

170 FERC ¶ 62,068
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

FreedomWorks, LLC

Project No. 15012-000

ORDER ISSUING PRELIMINARY PERMIT
AND GRANTING PRIORITY TO FILE LICENSE APPLICATION

(Issued February 3, 2020)

1. On October 16, 2019,¹ FreedomWorks, LLC (FreedomWorks) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA),² to study the feasibility of the proposed Ulysses Pump Storage Hydro Project No. 15012 (Ulysses Pump Storage Project or project) to be located in Grant County, West Virginia.

I. Project Proposal

2. The proposed Ulysses Pump Storage Project would consist of the following: (1) a new upper reservoir with a surface area of 1,042 acres and a storage capacity of 141,000 acre-feet at a surface elevation of approximately 2,960 feet above mean sea level (msl) created by constructing new dams with roller compacted concrete or earth and rock excavated from nearby mine site reclamation; (2) a new lower reservoir with a surface area of 1,139 acres and a storage capacity of 141,000 acre-feet at a surface elevation of 1,280 feet msl created by constructing new dams with roller compacted concrete or earth and rock excavated from nearby mine site reclamation; (3) three new 36,960-foot-long, 24-foot-diameter penstocks connecting the upper reservoir and lower reservoir; (4) a new 800-foot-long, 50-foot-wide, 25-foot-high powerhouse containing eight turbine-generator units with a total rated capacity of 4,000 megawatts; (5) a new transmission line connecting the powerhouse to a nearby electric grid interconnection point with options to evaluate multiple grid interconnection locations; and (6) appurtenant facilities. Initial fill and make-up water for the upper reservoir would come from groundwater inputs and the Stoney River, and the water for the lower reservoir would come from groundwater inputs and North Fork Patterson Creek. The proposed project would have an annual generation of approximately 17,520,000 megawatt-hours.

¹ FreedomWorks, LLC, revised its application on October 17, 2019.

² 16 U.S.C. § 797(f) (2018).

II. Background

3. The Commission issued public notice of FreedomWorks' permit application on November 14, 2019. A timely motion to intervene was filed by the West Virginia Highlands Conservancy (Conservancy). Comments were filed by the West Virginia Division of Natural Resources (West Virginia DNR), the West Virginia Rivers Coalition (Rivers Coalition), the Conservancy, and the U.S. Department of the Interior (Interior).

III. Discussion

A. Issues Related to Project Construction and Operation

4. Interior expresses concern that the proposed project could have an adverse effect on existing fish and wildlife resources and their habitats, including federally threatened and endangered species in Mill Run (a tributary of the Stoney River), North Fork Patterson Creek (a tributary of Patterson Creek), and other downstream and surrounding areas within the Potomac River watershed. West Virginia DNR, the Rivers Coalition, and the Conservancy express similar concerns regarding adverse effects on environmental resources.

5. Interior states that the use of local inflows to the Stoney River and North Fork Patterson Creek, as well as the withdrawal of groundwater, for the initial fill of the reservoirs has the potential to impact the hydrology and water quality of streams downstream of the reservoirs. According to West Virginia DNR, the upper reservoir would impact Mill Run, which is recognized as a naturally occurring and reproducing brook trout fishery, and the lower reservoir would impact North Fork Patterson Creek, a unique waterbody with a diverse assemblage of fish and freshwater mussel species that is stocked weekly during its trout stocking program. It states that freshwater mussel species such as brook floater and green floater are of special concern, and the population of green floater is the last remaining population of significance within the Patterson Creek watershed. It notes that the American eel and creek chubsucker are also found in North Fork Patterson Creek, and states that the project would effectively remove miles of quality habitat of the migratory American eel. Interior states that operation of the proposed project has the potential to result in fish entrainment and impingement at the intakes in the proposed upper and lower reservoirs. It recommends FreedomWorks investigate if the project area provides suitable habitat for the American eel and design/operate the project to minimize impacts to this species. Interior notes that its design criteria recommend 0.75-inch clear spacing between intake trash rack bars where the American eel is present while it recommends 1-inch clear spacing to be protective of native fish populations. West Virginia DNR states that the watershed of these streams would lose functionality and may experience significant degradation and recommends

that a certain amount of flow be maintained within the streams at all times as biologically and ecologically necessary.

6. West Virginia DNR states that the project would impact grassland habitat and a number of state rare and Species of Greatest Conservation Need (SGCN) that inhabit or may utilize the project area. It states that the upper reservoir could potentially affect a number of SGCN species to include bobolink, eastern meadowlark, field sparrow, grasshopper sparrow, Henslow's sparrow, vesper sparrow, Louisiana waterthrush, northern waterthrush, American bittern, green heron, sora, Virginia rail, Wilson's snipe, alder flycatcher, Nashville warbler, northern harrier, Appalachian cottontail, and balsam fir. The lower reservoir would negatively impact terrestrial habitat for the wood turtle and eliminate an area of high density of eastern box turtle. In addition, the lower reservoir would inundate high quality grassland habitat for a variety of SGCN bird species, including the last known site in Grant County for the loggerhead shrike. Other SGCN species that would be negatively affected by the lower reservoir include bobolink, eastern meadowlark, field sparrow, grasshopper sparrow, Henslow's sparrow, vesper sparrow, Louisiana waterthrush, northern waterthrush, white-faced meadowlark, and the northern red salamander. In addition, West Virginia DNR notes that there is a high probability that the federally endangered rusty-patched bumble bee may occur within the project area. Additional SGCN species that could be negatively affected include the little brown bat, tricolored bat, ruffed grouse, American woodcock, timber rattlesnake, Appalachian tiger swallowtail, silver-bordered fritillary, and monarch butterfly.

