access per year. For each access option listed, the access period would be limited to a set daily schedule of 9 a.m. to three hours before sunset.

## CONSULTATION

7. Prior to filing its access proposal and study results, NYSEG consulted with the following parties: Adirondack, American Whitewater, Ausable, New York DEC, TU, and U.S. Fish and Wildlife Service (FWS).

8. By letter filed April 13, 2007, FWS stated that it has no objection to whitewater boating access at the Rainbow Falls site since it does not impact fish or wildlife resources.<sup>3</sup> By letter dated April 13, 2007, American Whitewater indicated that it strongly disagrees with NYSEG's study result interpretations and its proposal to continue to prohibit whitewater boating access at the project. American Whitewater also provided comments on the study itself and access facilities at the site. On May 21, 2007, Ausable offered comments on the plan stating it fully supports the study and recommends not allowing access at the project. Ausable expressed concerns regarding safety, economic impacts, trespassing, carrying capacity, actual demand, and the need for year-round access.

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<sup>3</sup> On July 9, 2007, in response to the June 15, 2007 public notice (described below) of NYSEG's proposal, FWS filed comments similar to the comments in its April 13, 2007 letter.

## **PUBLIC NOTICE**

9. On June 15, 2007, the Commission issued a public notice soliciting comments, motions to intervene and protests for the whitewater access proposal with a deadline of July 15, 2007. On August 16, 2007, the Commission extended the comment date to September 30, 2007. The Commission received over 100 comment letters from individuals, agencies, and non-government organizations regarding whitewater access at the project.

10. On July 9, 2007, TU submitted comments on the proposal regarding impacts on salmon, boating safety on the river during the winter, and protection of private property. By letters filed June 21 and July 6, 2007, Adirondack responded to the licensee's filing stating that it disagrees with the licensee's interpretation of the study results concerning flows, demand, and safety; and it's overall findings that whitewater access should be denied. Adirondack indicates that estimated flow values and the maximum range of suitable flows are inaccurate, estimated potential demand is too low and lacks a scientific basis, and the study found no safety problems. Adirondack concludes that the Ausable River is navigable, provides spectacular whitewater boating opportunities, the public has a right to access it for recreational purposes, and there are no reasons to limit whitewater access in this section of the river. Finally, Adirondack requests the Commission require year-round whitewater access from sun-up to sun-down and specific access facilities at the site. By letter dated August 20, 2007, the Essex County Office of Emergency Services states that allowing access at the project would put unnecessary risk on its volunteer rescue workers during an emergency event. Finally, on June 29, July 13, July 24, and July 30, 2007, respectively, American Whitewater, New York DEC, TU, and the Essex County Fish and Game League (League) filed motions to intervene, which were granted.<sup>4</sup>

## **ENVIRONMENTAL ANALYSIS**

11. On April 9, 2008, Commission staff issued, for public comment, an environmental assessment (EA) on the licensee's study results and whitewater access proposal. The EA evaluated the environmental effects of the proposed option and alternative options and identified the staff's recommendations for requiring whitewater boating access at the project.

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<sup>4</sup> American Whitewater's motion to intervene was timely and unopposed and, accordingly, automatically granted by operation of 18 C.F.R. § 385.214(c) (1) (2008). On October 22, 2007, the Commission granted the late motions to intervene of New York DEC, TU, and the League.

