



STATE OF MICHIGAN

JENNIFER M. GRANHOLM
GOVERNOR

DEPARTMENT OF NATURAL RESOURCES
LANSING

REBECCA A. HUMPHRIES
DIRECTOR

January 5, 2006

Magalie Roman Salas
Secretary
Federal Energy Regulatory Commission
888 First Street, N.E.
Washington, DC 20426

Dear Secretary Salas:

SUBJECT: Upper Peninsula Power Company Development Plans for Upper Peninsula Hydro Lands: Bond Falls: 1864; Prickett: 2402; Au Train: 10856; Escanaba River Dam #4, Boney Falls: 2506; Cataract: 10854 – Compliance with Standard Land Use Article and Consistency with License Objectives.

The Michigan Department of Natural Resources (DNR) has recently been informed by the Upper Peninsula Power Company (UPPCO) that it intends to sell, or in some cases has sold, non-project lands adjacent to the above referenced hydropower projects to a land developer.

UPPCO has presented to the state and federal agencies, as well as tribal and non-governmental organization representatives (Agencies), a draft "Non-Exclusive License Agreement" ("NELA") to be signed by UPPCO and the land developer. The NELA would provide UPPCO's authorization to lot owners for certain uses of project lands, within the Federal Energy Regulatory Commission's (FERC) project boundary, between the reservoirs and the purchased lots. UPPCO has also provided to the Agencies a "Development Outline for Nonproject Lands" ("Outline"), which lists additional activities proposed to occur within project lands and waters. The uses and activities include constructing footpaths, piers, docks, installing electrical lines, and clearing view corridors.

While UPPCO has sought Agency comment on the proposed development, it has advanced the view that it has done so only as a courtesy and that it is not required to seek such comment. Further, UPPCO maintains that it has unilateral authority to permit such non-project use of project lands. Given the uses, and their resulting impacts, which would be authorized by the NELA and the Outline, the Agencies disagree with these views.

We plan to continue discussions with UPPCO regarding their development plans and their potential impacts on project lands and waters. However, we believe that our discussions with UPPCO should occur within the context of the general procedures outlined in Section 5.4.3 of the FERC Compliance Handbook, including application to FERC by UPPCO for non-project use of project lands. We also believe that public notice and comment is appropriate in this case, since the proposed non-project use of project lands, as well as the residential development of

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adjacent UPPCO lands, along with the resulting environmental effects, were not disclosed to the public during the relicensing process for any of the above licenses.

With respect to our review of the NELA and the Outline, it is the collective opinion of the Agencies that some of the uses of project lands that would be permitted or envisioned by those documents are not “consistent with the purposes of protecting and enhancing the scenic, recreational, and other environmental values of the project,” as required by the Standard Land Use Article, found within each of the above referenced licenses. (Bond Falls – Article 422; Prickett – Article 420; AuTrain – Article 410; Escanaba River – Article 414; Cataract – Article 414).

As such, and pursuant to the provisions of that Article, UPPCO does not have authority to unilaterally authorize such uses. Rather, it must seek approval of FERC.

This point is made clear by the March, 2004 Compliance Handbook of Commission’s Division of Hydropower Administration and Compliance (“Compliance Handbook”). Section 5.4.3 of the Handbook (pages 8 and 9) addresses the requirements of the Standard Land Use Article which “allows licensees to convey interests in project lands and waters (through leases, rights-of-way or fee title conveyances) for certain non-project uses, without obtaining prior Commission approval.” However, that authority is limited in important respects:

“Conveyances allowed under the standard land use article must be consistent with the scenic, recreation, and other environmental values of the project...*The licensee must also consult with the appropriate federal and state agencies to assure that the proposed use is compatible with the project’s recreation plan and resources, and that the instrument of conveyance includes appropriate covenants to protect the scenic, recreational, and other environmental values. If a proposed use does not meet the criteria of the standard land use article, the licensee must then obtain Commission approval prior to issuing the conveyance. The licensee requests Commission approval by filing an application for a non-project use of project lands.*” (Emphasis added).

An example and suggested contents of an application to be filed with FERC by the licensee is found in Appendix I of the Handbook.

