

149 FERC ¶ 61,033
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Cheryl A. LaFleur, Chairman;
Philip D. Moeller, Tony Clark,
and Norman C. Bay.

New Summit Hydro, LLC

Project No. 14612-000

ORDER ISSUING PRELIMINARY PERMIT
AND GRANTING PRIORITY TO FILE LICENSE APPLICATION

(Issued October 16, 2014)

1. On April 1, 2014, New Summit Hydro, LLC (New Summit) filed a preliminary permit application, pursuant to section 4(f) of the Federal Power Act (FPA),¹ to study the feasibility of the proposed New Summit Pumped Storage Project No. 14612, to be located near the City of Norton in Medina and Summit Counties, Ohio. For the reasons discussed below, we are issuing a preliminary permit to New Summit for the proposed project.

I. Project Proposal

2. The proposed project to be studied under the permit would consist of the following: (1) an excavated, diked, and asphalt-lined upper reservoir with a storage capacity of 8,000 acre-feet and a water surface area of 150 acres; (2) a lower underground reservoir, created by previous limestone mining activities, with a storage capacity of 7,760 acre-feet; (3) an underground powerhouse and appurtenant structures, including six 250-megawatt (MW) variable-speed reversible pump turbines, for a total installed capacity of 1,500 MW; (4) power plant buildings and surface structures, including a 17.5-foot-diameter vent stack; (5) a concrete-lined power tunnel located 300 feet below the ground surface that extends from the upper reservoir to two 17.5-foot-diameter, 2400-foot-long, concrete-lined vertical shafts connecting the power tunnel (approximately 30 feet in diameter and approximately 8,000 feet long) with the underground powerhouse

¹ 16 U.S.C. § 797(f) (2012).

penstocks; (6) an underground transformer gallery; (7) six steel concrete-lined penstocks (approximately 6 feet in diameter and 235 feet long); (8) four 345-kilovolt overhead transmission line circuits, approximately 3 miles long, arranged within an existing transmission line corridor located north of the proposed reservoir; and (9) onsite and offsite recreational facilities. The estimated annual generation of the New Summit Project would be between 1,300,000 and 2,000,000 megawatt-hours. There are no federal lands associated with the project.

II. Background

3. The Commission issued public notice of New Summit's permit application on April 23, 2014, establishing a deadline of June 22, 2014, for filing comments, motions to intervene, competing applications, and notices of intent to file a competing application.² Summit Metro Parks (Metro Parks) filed a timely motion to intervene and a protest, opposing New Summit's preliminary permit application on several grounds.³ The U.S. Department of the Interior (Interior) filed comments, encouraging agency consultation and providing environmental mitigation measures should the project be constructed. In addition, the City of Norton, Ohio (Norton), Friends of Metro Parks, Linda Bernat, and CM Schafer filed comments opposing the application. Norton raises several issues in its comments, and Friends of Metro Parks expresses support for Norton's and Metro Parks' arguments. Ms. Bernat asserts that the project, if constructed, would have an irreversible adverse environmental impact on the area, and CM Schafer states only that "The people of the area do not want the hydro-electric power plant." New Summit filed answers to Metro Parks' protest and Norton's comments.⁴

III. Discussion

4. 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

² Because the deadline fell on a Sunday, a day on which the Commission is closed, the deadline was extended to the close of Commission business on the next day, which was Monday, June 23, 2014. *See* 18 C.F.R. § 385.2007(a)(2) (2014).

³ Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's regulations. *Id.* § 385.214(c)(1).

⁴ Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2014), does not allow answers to protests unless otherwise ordered by the Commission. New Summit's answers assisted us in considering the issues in this proceeding, and we therefore find good cause to accept them. *See id.* § 385.101(e).

data and perform the acts required by section 9 of the FPA,⁵ 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.⁶ Because a permit is issued only to allow 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.⁷

A. Whether New Summit's Application Is an Application for a Successive Permit

5. South Run Pumped Storage, LLC (South Run) previously held a permit for a similar pumped storage project at the site that New Summit now proposes to develop.⁸ Norton and Metro Parks contend that South Run and New Summit are essentially the same company, controlled by Kevin Young, who they identified as an authorized representative for both companies. Given this connection, Norton and Metro Parks request that we treat New Summit's application as a successive permit application.⁹

⁵ 16 U.S.C. § 802 (2012).

