INTERNATIONAL JOINT COMMISSION
(DOCKET 6)

IN THE MATTER OF THE ORDER OF APPROVAL OF MAY 26, 1914, OF THE MICHIGAN NORTHERN POWER CO., ITS SUCCESSORS AND ASSIGNS FOR REGULATION OF LAKE SUPERIOR AND AMENDMENTS THERETO

SUPPLEMENTARY ORDER OF APPROVAL

(3 October 1979)

WHEREAS

The Commission, by Order of Approval dated May 26, 1914 (hereinafter referred to as the 1914 Order) approved the construction of compensating works and the control, maintenance and operation of said compensating works, and power canals, head gates, and by-passes of the Applicant in the St. Marys River (hereinafter sometimes collectively referred to as the works);

The Commission on September 27, 1978 issued Supplementary Orders In the Matter of the Regulation of Lake Superior and the St. Marys River (Dockets 6 and 8) and In the Matter of the Request by Great Lakes Power Corporation Limited for Permission to Proceed with Redevelopment of the Hydroelectric Generating Facilities at Sault Ste. Marie, Ontario;

The Commission, in its 1976 report, "Further Regulation of the Great Lakes", found that regulating the levels of Lake Superior, taking into account the levels of Lakes Michigan-Huron, would provide benefits throughout the Great Lakes System; and expressed its intention to propose amendment of the 1914 Order to accomplish such systemic regulation, to hold public hearings, and to amend the Order to reflect this new regulation objective, if the evidence warranted;

The 1976 Report was issued in response to a reference from Governments under Article IX of the Boundary Waters Treaty, and the Commission's role was advisory. The reference dealt with the degree to which benefits might result from further regulation of the Great Lakes. In considering amendments to the 1914 Orders the Commission's role is quasi-judicial, and it is bound by the provisions of Article VIII of the Treaty. The Commission has the responsibility thereunder, inter alia, to ensure that interests affected by the activities approved, both upstream and downstream of the works themselves, will be suitably and adequately protected by regulation of Lake Superior outflows;

The regulation objective set forth above (systemic regulation) means that all works in the St. Marys River would be operated so as to maintain the levels of Lake Superior and Lakes Michigan-Huron at the same relative position within their recorded ranges of stage and with respect to their mean monthly levels but not so as to increase the likelihood of Lake Superior exceeding 602.0 feet;

The Commission, at an executive meeting in Milwaukee, Wisconsin, on November 7, 1974, concluded that the Boundary Waters Treaty of 1909 does provide the Commission with authority to exercise continuing jurisdiction over Article III and Article IV cases, irrespective of any assertion of such continuing jurisdiction by the Commission in its Order of Approval and agreed that such continuing jurisdiction should be exercised with the greatest of care;

The Commission, in a letter to the Governments of the United States and Canada, dated November 2, 1976, stated in part:

> "In the Commission's Special Interim Report, the Commission recommended that the Governments approve the regulation objective and criteria set forth in that report and jointly grant to the Commission specific authority to adopt them and implement regulations in accordance therewith. The Commission has not changed its view on this matter.
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> "The Commission believes that there are several procedures which might be adopted by the Governments to achieve this end. These include a special agreement between the Governments or an application to the Commission for approval of a new use, obstruction or diversion of the boundary waters in the St. Marys River. Because of the complex legal and other issues involved in regulation of Lake Superior outflows, the Commission believes it desirable for the Governments to initiate a change in the 1914 Orders, after which the Commission will take the appropriate action under the Treaty and the Rules of Procedure.
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> "If the Governments do not initiate action to adopt the new objective, the Commission is prepared to implement the procedures set forth in 'Declaration' 2. This action would be undertaken pursuant to the jurisdiction conferred upon the Commission by the Boundary Waters Treaty and reflected in the Commission's 1914 Orders of Approval.
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> "This jurisdiction continues notwithstanding any particular action of the Commission, such as the issuance of an Order of Approval, unless there is some limit placed

on the Commission by the Treaty or some other relevant authority. The source of the Commission's continuing jurisdiction lies in Article VIII of the Treaty coupled with the purpose of the Treaty as set forth in its preamble.

