

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

Wyco Power and Water, Inc.

Preliminary Permit Application for
Regional Watershed Supply Project

) Project No. P-14263-000
)
) **MOTION TO INTERVENE BY**
) **SIERRA CLUB, CENTER FOR**
) **BIOLOGICAL DIVERSITY, ROCKY**
) **MOUNTAIN WILD, SAVE THE**
) **POUDRE: POUDE WATERKEEPER,**
) **BIODIVERSITY CONSERVATION**
) **ALLIANCE, WYOMING OUTDOOR**
) **COUNCIL, CITIZENS FOR DIXIE'S**
) **FUTURE, GLEN CANYON**
) **INSTITUTE, LIVING RIVERS:**
) **COLORADO RIVERKEEPER, AND**
) **UTAH RIVERS COUNCIL**

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INTRODUCTION

On October 18, 2011, the Commission issued a notice of acceptance of Wyco Power and Water, Inc.'s (Wyco) application for a preliminary permit for the Regional Watershed Supply Project (hereinafter the "Flaming Gorge Pipeline" or "Pipeline"), Project No. P-14263-000. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214, the Sierra Club, Center for Biological Diversity, Rocky Mountain Wild, Save the Poudre: Poudre Waterkeeper, Biodiversity Conservation Alliance, Wyoming Outdoor Council, Citizens for Dixie's Future, Glen Canyon Institute, Living Rivers: Colorado Riverkeeper, and Utah Rivers Council (collectively, the "Conservation Coalition"), hereby move to intervene in the preliminary permit proceedings and oppose the requested permit.¹

The Pipeline has an unrealistic and devastating scope: it proposes to take a massive amount of water out of the Flaming Gorge Reservoir and the Green River, pipe the water more than 500 miles over the Continental Divide and through or adjacent to two National Wildlife Refuges, fifty miles of sage grouse habitat, an Inventoried Roadless Area, a Federal Game Refuge, and other protected areas, and then deliver it at prices that few, if any, consumers could afford. As detailed below, the legal, policy, and practical barriers to this Pipeline are likely insurmountable.

In addition, the applicant for this Pipeline, Wyco, has a history of missteps and missed deadlines with a nearly identical project. Wyco's president, Aaron Million, and his company, Million Conservation Resource Group (MCRG), first proposed this

¹ This motion to intervene is timely because it is filed within the 60-day window initiated by the Commission's notice of acceptance dated October 18, 2011. See 18 C.F.R. § 385.214.

Pipeline to the U.S. Army Corps of Engineers (Corps) without the hydropower components. The Corps has jurisdiction over the impacts to the waterways that any version of this Pipeline will cause. However, the Corps terminated its review of that proposal after two and a half years because MCRG caused multiple delays and failed to comply with the agency's requirements.

Once the Corps terminated its review, Wyco turned to the Commission. In this version of the Pipeline, Wyco has attached a handful of hydroelectric components. Nonetheless, the Pipeline remains, first and foremost, a water supply project. Indeed, the Pipeline, absent the hydropower components, could proceed without a license from the Commission. In contrast, the project cannot proceed in any form – including as a hydropower project – without the multitude of permits required for the water pipeline and diversions. Further, the hydroelectric components make up as little as 5% of the footprint of the project. As such, it is not in the public interest to push the Commission into playing a lead role in evaluating a project that is overwhelmingly under other agencies' jurisdiction – including one that has already terminated a review.

As detailed below, the Commission should grant the Conservation Coalition's motion to intervene and deny Wyco's application for a preliminary permit for the proposed Flaming Gorge Pipeline.

BACKGROUND

I. The Flaming Gorge Pipeline Proposal

The proposed Pipeline is a massive interstate water supply project that would annually take approximately 81 billion gallons (250,000 acre-feet) of water out of the Flaming Gorge Reservoir and the Green River and pipe it more than 500 miles over the

Continental Divide to Colorado's Front Range for municipal, industrial, and agricultural use. 76 Fed. Reg. 65719 (Oct. 24, 2011) (FERC notice of acceptance of preliminary permit application); see also 74 Fed. Reg. 11920 (Mar. 20, 2009) (Corps notice of intent to prepare an environmental impact statement (EIS)).² The Pipeline would divert water from two places: (1) the Flaming Gorge Reservoir in Utah and Wyoming, and (2) the Green River in southwest Wyoming. Along its path through Wyoming and Colorado, the Pipeline right-of-way and the associated reservoirs and power components would cross over 3,200 acres of public lands, including lands in the Flaming Gorge National Recreation Area, the Sheep Mountain Inventoried Roadless Area in the Medicine Bow-Routt National Forest, two National Wildlife Refuges (NWRs), a Federal Game Refuge, and Soapstone Prairie Natural Area.

