



## DEPARTMENT OF ENERGY

### Federal Energy Regulatory Commission

[Docket No. UL26-3-000]

### **Arlon Warner; Notice of Pending Jurisdictional Inquiry and Soliciting Comments, Protests, and Motions to Intervene**

On February 4, 2026, the Federal Energy Regulatory Commission (Commission) received a request from the Vermont Department of Environmental Conservation (Vermont DEC) for a jurisdictional determination for the unlicensed Potter Brook Hydroelectric Project. The project is located on Potter Brook in Orleans County, Vermont.

Pursuant to section 23(b)(1) of the Federal Power Act (FPA),<sup>1</sup> a non-federal hydroelectric project must be licensed if it: (a) is located on a navigable water of the United States; (b) occupies lands or reservations of the United States; (c) utilizes surplus water or waterpower from a government dam;<sup>2</sup> or (d) is located on a stream over which Congress has Commerce Clause jurisdiction, is constructed or modified on or after August 26, 1935, and affects the interests of interstate or foreign commerce.

Regarding condition (d) above, for purposes of FPA section 23(b)(1), headwaters

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<sup>1</sup> 16 U.S.C. § 817(1).

<sup>2</sup> A project that meets condition (a), (b), or (c) is not required to be licensed if it holds a still valid pre-1920 federal permit.

and tributaries of navigable waters are Commerce Clause streams;<sup>3</sup> “post-1935” construction or modification at an existing project includes enlarging a project, such as increasing size of the reservoir, height of the dam, or generating capacity;<sup>4</sup> and projects that generate energy for transmission on the interstate grid affect interstate commerce.<sup>5</sup>

On November 7, 1983, Mr. Warner filed an application for exemption from licensing for the project,<sup>6</sup> which Commission staff rejected as deficient on May 8, 1985, explaining that rejection of the application did not relieve the applicant’s obligation under the FPA to obtain authorization from the Commission for the construction, operation, and maintenance of a hydroelectric project, and directing the applicant to refile an application for license or exemption for the project. On January 13, 1986, Mr. Warner filed a new application for exemption from licensing for the project,<sup>7</sup> which Commission staff rejected as deficient on July 25, 1986.

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<sup>3</sup> *FPC v. Union Electric Co.*, 381 U.S. 90, 94-96 (1965).

<sup>4</sup> See, e.g., *L.S. Starrett Co. v. FERC*, 650 F.3d 19, 26-27 (1st Cir. 2011); *Cent. Vt. Pub. Serv. Corp.*, 54 FERC ¶ 61,132, at 61,434 (1991) (citing *Puget Sound Power & Light Co. v. FPC*, 557 F.2d 1311 (9th Cir. 1977); *Aquenergy Systems, Inc.*, 29 FERC ¶ 61,026 (1984)).

<sup>5</sup> See *FPC v. Union Elec. Co.*, 381 U.S. at 94-95. Moreover, it is well settled that small hydroelectric projects that are connected to the interstate grid, even if they have no interstate sales, affect interstate commerce by displacing power from the grid, and the cumulative effect of the national class of these small projects is significant for purposes of FPA section 23(b)(1). See *Habersham Mills v. FERC*, 976 F.2d 1381, 1384-85 (11th Cir. 1992).

<sup>6</sup> Arlon Warner November 7, 1983 Application, Docket No. P-7549. Accession No. 19831109-0247.

<sup>7</sup> Arlon Warner January 13, 1986 Application, Docket No. P-9875. Accession No. 19860128-0173.

Vermont DEC requests that the Commission examine its jurisdiction for the Potter Brook Project on the grounds that the project is located on a stream over which Congress has Commerce Clause jurisdiction, was constructed after August 26, 1935, and is connected to the transmission grid and began selling power around 1984.<sup>8</sup>

In response to Vermont DEC's request, Commission staff is investigating the jurisdictional status of the Potter Brook Hydroelectric Project (UL26-3-000). A copy of Vermont DEC's request may be viewed on the Commission's website at <http://www.ferc.gov/docs-filing/elibrary.asp>. Enter the docket number, UL26-3-000. You may also register online at <http://www.ferc.gov/docs-filing/esubscription.asp> to be notified via email of new filings and issuances related to this or other pending projects. For assistance, call 1-866-208-3676 or e-mail [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), for TTY, call (202) 502-8659.

The Commission is soliciting comments, motions to intervene, and protests in this proceeding. Comments, motions to intervene, and protests must be filed by **45 days from notice or May 1, 2026, by 5:00 pm Eastern Time**. Anyone may submit comments, a protest, or a motion to intervene in accordance with the requirements of Rules and Practice and Procedure, 18 CFR 385.210, 211, and 214. In determining the appropriate action to take, the Commission will consider all protests or comments filed, but only those who file a motion to intervene in accordance with the Commission's Rules

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<sup>8</sup> Vermont DEC February 4, 2026 Request for Determination of Commission Jurisdiction for the Potter Brook Hydroelectric Project at 2-3.

may become a party to the proceedings. Any comments, protests, or motions to intervene must be received on or before the specified comment date.

The Commission strongly encourages electronic filing. Please file comments, protests, and motions to intervene using the Commission's eFiling system at <http://www.ferc.gov/docs-filing/efiling.asp>. Commenters can submit brief comments up to 6,000 characters, without prior registration, using the eComment system at <http://www.ferc.gov/docs-filing/ecomment.asp>. You must include your name and contact information at the end of your comments. For assistance, please contact FERC Online Support at [FERCOnlineSupport@ferc.gov](mailto:FERCOnlineSupport@ferc.gov), (866) 208-3676 (toll free), or (202) 502-8659 (TTY). In lieu of electronic filing, you may submit a paper copy. Submissions sent via the U.S. Postal Service must be addressed to: Debbie-Anne A. Reese, Secretary, Federal Energy Regulatory Commission, 888 First Street NE, Room 1A, Washington, DC 20426. Submissions sent via any other carrier must be addressed to: Debbie-Anne A. Reese, Secretary, Federal Energy Regulatory Commission, 12225 Wilkins Avenue, Rockville, Maryland 20852. The first page of any filing should include Docket Number UL26-3-000.

For public inquiries and assistance with making filings such as interventions, comments, or requests for rehearing, contact the Office of Public Participation at (202) 502-6595 or [OPP@ferc.gov](mailto:OPP@ferc.gov).

For further information, please contact Kelly Fitzpatrick at (202) 502-8435 or [kelly.fitzpatrick@ferc.gov](mailto:kelly.fitzpatrick@ferc.gov).

(Authority: 18 CFR 2.1)

Dated: March 17, 2026.

**Debbie-Anne A. Reese,**

*Secretary.*

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