Again, given the uses allowed by the current wording of the NELA and the Outline, UPPCO has not assured compliance with the above-quoted requirements. Therefore, UPPCO must seek FERC approval through an application for non-project use of project lands.

As stated above, the Agencies have a number of concerns related to compliance with the Standard Land Use Article which we have discussed with UPPCO. An attachment to this letter provides detailed information on proposed activities to be authorized in the NELA and how these activities would conflict with specific objectives of each hydropower license or with plans developed and approved under each license.

Furthermore, the cumulative effects of small-lot residential development along a significant percentage of shoreline on these reservoirs could lead to even greater impacts on project lands

and waters. The extensive shoreline development would be in conflict with key objectives within each license. Some of these key license objectives include: providing/maintaining opportunities for walk-in public access for shoreline fishing, hunting, and sightseeing; retention of naturally-appearing shorelines; protection/enhancement of sensitive wildlife and wildlife habitat; and protection/enhancement of old growth forest. As the UPPCO proposal now stands, it appears that an environmental assessment would be needed to fully evaluate the direct, indirect, and cumulative effects of such a large-scale proposal on project resources.

Therefore, we are requesting that the FERC inform UPPCO that issuance of conveyances for non-project use of project lands, via the current version of the NELA, would violate the Standard Land Use Article, because the provisions of the NELA are inconsistent with that article's requirements.

Further, FERC should direct UPPCO that it must comply with the procedures set forth in Section 5.4.3 of the Compliance Handbook. The procedures include, among other things, consulting with appropriate state and federal agencies to assure that the proposed use of project lands is compatible with the license, approved license plans, and the scenic, recreation, and other environmental values of the project.

UPPCO's proposals are receiving significant public interest. Given UPPCO's development goals for lands that affect Federally licensed hydropower generation and public values related to access and environmental quality, we believe it is in the public's interest as well as UPPCO's to follow mandated consultation and compliance requirements.

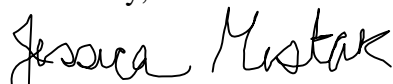
Once again, we plan to continue discussions with UPPCO regarding their development plans and their potential impacts on project lands and waters to determine whether the license conflicts we have identified can be satisfactorily mitigated or otherwise resolved. Should UPPCO choose to ignore the requirements of the Standard Land Use Article, as well as the procedures outlined in Section 5.4.3, and proceed ahead with unilateral authorization of non-project use of project lands via the NELA in advance of review and approval by the Commission, we reserve the right to seek enforcement of the licenses.

We want to emphasize that the Agencies are in agreement as to the content of this letter. In order to file this letter with FERC in a timely and efficient manner, we are filing as separate entities, but remain united in our views on this important matter.

If you have any questions about this matter, please contact me at 906-249-1611 ext 308 or mistakjl@michigan.gov. If you wish to contact me in writing, my address is:

Marquette Fisheries Station
Michigan Department of Natural Resources
484 Cherry Creek Rd
Marquette, MI 49855

Sincerely,



Jessica Mistak, Senior Fisheries Biologist

cc: Peggy Harding, FERC
Patricia Grant, FERC
Robert Evans, USFS
Craig Czarnecki, FWS
Christie Deloria, FWS
Gene Mensch, KBIC
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William Deephouse, MHRC/RAW
Shawn Puzen, UPPCO
Roger Trudeau, WPS
Pam Stevenson, AG
Jim Ekdahl, DNR
Ann Wilson, DNR
Mary Dettloff, DNR
Chris Freiburger, DNR

ATTACHMENT

Agency Concerns Upper Peninsula Power Company Proposed Development

Bond Falls and Victoria (FERC # 1864)

Buffer Zone Plan (approved 2/23/2005)

Old Growth- A key objective of the Bond Falls License and Buffer Zone Plan is to maintain or develop an unmanaged old growth forest in the Buffer Zone around the reservoir. In addition to large living trees of all species representative of the site, old growth forests include many other important components, including dead trees (snags), diseased/defective trees, and downed wood of all sizes on the forest floor. Multiple vegetative layers are also a common feature of old growth forests. Several proposed property uses would appear to be in conflict with this objective, including:

- allowing cutting, chipping, and/or removal of diseased, dead, and downed trees
- allowing trenching to install electrical lines
- placement of walking paths (depending on their width and density)
- filling low land, leveling terrain
- clearing of brush and shrubbery (other than for walking path)

Vegetative Management- According to the approved plan, no vegetative management shall occur in areas of the buffer zone not immediately adjacent to recreational or operational areas unless it is deemed desirable after consultation with the Implementation Team to enhance wildlife habitat, pest or disease control, remove invasive plant species, safety purposes, or for erosion or sediment control purposes. Several of UPPCO's proposed uses of project lands that including cutting of wood, brush, and other vegetation are in conflict with the Buffer Zone Plan.

Wetlands- The plan states that UPPCO will preserve, protect, and manage all wetlands under company ownership in a manner that recognizes their natural values and importance to the environment. In addition, UPPCO shall maintain control of vital wetlands under company ownership when to relinquish such control would risk degradation of wetland values. The resource agencies are concerned that existing wetlands may not be afforded sufficient protection in the sale of non-project lands.

Recreation Plan (approved 11/29/2005)

Providing for walk-in public access is another objective of the Recreation Plan. Placement of private lots around the reservoir would interfere with walk-in public access, since the public would have only limited access to the shoreline via boat launch areas, campground areas, and perhaps a few common access corridors (intended mostly for lot owners). UPPCO recently acknowledged the importance of limiting camping to designated sites to allow natural vegetative growth and facilitate obtaining old-growth forest characteristics within the buffer zone and will enhance nesting potential for common loons and other waterfowl. With limited camping allowed, UPPCO conceded that this will provide more habitat for threatened or endangered species by decreasing human disturbance along the reservoir shoreline while maintaining the recreational needs described in the Recreation Plan. Any increase in human use of the shoreline

would directly conflict with the intentions of the Recreation Plan. Furthermore, if UPPCO's land is developed, recreation would be restricted. Use of the Buffer Zone for hunting would be essentially eliminated in areas adjacent to private lots, since Michigan Law prohibits discharging a firearm for hunting within 450 feet of an occupied residence. Use of the Buffer Zone for shoreline fishing would also be mostly eliminated, since the Non-Exclusive License Agreement prohibits the public from shoreline fishing within 100 feet of Licensee's pier.

Wildlife and Land Management Plan (approved 2/4/2005)

A key objective of the Wildlife and Land Management Plan is to protect and/or enhance habitat for wildlife species, such as common loon and osprey, and protect nesting/denning wildlife from human disturbance. Creation of a buffer zone is also intended to protect and enhance habitat as part of the plan. Depending on their locations and density, placement of numerous residential lots around the reservoir shoreline could conflict with these objectives, since there would almost certainly be increased human use of shoreline areas, especially in front of and near residential lots. In addition, nest predators of loons (raccoons, skunks) often increase their populations as human residential density of an area increases, due to the availability of food. Road construction and road density both within the project boundary, and up to the project boundary, could also potentially have a detrimental effect on any of these species, particularly gray wolf.

Threatened and Endangered Species Protection and Enhancement Plan (approved 10/6/2005)

Similar to above, a key objective of the Threatened and Endangered Species Protection and Enhancement Plan is to protect and/or enhance habitat for sensitive species, such as bald eagle and gray wolf, and protect nesting/denning wildlife from human disturbance. Creation of a buffer zone is also intended to protect and enhance habitat as part of the plan. Depending on their locations and density, placement of numerous residential lots around the reservoir shoreline could conflict with these objectives, since there would almost certainly be increased human use of shoreline areas, especially in front of and near residential lots. In addition, nest predators of loons (raccoons, skunks) often increase their populations as human residential density of an area increases, due to the availability of food. Road construction and road density both within the project boundary, and up to the project boundary, could also potentially have a detrimental effect on any of these species, particularly gray wolf.