² Although the Application for Preliminary Permit does not clearly state the amount of water to be diverted, the application indicates that the amount is similar to the prior proposal to the Corps, which specified 250,000 acre-feet each year. See 74 Fed. Reg. at 11920. Specifically, Wyco estimates there will be an average annual flow through the hydropower components of the project of about 288 cubic feet per second (cfs), which results in approximately 208,500 acre-feet per year. Wyco Prelim. Permit Application at 16. When combined with the water removed from the system for the pumped storage projects and delivery within Wyoming and northern Colorado, the total Pipeline diversion would likely be approximately 250,000 acre-feet per year. Id. at 15, 16; see also Exh. 1 (Pflugh Decl. ¶ 41).






Figure 1

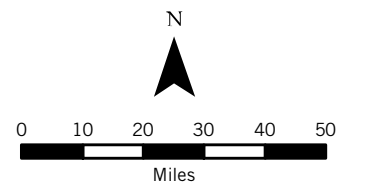
Regional Watershed Supply Project

Preliminary Permit Application

The proposed Regional Water Supply Project as depicted in the Preliminary Permit application and supporting documents submitted in September and October 2011. Locations depicted here are based on digitization of the application maps and should be viewed as approximate.

RWSP Components

-  Pipeline
-  Point of Diversion (POD)
-  Pump Station (PS)
-  Power Generation Station (RWSP Station)
-  Reservoir



The Pipeline's impacts would be staggering. Removing 81 billion gallons of water each year would dramatically reduce the Green River's flows, which are critical to sustain fish and wildlife habitat from Flaming Gorge Dam to Lake Powell, more than four hundred miles downstream. The Green is the largest tributary of the Colorado River and provides nearly 40 percent of the water entering the Colorado River at Lake Powell each year. Exh. 2 at 4, 11, 22 (Green, Colorado, and San Juan Rivers Flows; Green River Fisheries).³ The Green River also flows through three National Wildlife Refuges and supports a world-famous trout fishery averaging 6,000 to 8,000 fish per mile. *Id.* at 31. Moreover, four endangered fish species depend on the Green River flows for survival. In addition to the impacts downstream, the construction and operation of the Pipeline over its 500-mile route through Wyoming and Colorado would adversely affect myriad public resources, including water quality, recreational opportunities, historic trails, and numerous fish, wildlife, and bird species.

II. The Corps' Termination Of MCRG's Initial Application For Approval Of The Flaming Gorge Pipeline

Mr. Million first conceived of the idea of the Flaming Gorge Pipeline water supply project in 2003. *See* Exh. 3 at 4–5 (Westword article on Aaron Million and Flaming Gorge Pipeline). In 2009, MCRG applied for a Clean Water Act Section 404 permit for the Flaming Gorge Pipeline from the U.S. Army Corps of Engineers, which triggered review of the project under the National Environmental Policy Act (NEPA). *See* 33 U.S.C. § 1344 (Clean Water Act Section 404); 74 Fed. Reg. at 11920; Exh. 4 (Corps News Release). This version of the Pipeline was substantially similar to the

³ All Exhibit pinpoint citations in this motion are to the PDF page number for each Exhibit, as required by 18 C.F.R. § 385.2003(d).

current proposal, with one major exception – the hydropower components. See 74 Fed. Reg. at 11920.

During the Corps’ scoping process for the 2009 proposal, thousands of comments raising concerns and opposing the project were submitted by multiple federal agencies, state and local governments, American Indian tribes, water conservation districts, non-profit organizations, local businesses, and individuals. Exh. 5 at 5 (Corps Scoping Summary Report). In particular, several commenters questioned the legality and feasibility of such a project.

For example, the U.S. Bureau of Reclamation (Reclamation) told the Corps that the proposed diversion – 250,000 acre-feet per year – is not available in the Flaming Gorge Reservoir, due to requirements of the Endangered Species Act (ESA) and the needs of hydropower generation. Exh. 6 at 24–25 (Federal Agencies’ 2009 Scoping Comments to the Corps); see also id. at 20 (Department of Interior, Central Utah Project warning the Corps that the issue of water availability “will likely be hotly disputed as the basis for establishing the financial and technical feasibility of the [project]”). Similarly, the State of Wyoming objected to the Pipeline and noted that even in the context of past water development projects in the Colorado River basin, this project “is remarkable in terms [of] its scope and the sheer amount of water involved.” Exh. 7 at 2 (States’ 2009 Scoping Comments to the Corps). Several Wyoming and Utah counties also raised concerns over whether the project was economically feasible given the project’s multi-billion dollar price tag. See Exh. 8 at 16–18 (Coalition of Local Governments’ 2009

Scoping Comments to the Corps).⁴ As the National Park Service summarized: “The project proponent has not provided evidence that the project is legally and hydrologically feasible.” Exh. 6 at 30.