12. Also, the EA found that there is demand for whitewater boating access at the project, the upper chasm provides a high quality whitewater run for experienced boaters, and that such usage would have negligible to minimal adverse effects on other recreation users. The EA found that there will be potential safety, liability, and security risks but notes that such risks are not uncommon for hydropower projects. Based on its analysis, Commission staff concluded in the EA that whitewater boating access at the project should be provided under Option 7 (year-round access) with certain conditions to address safety/security issues, such as informational and warning signage and modification of existing security measures. The EA found that approval of Option 7, with staff's modifications, would not constitute a major federal action significantly affecting the quality of the human environment.<sup>5</sup>

13. In addition, the EA noted that there are potential risks of emergency rescue in the event of a boating accident in the chasm and stated that the Commission does not expect rescue agencies to take unnecessary risk in emergency situations and that boaters must recognize that a rescue may not occur.<sup>6</sup> Commission staff also noted the risk of serious boating accidents in the chasm is no different than the risks associated with similar advanced whitewater runs in the region and the fact that there may be risk involved does not obviate a licensee's responsibility to provide recreation opportunities in accordance with area needs.<sup>7</sup>

### **EA Recommendations**

14. In the EA, the staff recommends certain modifications to option 7 (staff recommended option) in order to address safety/security issues in conjunction with year-round whitewater access. Specifically, the EA recommends the following measures:

(1) The licensee should develop, in consultation with Adirondack, American Whitewater, Ausable, New York DEC, TU, and FWS, an implementation plan (plan) to provide year-round whitewater access at the project. The plan should be filed for Commission approval and include improvements that provide for safe access and use of the site. Specifically, the plan should include provisions to install: (1) appropriate safety and informational signage; (2) trash receptacles; (3) temporary restroom facilities; (4) a boat launch platform at the put-in site just below the powerhouse; (5) a stream gage that is accessible to boaters and provides real-time flow data; and (6) a parking area at the put-

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<sup>5</sup> See generally the section 7 of the EA ("Conclusions") at 23 - 26.

<sup>6</sup> See the EA at 19.

<sup>7</sup> See the EA at 15 and a similar Commission finding in *Public Utility District No. 1 of Chelan County, Washington*, 119 FERC ¶ 61,055 at P 10 (2007).

in site to accommodate a small number of whitewater boaters' vehicles. Further, the plan should contain provisions to modify the existing security fencing so that the access road is available to boaters while still securing necessary project infrastructure, and implement other appropriate safety and security modifications.

(2) Safety signage installed at the site should indicate that the river reach is classified as Class IV+, and should only be used by experienced boaters. The safety signage should also indicate that boaters enter at their own risk and boater rescue may not occur, trespassing onto Ausable or other private property is prohibited and is subject to state and local law. Informational signage should include access availability and boater use information, and a map of the chasm showing the major rapids, put-in and take-out locations, Ausable put-in location, off-site parking areas, and other key points at the chasm.

15. The plan should also include provisions for the construction, operation, and maintenance of the access site facilities, including of the entitie(s) responsible and implementation schedules. In addition, the plan should contain provisions to periodically review whitewater boating use at the site and in the chasm to assess whether any new or significant safety or security issues have resulted from such usage and, what, if any modifications or additional measures are needed to address such issues. The results of this periodic review and any proposed changes should be filed with the Commission.

### **Comments on the EA**

16. In response to the EA, the Commission received over 100 comment letters from individuals, as well as the specific comment letters noted below. In summary, those individuals in support of access state that there is nothing unusually dangerous in paddling the chasm; it would boost the local economy by bringing more tourism year-round; and would not pose undue risk on emergency rescue agencies, in the event of a boating accident, since rescuers would be able to assess their own risk at the time of rescue. Those individuals that oppose year-round access state that the river is too dangerous for safe rescue operations and it could cause a financial hardship to the community.

17. By letter filed April 18, 2008, American Whitewater states it is in full support of allowing year-round public access at the project and there is no reason to ban or limit paddling in the chasm. By letter filed May 27, 2008, the Adirondack states it fully supports year-round access and notes there is demand for access in this area and providing access will have minimal impact on other recreational users. By letter filed June 2, 2008, the Ausable states they are opposed to access at the project because of low demand, safety of their customers and paddlers and the welfare of its business.

