

171 FERC ¶ 62,084  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Pembroke Hydro Associates Limited Partnership

Project No. 3185-005

ORDER AMENDING EXEMPTION

(Issued May 13, 2020)

1. On February 27, 2019, as supplemented on July 9, 2019 and September 27, 2019, Pembroke Hydro Associates Limited Partnership, exemptee for the Webster Pembroke Hydroelectric Project No. 3185, filed an application for an amendment of the project exemption.<sup>1</sup> The project is located on the Suncook River between the towns of Pembroke and Allentown in Merrimack County, New Hampshire.

**Background**

2. The Commission issued an exemption from licensing to the Pembroke Hydropower Corporation for the Webster Pembroke Project on February 24, 1983. The Exemption was transferred to the current Exemptee, Pembroke Hydro Associates Limited Partnership (a subsidiary of Eagle Creek Renewable Energy, LLC).<sup>2</sup> The project consists of: (1) the Webster Dam; (2) a reservoir with a surface area of 34 acres; (3) a headgate structure; (4) a power canal; (5) a concrete-encased penstock eight feet in diameter and 460 feet long; (6) the Pembroke Dam with spillway; (7) a powerhouse at the Pembroke Dam site, about 900 feet downstream from the Webster Dam; (8) a turbine-generator unit with rated installed capacity of 2,750 kilowatt;<sup>3</sup> and (9) appurtenant facilities. Webster Dam is located upstream from Pembroke Dam and impounds Irish Pond, which serves as storage for hydroelectric and recreational uses. A power canal conveys water from the Webster Dam through a penstock to the powerhouse, which abuts the Pembroke Dam. Pembroke Dam does not impound water during normal conditions and does not contribute to hydroelectric operations. A low-level waste gate located at the base of Pembroke Dam was previously removed and always remains open to pass the required minimum flow releases from Webster Dam out to the tailrace.

**Exemptee's Proposal**

3. The exemptee proposes to remove a portion of stacked stone blocks, of varying dimensions, and stone cap blocks from the Pembroke Dam spillway. The removal area

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<sup>1</sup> *Pembroke Hydro Corporation*, 22 FERC ¶ 61,230 (1983).

<sup>2</sup> See letter filed July 9, 2013 dated July 8, 2013.

<sup>3</sup> *Pembroke Hydro Corporation*, 54 FERC ¶ 62,009 (1991).

totals approximately 30 linear feet, or 380 square feet of the existing dam. The stone blocks would be removed one by one via a crane that would be placed on a pad located on previously disturbed ground. The stone blocks would be taken off-site and either donated or disposed of properly. The exemptee would continue to meet the minimum flow of ten cubic feet per second in the bypassed reach and below the tailrace as required by Article 9 of the exemption order. Removing the masonry stones is necessary to ensure high flows would no longer overtop Pembroke Dam and to ensure renters occupying the bottom level of the Emerson Mills Condo building, located adjacent to the Pembroke Dam's right abutment, are not flooded.

### **Public Notice**

4. On May 9, 2019, the Commission issued a public notice soliciting comments, motions to intervene, protests, and recommendations for the exemptee's application. No responses to the notice were filed.

### **Environmental Review and Consultation**

5. Commission staff have reviewed the environmental information in the exemptee's application and other pertinent information. Resources that would or could be affected by approving the amendment are discussed below.

#### **A. Cultural and Historic Resources**

6. Section 106 of the National Historic Preservation Act (NHPA) requires that the Commission take into account the effects of its actions on historic properties and afford the Advisory Council on Historic Preservation (Advisory Council) a reasonable opportunity to comment on the undertaking.<sup>4</sup> Historic properties are those that are listed or eligible for listing in the National Register. The regulations implementing section 106 of the NHPA also require that the Commission seek concurrence with the state historic preservation office on any finding involving effects or no effects on historic properties, and consult with interested Indian tribes or Native Hawaiian organizations that attach religious or cultural significance to historic properties that may be affected by an undertaking. In this document, we also use the term "cultural resources" for properties that have not been determined eligible for listing in the National Register. Cultural

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<sup>4</sup> An undertaking means "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license, or approval." 36 C.F.R. § 800.16 (2019). Here, the undertaking is the potential issuance of an order amending exemption for the Webster Pembroke Project.

resources represent things, structures, places, or archaeological sites that can be either prehistoric or historic in origin. In most cases, cultural resources less than 50 years old are not considered historic.