⁶ 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 respect to the filing of development applications for the affected site.”).

⁷ 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 10 (2003); see also *Metro Hydroelectric Co. v. Metro Parks*, 541 F.3d 605, 612-13 (6th Cir. 2008) (discussing whether a preliminary permit grants any property rights); *Town of Summersville, W.Va. v. FERC*, 780 F.2d 1034 (D.C. Cir. 1986) (discussing the nature of preliminary permits).

⁸ See *South Run Pumped Storage, LLC*, 135 FERC ¶ 62,039 (2011). The preliminary permit expired on March 31, 2014.

⁹ It is Commission policy to grant a successive permit only if it concludes that the applicant has pursued the requirements of its prior permit in good faith and with due diligence. See, e.g., *Greybull Valley Irrigation District*, 143 FERC ¶ 61,131, at

(continued ...)

Norton and Metro Parks contend that South Run failed to pursue its permit with good faith and due diligence and ask the Commission to deny New Summit's permit application on that basis. Specifically, Norton and Metro Parks state that South Run filed duplicative progress reports and failed to conduct consultations during its permit term.

6. In response, New Summit maintains that it is independent of Free Flow Power Corporation (Free Flow), the parent company of South Run, and that neither South Run nor Free Flow control New Summit.

7. As the Commission recently recognized in *KC Pittsfield LLC*, we will treat a prior permit holder and a new permit applicant as the same entity when the prior permit holder has a "cloak of control" over the second permit.¹⁰ In such a situation, the Commission will treat the permit application as a successive application and will consider whether the prior permittee pursued its permit with good faith and due diligence.¹¹ Here, Norton and Metro Parks fail to demonstrate that Free Flow or South Run control New Summit. Mr. Young is an agent and managing member for New Summit, but was merely an agent for South Run. Norton and Metro Parks have not provided information indicating that Mr. Young controlled South Run, and nothing in the record indicates he did so. Activities such as filing progress reports and preparing permit application materials, as South Run's agent, do not demonstrate that he acted as South Run's controlling principal or manager. Therefore, we do not consider New Summit to be the same entity as South Run, and we will not treat New Summit's application as an application for a successive permit.

B. Sufficiency of Application

8. Norton contends that New Summit should not be issued a permit because Exhibit 3 of the permit application fails to identify existing housing developments located at the proposed upper reservoir site, two 10-acre properties owned by Norton within the proposed project boundary, and the location of a park adjacent to the proposed project boundary.

P 8 (2013) (citing *City of Redding, Cal.*, 33 FERC ¶ 61,019 (1985) (permittee must take certain steps, including consulting with the appropriate resource agencies early in the permit term, and timely filing six-month progress reports)); *Cascade Creek, LLC*, 140 FERC ¶ 61,221 (2012).

¹⁰ *KC Pittsfield LLC*, 147 FERC ¶ 61,040, at n.8 (2014) (citing *Long Lake Energy Corp.*, 29 FERC ¶ 61,290, at 61,592 (1984)).

¹¹ See *KC Pittsfield*, 147 FERC ¶ 61,040 at P 7.

9. New Summit's Exhibit 3 maps show the project features with reference to South Run, the cities of Norton and Wadsworth, Silver Creek Metro Park (which is owned and operated by Metro Parks), and area roads and bodies of water in sufficient detail to inform interested entities of the specific location of the project. Section 4.81(d) of our regulations¹² does not require a permit applicant to identify land ownership or houses on the Exhibit 3 maps. Providing this additional detail is not needed to adequately describe the specific location of the proposed project.