18. By letters filed May 27 and July 11, 2008, NYSEG states that it is opposed to whitewater access at the project, noting the safety issues associated with providing

access. Specifically, NYSEG states that the EA mistakenly assumes that only experienced boaters would access the site and that any level of boater could access the river and that year-round access is unnecessary due to hazardous winter conditions. NYSEG also notes the EA states that the licensee could restrict access “as necessary” but does not define such circumstances and that it does not want to make this determination.

19. In addition, NYSEG states it should not be responsible for removing debris from Mike’s Hole (a section of rapids outside the project boundary that contains some manmade debris); and that the restroom facilities, boat launch platform, and stream gage recommendations for the access site should be deleted. The NYSEG also states the EA did not address that rescue in the area would require rescue workers to risk their lives, particularly in the winter. Additionally, the licensee states that scouting of the river is not possible; access at the site is unsafe, as flow gages in the area are insufficient to use to judge downstream conditions, and inexperienced boaters will not be able to see the rapids and could easily discredit any warning signs. Additionally, NYSEG states it would be unable to clear the driveway to the project site of snow and ice sufficiently to allow access.

20. By letter filed June 19, 2008, American Whitewater provides comments in response to the licensee’s May 27 letter. American Whitewater states the river is a unique resource that should be open to the public. American Whitewater notes that safety risks to unskilled individuals are not uncommon at recreation sites. However, American Whitewater states it is not aware of any closures of these resources solely for this reason. Additionally, American Whitewater asserts that whitewater paddling is no more risky than many other recreational activities, and this should not be a reason to restrict access. American Whitewater states that it should not be up to NYSEG when to prohibit access “as necessary” but up to the paddlers to decide what is safe. American Whitewater states that the paddlers are recreational experts, not the licensee’s personnel. American Whitewater also states that though the U.S. Geological Survey (USGS) gage is sufficient for paddler’s gage needs, a standard staff gage at the put in site would greatly benefit paddlers and increase safety. Last, American Whitewater states that there is no precedent that supports restricting access for whitewater boating.

21. By letter filed May 27, 2008, the USGS states that the drainage area at the project is about 12% more than at the gaging station. The USGS states that flow increases downstream with increased drainage area, so the streamflow at the project would be expected to be greater than the streamflow reported at the USGS gaging station. However, the EA reports the average streamflow at the project to be considerably less than what is reported at the gaging station. The USGS states an explanation of the data used in the EA would be useful.

22. By letters filed May 27, 28, 29, and June 16, 2008, the Clinton County Office of Emergency Services (County); Upstate New York Tourism Alliance; Janet Duprey, a

New York State Assembly member; and Town of Ausable, respectively, state they are opposed to access at the project for safety concerns. In particular, the County states that emergency rescue of boaters in the chasm from November 1 to May 1 would place volunteers in danger and it is opposed to open access during these months.

## **DISCUSSION**

### **Reevaluation of Year-Round Whitewater Access**

23. In the EA, Commission staff recommends the project provide year-round whitewater access under Option 7 with certain modifications to address safety and security issues. The Commission received significant comments on the EA's recommendations. Many of these comments related to the safety of boaters and rescue personnel. Given this information, we have reexamined the appropriateness of year-round whitewater access at the project. American Whitewater states that the project is unique in that it provides optimal flow for whitewater boating when such flows are not available at other rivers in the area, particularly during the summer and fall months. The licensee's plan states that the optimal flow for whitewater boating is between 400 cfs and 950 cfs. After reviewing average monthly flows from 2001-2007 from the USGS gage (Gage No. 04275500) upstream from the project, we found the most optimal flows occur from June to March with flows between 943 and 337 cfs. Flows in April and May were the highest ranging from 1,300 to 2,100 cfs (see Table 1). Additionally, the use study found that no boater participation occurred during flow events above 1,000 cfs.

24. One area of concern has been the appropriateness of allowing whitewater boating during harsh winter months. As such, we consider temperature and precipitation data in our further review of the issue. We evaluated average monthly temperature between 1884 and 2008, and found that it was below freezing from the months of December through March. In addition, we evaluated monthly average precipitation, including snowfall. We found that the wettest months in the area are between May through November, and the months with the most snowfall are from December through March (see Table 1).