"Article VIII of the Treaty states in relevant part that the Commission:

> 'shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III and IV of this Treaty the approval of the Commission is required ...'

"Nowhere in Article VIII or elsewhere in the Treaty is this jurisdiction, once conferred, limited to the completion of any particular action by the Commission.

"The stated purpose of the Treaty is 'to make provision for the adjustment and settlement' of all questions arising in the future, 'involving the rights, obligations, or interests of either (the United States or Canada) in relation to the other or to the inhabitants of the other, along the common frontier ....' The International Joint Commission is part of the institutional framework established by the Treaty to assure that the above-stated purpose is met, and its jurisdiction must be construed in such a way as to implement the purpose of the Treaty. Continuing jurisdiction over matters which properly come to the Commission under Articles III, IV and VIII is essential to ensure that new problems and conflicts will not arise between the United States and Canada over matters once passed upon by the Commission as new equities and concepts emerge with respect to particular Article III and Article IV cases.

"The Commission is mindful of the 'rules or principles' set forth in Article VIII which the Commission is bound to observe in the exercise of its jurisdiction over Article III or IV matters under the Treaty. These apply to both the original consideration of matters falling within Articles III, IV and VIII and to the continuing jurisdiction of the Commission in any particular matter under the provisions of the Treaty.

"Although the Commission is satisfied that it continues to have jurisdiction to take the actions indicated in 'Declaration' 2 of the report, the Commission is of the opinion, as stated earlier in this letter, that it would be preferable for the Governments to initiate the action to change the 1914 Orders of Approval."

By letter dated February 21, 1977 the Governments advised the Commission that they continue to support the new regulation objective; and stated their general concurrence with the Commission's statement of the continuing nature of its jurisdiction, set forth by the Commission in its letter to Governments, dated November 2, 1976; in this regard the Commission notes and endorses the view of the United States Government, referred to in the United States Government letter of February 21, 1977, regarding an analogous jurisdictional question arising in proceedings in 1974 under Docket 46 on the Skagit application and contained in a submission, dated September 24, 1974, which reads in part as follows:

> "Given these concerns, the Commission may wish to construe its powers under Articles IV and VIII of the Boundary Waters Treaty as imposing a continuing delegation of oversight and review to assure that the Commission's actions are in conformity with the Treaty in the light of all relevant circumstances."

The Commission issued public notice of and subsequently held information meetings in Duluth, Minnesota; Thunder Bay, Ontario; Sault Ste. Marie, Ontario; Milwaukee, Wisconsin; St. Clair, Michigan; London, Ontario; and Buffalo, New York during November and December 1978 on this matter;

The Commission issued public notice of and subsequently held public hearings in Duluth, Minnesota; Thunder Bay, Ontario; Sault Ste. Marie, Ontario; Buffalo, New York; and St. Clair, Michigan, during December 1978 and January 1979;

The Commission issued public notice in June 1979 of receipt of an Environmental Evaluation of Lake Superior Regulation Plan 1977, prepared by the U.S. Army Corps of Engineers for the U.S. Member of the International Lake Superior Board of Control, distributed copies to interested parties, made copies available at public libraries, and requested comment by August 1, 1979;

The Commission has considered the views of the public, as expressed through testimony at the public hearings and through other submissions, the advice of its International Lake Superior Board of Control and the views and comments of Governments, all part of the public record;

The Commission finds that Lake Superior cannot be regulated within a one and one-half foot range. The mean elevation of Lake Superior over the period of record has been 600.4 feet. The Lake has been below 600.5 feet over 52 percent of the time and below 600.0 feet about 25 percent of the time. All regulation plans since regulation began in 1922 have utilized the full range of Lake Superior levels for the period of record;

