

171 FERC ¶ 61,138
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Neil Chatterjee, Chairman;
Richard Glick, Bernard L. McNamee,
and James P. Danly.

Pumped Hydro Storage LLC

Project No. 14994-000

ORDER ISSUING PRELIMINARY PERMIT AND GRANTING PRIORITY TO FILE
LICENSE APPLICATION

(Issued May 21, 2020)

1. On May 10, 2019, as supplemented on August 1, 2019, Pumped Hydro Storage LLC (Pumped Hydro Storage) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA),¹ to study the feasibility of the 3,200-megawatt (MW) Little Colorado River Pumped Storage Project No. 14994 (Little Colorado River Project)² on the Little Colorado River in Coconino County, Arizona. For the reasons discussed below, we are issuing a preliminary permit to Pumped Hydro Storage.

I. Proposal

2. As proposed, the Little Colorado River Project would comprise new upper and lower reservoirs located entirely on Navajo Nation lands east of Grand Canyon National Park. The upper reservoir would consist of a new 200-foot-high, 3,200-foot-long upper dam and 220-acre upper reservoir with a total storage capacity of 15,400 acre-feet at a normal maximum operating elevation of 5,860 feet mean sea level (msl). The lower reservoir, which would be located on the Little Colorado River, would consist of a new 150-foot-high, 1,000-foot-long lower dam and 250-acre lower reservoir with a total storage capacity of 15,000 acre-feet at a normal maximum operating elevation of

¹ 16 U.S.C. § 797(f) (2018).

² In its application, Pumped Hydro Storage named the project the Navajo Nation Little Colorado River Project. We note that the proposed project is not in any way affiliated with the Navajo Nation and the Navajo Nation has not had any role in Pumped Hydro Storage's pursuit of this project. To avoid any confusion as to the identity of the project proponent, we have omitted "Navajo Nation" from the project name.

2,880 feet msl. The proposed project would also include construction of: (1) a 4,000-foot-long, 50-foot-diameter lower dam spillway; (2) two 8,000-foot-long, 32-foot-diameter underground penstocks; (3) a 1,200-foot-long, 60-foot-wide, 40-foot-high tailrace; (4) a 1,200-foot-long, 150-foot-wide, 150-foot-high powerhouse, located in a semi-underground cavern and housing eight 400-MW pump-turbine generators; (5) two new 22-mile-long, 500-kilovolt transmission lines to deliver generated power to the electric grid; and (6) a 12,000-foot-long, 36-foot-diameter roadway access tunnel to the Little Colorado River.

3. During power generation, water would flow from the upper reservoir, through the penstocks and powerhouse, and discharge through the tailrace into the lower reservoir. The Little Colorado River would flow through the lower dam spillway, creating an open-loop system. The estimated annual generation of the project would be 8,500 gigawatt-hours. Pumped Hydro Storage requests a permit term of 36 months.

II. Procedural Issues

A. Notice, Interventions, and Comments

4. On September 17, 2019, the Commission issued public notice of Pumped Hydro Storage's permit application, establishing a deadline of November 18, 2019, for filing comments, interventions, and competing applications. Notice of the application was published in the *Federal Register* on September 23, 2019.³

5. Arizona Game and Fish Department filed a timely notice of intervention and comments.⁴ Fifteen individuals and entities, listed in the appendix to this order, filed timely, unopposed motions to intervene and comments.⁵ A number of individuals and entities filed timely and untimely protests and comments. In addition, the Sierra Club, the Center for Biological Diversity, and the Grand Canyon Trust filed protests on behalf of several individuals. No competing applications were filed. On November 25, 2019, the Navajo Nation filed an untimely motion to intervene, which was granted by the Secretary's notice on April 23, 2020, and comments.

6. On March 3, 2020, Save the Colorado, Grand Canyon Trust, Living Rivers and Colorado Riverkeeper, Sierra Club, Waterkeeper Alliance, and WildEarth Guardians

³ 84 Fed. Reg. 49,723 (Sept. 23, 2019).

⁴ Timely notices of intervention are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. 18 C.F.R. § 385.214(a)(2) (2019).

⁵ Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission's Rules of Practice and Procedure. *Id.* § 385.214(c)(1).

(collectively Conservation Coalition) supplemented their November 18, 2019 motion to intervene and comments.