25. Temperatures below freezing, flows above 1,000 cfs, and heavy snowfall represent winter and flow conditions that are less conducive to whitewater boating and pose a greater safety risk to both participants and rescue workers. Further, it is likely that few, if any, boaters would run the chasm under such conditions. Given this information, we find providing access between Saturday of Memorial Day weekend to October 31 (Option 3) would meet the majority of demand and provide boaters with a range of optimal flows while further ensuring the safety of rescue personnel and boaters. In addition, the licensee's operation and maintenance costs in providing access under Option 3 would be significantly reduced compared to providing year-round access. The licensee's Option 3



would incur an estimated \$12,900 in annual maintenance compared to \$28,150 for year-round access.

**Table 1.** Average monthly streamflow, temperature, and precipitation in the project area.

| Month         | Average Monthly Flow (cfs)  | Average Monthly Temperature (Fahrenheit)   | Average Monthly Precipitation (inches)  | Average Monthly Snowfall (inches) |
|---------------|---|--|---|-----------------------------------|
| January       | 606   | 18.2   | 1.86  | 20.52                             |
| February      | 403   | 19.1   | 1.66  | 19.05                             |
| March         | 706   | 29.6   | 2.17  | 18.17                             |
| April         | 2,100   | 43.1   | 2.57  | 3.86                              |
| May           | 1,350   | 55.6   | 3.09  | 0                                 |
| June          | 943   | 65.1   | 3.5   | 0                                 |
| July          | 416   | 69.9   | 3.7   | 0                                 |
| August        | 337   | 67.7   | 3.56  | 0                                 |
| September     | 337   | 59.8   | 3.42  | 0                                 |
| October       | 776   | 48.6   | 3   | 0.59                              |
| November      | 937   | 37   | 2.8   | 4.38                              |
| December      | 727   | 23.8   | 2.13  | 21.22                             |
| <b>Source</b> | <i>Flow based on USGS stream gage data for water years 2001-2007 for the Ausable River (gage no. 04275500).</i> | <i>Temperature and Precipitation based on the National Weather Service (NWS) data for years 1884-2008 at the Burlington, VT weather station, located 17 miles east of the project.</i> | <i>Snowfall based on the NWS data for years 1998-2008 at Burlington, VT weather station</i> |                                   |

### Safety-related Comments on the EA

26. In its comments on the EA, the licensee states that year-round access is not supported by precedent and cites *City of Tacoma*<sup>8</sup> (*Nisqually*) as a precedent for relieving a licensee of the requirement to provide any whitewater releases. The licensee contends that *Nisqually* shows that, under circumstances similar to those involved here, the Commission did not require public access due to safety concerns, low usage, comparable nearby runs, and unpredicted expenses.

<sup>8</sup> See Order Approving Whitewater Boating Report issued November 21, 2002, 101 FERC ¶ 61,198 (2002).

27. However, *Nisqually* is distinguishable from the instant Rainbow Falls proceeding. In *Nisqually*, licensee City of Tacoma, Washington, released the whitewater flows as set forth in its license and completed a three-year study of the releases. The city then recommended that the Commission not require further whitewater releases, based on the study results, and the Commission found:

Given that there has not been extensive use of the whitewater boating opportunities at the Nisqually Project, that there are comparable whitewater runs available in Washington State, that the whitewater events have proven to be significantly more expensive than originally expected, and that responding to whitewater boating incidents has been placed a heavy burden on local rescue agencies, we will accept Tacoma's final report, and will not require additional whitewater boating releases at the Nisqually Project. [<sup>9</sup>]

28. In the case of the Rainbow Falls Project, a study of the demand and feasibility of whitewater boating was also conducted. However, unlike *Nisqually*, the Rainbow Falls study results show that there is demand for whitewater boating at the site and that access can be provided with specific measures to address safety/security issues. The run would also provide whitewater boating opportunities during certain times of the year when other whitewater boating resources in the region do not have optimal flows for boating, particularly during the summer months.

