

154 FERC ¶ 62,014
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Empire State Hydro 301, LLC

Project No. 14701-000

ORDER ISSUING PRELIMINARY PERMIT,
AND GRANTING PRIORITY TO FILE LICENSE APPLICATION

(Issued January 11, 2016)

1. On August 20, 2015, Empire State Hydro 301, LLC (Empire) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA),¹ to study the feasibility of the proposed Diamond Mills Hydroelectric Project No. 14701 (Diamond Mills Project or project) to be located at the existing Diamond Mills Dam on Esopus Creek in Saugerties, Ulster County, New York.

I. Project Proposal

2. The proposed project would consist of: (1) an 140-acre impoundment with a normal volume of 826 acre-feet; (2) an existing 350-foot-long, 32-foot-high concrete gravity dam with a spillway length of 340 feet; (3) an existing 30-foot-long, 9-foot-high auxiliary spillway; (4) an existing 10-foot-long, 6-foot-diameter penstock; (5) two new 750-kilowatt turbines; (6) a new 50-foot-long, 30-foot-wide powerhouse; (7) a new 300-foot-long, 12.7-kilovolt transmission line; and (8) appurtenant facilities. The estimated annual generation of the Diamond Mills Project would be 5,300 megawatt-hours.

II. Background

3. The Commission issued public notice of Empire's permit application on October 15, 2015. Comments were filed by the U.S. Department of the Interior (Interior) and Patrick Landewe (Mr. Landewe), a village trustee of the Village of Saugerties, New York (Village). No motions to intervene were filed on the proposed project.

III. Discussion

A. Notice

4. Mr. Landewe commented that the Village and the New York State Department of State (New York DOS) should have been listed in Empire's application among "[o]ther

¹ 16 U.S.C. § 797(f) (2012).

interested political subdivisions, organizations, or agencies that would likely be interested in the proposed project” because the Diamond Mills Dam is located within Village boundaries and the New York DOS is the agency responsible for administering the New York State Coastal Management Program.

5. As an interested entity, the Village will be added to the mailing list for the proposed project. Empire was not required to list the state agency responsible for administering the New York State Coastal Management Program in its application. However, if the New York DOS wishes to be added to the mailing list, it may request so at any time.

B. Issues Related to Project Construction and Operation

6. Interior expressed concern that existing fish and wildlife resources and habitats may be adversely impacted by the construction and operation of the proposed Diamond Mills Project. Interior states that it would be opposed to any hydroelectric construction or operation that would destroy or seriously degrade fish and wildlife resources and associated habitats in or near Esopus Creek and recommends that Empire be required to coordinate with the U.S. Fish and Wildlife Service (FWS) to consider development and operations that would be compatible with existing fish and wildlife resources.

7. A preliminary permit does not authorize a permittee to undertake construction of the proposed project. The purpose of a preliminary permit is to study the feasibility of the project, including studying potential impacts. The concerns raised in the comments are premature at the preliminary permit stage, in that they address the potential effects of constructing and operating the proposed project. Should the permittee file a license application, these issues will be addressed in the licensing process.

C. Consultation and Study Requirements under the Permit

8. Interior states that bald eagles are protected under the Migratory Bird Treaty Act² and the Bald and Golden Eagle Protection Act,³ and recommends that Empire follow the Bald Eagle Management Guidelines found on FWS’ website prior to construction if bald eagles are present in the project area.

9. Interior states that Empire is required to consult with the National Park Service (Park Service) about recreational resources, historic and archaeological values, and land management and aesthetic issues. Interior recommends that the following be stipulated

² See 16 U.S.C. §§ 703-712 (2012).

³ See *id.* §§ 668-668d.

in any preliminary permit issued by the Commission regarding the project: (1) Empire shall design and conduct, at project cost, as soon as practicable after issuance of the project's preliminary permit, preparatory studies in cooperation with the New York DEC, FWS, and Park Service; (2) these studies shall address, but not be limited to, the effects of project construction and operations on the movements of fish and other aquatic organisms, the reproduction and survival of aquatic or semi-aquatic fish and wildlife resources, recreational fishing and navigation, wetland and riparian wildlife, vegetative species, and historical and archaeological resources; and (3) the studies shall also identify and evaluate general measures to avoid, offset, and/or reduce adverse project-caused impacts on fish and wildlife resources.

10. Mr. Landewe states that the project would be located on a coastal area of the Hudson River and as such would likely be subject to a coastal management program consistency review by the New York DOS.

11. The Commission has not sought to place all relevant study requirements in preliminary permits.⁴ Rather, the studies to be undertaken by a permittee are shaped by the Commission's filing requirements for development applications. Potential development applicants are required to consult with appropriate state and federal resource agencies and affected Indian tribes, conduct all reasonable studies requested by the agencies, and solicit comments on the applications before they are filed.⁵ Further, permit conditions have been framed to ensure that the permittee does not tie up a site without pursuing in good faith a study of the project's feasibility.⁶

IV. Permit Information

12. Section 4(f) of the FPA authorizes the Commission to issue preliminary permits for the purpose of enabling prospective applicants for a hydropower license to secure the data and perform the acts required by section 9 of the FPA,⁷ which in turn sets forth the material that must accompany an application for license. The purpose of a preliminary permit is to preserve the right of the permit holder to have the first priority in applying for a license for the project that is being studied.⁸ Because a permit is issued only to allow

⁴ See, e.g., *Continental Lands Inc.*, 90 FERC ¶ 61,355 at 62,177 (2000).

⁵ See 18 C.F.R. § 4.38 (2015).