7. Commenters argue that the permit should not be issued because: (1) project construction and operation will have negative impacts on the environment, cultural resources, recreation, scenery, existing federal projects, and Grand Canyon National Park; (2) a segment of the Little Colorado River is listed in the Nationwide Rivers Inventory as eligible for inclusion in the National Wild and Scenic River System; (3) the Commission did not initiate tribal or National Historic Preservation Act (NHPA) consultation; (4) the applicant is not qualified for a permit; and (5) the application is deficient.

8. The comments on the application have been fully considered in determining whether to issue a permit for the project and are discussed below.⁶

B. Insufficient Notice

9. On November 21, 2019, the Upper Colorado River Commission filed comments requesting that the Commission issue a new notice of the application, asserting that the notice contained two different project numbers—the correct Project No. 14994-000 and, incorrectly, Project No. 14944.⁷ We disagree that a new notice is necessary. The notice correctly provided details concerning the Little Colorado River Project, including the correct project number. Accordingly, the public was provided accurate notice of Pumped Hydro Storage's application, and, as indicated above, members of the public, stakeholders, and local, state, and federal agencies intervened and provided comments in this proceeding, demonstrating that they received actual notice of the application.

III. Discussion

A. Effects of Project Construction and Operation

10. Several commenters raise concerns about the effects of project construction and operation, including effects on water resources, public lands, fish and wildlife, cultural resources, recreation, scenery, the Salt River Reclamation Project, Bureau of Reclamation's Glen Canyon Dam, and Grand Canyon National Park.⁸

⁶ Because the untimely comments and protests and supplemental information was filed in time for us to consider it in this order, we do so.

⁷ Upper Colorado River Commission November 21, 2019 Supplement to Comments.

⁸ See, e.g., Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users' Association October 8, 2019 Motion to Intervene;

11. The Salt River Project Agricultural Improvement and Power District and the Salt River Valley Water Users' Association, filing jointly, and the Navajo Nation state that they claim water rights to the Little Colorado River and its tributaries and are parties to the ongoing adjudication of those rights and that the project could interfere with those rights.⁹ The Conservation Coalition and the Center for Biological Diversity state that the Commission should deny the application because the project is unlikely to be licensed due to its impacts to the endangered humpback chub and its critical habitat, both protected under section 7 of the Endangered Species Act (ESA).¹⁰ The Hualapai Tribe, the Conservation Coalition, the Center for Biological Diversity, and the Upper Colorado River Commission argue that the project would undermine longstanding efforts to minimize impacts to the humpback chub.¹¹

12. Because a permit does not authorize a permittee to undertake construction, these concerns are premature at the permit stage in that they address the potential effects of constructing and operating the proposed project.¹² The purpose of a permit is to secure the permit holder's priority for hydropower development while it studies the feasibility of the project, including studying potential impacts. Should the permittee file a license application, the issues raised can be addressed in the licensing process.

Conservation Coalition November 18, 2019 Motion to Intervene at 18–19, 27–41; Arizona Game and Fish Department November 18, 2019 Comment.

⁹ Salt River Project Agricultural Improvement and Power District and Salt River Valley Water Users' Association October 8, 2019 Motion to Intervene at 2; Navajo Nation November 25, 2019 Motion to Intervene at 1. Similarly, the Southwest Tribal Fisheries Commission is concerned with the effects of project construction and operation on water availability that could impact tribal water rights. Southwest Tribal Fisheries Commission November 25, 2019 Comment at 1.

¹⁰ Conservation Coalition November 18, 2019 Motion to Intervene at 27–33; Center for Biological Diversity November 18, 2019 Motion to Intervene at 12–18.

¹¹ Hualapai November 18, 2019 Comment at 2; Conservation Coalition November 18, 2019 Motion to Intervene at 33–36; Center for Biological Diversity November 18, 2019 Motion to Intervene at 14; Upper Colorado River Commission November 21, 2019 Comment at 2.

¹² See, e.g., *Tomlin Energy LLC*, 169 FERC ¶ 61,037, at P 8 (2019) (explaining that concerns about project operation are premature at the permit stage).

B. Agency Consultation and Study Requirements Under the Permit

13. The Department of the Interior (Interior) recommends that Pumped Hydro Storage coordinate with the Fish and Wildlife Service, the National Park Service, and all affected tribes prior to conducting geotechnical studies by borehole drilling and test pits, to ensure that there are no effects to endangered species, cultural resources, or National Park Service resources.¹³ As discussed below, a permit does not authorize any ground-disturbing activity. Accordingly, a permittee is required to obtain any necessary authorizations from appropriate entities and to comply with any applicable laws and regulations prior to conducting any field studies, including geotechnical studies.