29. It has long been the Commission's policy that "licensees whose project comprise land and water resources with outdoor recreational potential have a responsibility for the development of those resources in accordance with area needs, to the extent that such development is not inconsistent with the primary purpose of the project."<sup>10</sup> Where as here, there are safety concerns, it is appropriate to move with caution in order to determine whether whitewater releases should be included as part of the license. In this regard, we have carefully considered the appropriateness of whitewater boating at the Rainbow Falls project.

30. In requesting that no whitewater access be required, the licensee reiterated its concerns about the safety of rescue personnel in the event of a boating accident in the area. In recommending year-round whitewater access (Option 7), Commission staff in

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<sup>9</sup> *Id.* P 18 (footnote omitted).

<sup>10</sup> Order No. 313, *Recreational Development at Licensed Project*, 34 FPC 1546 (1965). See also the policy on "Recreational development at licensed projects" at 18 C.F.R. § 2.7 (2008).

the EA states it does not expect rescue agencies to take unnecessary risks to perform emergency rescues in the chasm and that boaters enter the river at their own risk. Additionally, the EA states that while there may be some risks associated with whitewater boating, it does not obviate the licensee's responsibility to provide recreational opportunities in accordance with the area needs.<sup>11</sup> Based on the reevaluation analysis set forth above, the five-month (Option 3) whitewater access required by this order strikes an appropriate balance between meeting reasonable recreational demand and mitigating valid safety concerns. As further discussed below, the whitewater access implementation plan required by this order includes additional appropriate safety/security measures, including, periodic reporting and consultation with the boating community.

31. Regarding the EA's suggestion that the access site be closed during adverse weather conditions, the licensee states that it should not be responsible for determining when to restrict access during such conditions. In its June 19, 2008 letter, American Whitewater states that boaters should be able to make the decision to enter the river and not the licensee; therefore the licensee should not be given the right to close the site "as necessary."

32. As stated in the EA,<sup>12</sup> the licensee should be able to determine when to close the site due to scheduled or emergency maintenance or project construction activities. Signage at the site and posted on a website and/or telephone hotline could identify when the site is closed by the licensee and when it is expected to reopen. As noted above, we reexamined whitewater access at the project and concluded that the access site should be closed during the winter months. The required implementation plan should include provisions on site closure during the winter months and due to project maintenance or construction activities.

### **Recommended Whitewater Access Facilities and Measures**

33. The licensee provides comments on the recommended access facilities and measures noted in the EA. The licensee reiterated its comments about the cost of construction, operation, and maintenance of the access facilities. After further evaluation, we find that option 3, proposed in the plan, and would require the licensee to incur significantly less cost than compared to providing year-round access.

34. The licensee also states that any additional facilities at the site would require approval by the New York State Office of Parks, Recreation, and Historical Preservation

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<sup>11</sup> See the EA at 15. See also *Public Utility District No. 1 of Chelan County, Washington*, 119 FERC ¶ 61,055 P 10 (2007).

<sup>12</sup> See the EA at 19.

(SHPO), in accordance with the project historic resources management plan (HRMP) pursuant to article 416. The HRMP was approved during relicensing and article 416 requires its implementation. The HRMP determined that the entire Rainbow Falls facility (powerhouse, gatehouse, penstocks, etc.) is eligible for listing on the National Register of Historic Places. In accordance with the provisions of the HRMP, the licensee is required to consult with the SHPO for any ground disturbing activities that may affect cultural resources.