Before these concerns were addressed, the Corps terminated its consideration of the Flaming Gorge Pipeline on July 14, 2011. 76 Fed. Reg. 43994 (July 22, 2011); Exh. 10 (Corps Public Notice of Termination). The Corps explained that the project’s purpose was “uncertain and variable,” and “the Corps has spent much time dealing with delays on the part of [Million Conservation Resource Group].” Exh. 11 at 3 (Corps Letter to Aaron Million (hereinafter the “Schenk letter”).

III. Wyco’s Application To The Commission

Less than two months after the Corps terminated its review of the Pipeline, Mr. Million tried his luck with a new agency – the Federal Energy Regulatory Commission. On September 1, 2011, Wyco applied to the Commission for a preliminary permit for the Flaming Gorge Pipeline, after adding a handful of hydropower components to the Pipeline. 76 Fed. Reg. at 65719. This latest version of the Pipeline includes two pumped storage hydroelectric components and five conventional hydropower components, with an installed capacity of approximately 550 megawatts (MW). Id.

On October 5, 2011, the Commission informed Wyco that its preliminary permit application was deficient and that Wyco must provide additional information on the project. Wyco responded on October 13, 2011. Wyco’s response contains numerous

⁴ Water from the Flaming Gorge Pipeline would be the most expensive in Colorado history. See Exh. 9 at 48–49 (Honey Creek Res., Economic and Financial Impacts of the Proposed Flaming Gorge Pipeline); Western Resource Advocates et al., Motion to Intervene in Preliminary Permit Proceedings, P-14263-000, at section III(B)(i) (hereinafter “WRA Motion”).

inconsistencies and impossibilities. Exh. 1 ¶¶ 15, 46 (Pflugh Decl.). However, the Commission issued its notice of acceptance of the preliminary permit application on October 18, 2011. 76 Fed. Reg. at 65719–20.

Although the Pipeline now includes hydropower components, Mr. Million has reportedly conceded that it would necessarily consume more energy than it could generate. See Exh. 12 at 2 (Billings Gazette article stating: “Although Million said the project couldn’t produce more energy than it uses, he said the hydropower could provide a valuable offset to its operating costs.”). This is an obvious conclusion given the prodigious power requirements necessary to every year pump 81 billion gallons of water over 500 miles, up and down the varied landscape of southern Wyoming and over the Continental Divide. As a result, the Flaming Gorge Pipeline, as proposed to the Commission, is still primarily a water supply project.

Moreover, the significant environmental impacts and the legal hurdles to this project that were raised during the Corps’ review have not changed. For example, the project still requires approximately 250,000 acre-feet per year from the Green River and Flaming Gorge Reservoir, an amount Reclamation has already determined is inconsistent with ESA requirements and hydropower generation. Moreover, a key hydroelectric component is likely barred by the U.S. Forest Service’s Roadless Rule, the Pipeline is inconsistent with several Federal land management plans, and Wyco has already proven unable to obtain essential permits from the Corps. As detailed below, no further studies will change the fact that the Pipeline is infeasible and that a license should not – and cannot – be issued for this project.

INTERESTS OF INTERVENORS

I. The Conservation Coalition's Interests

The Conservation Coalition's interests in this preliminary permit proceeding are in the public interest pursuant to 18 C.F.R. § 385.214(b)(2)(iii), as described below.

Sierra Club

The Sierra Club is a national nonprofit organization with over 1.3 million members and supporters across the United States and is dedicated to protecting wild places, wildlife, clean air, and clean water for current and future generations. The Rocky Mountain (Colorado), Wyoming, and Utah Chapters of the Sierra Club, representing over 20,000 members, have a long history of public education and advocacy to protect the water and public land resources in the Upper Colorado River Basin, including the Green River drainage. In recent years, the Sierra Club has worked with the Interbasin Compact Committee to address the gap between current water supplies and future needs and to promote water conservation techniques to alleviate the need for new water projects. The Club has worked for decades to protect instream flows, water quality, and riparian and upland wildlife habitat throughout the Green River drainage.

The Sierra Club has a special interest in the Green River drainage, including Flaming Gorge Dam and reservoir, and has advocated for responsible management of this watershed for many years. The Pipeline would adversely affect rivers, streams, public lands, and wildlife that its members highly value. Sierra Club members enjoy fishing, hunting, hiking, wildlife viewing, and other outdoor activities along the Green River and its tributaries, and some depend on the local economy supported by Flaming Gorge National Recreation Area.

Center for Biological Diversity

The Center for Biological Diversity (CBD) is a national nonprofit organization with 320,000 members and online activists nationwide. CBD uses science, law, and public outreach to protect the lands, waters, and climate that species need to survive. The organization also focuses on protecting endangered species and the habitats upon which they depend.