14. Next, Interior states that the endangered humpback chub and its critical habitat may be adversely affected by the proposed project and that, if the Commission issues the permit, consultation under section 7 of the ESA would be required.¹⁴ Because a permit does not authorize a permittee to undertake any ground disturbance or enter onto any lands, its issuance does not have the potential to jeopardize the humpback chub or to destroy or adversely modify its critical habitat. Therefore, it does not give rise to the requirement to consult under section 7 of the ESA.¹⁵ Should Pumped Hydro Storage file a license application for the project, the Commission will comply with the requirements of the ESA during its review of the application.

15. Commenters also request that any permit issued include specific study and consultation requirements.¹⁶ In its application, Pumped Hydro Storage outlines certain studies that it intends to complete during the permit term.¹⁷ The Commission, however,

¹³ Department of the Interior November 15, 2019 Comment at 4. In addition, because of the National Park Service's mandate to protect the resources and values of Grand Canyon National Park, Interior requests consultation should the project proceed further. *Id.* at 4.

¹⁴ *Id.* at 1–2.

¹⁵ 16 U.S.C. § 1536 (2018) (directing federal agencies to consult with the Secretary of the Interior to ensure its actions do not jeopardize any endangered or threatened species or destroy or adversely modify any critical habitat); *see also* 50 C.F.R. pt. 402 (implementing regulations concerning agency consultation).

¹⁶ *See, e.g.*, Department of the Interior November 15, 2019 Comment at 7; Conservation Coalition November 18, 2019 Motion to Intervene at 42–43; Center for Biological Diversity November 18, 2019 Motion to Intervene at 21–30.

¹⁷ Pumped Hydro Storage August 1, 2019 Application at 9.

has not sought to place study requirements in permits.¹⁸ Nonetheless, as part of the licensing process, potential 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 draft license applications before they are filed.¹⁹

C. Nationwide Rivers Inventory and Wild and Scenic River Eligibility

16. American Whitewater and Northern Arizona University comment that a 114-mile segment of the Little Colorado River is listed in the Nationwide Rivers Inventory as eligible for inclusion in the National Wild and Scenic River System, and therefore, argue that the Commission should not grant a permit for the proposed project.²⁰ This issue is also premature at the permit stage. While the Nationwide Rivers Inventory is a comprehensive plan as defined by section 10(a)(2)(A) of the FPA,²¹ inconsistency with a federal or state comprehensive plan does not require the denial of a project at licensing. Indeed, in implementing section 10(a)(2)(A), the Commission stated that, although it has the clear duty to consider a project's consistency with a comprehensive plan, such a plan cannot preclude a project.²² In addition, the fact that a portion of the Little Colorado River is eligible for inclusion in the National Wild and Scenic River System does not preclude our issuance of a permit, as a permit does not authorize a permittee to undertake construction. Should the permittee file a license application, issues related to the project's effects on the values of the Little Colorado River would be addressed during the license application preparation and review process.

¹⁸ See, e.g., *Continental Lands Inc.*, 90 FERC ¶ 61,355, at 62,177 (2000).

¹⁹ 18 C.F.R. § 4.38 (2019).

²⁰ American Whitewater November 7, 2019 Motion to Intervene at 2; Northern Arizona University November 25, 2019 Comment at 2.

²¹ 16 U.S.C. § 803(a)(2)(A) (2018).

²² *Interpretation of Comprehensive Plans Under Section 3 of the Electric Consumers Protection Act*, Order No. 481, FERC Stats. & Regs. ¶ 30,773 (1987) (cross-referenced at 41 FERC ¶ 61,042), *order on reh'g*, Order No. 481-A, FERC Stats. & Regs. ¶ 30,811 (1988) (cross-referenced at 43 FERC ¶ 61,120); see also *County of Tuolumne*, 45 FERC ¶ 61,188, at 61,535 (1988) (“[W]hereas [the Commission] has the clear duty to give full consideration to a proposed project's consistency with a state or federal comprehensive plan, such plan cannot veto a project.”).