⁶ See *City of Richmond, Va.*, 53 FERC ¶ 61,342 at 62,247 (1990).

⁷ 16 U.S.C. § 802 (2012).

⁸ See, e.g., *Mt. Hope Waterpower Project LLP*, 116 FERC ¶ 61,232 at P 4 (2006) ("The purpose of a preliminary permit is to encourage hydroelectric development by affording its holder priority of application (i.e., guaranteed first-to-file status) with

the permit holder to investigate the feasibility of a project while the permittee conducts investigations and secures necessary data to determine the feasibility of the proposed project and to prepare a license application, it grants no land-disturbing or other property rights.⁹

13. Article 4 of this permit requires the permittee to submit a progress report no later than the last day of each six-month period from the effective date of this permit. The late filing of a report or the supplementation of an earlier report in response to a notice of probable cancellation will not necessarily excuse the failure to comply with the requirements of this article.

14. During the course of the permit, the Commission expects that the permittee will carry out pre-filing consultation and study development leading to the possible development of a license application. The pre-filing process begins with preparation of a Notice of Intent (NOI) and Pre-Application Document (PAD) pursuant to sections 5.5 and 5.6 of the Commission's regulations.¹⁰ The permittee must use the Integrated Licensing Process unless the Commission grants a request to use an alternative process (Alternative or Traditional Licensing Process). Such a request must accompany the NOI and PAD and set forth specific information justifying the request.¹¹ Should the permittee file a development application, notice of the application will be published, and interested persons and agencies will have an opportunity to intervene and to present their views concerning the project and the effects of its construction and operation.

15. A preliminary permit is not transferable. The named permittee is the only party entitled to the priority of the application for license afforded by this preliminary permit. In order to invoke permit-based priority in any subsequent licensing competition, the named permittee must file an application for license as the sole applicant, thereby evidencing its intent to be the sole licensee and to hold all proprietary rights necessary to

respect to the filing of development applications for the affected site.”).

⁹ Issuance of this preliminary permit is thus not a major federal action significantly affecting the quality of the human environment. A permit holder can only enter lands it does not own with the permission of the landholder, and is required to obtain whatever environmental permits federal, state, and local authorities may require before conducting any studies. *See, e.g., Three Mile Falls Hydro, LLC*, 102 FERC ¶ 61,301 at P 6 (2003); *see also Town of Summersville, W.Va. v. FERC*, 780 F.2d 1034 (D.C. Cir. 1986) (discussing the nature of preliminary permits).

¹⁰ 18 C.F.R. §§ 5.5 and 5.6 (2015).

¹¹ *See* 18 C.F.R. § 5.3 (2015).

construct, operate, and maintain the proposed project. Should any other parties intend to hold during the term of any license issued any of these proprietary rights necessary for project purposes, they must be included as joint applicants in any application for license filed. In such an instance, where parties other than the permittee are added as joint applicants for license, the joint application will not be eligible for any permit-based priority.¹²

The Director orders:

(A) A preliminary permit is issued for the Diamond Mills Hydroelectric Project No. 14701 to Empire State Hydro 301, LLC, for a period effective the first day of the month in which this permit is issued, and ending either 36 months from the effective date or on the date that a development application submitted by the permittee has been accepted for filing, whichever occurs first.

(B) This preliminary permit is subject to the terms and conditions of Part I of the Federal Power Act and related regulations. The permit is also subject to Articles 1 through 4, set forth in the attached standard form P-1.

(C) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days of the date of its issuance, as provided in section 313(a) of the Federal Power Act, 16 U.S.C. § 8251 (2012), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2015).

John B. Smith, Chief
Mid-Atlantic Branch
Division of Hydropower Licensing

¹² See *City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

Form P-1 (Revised April 2011)**FEDERAL ENERGY REGULATORY COMMISSION****TERMS AND CONDITIONS OF
PRELIMINARY PERMIT**

Article 1. The purpose of the permit is to maintain priority of application for a license during the term of the permit while the permittee conducts investigations and secures data necessary to determine the feasibility of the proposed project and, if the project is found to be feasible, prepares an acceptable application for license. In the course of whatever field studies the permittee undertakes, the permittee shall at all times exercise appropriate measures to prevent irreparable damage to the environment of the proposed project. This permit does not authorize the permittee to conduct any ground-disturbing activities or grant a right of entry onto any lands. The permittee must obtain any necessary authorizations and comply with any applicable laws and regulations to conduct any field studies.

Article 2. The permit is not transferable and may, after notice and opportunity for hearing, be canceled by order of the Commission upon failure of the permittee to prosecute diligently the activities for which a permit is issued, or for any other good cause shown.

Article 3. The priority granted under the permit shall be lost if the permit is canceled pursuant to Article 2 of this permit, or if the permittee fails, on or before the expiration date of the permit, to file with the Commission an application for license for the proposed project in conformity with the Commission's rules and regulations then in effect.

Article 4. No later than the last day of each six-month period from the effective date of this permit, the permittee shall file a progress report. Each progress report must describe, for that reporting period, the nature and timing of what the permittee has done under the pre-filing requirements of 18 C.F.R. sections 4.38 and 5.1-5.31 and other applicable regulations; and, where studies require access to and use of land not owned by the permittee, the status of the permittee's efforts to obtain permission to access and use the land. Progress reports may be filed electronically via the Internet, and the Commission strongly encourages e-filing. Instructions for e-filing are on the Commission's website at <http://www.ferc.gov/docs-filing/efiling.asp>. To paper-file instead, mail four copies of the progress report to the Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426.

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