35. In addition, the licensee states the recommended boat launching platform is not necessary at the site given the natural, gradual slope of the riverbank; the recommended streamflow gage is not necessary given nearby USGS gaging station and the availability of flow data on the USGS website; and that temporary restroom facilities should not be required at the site during the winter due to maintenance costs. In its June 19, 2008 comments, American Whitewater agrees with the licensee that no restroom facilities are needed at the site and that the USGS gage is sufficient in providing information regarding flows at the project but that a standard staff gage at the put-in would benefit paddlers and increase safety. Both the licensee and American Whitewater indicate that the upstream USGS gaging station would provide sufficient flow data for boaters using the project's whitewater access site.

36. After further consideration of this issue, we agree that the installation of a separate streamflow gage at the access site is not necessary. Since the project is operated in a run-of-river mode, flows recorded at the upstream gage would approximate flows at the site. For the purposes of assessing whitewater boating flow conditions, this data would be sufficient and is readily available on the USGS website. To ensure boaters are aware of this available flow data, information about the USGS website address and the upstream gaging station should be provided on signage installed at the access site.

37. In addition, the licensee states that the recommended warning signs for the access site noted in the EA are not sufficient to prevent inexperienced boaters from accessing the river and would create unsafe conditions. Finally, the licensee states that it should not be responsible for removing of existing debris in the river at the Mike's Hole rapids, located downstream of the project, as suggested in the EA. The access facilities are to include warning and other signage to clearly indicate that the river is a Class IV+ and is to be used by only highly skilled boaters between Saturday of Memorial Day weekend and October 31. Flows would be at optimal levels during this time and not unlike flows at other Class IV+ access sites. Signs would be posted that individuals enter the river knowing that rescue may not occur and that a high level of skill is needed to safely boat this stretch of the chasm. This issue was sufficiently covered in the EA. Further, the EA notes that the existing debris at Mike's Hole rapids was not identified as a significant safety concern and could be removed or, as an alternative, signage at the project's access site could inform boaters of the presence of such debris and how to best avoid it. The EA did not recommend the licensee be responsible for removing the existing debris.

### **Interim Whitewater Access**

38. Both American Whitewater and Adirondack support the EA's analysis and findings, including requiring the licensee to develop an implementation plan to provide whitewater access at the project (albeit for year-round access, which is being rejected and reduced here). Both entities express concerns about the time required to complete the recommended implementation plan and ultimately provide access and request the Commission require the licensee provide interim access immediately while the licensee is develop its implementation plan.

39. As discussed in the EA, certain safety and security issues need to be addressed prior to providing whitewater access at the project. The construction of specific safety and security improvements, such as signage and security fencing modifications, need to be completed before providing safe access. In turn, an implementation plan for such safety and security measures would need to be filed with the Commission for approval. These actions would take time to complete and are needed regardless of whether or not interim or permanent whitewater access is provided at the site. It is also important to note that the licensee must install signage, additional security fencing at the project, and other appropriate improvements which can affect how quickly implementation can occur.

40. Commission staff believes that the required whitewater boating access facilities should be completed as soon as practical in order to provide whitewater boating opportunities at the project in a timely manner. As discussed below, this order requires the licensee to develop and file, for Commission approval, an implementation plan, within four months, to complete the necessary improvements and open the whitewater access site as soon as practical.

### **Consideration of Specific Comment Letters**

41. In its comment letter on the EA, the Ausable reiterated its earlier concerns about the financial effects of whitewater access and boating on its business, boater trespass on private lands during scouting activities, and the safety of rescue personnel in the event of a boating accident. In its comments, the American Whitewater and Adirondack reiterate their contention that whitewater boating on the river is no more dangerous than boating on other rivers and should not be restricted. The EA addressed these issues. As discussed above, by providing access during optimal flow periods when other nearby whitewater opportunities are not available due to low flow, reasonable access would be provided that reduces the safety risk to boaters and rescue personnel.