D. Tribal and National Historic Preservation Act Consultation

17. Commenters raise several tribal concerns tied to the project's location.²³ The project site will be on the Navajo Nation Reservation, which is held in trust for the Navajo Nation by the Bureau of Indian Affairs.²⁴ The Navajo Nation maintains an endangered species list²⁵ and has designated the Little Colorado River as a Biological Preserve, thereby restricting all development not compatible with management goals for the area. According to Interior, the project would also affect several tribes with connections to the project area.²⁶ Tribes, Interior, and conservation groups assert that the Commission should have initiated consultation with affected tribes as part of its consideration of Pumped Hydro Storage's permit application.²⁷

18. Because permits do not authorize construction and operation of a project and the development of a license application is not guaranteed, it is premature to initiate government-to-government consultation with affected tribes at this time.²⁸ Should Pumped Hydro Storage begin the process of developing a license application, the

²³ See, e.g., Hopi Tribe November 1, 2019 Motion to Intervene; Department of the Interior November 15, 2019 Comment at 5–7; Hualapai Tribe November 18, 2019 Comment; Havasupai Tribal Council November 18, 2019 Motion to Intervene; Navajo Nation November 25, 2019 Motion to Intervene at 1–3.

²⁴ Interior notes that Pumped Hydro Storage failed to identify the reservation as federal land in its application and requests that future filings correct for this failing. Department of the Interior November 15, 2019 Comment at 6.

²⁵ The Navajo Endangered Species List includes fifteen species occurring or with the potential to occur in the Little Colorado River, including the humpback chub. Navajo Nation November 22, 2019 Motion to Intervene at 2.

²⁶ Department of the Interior November 15, 2019 Comment at 5 (identifying the Navajo Nation, the Havasupai Tribe, the Hopi Tribe, the Hualapai Tribe, the Kaibab Band of Paiute Indians, the Las Vegas Tribe of Paiute Indians, the Moapa Band of Paiute Indians, the Paiute Indian Tribe of Utah, the San Juan Southern Paiute Tribe, the Yavapai-Apache Nation, and the Pueblo of Zuni).

²⁷ Hopi Tribe November 1, 2019 Motion to Intervene at 3; National Parks Conservation Association November 14, 2019 Motion to Intervene at 4; Department of the Interior November 15, 2019 Comment at 5; Havasupai Tribe November 18, 2019 Motion to Intervene at 2; Navajo Nation November 25, 2019 Motion to Intervene at 3, 5; Southwest Tribal Fisheries Commission November 25, 2019 Comment at 1.

²⁸ See, e.g., *Premium Energy Holdings, LLC*, 170 FERC ¶ 61,231, at P 24 (2020).

Commission will engage with affected tribes and will assure that tribal concerns and interests are considered.²⁹

19. Next, the Conservation Coalition argues that the Commission should deny the application because, without the Navajo Nation's support,³⁰ the applicant may be prevented from conducting feasibility studies or obtaining a license.³¹ The Conservation Coalition notes that the Navajo Nation could deny permits or impose conditions on the project under section 401 of Clean Water Act³² and that the Bureau of Indian Affairs could impose mandatory conditions under section 4(e) of the FPA pursuant to its trust responsibilities.³³

20. A permit applicant is not required to have obtained access rights to a project site as a condition of receiving a permit, and a permit does not grant a right of entry onto any lands. Further, as noted above, a permittee must obtain any necessary authorizations and comply with any applicable laws and regulations to conduct any field studies. We note, however, that when a permittee initiates the pre-filing consultation process in order to prepare a license application, lack of access to the project site for studies could preclude the preparation of an adequate application. The Conservation Coalition's assertions regarding Clean Water Act permitting and mandatory conditions, are premature at the permit stage and would be addressed, if necessary, during the licensing process.

21. Last, commenters request that any studies during the permit term include consultation with the State Historic Preservation Office pursuant to the NHPA.³⁴ The tribes and Interior identify several cultural resources and sacred and historical sites

²⁹ See 18 C.F.R. § 2.1c (2019) (policy statement on consultation with Indian tribes in Commission proceedings).

³⁰ On November 20, 2019, the Cameron Chapter of the Navajo Nation, situated adjacent to the location of the proposed project, passed a resolution denying the project and associated studies. Navajo Nation November 25, 2019 Comment.

³¹ Conservation Coalition November 18, 2019 Motion to Intervene at 39–40.