10. Norton also contends that the application should be denied because Exhibit 2 does not provide a description of studies conducted or to be conducted for purposes of determining the technical, economic, and financial feasibility of the proposed project, as described in section 4.81(c)(1) of our regulations.¹³

11. We find that New Summit's description of its proposed studies satisfies the requirements of section 4.81(c)(1) because it lists and describes 12 studies that it intends to conduct. These studies include studies on threatened or endangered species, water quality and reservoir filling, and groundwater quantity and quality. Our regulations do not require a permit application to provide information in any further detail.

12. Metro Parks states that the application failed to comply with the requirements of section 4.32(a)(2) of the regulations because it did not identify Metro Parks, which was created by the Ohio legislature to conserve and manage natural resources, as a political subdivision in the general area of the project.

13. The purpose of section 4.32(a)(2) of our regulations is to identify municipal entities in the area of the proposed project that might wish to file a competing application.¹⁴ Based on Metro Parks' description of its function and the Ohio statute that

¹² 18 C.F.R. § 4.81(d) (2014).

¹³ 18 C.F.R. § 4.81(c)(1) (2014).

¹⁴ 18 C.F.R. § 4.32(a)(2) (2014), which implements section 4(f) of the FPA, 16 U.S.C. § 797(f) (2012). Section 4(f) requires that notice be given to "any State or municipality likely to be interested in or affected by such application." Section 3(7) of the FPA defines "municipality" to be a city, county, drainage or irrigation district, or "other political subdivision or agency of a State *competent under the laws thereof to carry on the business of developing, transmitting, utilizing, or distributing power.*" 16 U.S.C. § 796(7) (2012) (emphasis added). *See also FFP Qualified Hydro 14, LLC*, 147 FERC ¶ 61,233, at P 22 and n.37 (2014) (discussing the purpose of FPA section 4(f)).

created it, Metro Parks appears to be a resource agency,¹⁵ not a municipal entity that could file a competing application.¹⁶ Thus, neither the FPA nor our regulations requires a permit applicant to identify agencies such as Metro Parks in its permit application.

C. Access to Site

14. Norton contends that New Summit does not have the necessary access or property rights to conduct all of its proposed studies, and therefore, the permit application should be denied.

15. In response, New Summit states that it is not required to obtain all access rights prior to submitting a preliminary permit application, and confirms that it would contact landowners before accessing their land.

16. The Commission does not require a permit applicant to have obtained all access rights to a project site as a condition of receiving a preliminary permit because a preliminary permit only allows the permit holder to maintain priority to file a license application.¹⁷ A preliminary permit does not grant a right-of-entry onto any lands. A permittee must obtain any necessary authorizations and comply with any applicable laws and regulations to conduct any field studies.¹⁸

D. Consultation and Study Requirements under the Permit

17. Interior recommends that New Summit obtain information regarding project impacts on water quality, fish and wildlife resources, terrestrial resources, and threatened and endangered species, and identify potential protection measures. Interior also

¹⁵ See Ohio Rev. Code Ann. § 1545.11 (West 2014); Metro Parks' Motion to Intervene at 1-2.

¹⁶ There is no evidence that Metro Parks is authorized to develop hydropower. In any event, even assuming that Metro Parks would qualify as a municipal entity under the FPA, the agency expressed no interest in filing a competing application.

¹⁷ See 16 U.S.C. § 798 (2012); see also *Utah Independent Power, Inc.*, 141 FERC ¶ 61,226, at n.7 (2012) (“permittees are not required to have obtained all access rights to a project site as a condition of receiving a permit”); *Michael Earl Springer and James Baynard Boulden*, 24 FERC ¶ 61,027, at 61,112 (1983) (“[o]wnership of the property interests necessary to operate the project is not a prerequisite for receiving a preliminary permit.”).

¹⁸ See *supra* note 7.

recommends that New Summit consult with its Fish and Wildlife Service and the Ohio Department of Natural Resources to obtain information regarding necessary studies, to review data, and to gather information for mitigation measures.