7. The exemptee initiated consultation with the New Hampshire State Historic Preservation Officer (New Hampshire SHPO) on May 29, 2018. The New Hampshire SHPO concluded that the proposed work would have an adverse effect on historic properties and notified the exemptee and the Commission of that determination in a letter dated December 28, 2018. Commission staff and the exemptee continued consultation with the New Hampshire SHPO and developed a Memorandum of Agreement (MOA) detailing a mitigation plan to address the proposed work's adverse effect to historic properties. By letter dated August 9, 2019, Commission staff notified the Advisory Council of the undertaking's adverse effect and asked the Advisory Council to let the Commission know whether it intended to participate in consultation regarding the MOA, pursuant to 36 C.F.R. Part 800.6, within 15 days. The Advisory Council did not file a response within 15 days. Therefore, by letter dated September 20, 2019, Commission staff forwarded the final MOA for execution to the New Hampshire SHPO. On October 9, 2019, the Advisory Council responded stating that although it did not respond within the 15 days with a decision regarding participation, it assumed that the consultation to resolve adverse effects continued and that Commission staff should file a copy of the final MOA with the Advisory Council once it is executed.

8. Pursuant to Section 106 of the NHPA, as amended (54 U.S.C. § 306108 (2018)), and its implementing regulations at 36 C.F.R § 800.5(a)(2)(vii), Commission staff have determined that the licensee's proposal would adversely affect the Pembroke Dam, which is a contributing feature of the Pembroke Mill, listed in the National Register. The Commission and the exemptee, in consultation with the New Hampshire SHPO, developed a plan to mitigate the adverse effect and included it in a MOA that was executed by Commission staff signature on September 20, 2019 and by the New Hampshire SHPO on October 23, 2019. The MOA sets forth measures to be carried out to mitigate adverse effects to historic properties, resolve disputes, and amend or terminate the agreement. Those measures include preparation of photographic (digital) documentation of the dam and its setting prior to and during project implementation, development and installation of interpretative signage in the vicinity of Pembroke Mill, and design and installation of historic banners that would be placed along the bridge over Pembroke Dam. Ordering paragraph (B) requires the exemptee to implement the MOA. This satisfies the Commission's NHPA obligations.

## **B. Threatened and Endangered Species**

9. Section 7(a)(2) of the Endangered Species Act (ESA) of 1973<sup>5</sup> requires federal agencies to ensure their actions are not likely to jeopardize the continued existence of federally listed threatened and endangered species or result in the destruction or adverse modification of their designated critical habitat. A U.S. Fish and Wildlife Service Information for Planning and Consultation Report, filed with the amendment application, was generated for the exemptee's proposal on October 30, 2018.

10. The federally-listed threatened northern long-eared bat and the federally-listed threatened small whorled pogonia were both identified as having potential presence in the project area. Although the presence of a crane during construction could potentially alter northern long-eared bat feeding or travel patterns, the proposed project is expected to take only two weeks to complete, and therefore is not expected to affect the bats. Also, by locating the crane pad on already disturbed and maintained areas, no new land would be disturbed, thereby avoiding effects to any potential small whorled pogonia populations. Additionally, there are no critical habitats identified in the project area. As a result, the proposed work would have no effect to federally-listed threatened and endangered species.

## **C. Fish and Aquatic Resources**

11. The New Hampshire Natural Heritage Bureau (Heritage Bureau) completed a review of the project on June 11, 2018. The proposed removal work would be conducted within an area flagged for potential effects to the state-listed endangered brook floater. However, the Heritage Bureau concluded in a November 1, 2018 email to the exemptee that they do not expect impacts to brook floater because there are no known populations of brook floaters in the vicinity of the project. In that email, the Heritage Bureau also forwarded a recommendation it received from a state biologist at the New Hampshire Fish and Game Department to have a monitor present during the removal work to assess potential future fish passage on site for migrating anadromous and catadromous fish, including river herring and American eel. Therefore, ordering paragraph (C) requires the exemptee to invite staff from the New Hampshire Fish and Game Department to be present during removal work. Additionally, in order to protect water quality, the exemptee plans to place a turbidity curtain downstream of Pembroke Dam prior to the start of the project work and would not remove it until the work is complete.

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<sup>5</sup> 16 U.S.C. § 1536(a) (2018).