³² 33 U.S.C. § 1341 (2018).

³³ 16 U.S.C. § 797(e) (2018).

³⁴ Living Rivers and Colorado Riverkeeper October 10, 2019 Comment at 2; River Runners For Wilderness October 10, 2019 Comment at 1; Department of the Interior November 15, 2019 Comment at 6; Arizona State Historic Preservation Office November 18, 2019 Comment; Sheep Mountain Alliance November 18, 2019 Motion to Intervene at 2.

that may be adversely affected by the proposed project.³⁵ Further, the Conservation Coalition argues that the Commission should deny the application because the project is unlikely to be licensed due to the Hopi Tribe's opposition to the project based on concerns that it will harm traditional cultural properties and other historically and culturally significant sites.³⁶

22. Because a permit does not authorize a permittee to undertake any ground disturbance or to enter onto any lands, issuance of a permit does not have the potential to cause effects on historic properties and, therefore, does not give rise to any obligations to consult under section 106 of the NHPA.³⁷ Should Pumped Hydro Storage file a license application, the Commission will comply with the requirements of the NHPA, including consultation with state and tribal historic preservation officers or designated officials.

E. Pumped Hydro Storage's Qualifications

23. Commenters argue that the Commission should dismiss Pumped Hydro Storage's application because the applicant lacks the requisite fitness to be a permittee.³⁸ Specifically, the Conservation Coalition asserts that one of the applicant's principal members, Justin Rundle, has a history of rejected, canceled, and surrendered permits with the Commission.³⁹ The Conservation Coalition also states that the applicant's other

³⁵ Hopi Tribe November 1, 2019 Motion to Intervene; Department of the Interior November 15, 2019 Comment at 6; Center for Biological Diversity November 18, 2019 Motion to Intervene at 20; Navajo Nation November 25, 2019 Motion to Intervene at 2; Havasupai Tribe November 18, 2019 Motion to Intervene at 2.

³⁶ Conservation Coalition November 18, 2019 Motion to Intervene at 27–28, 36–39.

³⁷ 54 U.S.C. § 306108 (2018); 36 C.F.R. § 800.3 (2019) (providing that an agency has no further obligation under section 106 if an undertaking, as defined in section 800.16(y), does not have the potential to cause effects on historic properties); *id.* § 800.16(y) (2019) (defining undertaking to include a project requiring a federal permit, license, or approval).

³⁸ Hopi Tribe November 1, 2019 Motion to Intervene at 3; Conservation Coalition November 18, 2019 Motion to Intervene at 23–27; American Rivers November 21, 2019 Motion to Intervene at 4–5; Conservation Coalition March 13, 2020 Supplement to Motion to Intervene.

³⁹ Conservation Coalition November 18, 2019 Motion to Intervene at 24–25 (specifying 12 permits that were rejected, canceled, or surrendered, largely between 1990 and 1994).

principal member, Steve Irwin, has made several statements to the media indicating that the corporation may not expeditiously pursue the project.⁴⁰

24. It is the Commission's general policy not to scrutinize a permit applicant's ability to perform or finance studies or to pursue a project to completion.⁴¹ The Commission may consider an applicant's compliance history in deciding whether to issue a permit,⁴² but we are unpersuaded that Mr. Rundle's history rises to the level of noncompliance such that Pumped Hydro Storage's application should be rejected. Regarding Mr. Irwin's statements to the media, the Commission does not expect a permit applicant to certify its intent to develop a proposed project because the purpose of a permit is to study a project's feasibility.

25. The Hopi Tribe and American Rivers aver that the applicant lacks the financial fitness to perform studies under a permit.⁴³ While our regulations do require a permit applicant to provide a statement of costs and financing, including, to the extent possible, financing sources, our regulations also acknowledge that full, detailed project information may not be available when a permit application is filed.⁴⁴ The Commission has means to ensure that a permittee actively pursues a project, including the ability to cancel a permit for failure to comply with permit conditions or for other good cause.⁴⁵

⁴⁰ Conservation Coalition November 18, 2019 Motion to Intervene at 26–27 (citing Mr. Rundle as stating “it’s unlikely both facilities will be built” and that “construction wouldn’t start for about ten years”); Conservation Coalition March 13, 2020 Supplement to Motion to Intervene (citing Mr. Rundle as stating “it is now only pursuing one of the Little Colorado River projects” and that it is working on a revamped proposal to instead dam a side canyon of the Little Colorado River).