18. Norton contends that New Summit should be denied a permit because its proposed studies would not provide sufficient information for a license application.

19. Metro Parks maintains that the application fails to provide information on the project's proposed water usage and the impact of the project on area aquifers and wetlands. Metro Parks also contends that New Summit failed to provide any information about whether the project is economically feasible or practical.

20. The Commission does not impose specific study requirements in preliminary permits.¹⁹ Rather, the studies to be undertaken by a permittee are shaped by the Commission's filing requirements for development applications.²⁰ Potential development applicants must 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.²¹

E. Issues Related to Project Construction and Operation

21. Norton states that because New Summit lacks the property rights to construct, operate, and maintain the proposed project, its application for a preliminary permit should be denied. Norton contends that the construction and operation of the proposed project may have significant impacts on an existing aquifer and wetlands, and the application does not identify the source of initial fill water for the project reservoir and how frequently the project reservoir would need to be refilled.²²

22. Interior expresses concern that fish and wildlife resources and some federally threatened and endangered species could be adversely affected by the project

¹⁹ See, e.g., *Continental Lands, Inc.*, 90 FERC ¶ 61,355, at 62,177 (2000).

²⁰ See *id.*

²¹ See 18 C.F.R. § 4.38 (2014).

²² Norton also contends that the project would conflict with a proposed compressed air energy storage facility. In response, New Summit explains that the proposed compressed air storage project is no longer viable because the Ohio Power Siting Board invalidated the certificate to construct the project on September 30, 2013. See New Summit's June 23, 2014 Answer to Norton's Comments at 5.

construction and operation. Interior also states that the project site may be prone to subsidence (i.e. sinking and settling) due to past underground mining activity. Relying on Interior's comment, Metro Parks argues that the possible occurrence of endangered and threatened species in the project area amounts to a practical bar to constructing the project.²³ In addition, Ms. Bernat asserts, without further explanation, that the project, if constructed, would result in adverse environmental impacts to the area.

23. It would be premature to address these concerns at the preliminary permit stage. 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.²⁴

24. Further, the potential occurrence of threatened or endangered species in the project area is not a prohibition against issuing a preliminary permit to New Summit. We generally deny preliminary permit applications based on federal considerations only when a federal statute clearly precludes the licensing of a project.²⁵ The Endangered Species Act of 1973 does not provide such a bar and indeed one of the purposes of a preliminary permit is to study the proposed project location to determine potential environmental impacts.

IV. Permit Information

25. 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

²³ Friends of Metro Parks contends that the upper reservoir will be in Silver Creek Metro Park and states that the proposed project would impact the park. New Summit states that the proposed upper reservoir would avoid the Silver Creek Metro Parks area and explains that the location of the proposed project's upper reservoir is located at a different site than that identified in South Run's permit. *See* New Summit's June 27, 2014 Answer to Metro Parks' Protest at 3.

²⁴ *See FFP Qualified Hydro 14*, 145 FERC ¶ 61,255 at P 22.

²⁵ *See Hudson River-Black River Regulating Dist.*, 33 FERC ¶ 61,122, at 61,261 (1985).

probable cancellation will not necessarily excuse the failure to comply with the requirements of this article.

26. 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.²⁶ 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.²⁷ 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.

27. 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 construct, operate, and maintain the proposed project. Should any other entities 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 entities other than the permittee are added as joint applicants for license, the joint application will not be eligible for any permit-based priority.²⁸

The Commission orders:

(A) A preliminary permit is issued for the New Summit Pumped Storage Project No. 14612 to New Summit Hydro, 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.

²⁶ 18 C.F.R. §§ 5.5 and 5.6 (2014).

²⁷ *See id.* § 5.3.

²⁸ *See City of Fayetteville Public Works Comm'n*, 16 FERC ¶ 61,209 (1981).

(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. § 825f (2012), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2014).

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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.