

174 FERC ¶ 61,106
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Richard Glick, Chairman;
Neil Chatterjee, James P. Danly,
Allison Clements, and Mark C. Christie.

Navajo Energy Storage Station LLC

Project No. 15001-000

ORDER ISSUING PRELIMINARY PERMIT AND GRANTING PRIORITY TO
FILE LICENSE APPLICATION

(Issued February 18, 2021)

1. On July 1, 2019, Navajo Energy Storage Station LLC (NESS) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA),¹ proposing to study the feasibility of the Energy Storage Station Pumped Storage Project (ESS Project or project),² to be located at the U.S. Bureau of Reclamation's Lake Powell Reservoir on the Colorado River and on Navajo Nation land on the south shore of Lake Powell in San Juan County, Utah.³

I. Proposal

2. As proposed, the ESS Project would use the Bureau of Reclamation's Lake Powell Reservoir, created by Glen Canyon Dam, for its lower reservoir, and would include the construction of a new upper reservoir. The upper reservoir would be impounded by a new, 15,150-foot-long, 131-foot-high rockfill concrete dam. The upper reservoir would have a usable storage capacity of 18,600 acre feet. Additional new project facilities would include: (1) a vertical intake for the upper reservoir; (2) a shoreline intake on Lake

¹ 16 U.S.C. § 797(f).

² In its application, NESS named the project the Navajo Energy Storage Station Pumped Storage 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 NESS's pursuit of this project. To avoid any confusion as to the identity of the project proponent, we have omitted "Navajo" from the project name.

³ The Notice of Application erroneously indicated that the project would be located in San Juan County, Arizona.

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Powell for the lower reservoir; (3) an approximately 6,550-foot-long water conveyance structure between the two reservoirs that would include a single 35-foot-diameter headrace tunnel, eight 11-foot-diameter penstocks, eight 15-foot-diameter draft tubes, and two 31-foot-diameter tailrace tunnels; (4) a powerhouse that would include eight variable-speed pump turbine generating units with a combined capacity of 2,210 megawatts; (5) an 18-mile-long, 500-kilovolt transmission line that will connect with an existing 230-kilovolt line owned by Western Area Power Administration; and (6) appurtenant facilities.

3. During power generation, water would flow from the upper reservoir, through the penstocks and powerhouse, and discharge through the tailrace into Lake Powell. The estimated annual generation of the ESS Project would be 3,365 gigawatt hours.

II. Notice, Interventions, and Comments

4. On January 14, 2020, the Commission issued public notice of the permit application, establishing a deadline of March 16, 2020, for filing comments, interventions, and competing applications. Notice of the application was published in the *Federal Register* on January 22, 2020.⁴

5. The U.S. Department of Interior (Interior) filed timely comments for the U.S. Bureau of Reclamation (Reclamation) and the National Park Service, encouraging further agency consultation. The Navajo Nation and Southwest Transmission Dependent Utility Group filed timely, unopposed motions to intervene and comments.⁵ Wild Earth Guardians and Save the Colorado (jointly “Wild Earth Guardians”) and, separately, the Center for Biological Diversity filed timely, unopposed motions to intervene and comments opposing the application. The Upper Colorado River Commission and Joyce Patry filed untimely comments, which will be considered in this proceeding.

III. Discussion

A. Jurisdiction

4. Sections 4(e) and 4(f) of the FPA⁶ authorize the Commission to issue preliminary permits and licenses for non-federal hydropower projects to be located at federal dams

⁴ 85 Fed. Reg. 3673 (Jan. 22, 2020).

⁵ Timely, unopposed motions to intervene are granted by operation of Rule 214 of the Commission’s regulations. 18 C.F.R. § 385.214(c)(1) (2020).

⁶ 16 U.S.C. §§ 797(e) and (f).

and facilities. This jurisdiction is withdrawn if hydropower generation at the site is authorized for federal development, or if Congress otherwise unambiguously withdraws the Commission's jurisdiction, either congressionally or administratively.⁷

5. Because hydropower development at Lake Powell has been reserved for federal development, Reclamation is presumed to have jurisdiction of projects located entirely at that site.⁸ However, the Commission retains jurisdiction over non-federal hydropower facilities located outside of Lake Powell, which would include the new upper reservoir, the new access tunnels, the new powerhouses, and the new transmission line.⁹

6. Accordingly, to proceed with the development of project features using the Lake Powell Reservoir, the applicant will have to apply for and obtain a lease of power privilege from Reclamation. For parts of the proposed project that would be located outside the Lake Powell Reservoir, the applicant would be required to obtain a Commission license.

B. Completeness of NESS' Application

7. Center for Biological Diversity argues that the application is incomplete because it contains misleading or inaccurate information regarding powerhouse location, tailrace length, and plans for transmission lines from the project.¹⁰ The Center for Biological

⁷ See *City of Gillette, Wyoming*, 25 FERC ¶ 61,366 (1983).