⁴¹ See, e.g., *Utah Indep. Power, Inc.*, 140 FERC ¶ 62,222, at P 11, *reh’g denied*, 141 FERC ¶ 61,226 (2012); *Symbiotics, LLC*, 99 FERC ¶ 61,101, at 61,419 (2002).

⁴² *Energie Grp., LLC v. FERC*, 511 F.3d 161, 164 (D.C. Cir. 2007) (finding the Commission may consider the fitness of the applicant in deciding whether to issue a permit); *Appalachian Rivers Res. Enhancement, LLC*, 113 FERC ¶ 62,100 (2005) (denying permit application based on applicant’s unsatisfactory compliance record).

⁴³ Hopi Tribe November 1, 2019 Motion to Intervene at 3; American Rivers November 21, 2019 Motion to Intervene at 4–5, 8.

⁴⁴ 18 C.F.R. 4.81(c)(4)(ii) (2019); see also *Cat Creek Energy, LLC*, 167 FERC ¶ 61,046, at P 11 (2019); *Symbiotics, LLC*, 99 FERC at 61,419.

⁴⁵ 16 U.S.C. § 798(d) (2018) (providing that the Commission may cancel a permit during its term if a permittee fails to comply with permit conditions or for other good

F. Issues with Pumped Hydro Storage's Application

26. Commenters raise several concerns regarding the sufficiency of Pumped Hydro Storage's application, including that it: (1) conflicts with another permit application; (2) is misleading; (3) lacks specificity; and (4) is incomplete for failing to disclose the project's proximity to Grand Canyon National Park and identify several Indian tribes and to adequately consider certain issues.

27. The Center for Biological Diversity asserts that Pumped Hydro Storage's applications for the Little Colorado River Project and the Salt Trail Canyon Pumped Storage Project No. 14992 (Salt Trail Canyon Project) conflict with one another.⁴⁶ Specifically, it states that the proposed lower dam and powerhouse for the Salt Trail Canyon Project would be within the lower reservoir for the Little Colorado River Project.

28. To prevent a permittee from losing its priority to file a license application to develop a water resource, the Commission generally will not issue two permits to two separate entities who propose projects that could use the same water resource.⁴⁷ Therefore, the dispositive consideration here is not a permit application's project boundary, which, along with the location of project facilities, may change while a project is being studied, but rather whether issuing two permits that could use the same water resource would result in one permit holder losing priority to develop a water resource to another permit holder.⁴⁸ Because both permit applicants are the same entity, there is no possibility for that situation to occur here.⁴⁹

cause); 18 C.F.R. § 4.83 (2019) (implementing regulations concerning permit cancellation).

⁴⁶ Center for Biological Diversity November 18, 2019 Motion to Intervene at 6–7; *see also* Pumped Hydro Storage, Application, Docket No. P-14992-000 (filed August 1, 2019) (Pumped Hydro Storage's application for the Salt Trail Canyon Project).

⁴⁷ 18 C.F.R. § 4.33(a)(1) (2019) (providing the Commission will not accept a permit application for a project that would use the same water resource as another permitted project); *see also Russell Canyon Corp.*, 58 FERC ¶ 61,288, at 61,924 (1992) (“[I]t has long been the Commission's policy not to issue more than one permit for the same water resource.”) (citing *Fort Miller Pulp and Paper Co.*, 18 FERC ¶ 61,096 (1982); *Modesto and Turlock Irrigation Dist.*, 24 FERC ¶ 61,152 (1983); *Ashuelot Hydro Partners, Ltd.*, 30 FERC ¶ 61,048 (1985)).

⁴⁸ *Grand Coulee Project Hydroelectric Auth.*, 135 FERC ¶ 61,046, at P 5, n.5 (2011) (citing *Streamline Hydro, Inc.*, 33 FERC ¶ 61,361, at 61,712 (1985)).