7. Interior states that the project would require a large amount of tree clearing, and there is potential for avian mortality from habitat destruction and alteration. It offers the following general recommendations to avoid and minimize impacts to migratory birds within and around the project area: (1) clear natural or semi-natural habitats between September 1 and March 31, which is outside the nesting season for most native bird species; (2) avoid permanent habitat alterations in areas where birds are highly concentrated and avoid establishing sizable structures along known bird migration pathways or known daily movement flyways (e.g., between roosting and feeding areas); (3) avoid fragmenting large, contiguous tracts of wildlife habitat and where practicable, concentrate construction activities on lands already altered; (4) minimize habitat loss and fragmentation by clustering development features; and (5) develop a habitat restoration plan for the site.

8. According to Interior, the proposed project is located within the known ranges of the federally listed northern long-eared bat, Virginia big-eared bat, and Indiana bat. It notes that a portion of the project is located within 10 miles of a hibernaculum for the northern long-eared bat and Virginia big-eared bat, and within the foraging area for the Virginia big-eared bat. Interior states that land-clearing, especially of forested areas, may adversely affect these bat species by killing, injuring or disturbing roosting bats, and by

removing or reducing the quality of foraging or roosting habitat. In addition, if any natural caves or abandoned mines occur within the project area, there is potential for these species to be affected by project construction and operation as caves or mines are used by these species during hibernation and as summer roost sites. West Virginia DNR states that the penstocks would cross three bands of limestone and are in proximity to four known cave structures. It recommends extreme care during construction to avoid any deleterious impacts to the cave systems in the area and any existing surface habitat structures.

9. 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.

B. Consultation and Study Requirements under the Permit

10. Interior states that consultation with the U.S. Fish and Wildlife Service (FWS) would be necessary regarding projects that may adversely affect federally listed species or critical habitat. Interior recommends FreedomWorks coordinate with the FWS to consider development and operations that would be compatible with existing fish and wildlife resources.

11. Bald eagles are protected under the Bald and Golden Eagle Protection Act.³ Because bald eagles are known to be present, year-round, in the vicinity of the proposed project, Interior recommends FreedomWorks follow the Bald Eagle Management Guidelines found on FWS' website prior to construction.

12. West Virginia DNR considers geotechnical studies to be critical in determining the feasibility of the project and states that the presence of cavities within the underlying limestone layers at the project site has the potential to result in catastrophic failure of the upper geological layers from heavy loads such as the reservoirs. It recommends water quality studies in both the upper and lower reservoir watersheds, as well as in the Stoney River. West Virginia DNR questions why a fisheries study is not proposed as the project is likely to have an impact on fisheries resources due to dewatering miles of stream and inundation of large sections of free-flowing riverine habitat. It supports recreation studies and is concerned that the project will have a negative impact on angling opportunities in the watersheds. The Rivers Coalition expresses similar concerns regarding geotechnical, water quality, and fisheries studies. It states that the proposed

³ See 16 U.S.C. §§ 668-668d (2018).

market analysis must include details of wind and/or solar electricity generating facilities that would be used and demonstrate that the generation at these facilities would be sufficient to power the project.

13. Interior recommends FreedomWorks design and conduct studies in cooperation with West Virginia DNR, the West Virginia Department of Environmental Protection, FWS, the National Park Service, and the Bureau of Indian Affairs or affected tribes to understand the effects of project construction and operation on the reproduction and survival of aquatic and semi-aquatic fish and wildlife resources, recreational fishing, wetland and riparian wildlife, forest-dependent wildlife, rare plant species, and historical and archeological resources. It recommends FreedomWorks identify and evaluate general measures to avoid, offset, and/or reduce adverse impacts on fish and wildlife resources.

14. 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

15. 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 (2019).

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

⁷ 16 U.S.C. § 802 (2018).

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

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

16. Article 4 of this permit requires the permittee to submit a progress report no later than the last day of each 12-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.

17. 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.

18. 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

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.”).

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 (2019).

¹¹ *See* 18 C.F.R. § 5.3 (2019).

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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 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 Ulysses Pump Storage Hydro Project No. 15012 to FreedomWorks, LLC, for a period effective the first day of the month in which this permit is issued, and ending either 48 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. § 825 *l* (2018), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2019).

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 October 2018)**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 12-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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