⁸ See the 1992 Memorandum of Understanding entered into by the Commission and Reclamation to guide determinations of whether the Commission has authority to license proposed non-federal hydropower development at individual projects. 58 Fed. Reg. 3269 (Jan. 8, 1993). See also October 4, 2019 Letter from Max Spiker (Senior Advisor, Hydropower, Bureau of Reclamation) to Timothy Konnert (Chief, West Branch Division of Hydropower Licensing).

⁹ See 58 Fed. Reg. 3269 at 3270 ("In the event that non-federal hydropower facilities would be located inside and outside of the boundaries of a Reclamation project, and if hydroelectric power development is reserved under reclamation law, then the Commission shall have jurisdiction over the portion of the facilities located outside the boundaries of the Reclamation project and Reclamation shall have jurisdiction over the portion of the facilities located inside the boundaries of the Reclamation project."). See also Department of the Interior March 9, 2020 Comments at 1 ("[I]n addition to a license from the FERC, [NESS] will need to apply for and obtain a Lease of Power Privilege from Reclamation for non-federal project features sited on Lake Powell").

¹⁰ Center for Biological Diversity Motion to Intervene at 10-12.

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Diversity also argues that the application contains misleading information regarding the public benefits of the project.¹¹ Further, it claims that the proposed studies in the application are inadequate and requests that it be allowed to participate in study development.¹² Specifically, the Center for Biological Diversity argues that more detailed transmission, dispatch, and economic studies are necessary for the Commission to grant the permit,¹³ and that environmental studies are needed to determine the proposed project's impact on threatened and endangered species, visual resources, surface and subsurface impacts, and road access.¹⁴

8. We find that the applicant's description of the project satisfies the requirements of section 4.81(b) and section 4.81(d) of the Commission's regulations.¹⁵ We also find the

¹¹ *Id.* at 5-7 (arguing that the project would result in a net increase in greenhouse gas emissions even under optimal circumstances despite the applicant's position that the project would help integrate renewables and help states in the region expand renewable generation).

¹² *Id.* at 12.

¹³ *Id.* at 12-17.

¹⁴ *Id.* at 17-22.

¹⁵ 18 C.F.R. § 4.81(b), (d) (2020) (requiring a description of the proposed project, including: existing and proposed dams, spillways, penstocks, powerhouses, tailraces, or other structures to be part of the project; reservoir information; transmission line information; estimated average annual energy production and installed capacity; all lands of the United States within the project boundary; information on whether a proposed project would develop, conserve, and use water interests in the region for the public interest; and topographical maps at a legible scale).

description of its proposed studies satisfies the requirements of section 4.81(c)(1)¹⁶ because it lists and describes 14 studies that it intends to conduct, including expanding on a previous Bureau of Reclamation study.¹⁷ These studies include studies on threatened or endangered species, water quality and reservoir filling, aesthetic resources, cultural resources, wildlife and botanical resources, and economic and commercial feasibility.¹⁸ Our regulations do not require a permit application to provide information in any further detail. Study development regarding any license application will be a public process and the Commission does not render judgment on the feasibility of study design at the permit stage.

C. Access to Site

9. Center for Biological Diversity contends that the applicant does not have the necessary ability to access Navajo Nation or National Park Service land. Additionally, the Center for Biological Diversity contends that access for studies may have adverse impacts that should be addressed in the application. The National Park Service notes that the applicant would need permits and rights-of-way prior to conducting any entry, survey, or studies on Park Service land.¹⁹ Similarly, the Bureau of Reclamation states that the applicant must apply for and obtain permits for right of entry prior to entering the lands for any purpose including for use of land should construction activities proceed.²⁰

10. A permit applicant is not required to have obtained access rights to a project site as a condition of receiving a preliminary permit, and a preliminary permit does not grant a

¹⁶ *Id.* § 4.81(c)(1) (requiring the applicant include a study plan containing a description of “any studies, investigations, tests, or surveys . . . for the purposes of determining the technical, economic, and financial feasibility of the proposed project, taking into consideration its environmental impacts, and of preparing an application for a license for the project” and the “approximate locations and nature of any new roads that would be built for the purpose of conducting the studies”).

¹⁷ NESS Application at Exhibit 2.

¹⁸ *Id.*

¹⁹ The National Park Service notes that review of any proposal for rights-of-way would include analysis and consultation under the National Environmental Policy Act, the Endangered Species Act, and section 106 of the National Historic Preservation Act. Department of the Interior Comments at 3.

²⁰ *Id.* at 2.

right of entry onto any lands.²¹ A preliminary permit only allows the permit holder to maintain priority to file a license application.²² Further, 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.