42. The licensee states the EA ignored comments from the Essex County Office of Emergency Services and Mr. Thomas Dragoon of West Chazy, New York. Mr. Dragoon

experienced the loss of his son who had been boating on the river in 2006 upstream of the project near Alice Falls and in his comments states concerns for public safety and the safety of rescue operations. Section 6.2.4 of the EA addressed safety issues and concerns raised by individuals and others who filed comments with Commission, including Mr. Dragoon and the Essex County Office of Emergency Services. Specifically, the staff recommended implementation plan would include measures to address safety and rescue concerns such as informational signage that states rescue may not occur and that this stretch of river is for expert boating only. As noted above, we have reevaluated the appropriateness of whitewater access at the project, based in part, on safety issues.

43. In its comments on the EA, the USGS states that the data used in the EA varies from their information. Specifically, the USGS reports that the average annual streamflow, for the same period cited in the EA, at the USGS upstream gaging station (Gage No. 04275500) is 669 cfs, while the EA reports a value of 350 cfs; and that the EA cites a 90% exceedence flow of 150 cfs, while the same flow at the gaging station is calculated to be 164 cfs. The USGS also notes that more recent information can be obtained on it's website.

44. The data used in the staff's EA on the whitewater access analysis was based on the Commission's license EA prepared in 2004.<sup>13</sup> Commission staff has reviewed the streamflow data provided in the USGS letter, as well as, more recent data from its upstream gaging station and concurs with the USGS's assessment of streamflow characteristics in the vicinity of the project. However, these revised streamflow figures do not in themselves change our conclusions in the EA. Nonetheless, we considered this revised streamflow data in our reevaluation of whitewater access at the project.

## CONCLUSION

45. In general, providing whitewater access at the project for experienced boaters would not result in significant conflicts between boaters and other recreation users, would not represent a prohibitive safety/security risk, and is consistent with project purposes. As discussed in the EA, there is demand for whitewater boating at the project. This access would provide high quality, whitewater boating opportunities for experienced boaters during certain times of the year when other whitewater boating resources in the region do not have optimal flows for boating. While Option 7 provides year-round whitewater access, it also poses the greatest safety risks of the options identified in the plan, particularly during adverse winter conditions and at flows above optimal levels for boating, and the safety risks are simply unwarranted, especially in relation to the demand

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<sup>13</sup> See page 18 of the Environmental Assessment for the project's license order, issued April 2, 2004.

for public whitewater access. Option 3 provides whitewater access during five months of the year when flows are optional for boating and outside the winter months. Access during this time would meet most demand for whitewater boating at the project and poses less safety risk for boaters and rescue personnel, striking a reasonable balance between risk and demand.

46. While we recognize the potential risks of emergency rescue in the event of a boating accident in the chasm, we do not expect rescue agencies to take unnecessary risk in emergency situations. Boaters must recognize that a rescue may not occur. However, the risk of a serious boating accident in the chasm is no different than the risks associated with similar advanced whitewater runs in the region. Such risks can be reduced through the implementation of appropriate safety measures, including safety gates, and informational and warning signage indicating when the site is open for access and where to find flow information (i.e., website and/or telephone hotline).

47. Further, we find that whitewater boating access at the project can be provided at a reasonable cost and that such costs could be minimized by providing limited improvements and modifying existing security measures to reduce or eliminate the need for new security measures and frequent site visits by licensee personnel.

48. In order to address the issues discussed above, the licensee should develop a plan to implement option 3 of the proposed plan to provide whitewater access at the project from Saturday of Memorial Day weekend through October 31. The licensee should develop the implementation plan in consultation with the SHPO, Adirondack and American Whitewater. The plan, at minimum, should provide the parameters set forth in ordering paragraph (B), below.

49. The licensee should also include with the plan filed with the Commission, documentation of consultation, copies of comments and recommendations on the completed plan after they have been prepared and provided to the consulted entities, and a specific description of how the entities' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the entities to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

50. The Commission should reserve the right to require changes to the plan. No activities covered by the plan shall begin until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

The Director orders:

(A) Option 3 (Saturday of Memorial Day weekend to October 31) of the whitewater access plan filed on May 23, 2007, as supplemented May 25, 2007, for the Rainbow Falls Hydroelectric Project (FERC No. 2835), as modified in paragraph (B), is authorized.