⁴⁹ In the event of a conflict at the licensing stage over the projects' use of water

29. Next, the Center for Biological Diversity argues that the application is misleading because it states that the project would support renewable energy generation even though the project may be a net user of electricity, including electricity generated from fossil fuels and that the project would reduce the timing imbalance between peak energy demand and renewable energy production, but fails to account for the complexities of grid balancing and renewable integration.⁵⁰ We disagree that the application is misleading. Pumped Hydro Storage states that the project will be designed to store excess renewable energy to help integrate renewables into the grid.⁵¹ By doing so, Pumped Hydro Storage is merely stating its objective for the project. Given the uncertainty of the grid's future generation mix, there is no way of knowing, at this stage, whether the project would use electricity generated from renewable resources or from fossil fuels or would facilitate the future development of renewable energy. In any case, the extent of project generation is an issue to be considered during licensing, not at the permit stage

30. American Rivers contends that the Commission should deny the application because it is so vague and uncertain that the applicant is unlikely to prepare an adequate license application.⁵² In doing so, American Rivers relies on Commission staff's decision in *Wyco Power and Water, Inc.*⁵³ However, the application in *Wyco* is distinguishable from Pumped Hydro Storage's application. In *Wyco*, Commission staff denied a permit for a proposal to construct seven hydropower projects along the underdetermined route of a 501-mile-long water conveyance.⁵⁴ On rehearing, the Commission distinguished that proposal from pumped storage proposals which were granted permits, explaining that, even though the precise location of the facilities in those cases was not known, the applicants proposed to study "a narrowly-defined stretch of river," as is the case here.⁵⁵

resources, Pumped Hydro Storage will only be able to proceed with one of the proposed projects.

⁵⁰ Center for Biological Diversity November 18, 2019 Motion to Intervene at 5, 9–12.

⁵¹ Pumped Hydro Storage August 1, 2019 Application at 8.

⁵² American Rivers November 21, 2019 Motion to Intervene at 4–8.

⁵³ 138 FERC ¶ 62,150 (2012) (*Wyco*).

⁵⁴ *Wyco*, 138 FERC ¶ 62,150 at P 4 (emphasizing the proposal's lack of detail). In *Wyco*, Commission staff clarified that the Commission only had authority to act on the proposal for the seven hydropower projects, not the water conveyance. *Id.* P 4, n.6.

⁵⁵ *Wyco Power and Water, Inc.*, 139 FERC ¶ 61,124, at P 12 (2012).

Pumped Hydro Storage has provided the approximate configuration and design specifications for a discrete pumped storage project. Our regulations acknowledge that full, detailed project information may not be available when a permit application is filed.⁵⁶ Therefore, we do not find that Pumped Hydro Storage's applications is so vague that it should be rejected.

31. The Conservation Coalition comments that the application failed to disclose that the project is proposed just a few miles from Grand Canyon National Park.⁵⁷ However, in accordance with the Commission's regulations, Pumped Hydro Storage identified Grand Canyon National Park Supervisor's Office as an entity in the general area of the project that it believed would likely be interested in, or affected by, the application.⁵⁸ Further notice is not required.

32. Commenters assert that Pumped Hydro Storage failed to include in its application several Indian tribes that may be affected by the project.⁵⁹ In accordance with the Commission's regulations, Pumped Hydro Storage identified parties in the general area of the project that it believed would likely be interested in, or affected by, the application.⁶⁰ Although Pumped Hydro Storage failed to include certain tribes in the list of interested parties, the Navajo Nation, the Hopi Tribe, and the Havasupai Tribe intervened in this proceeding, and the Hualapai Tribe provided comments. Should Pumped Hydro Storage develop a license application, tribes will have several

⁵⁶ *Cat Creek Energy, LLC*, 167 FERC ¶ 61,046 at P 11; *Symbiotics, LLC*, 99 FERC at 61,419.

⁵⁷ Conservation Coalition November 18, 2019 Motion to Intervene at 7.

⁵⁸ 18 C.F.R. § 4.32(a)(2) (2019); Pumped Hydro Storage August 1, 2019 Application at 4–5.

⁵⁹ Hopi Tribe November 1, 2019 Motion to Intervene at 3; Department of the Interior November 15, 2019 Comment at 5; Hualapai Tribe November 18, 2019 Comment at 2; Conservation Coalition November 18, 2019 Motion to Intervene at 10; American Rivers November 21, 2019 Motion to Intervene at 5; Southwest Tribal Fisheries Commission November 25, 2019 at 1 (identifying the Havasupai Tribe, the Hopi Tribe, the Hualapai Tribe, the Kaibab Band of Paiute Indians, the Las Vegas Tribe of Paiute Indians, the Moapa Band of Paiute Indians, the Paiute Indian Tribe of Utah, the San Juan Southern Paiute Tribe, the Yavapai-Apache Nation, and the Pueblo of Zuni).

