

152 FERC ¶ 62,141  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Virterras Hydro Power, Inc.

Project No. 14679-000

ORDER ISSUING PRELIMINARY PERMIT  
AND GRANTING PRIORITY TO FILE LICENSE APPLICATION

(Issued September 2, 2015)

1. On May 1, 2015, Virterras Hydro Power, Inc. (Virterras Hydro) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA),<sup>1</sup> to study the feasibility of the proposed Silver Creek Pumped Storage Project No. 14679 (Silver Creek Project or project) to be located on Silver Creek Reservoir in Schuylkill County, Pennsylvania.

**I. Project Proposal**

2. The proposed project would consist of the following new features: (1) an 8,000-foot-long, 125- to 175-foot-high roller-compacted concrete or rock-filled semi-circular dam and/or dike forming an upper reservoir having a surface area of 150 acres and a total storage capacity between approximately 8,000 and 10,000 acre-feet at a normal maximum water surface elevation between approximately 1,650 and 1,750 feet above mean sea level (msl); (2) a lower reservoir encompassing the existing Silver Creek Reservoir and neighboring abandoned mines land and having a surface area of 100 acres and a total storage capacity of 10,000 acre-feet at a normal maximum water surface elevation between 1,200 and 1,300 feet msl; (3) a 3,000-foot-long tunnel connecting the upper and lower reservoirs; (4) a powerhouse containing two turbine units with a total rated capacity of 250 megawatts; (5) a 2-mile-long transmission line connecting to an existing 230-kilovolt (kV) line or a 4,000-foot-long transmission line connecting to an existing 69-kV line; and (6) appurtenant facilities. The proposed project would have an annual generation of 784,750 megawatt-hours.

**II. Background**

3. The Commission issued public notice of Virterras Hydro's permit application on June 2, 2015. Comments were filed by the U.S. Department of the Interior (Interior); Pennsylvania State Representative Mike Tobash and Pennsylvania State Senator Dave Argall; the Law Offices of Pfeiffer, Brown, DiNicola, and Frantz, representing both the Township of Blythe, Schuylkill County, Pennsylvania, and the Municipal Authority of

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<sup>1</sup> 16 U.S.C. § 797(f) (2012).

the Township of Blythe, Schuylkill County, Pennsylvania (the Township and the Authority); Pottsville Area School District, Pottsville, Pennsylvania; Schuylkill Headwaters Association of Pottsville, Pennsylvania; Robert Klinger of Schuylkill Haven, Pennsylvania; Kerwick Insurance Agency, Inc. of Pottsville, Pennsylvania; Alfred Benesch & Company of Pottsville, Pennsylvania; Kleinschmidt Associates of Strasburg, Pennsylvania; Matthew Schwartz of Pottsville, Pennsylvania; James Nevada of Doyleston, Pennsylvania; Paul and Michael DiRenzo of Pottsville, Pennsylvania; and Virterras Hydro.

### **III. Discussion**

#### **A. Issues Related to Project Construction and Operation**

4. Interior expressed concern that fish and wildlife resources including federally threatened and endangered species could be adversely affected by the project construction and operation. Specifically, Interior states that northern long-eared bats, bald eagles, migratory birds, and their habitats could be affected by the project. Interior also notes that the project could affect water quality in Big Creek downstream of the Silver Creek Reservoir, and negatively impact a recovering wild brook trout population in the Schuylkill River downstream of the Silver Creek confluence.

5. State Representative Mike Tobash and State Senator Dave Argall along with several commenters express support for the project. However, the Township and the Authority oppose the project and states that the project would destroy the Silver Creek Reservoir which is the primary source of drinking water for thousands of families. In addition, the Township and the Authority believe that the economic and environmental costs associated with the project would far exceed any anticipated benefits.

6. 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**

7. Interior recommends that Virterras Hydro design and conduct studies in coordination with the Pennsylvania Fish and Boat Commission, the Pennsylvania Game Commission, the U.S. Fish and Wildlife Service, the National Park Service, and the Bureau of Indian Affairs or affected Tribes to understand project effects 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. Interior recommends that Virterras

Hydro identify and evaluate general measures to avoid, offset, and/or reduce adverse impacts on fish and wildlife resources.

8. The Commission has not sought to place all relevant study requirements in preliminary permits.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup>

#### **IV. Permit Information**

9. 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,<sup>5</sup> 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.<sup>6</sup> 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.<sup>7</sup>

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<sup>2</sup> See, e.g., *Continental Lands Inc.*, 90 FERC ¶ 61,355 at 62,177 (2000).

<sup>3</sup> See 18 C.F.R. § 4.38 (2015).

<sup>4</sup> See *City of Richmond, Va.*, 53 FERC ¶ 61,342 at 62,247 (1990).

<sup>5</sup> 16 U.S.C. § 802 (2012).

<sup>6</sup> 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.”).

<sup>7</sup> 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. 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.

11. 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.<sup>8</sup> 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.<sup>9</sup> 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.

12. 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 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.<sup>10</sup>

The Director orders:

(A) A preliminary permit is issued for the Silver Creek Pumped Storage Project No. 14679 to Virterras Hydro Power, Inc. 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.

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<sup>8</sup> 18 C.F.R. §§ 5.5 and 5.6 (2015).

<sup>9</sup> See 18 C.F.R. § 5.3 (2015).

<sup>10</sup> See *City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

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(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* (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

**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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