(B) The licensee shall provide the Commission, for approval, within 120 days from the date of issuance of this order, a plan for implementation of whitewater boating access at the project pursuant to option 3 authorized in paragraph (A). The plan shall be developed in consultation with the New York State Office of Parks, Recreation, and Historical Preservation, American Whitewater, and Adirondack Mountain Club and provide for the completion of the access facilities and the availability of the access site for public use as soon as practical. At a minimum, the plan shall provide:

(a) Description of needed facilities to provide safe and reasonable access to the water and how the licensee will accomplish the required access. At a minimum, these access facilities shall include improvements to provide safe access and entry into the water at the put-in site, appropriate safety and information signage, new or modified security improvements, and a small parking area. The need for restroom facilities and trash receptacles shall also be considered. Also, the plan shall include a description of type and location of facilities, including materials, design drawings, and maps showing the location and layout of the proposed facilities and security modifications, and other key points in the area. At a minimum, the maps shall identify: 1) put-in and take-out locations; 2) major rapids and other characteristics; 3) private access sites and land uses along the chasm below the project; 4) parking facilities in the area; 5) modified security fencing and other areas that are restricted to public access; and 6) any other areas that have been determined as important to users of the access site. The final proposed facilities and measures shall be determined through consultation with the parties.

(b) Installation of appropriate safety and information signage at the access site, including a map of the whitewater run, access and exit points, and key river features (i.e., Mike's Hole, etc.). The informational signs shall include licensee contact information and language indicating the site is open from Saturday of Memorial Day weekend to October 31, hours of operation, and any other information that would enhance safety at the site. The licensee shall also include the specific language proposed for the safety signs indicating: 1) the river reach is classified as Class IV+; 2) the site is open to expert boaters only from Saturday of Memorial Day weekend to October 31, but may be closed by the licensee during scheduled or emergency project construction or maintenance activities in the area; 3) boaters enter the water at their own risk and boater rescue may not occur; 4) trespassing on private property along the chasm is prohibited and is subject



to state and local laws; and 5) information about the U.S. Geological Survey website address and the upstream gaging station.

(c) The construction, operation, and maintenance schedule of the access site facilities, including the entitie(s) responsible for conducting such activities.

(d) A plan and schedule for periodic review of the access site, in cooperation with the boating community (*i.e.*, American Whitewater and Adirondack Mountain Club) and New York State Office of Parks, Recreation, and Historical Preservation, to assess whether any changes or modifications are needed to the access facilities or provisions to address new or additional safety concerns and a schedule and provisions for the submission of the review results with the Commission along with documentation of consultation with American Whitewater and Adirondack Mountain Club. The Commission should reserve the right to require changes to the access site based on the results of the periodic review.

(e) The licensee shall also include with the plan filed with the Commission, documentation of consultation with the Adirondack Mountain Club, American Whitewater, and New York State Office of Parks, Recreation, and Historical Preservation, including copies of comments and recommendations on the completed plan, and a specific description of how the entities' comments are accommodated by the plan. The licensee shall allow a minimum of 30 days for the entities to comment and to make recommendations before filing the plan with the Commission. If the licensee does not adopt a recommendation, the filing shall include the licensee's reasons, based on project-specific information.

The Commission reserves the right to require changes to the plan. No activities covered by the plan shall begin until the licensee is notified by the Commission that the plan is approved. Upon Commission approval, the licensee shall implement the plan, including any changes required by the Commission.

(C) This order constitutes final agency action. Requests for rehearing by the Commission may be filed within 30 days of the date of issuance of this order, pursuant to 18 CFR § 385.713.

Robert J. Fletcher  
Chief, Land Resources Branch  
Division of Hydropower  
Administration and Compliance