The Commission finds that the terms "primary" and "secondary" water used in the 1914 Order are no longer meaningful terms. They do not provide any guidance regarding the amount of water available for power purposes. Pursuant to the 1914 Order, as amended, and as required by the Treaty, each country has, on its own side of the boundary, equal and similar rights in the uses of the waters for power, subject, however, to the provision of water for navigation purposes and the protection of the fishery in the rapids. Consistent with the Treaty, where one country has had available to it additional capacity for the use of water for power purposes relative to the other country, the operational practice has been to allow that country to use such waters, without granting any rights or entitlements;

The Commission finds that regulation of Lake Superior outflows in accordance with the objective of systemic regulation should result in: (a) a slight reduction in the historic range of stage on Lakes Michigan-Huron and a lesser reduction in the historic range of stage of Lakes Superior and Erie; (b) no change in the mean levels of Lakes Superior and Erie and a slight lowering in the mean levels of Lakes Michigan-Huron; (c) no greater probability of exceeding 602.0 than would have occurred using the 1955 Modification of the Rule of 1949 and using supplies of the past as adjusted; and (d) a small reduction in the maximum levels of Lakes Michigan-Huron and Erie;

The Commission finds that regulation of Lake Superior outflows in accordance with the objective of systemic regulation will not result in any material adverse affects to fish, wildlife or other environmental interests in the Great Lakes Basin;

The Commission finds, based upon the above considerations, that systemic regulation will provide suitable and adequate provision for the protection and indemnity of interests that may be affected by regulation of the outflow of Lake Superior to a greater extent than that provided by the said Order.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT THE ORDER OF APPROVAL OF MAY 26, 1914 AS AMENDED ON SEPTEMBER 27, 1978, IS HEREBY FURTHER AMENDED AS FOLLOWS:

1. Condition as to control and operation numbered 5 of the said Order of May 26, 1914 is deleted the following substituted therefore:

> "6. All compensating works heretofore built and all works built under this Order, as amended, including all power canals, their head gates and by-passes, shall be so operated as to maintain the monthly mean level of Lake Superior as nearly as may be within its recorded range of stage below elevation 602.0 IGLD (1955); provide no greater probability of exceeding elevation 602.0 IGLD (1955) than would have occurred using the

1955 Modification of the Rule of 1949; and to the extent consistent with the above, maintain the levels of Lake Superior and Lakes Michigan-Huron at the same relative position within their recorded ranges of stage and with respect to their mean monthly levels, assuming supplies of the past as adjusted; and in such a manner as not to interfere with navigation. Supplies of the past as adjusted are defined as the monthly water supplies for the period 1900 to 1976 adjusted to a condition assuming a continuous diversion out of the Great Lakes Basin of 3100 cubic feet per second at Chicago and a continuous diversion into the Great Lakes Basin of 5000 cubic feet per second from the Albany River Basin.

Such operation shall be in accordance with a plan of regulation, approved by the Commission, and consistent with the following criteria:

a. The level of Lake Superior shall be maintained within its recorded range of stage when tested with supplies of the past as adjusted. The regulated monthly mean level of Lake Superior shall not exceed elevation 602.0 IGLD (1955) or fall below elevation 598.4 IGLD (1955) under these conditions.

b. To guard against unduly high stages of water in the lower St. Marys River, the excess discharge at any time over and above that which would have occurred at a like stage of Lake Superior prior to 1887, shall be restricted so that the elevation of the water surface immediately below the locks shall not be greater than 582.9 IGLD (1955). The 1887 stage discharge relationship for Lake Superior is defined by the equation:

$$Q = 4901 \ (\text{Marquette} - 593.71)^{1.5}$$

where Q = Outflow through the St. Marys River in cubic feet per second

Marquette = level of Lake Superior at Marquette, Michigan in feet, above Father Point, Quebec, IGLD (1955).

This relationship is set forth in the report of the Coordinating Committee on Great Lakes Basic Hydraulic and Hydrologic Data, dated June 1970.

c. To guard against unduly low levels in Lake Superior, the outflow from Lake Superior shall be reduced whenever, in the opinion of the Board, such reductions are necessary in order to prevent unduly low stages of water in Lake Superior, and shall fix the amounts of such reductions; provided, that whenever the monthly mean level of the Lake is less than 600.5 IGLD (1955), the total discharge permitted shall be no greater than that which it would have been at the prevailing stage and under the discharge conditions which obtained prior to 1887.