AuTrain (FERC # 10856)

Land Management Plan (approved 5/3/1999)

According to Article 407 of the license, no timber harvesting is to occur within the 200 foot buffer (certain activities are permitted for safety and resource protection purposes). As part of the Land Management Plan, UPPCO recognized the value of retaining vegetation within the buffer zone. For example, fruit and mast bearing trees and shrubs will be retained on UPPCO lands for the enhancement of wildlife; lowland stands of conifers for winter cover of white-tailed deer will be maintained; and hollow, wolf trees, and den trees will be retained. In the plan, UPPCO states that the majority of the shoreline is in a natural state and all lands are open for public use. As a result, the lands are managed to provide both recreation and protection of the natural beauty of the area. Currently, vehicles are confined to public access roads, but fisherman, hikers, skiers, and hunters may walk wherever they wish. UPPCO's proposal to

allow cutting, chipping, and/or removal of diseased, dead, and downed trees, trenching to install electrical lines, placement of walking paths, filling of low land, and clearing of brush and shrubbery appears to be in conflict with the intent of the FERC license and associated plans. Furthermore, if UPPCO's land is developed, recreation would be restricted. Use of the Buffer Zone for hunting would be essentially eliminated in areas adjacent to private lots, since Michigan Law prohibits discharging a firearm for hunting within 450 feet of an occupied residence. Use of the Buffer Zone for shoreline fishing would also be mostly eliminated, since the Non-Exclusive License Agreement prohibits the public from shoreline fishing within 100 feet of Licensee's pier.

Wildlife Management Plan (approved 5/13/1999)

The goal of the Wildlife Management Plan is to provide protection of environmentally sensitive areas on project lands for wildlife use. The objectives of the plan include: 1) forest habitat management and development, 2) waterfowl management, and 3) endangered or sensitive species management. With these objectives, UPPCO proposed to minimize impact to the buffer zone, increase the overall number of waterfowl using the project, and protect sensitive species. A number of Threatened and Endangered species have been identified using the AuTrain Basin (bald eagle, osprey, common loon). In addition, there is at least one active eagle nest within the project boundary. Depending on their locations and density, placement of numerous residential lots around the reservoir shoreline could conflict with these objectives, since there would almost certainly be increased human use of shoreline areas, especially in front of and near residential lots. In addition, nest predators of loons (raccoons, skunks) often increase their populations as human residential density of an area increases, due to the availability of food. Road construction and road density both within the project boundary, and up to the project boundary, could also potentially have a detrimental effect on any of these species.

Prickett (FERC # 2402)

Comprehensive Wildlife, Land Use, and Recreation Management Plan (approved 6/1/1999)

Bald Eagle Management- The approved plan involves zones and limited human disturbance during nesting period February 1 to September 1, as well as protection of super canopy trees to perpetuate the desirable features of the area for protection and enhancement of bald eagles and their habitat. The plan also states "Since the availability of forage and preservation of habitat is essential to the survival and well-being of the bald eagle, UPPCO intends to retain the 1,210 acres within the Prickett Hydroelectric Project Boundary currently under its ownership for the duration of the license and operate the project in an approximate run-of-river mode." As of 2005, there are two active eagle nests within project boundary.

Depending on their locations and density, placement of numerous residential lots around the reservoir shoreline could conflict with the Bald Eagle Management Plan, since there would almost certainly be increased human use of shoreline areas, especially in front of and near residential lots. Road construction and road density both within the project boundary, and up to the project boundary, could also potentially have a detrimental effect on bald eagles.

Wildlife Management- The objective of the Wildlife Management Plan is to maintain the forest with the diversity of vegetation types and age classes, including maintenance of den/cavity trees and shade intolerant forest habitat for grouse and deer. Much of the active wildlife management consists of installation and maintenance of waterfowl and other avian nesting structures. Depending on their locations and density, placement of numerous residential lots around the reservoir shoreline could conflict with this objective, since there would almost certainly be increased human use of shoreline areas, especially in front of and near residential lots. Road construction and road density both within the project boundary, and up to the project boundary, could also potentially have a detrimental effect on wildlife species.