D. Agency and Tribal Consultation Under the Permit

11. The Navajo Nation argues “that the preliminary permit should not be granted without the consent of the Navajo Nation, including its approval of all leases, permits and rights-of-way required under the laws of the Navajo Nation.”²³ The Navajo Nation asserts that the Commission should have initiated government-to-government consultation with the tribe as part of its consideration of the applicant’s permit application.²⁴

12. 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.²⁵ The Commission recognizes the unique relationship between the United States and Indian tribes, acknowledges its trust responsibility to Indian Tribes, and endeavors to work with tribes on a government-to-government basis, seeking to address the effects of proposed projects on tribal rights and resources through consultation.²⁶ Should the applicant begin

²¹ See *Pumped Hydro Storage LLC*, 171 FERC ¶ 61,138, at PP 17-18 (2020) (rejecting argument that the preliminary permit should be denied because the proposed project site is on Navajo Nation land and without the tribe’s support, the applicant would be prevented from conducting feasibility studies or obtaining a license).

²² See 16 U.S.C. § 798; *New Summit Hydro, LLC*, 149 FERC ¶ 61,033, at P 16 (2014); see also *Utah Independent Power, Inc.*, 141 FERC ¶ 61,226, at n.7 (2012) (“permittees are not required to have obtained all access rights to a project site as a condition of receiving a permit”).

²³ Navajo Nation Motion to Intervene.

²⁴ *Id.*

²⁵ See, e.g., *Pumped Hydro Storage LLC*, 171 FERC ¶ 61,138 at P 18 (citing *Premium Energy Holdings, LLC*, 170 FERC ¶ 61,231, at P 24 (2020)).

²⁶ 18 C.F.R. § 2.1c (2020).

the process of developing a license application, the Commission will reach out to consult with the Navajo Nation and other affected tribes to ensure that tribal concerns and interests are addressed.

E. Other Issues and Concerns

13. The remainder of the issues raised by the commenters including concerns regarding (i) the effects of project construction and operation on water rights and water resources,²⁷ (ii) the feasibility of the project due to the impacts of climate change and concomitant drought conditions,²⁸ and (iii) the potential impact of the project on threatened or endangered species²⁹ are premature and outside the scope of this proceeding. A preliminary permit does not authorize a permittee to undertake construction of the proposed project. The purpose of a preliminary permit is to secure the permit holder's priority for hydropower development while it studies the feasibility of the project, including studying potential impacts. The remainder of the concerns raised by commenters are premature at the preliminary permit stage in that they address the potential effects of constructing and operating the proposed project.³⁰ Should the

²⁷ See Navajo Nation Motion to Intervene; Southwest Transmission Dependent Utility Group Motion to Intervene at 3; Wild Earth Guardians Motion to Intervene at 9-10; Upper Colorado River Commission Comment at 1-2.

²⁸ See Wild Earth Guardians Motion to Intervene at 9-10; Center for Biological Diversity Motion to Intervene at 8.

²⁹ Center for Biological Diversity Motion to Intervene at 17.

³⁰ See, e.g., *Green Energy Storage Corp*, 150 FERC ¶ 61,042, at P 10 (2015) (opposition to the construction of the project is outside the scope of the preliminary permit proceeding); *Tomlin Energy LLC*, 169 FERC ¶ 61,037, at P 8 (2019) (explaining that concerns about impacts of project operation are premature at the permit stage); *Alaska Power Co., Inc.*, 138 FERC ¶ 62,130, at P 7 (2012) (stating that concerns over the project's impact on fish and wildlife resources and the cumulative impacts of basin development are premature at the permit stage); *SV Hydro, LLC*, 173 FERC ¶ 62,047, at P 5 (2020) (declining to address commenters claims that the upper reservoir could fail and endanger residents and infrastructure downstream; that the initial fill water is subject to private and public ownerships, and thus not readily available; and that the

proposed project could be an impediment to accessing iron ore deposits because they are premature).

permittee file a license application, these issues will be addressed in the licensing process.

IV. Permit Information

14. Section 4(f) of the Federal Power Act 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,³¹ 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.³² 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.³³ 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.³⁴

15. 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.

³¹ 16 U.S.C. § 802.

³² 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.”).

³³ 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).

³⁴ See *City of Richmond, Va.*, 52 FERC ¶ 61,322, at 62,281, *reh'g denied*, 53 FERC ¶ 61,342 (1990).

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16. 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 the 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.³⁵ 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.³⁶ 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 effects of its construction and operation.

17. 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.

The Commission orders:

(A) A preliminary permit is issued for the Navajo Energy Storage Station Pumped Storage Project No. 15001 to Navajo Energy Storage Station LLC, for a period effective from 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.

(C) This order constitutes final agency action. Any party may file a request

³⁵ 18 C.F.R. §§ 5.5-5.6 (2020).

³⁶ 18 C.F.R. § 5.3 (2020).

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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*, and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2020).

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 <https://ferconline.ferc.gov/FERCOOnline.aspx> . To paper-file via USPS, mail four copies of the progress report to Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 888 First Street, N.E., Room 1A, Washington, D.C. 20426. To paper-file via any other carrier, mail four copies of the progress report to Kimberly D. Bose, Secretary, Federal Energy Regulatory Commission, 1225 Wilkins Avenue, Rockville Maryland 20852.

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