⁶⁰ Pumped Hydro Storage August 1, 2019 Application at 4–5; *see also* 18 C.F.R. § 4.32(a)(2) (2019).

opportunities to participate, including through tribal consultation.⁶¹ Any tribe that wishes to be added to the Commission's mailing list regarding the permit may file a letter with the Secretary of the Commission.⁶² Tribes can also be kept apprised of the filings in the docket by registering for the Commission's eSubscription service.⁶³ Accordingly, this issue does not affect our consideration of the permit application.

33. Finally, Center for Biological Diversity and American Rivers assert that the application is incomplete for failing to adequately consider Little Colorado River flows and floods, sediment load, tribal issues, and listed species.⁶⁴ As stated above, our regulations acknowledge that full, detailed project information may not be available when a permit application is filed.⁶⁵ To ensure that we have adequate information to determine project effects and benefits, we require that detailed information regarding the proposed project be provided at such time as a license application is filed.⁶⁶ The very purpose of a permit is to study a project's feasibility, including potential impacts. Therefore, these concerns are premature at the permit stage in that they involve the potential effects of constructing and operating the proposed project, which would be addressed in the licensing process.⁶⁷

⁶¹ See 18 C.F.R. § 2.1c (2019) (policy statement on consultation with Indian tribes in Commission proceedings).

⁶² *Resources, How To Guides, Be Added to the Commission's Mailing List*, FERC, <https://www.ferc.gov/resources/guides/how-to/mailling-list.asp> (accessed February 13, 2020). Of the tribes provided by the Bureau of Indian Affairs, the Hualapai Tribe has been added to the mailing list.

⁶³ See *eSubscription*, FERC, <https://www.ferc.gov/docs-filing/esubscription.asp> (accessed February 21, 2020).

⁶⁴ American Rivers November 21, 2019 Motion to Intervene at 5–8; Center for Biological Diversity November 18, 2019 Motion to Intervene at 7–9, 19–20.

⁶⁵ *Cat Creek Energy, LLC*, 167 FERC ¶ 61,046 at P 11; *Symbiotics, LLC*, 99 FERC at 61,419.

⁶⁶ *Cat Creek Energy, LLC*, 167 FERC ¶ 61,046 at P 11; *FFP Mass 1, LLC*, 133 FERC ¶ 62,230, at P 7 (2010).

⁶⁷ See *supra* Section III.A, III.D.

IV. Permit Information

34. 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,⁶⁸ 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.⁶⁹ 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.⁷⁰ 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.⁷¹

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

36. 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

⁶⁸ 16 U.S.C. § 802 (2018).

⁶⁹ 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.”).

⁷⁰ 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).

⁷¹ See *City of Richmond, Va.*, 52 FERC ¶ 61,322, at 62,281, *reh'g denied*, 53 FERC ¶ 61,342 (1990).

and 5.6 of the Commission's regulations.⁷² 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.⁷³ As stated above, if the permittee files a development application, notice of the application will be published, and those interested may intervene and comment on the project and the effects of its construction and operation.

37. 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.⁷⁴

The Commission orders:

(A) A preliminary permit is issued for the Little Colorado River Pumped Storage Project No. 14994 to Pumped Hydro Storage 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.

(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.

⁷² 18 C.F.R. §§ 5.5–5.6 (2019).

⁷³ *See id.* § 5.3.

⁷⁴ *See City of Fayetteville Pub. Works Comm.*, 16 FERC ¶ 61,209 (1981).

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(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).

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.

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.

Appendix – Intervenors

American Rivers

American Whitewater

Arizona Game and Fish Department

Center for Biological Diversity

Colorado River Commission of Nevada

Havasupai Tribe

Hopi Tribe

Living Rivers and Colorado Riverkeeper

National Parks Conservation Association

River Runners For Wilderness

Navajo Nation

Salt River Project Agricultural Improvement and Power District and Salt River Valley
Water Users' Association

Save the Colorado, Grand Canyon Trust, Living Rivers and Colorado Riverkeeper, Sierra
Club, Waterkeeper Alliance, and WildEarth Guardians (collectively Conservation
Coalition)

Sheep Mountain Alliance

Southwest Transmission Dependent Utility Group

Western Colorado River Runners

Document Content(s)

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