Notwithstanding the above criteria, in the event of supplies to Lakes Superior, Michigan or Huron more extreme than supplies of the past as adjusted, the Commission will indicate the appropriate outflows from Lake Superior to suitably and adequately protect all interests upstream and downstream of the works. At such times, the Commission will also indicate, as the occasion may require, the interrelationship between the criteria, the conditions, and other requirements of this Order, as amended.

2. Condition as to control and operation numbered 6 of the said Order of May 26, 1914 is deleted and the following substituted therefore:

"6. The mean elevation of Lakes Superior, Michigan and Huron shall be ascertained by taking the mean of the readings of automatic gauges on each lake. The gauges shall be so located that the combined readings on each lake provide a representative mean level on that lake. At least four gauges shall be utilized on Lake Superior, two of which are maintained by Canada and two by the United States; at least six gauges shall be utilized on Lakes Michigan-Huron, two of which are maintained by Canada and four by the United States. The records of these gauges shall be furnished to the International Lake Superior Board of Control, hereinafter referred to, at such intervals as the Board may require.

All elevations in this Order will be on International Great Lakes Datum (IGLD) referred to mean sea level at Father Point, Quebec. This Datum will be adjusted periodically for reasons such as crustal movement, and the levels herein will be adjusted accordingly."

3. Condition as to control and operation numbered 7 of the said Order of May 26, 1914 is deleted and the following substituted therefore:

"7. A Board of Control to be known as the International Lake Superior Board of Control, consisting of an

equal number of members from Canada and the United States, is hereby established. The members of the Board of Control shall be appointed by the Commission. The operation of all works referred to in Condition as to control and operation number 6 of this Order shall be under the direct control of the Board. The duties of the Board shall be to periodically review and develop for Commission approval plans of regulation under which the compensating works and power canals and their head gates and bypasses shall be operated so as to achieve the purpose set forth herein; to determine the flow required by the approved plan of regulation and allocate the amount of water available for power purposes; to report any violation of this Order to the Commission; and to give effect to any instructions of the Commission, as issued from time to time, with respect to this Order. The Board shall report to the Commission at such times as the Commission may determine. In the event of any disagreement among the members of the Board which they are unable to resolve, the matter shall be referred by them to the Commission for decision. The Board may, at any time, make representations to the Commission in regard to any matter affecting or arising out of the terms of this Order with respect to water levels and outflows."

4. Conditions as to control and operation numbered 8, 9, 11 and 17 of said Order of May 26, 1914 are deleted.

5. Condition as to control and operation numbered 20 of the said Order of May 26, 1914 is deleted and the following substituted therefore:

"20. The amount of water available in each country for power purposes, under the 1914 Order, as amended, shall be one-half of the total amount available for power purposes as determined by the approved regulation plan and the requirements regarding flow allocation of the said Order, as amended, without prejudice to any determination by Governments of the ownership and distribution of waters diverted into Lake Superior from Long Lac and Ogoki."

6. Condition 1(b) of the Supplementary Order of Approval in the Matter of the Regulation of Lake Superior and the St. Marys River (Dockets 6 and 8), dated September 27, 1978, is deleted and the following substituted therefore:

"b) For settings of up to four gates open the compensating works shall be operated so that the flow over the St. Marys Rapids shall be that which would occur under the 1955 modification of the Rule of 1949 or the approved regulation plan,whichever is greater, in the absence of the additional capacity provided by the Great Lakes Power Redevelopment project;"

7. AND IT IS FURTHER ORDERED that the Commission retains jurisdiction over the subject matter of the Order of Approval, as amended, and may, after giving such notice and opportunity to all interested parties to make representations as the Commission deems appropriate, make such further Order or Orders relating thereto as may be necessary in the judgment of the Commission.

Signed this third day of October 1979.

Robert J. Sugarman

Stuart Hodgson

Charles R. Ross

Bernard Beaupré

Jean Hennessey

Jean R. Roy