Threatened and Endangered Species- The plan proposes protection of habitat for gray wolf and wood turtle by closing unnecessary roads and public education. Provisions for the protection of osprey are taken into account, in part, by construction of two nesting platforms. Depending on their locations and density, placement of numerous residential lots around the reservoir shoreline could conflict with protection of threatened and endangered species, since there would almost certainly be increased human use of shoreline areas, especially in front of and near residential lots. In addition, nest predators (raccoons, skunks) often increase their populations as human residential density of an area increases, due to the availability of food. Road construction and road density both within the project boundary, and up to the project boundary, could also potentially have a detrimental effect on any of these species, particularly gray wolf.

Land Use- In the Order Modifying and Approving this plan, FERC stated that Article 414 should be modified so that no timber harvesting activities, including single-tree selection, would occur within the proposed 200 foot shoreline buffer around the project reservoir, on islands within the reservoir, and within 1/4 mile of active bald eagle nests. According to FERC, by not allowing cutting, these lands would remain in their present condition and any old growth trees on these lands would continue to benefit the species that are dependent upon old growth areas. UPPCO's proposal to allow cutting, chipping, and/or removal of diseased, dead, and downed trees, trenching to install electrical lines, placement of walking paths, filling of low land, and clearing of brush and shrubbery appears to be in conflict with the intent of the FERC license and associated plans.

Recreation- The approved plan identifies the majority of the shoreline is in an undeveloped, natural state. The project area is characterized as rural. If UPPCO's land is developed, recreation would be restricted. Use of the Buffer Zone for hunting would be essentially eliminated in areas adjacent to private lots, since Michigan Law prohibits discharging a firearm for hunting within 450 feet of an occupied residence. Use of the Buffer Zone for shoreline fishing would also be mostly eliminated, since the Non-Exclusive License Agreement prohibits the public from shoreline fishing within 100 feet of Licensee's pier.

Escanaba (FERC #2506)

Land Use Management Plan (approved 4/18/1996)

The objectives of this plan are to protect the natural and scenic character of the project shoreline, protect sensitive wildlife habitat, and protect Threatened and Endangered species. The 200 foot undeveloped buffer is intended to protect the natural and scenic character of the project

shoreline by limiting development and minimizing the views to timber harvest areas. The licensee will adhere to a “no-harvest” policy for timber within the buffer zone. Individual trees will only be removed in the instance they pose a hazard to the public, interfere with project operations, or detract from the aesthetic qualities of the site. Prior to removing any trees from the buffer zone, the licensee proposes to consult with the FWS and MDNR about any tree removal decisions. To limit development within the buffer zone, no facility development will be permitted in this area. Vehicular access will be prohibited, but non-vehicular activities such as hiking, bird-watching, and hunting will be encouraged.

UPPCO’s proposal to allow cutting, chipping, and/or removal of diseased, dead, and downed trees, trenching to install electrical lines, placement of walking paths, filling of low land, and clearing of brush and shrubbery appears to be in conflict with the intent of the FERC license and associated plans.

Wildlife Management Plan (approved 12/17/1996)

In this plan, the licensee proposes to manage the project lands as a buffer zone to protect the reservoirs and river, minimize human activity in the Boney Falls and Dam No. 3 area, install nesting boxes (wood duck, osprey, mallard, purple martin, bluebird, and bat), and protect endangered and unique animal and plant species. Both road construction and timber harvesting are restricted within the buffer zone. The plan states that disturbance by human activity within the Boney Falls and Dam No. 3 area will further interfere with raptor and waterfowl nesting success and feeding. Therefore, human activity in this area will be minimized. The licensee proposes to prescribe burn the prairie community between Mead Lodge and Dam No. 3.

Depending on their locations and density, placement of numerous residential lots around the reservoir shoreline could conflict with the objective of the Wildlife Management Plan which calls for minimized human activity to reduce disturbance to raptor and waterfowl nesting success and feeding, since there would almost certainly be increased human use of shoreline areas, especially in front of and near residential lots. Road construction and road density both within the project boundary, and up to the project boundary, could also potentially have a detrimental effect on wildlife species.