## **Dam Safety**

12. The exemptee submitted design drawings, a Quality Control and Inspection Program, and Temporary Construction Emergency Action Plan on October 11, 2018. The Commission's Division of Dam Safety and Inspections – New York Regional Engineer (D2SI-NYRO) reviewed the submittal and provided comments by letter dated September 12, 2019. The exemptee addressed the comments by letter dated October 10, 2019. By letter dated December 11, 2019, D2SI-NYRO accepted the response provided and asked the exemptee to submit an updated construction schedule.

13. Along with the review of the filings to D2SI-NYRO, we conclude that the proposed modifications would not adversely impact the safety of the project when constructed, operated, and maintained in accordance with the Commission's standards and oversight.

## **Administrative Provisions**

### **A. Design Drawings**

14. The exemptee's February 27, 2019 application included project design drawings filed as "Exhibit F".<sup>6</sup> However, we do not typically approve construction/design drawings as the exemptee is required to file as-built exhibits after completion of construction.

### **B. As-Built Exhibits**

15. To ensure the Commission's records accurately depict the project as built, ordering paragraph (D) requires the exemptee to file revised as-built Exhibits A, F and G, as appropriate, that reflect as-built conditions within 90 days of completing construction of the facility authorized by this order.

## **Conclusion**

16. The exemptee proposes to remove a portion of stacked stone blocks, of varying dimensions, and stone cap blocks from the Pembroke Dam spillway to ensure high flows would no longer overtop Pembroke Dam and to ensure renters occupying the bottom level of an adjacent condominium building would not flood. The stone blocks would be removed one by one via a crane that would be placed on a pad located on a previously

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<sup>6</sup> The naming conventions the Commission uses for project exhibits have changed since the exemption order was issued for this project. The Exhibit F designation is for general design drawings of principal project features, and not construction or project design drawings.

disturbed area. The stone blocks would be taken off-site and either donated or disposed of properly. The exemptee would continue to meet minimum flow requirements during and after construction. The proposed amendment would have an adverse effect to the historic Pembroke Dam, however that effect has been mitigated and Commission staff have executed a MOA with the New Hampshire SHPO memorializing that mitigation. The terms of that MOA are made part of the project by this order. The exemptee would also work with a biologist from the New Hampshire Fish and Game Department during construction to assess potential future fish passage on site for migrating anadromous and catadromous fish including river herring and American eel. Therefore, based on the information provided by the exemptee, agency comments, and staff's independent analysis, we find that the exemptee's proposal would prevent flooding while maintaining dam safety without significantly affecting environmental resources in the project area. Therefore, the exemptee's application for amendment should be approved.

The Director orders:

(A) Pembroke Hydro Associates Limited Partnership's, a subsidiary of Eagle Creek Renewable Energy, application for an amendment of the project exemption, filed February 27, 2019, as supplemented on July 9, 2019 and September 27, 2019 for the Webster Pembroke Hydroelectric Project No. 3185, is approved.

(B) *Memorandum of Agreement.* The exemptee must implement the Memorandum of Agreement (MOA) Among the Federal Energy Regulatory Commission and the New Hampshire State Historic Preservation Officer (New Hampshire SHPO) Regarding the Amendment of Exemption for the Webster Pembroke Project (FERC No. 3185-005), executed on October 23, 2019. In the event the MOA is terminated, the exemptee must continue to implement the provisions of the MOA until the exemptee fulfills all the requirements of the amendment order. The Commission may request changes to the provisions of the MOA at any time while the MOA is in effect. The exemptee must provide the Commission with notification that all provisions of the MOA have been fulfilled and accepted by the New Hampshire SHPO within 60 days of receiving such notification from the New Hampshire SHPO.

(C) The exemptee must invite the New Hampshire Fish and Game Department to be present during removal of stone cap blocks from the Pembroke Dam spillway.

(D) *As-Built Drawings.* Within 60 days of completion of construction of the improvements authorized by this amendment, the licensee must file for Commission approval, revised exhibits A, F, and G, as applicable, to reflect as-built conditions at the project.

(E) This order constitutes final agency action. Any party may file a request for rehearing of this order within 30 days from the date of its issuance, as provided in section

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313(a) of the Federal Power Act, 16 U.S.C. § 825*l* (2018), and the Commission's regulations at 18 C.F.R. § 385.713 (2019). The filing of a request for rehearing does not operate as a stay of the effective date of this order, or of any other date specified in this order. The exemptee's failure to file a request for rehearing shall constitute acceptance of this order.

Kim A. Nguyen, Chief  
Environmental and Project Review Branch  
Division of Hydropower Administration  
and Compliance

Document Content(s)

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