Threatened and Endangered Species Management Plan (approved 12/17/1996)

Sensitive wildlife and botanical resources that have been identified at the project primarily occur within the designated buffer zone, including two federally threatened plant species (dwarf lake iris and Houghton’s goldenrod) and several state protected plant species. To protect these special concern resources, UPPCO pledges to minimize or restrict access through areas where these plants could occur. Although there is no known currently active bald eagle nest within the project boundary, bald eagle nests have been identified in the past. To protect bald eagles, UPPCO proposes to designate the buffer zone as a no harvest zone as well as a 1,320 foot protective radius of no human activity during the nesting period. During the winter months, the licensee would minimize ingress and egress within foraging areas in the buffer zone to minimize disturbance to eagle foraging. The plan states that disturbance by human activity within the Boney Falls and Dam No. 3 area will further interfere with raptor and waterfowl nesting success and feeding. Therefore, human activity in this area will be minimized. The plan also emphasizes that the licensee shall not remove any tree in the buffer zone without prior

consultation with the FWS and MDNR and shall only remove trees as required for disease control or public safety in order to protect bald eagle habitat.

Depending on their locations and density, placement of numerous residential lots around the reservoir shoreline could conflict with the objective of the Wildlife Management Plan which calls for minimized human activity to reduce disturbance to sensitive nesting success and feeding, since there would almost certainly be increased human use of shoreline areas, especially in front of and near residential lots. In addition the increased human use of the shoreline area could negative impact special concern resources. Road construction and road density both within the project boundary, and up to the project boundary, could also potentially have a detrimental effect on sensitive species.

Cataract (FERC # 10854)

Land Management Plan (approved 3/8/1999)

As part of the plan, UPPCO proposes to manage the 200 foot buffer around all riparian areas for old growth and natural plan succession, with any management with the buffer zone proceeding only if approved by the natural resource agencies. UPPCO proposes to retain fruit and mast bearing trees and shrubs for the enhancement of wildlife. In addition, lowland stands of conifers for winter cover of white-tailed deer will be maintained and hollow, wolf trees, and den trees will be retained. In the plan, UPPCO states that the majority of the shoreline is in a natural state and all lands are open for public use. As a result, the lands are managed to provide both recreation and protection of the natural beauty of the area. Currently, vehicles are confined to public access roads, but fisherman, hikers, skiers, and hunters may walk wherever they wish. UPPCO's proposal to allow cutting, chipping, and/or removal of diseased, dead, and downed trees, trenching to install electrical lines, placement of walking paths, filling of low land, and clearing of brush and shrubbery appears to be in conflict with the intent of the FERC license and associated plans. Furthermore, if UPPCO's land is developed, recreation would be restricted. Use of the Buffer Zone for hunting would be essentially eliminated in areas adjacent to private lots, since Michigan Law prohibits discharging a firearm for hunting within 450 feet of an occupied residence. Use of the Buffer Zone for shoreline fishing would also be mostly eliminated, since the Non-Exclusive License Agreement prohibits the public from shoreline fishing within 100 feet of Licensee's pier.

Wildlife Management Plan (filed March 8, 1999)

The goal of the Wildlife Management Plan is to provide protection of environmentally sensitive areas on project lands for wildlife use. The objectives of the plan include: 1) forest habitat management and development, 2) waterfowl management, and 3) endangered or sensitive species management. With these objectives, UPPCO proposed to minimize impact to the buffer zone, increase the overall number of waterfowl using the project, and protect sensitive species. For the protection of wildlife, active vegetative management can take place within the 200 foot buffer zone only when approved by all parties (licensee, USFWS, and MDNR).

Depending on their locations and density, placement of numerous residential lots around the reservoir shoreline could conflict with these objectives, since there would almost certainly be increased human use of shoreline areas, especially in front of and near residential lots. In

addition, nest predators of (raccoons, skunks) often increase their populations as human residential density of an area increases, due to the availability of food. Road construction and road density both within the project boundary, and up to the project boundary, could also potentially have a detrimental effect on any of these species, particularly gray wolf.

Overall Concerns

In addition to the above mentioned concerns, the resource agencies are especially concerned about the cumulative impact of the proposed development. The uses of project land as proposed by UPPCO have the ability to significantly diminish public access and recreational use of the shoreline buffer and project waters, as well as wildlife habitat.

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