CBD has an interest in and concern about water projects in the Upper Colorado River Basin, including the proposed Flaming Gorge Pipeline. As proposed, the Pipeline would adversely affect habitat for species of concern to CBD and at risk of extinction, such as the Colorado pikeminnow, razorback sucker, humpback chub, and bonytail in the Green River downstream from Flaming Gorge Dam. CBD's staff includes biologists, ecologists, and endangered species and climate scientists who can offer expert opinions on these impacts. Many of CBD's members recreate on the Green and Colorado Rivers downstream of Flaming Gorge Dam. Those activities include but are not limited to boating, hiking, camping, bird-watching, and photography. Many of CBD's members derive happiness and a sense of well-being from natural ecosystems and native species, including the endangered fish in the Green River, being protected and sustained rather than destroyed.

Rocky Mountain Wild

Rocky Mountain Wild (RMW) is a nonprofit organization with 1,750 members in Colorado, Utah, Wyoming, New Mexico, California, Texas, and New York, and offices in Denver and Durango, Colorado. RMW's mission is to stem dramatic losses of native species and habitat in Colorado, Utah, and Wyoming. RMW is dedicated to the

conservation and recovery of native species and ecosystems across this region. To further its goal to protect imperiled species and prevent their extinction, the organization participates in administrative processes, legal actions, public outreach, organizing, and education. RMW's staff collectively has over 100 years of conservation experience and has helped protect over two million acres of wildlife habitat. This staff includes biologists, policy experts, legal analysts, geographers, and mapping specialists. RMW's members engage in fishing, wildlife viewing, hiking, and boating on the rivers and streams of the Upper Colorado River Basin.

Save the Poudre: Poudre Waterkeeper

Save the Poudre: Poudre Waterkeeper (STP) is a nonprofit organization based in Fort Collins, Colorado, with 6,000 supporters in northern Colorado and beyond. STP is dedicated to restoring the Cache la Poudre and other rivers, including the Colorado. Having commented on proposed water projects such as the Windy Gap FIRMING Project, the Halligan and Seaman project, and the Flaming Gorge Pipeline when it was before the U.S. Army Corps of Engineers, STP brings a breadth of experience with large water projects to the permitting proceeding. STP has also worked extensively to combat the harmful effects that would result from the proposed Northern Integrated Supply Project (NISP). Some NISP participants propose to use water from the Flaming Gorge Pipeline in Fort Collins and northern Colorado, and Wyco has publicly stated that Pipeline water could be used to fill NISP's proposed Glade Reservoir. STP advocates for conserving and improving the efficiency of existing water resources so that these large-scale water diversion projects, such as the Flaming Gorge Pipeline, are unnecessary. STP sponsors scientific and socio-economic studies that will play a critical role in defining healthy

rivers as the centerpiece of the regional economy and in protecting Colorado's rivers for future generations. The Flaming Gorge Pipeline would directly and adversely affect STP's members' interests in protecting these rivers.

Biodiversity Conservation Alliance

The Biodiversity Conservation Alliance (BCA) is a nonprofit organization based in Laramie, Wyoming, with 4,250 members and supporters. BCA's mission is to protect wildlife and wild places, including the rivers of southern Wyoming and Colorado. BCA focuses on entire ecosystems as well as individual species, particularly species that are in need of immediate conservation help but do not have a high public profile. BCA conducts fieldwork and other analyses to identify these sensitive species and their habitat, including in areas the Flaming Gorge Pipeline would adversely affect. Specifically, BCA has extensive experience researching and protecting the greater sage grouse, whose habitat may be harmed by the Pipeline as proposed. In addition, BCA's members recreate in the Upper Colorado River Basin through fishing, hiking, and wildlife viewing.

Wyoming Outdoor Council

The Wyoming Outdoor Council (WOC) is a nonprofit organization based in Lander, Wyoming, with approximately 1,450 members both in and outside of Wyoming. Wyoming residents founded WOC to conserve the state's wildlife and protect its air, water, and land, including healthy vegetation and productive soils, by promoting sound natural resources policies. To meet this mission, WOC works closely with state and federal agencies and elected officials and collaborates with diverse partners, including hunting, fishing, conservation, recreation, education, faith-based, and labor groups. The Flaming Gorge Pipeline would adversely affect WOC's members, who regularly engage

in wildlife viewing, outdoor recreation, scientific study, and other activities in southern Wyoming, both at Flaming Gorge Reservoir and on public lands that the Pipeline would cross.

Citizens for Dixie's Future

Citizens for Dixie's Future (CDF) is a nonprofit organization based in Hurricane, Utah, with 1,900 supporters. CDF is dedicated to protecting natural resources and quality of life in Utah through smart-growth planning. CDF represents the public interest by creating a local voice to protect water resources, recreation, wildlife, and scenic open spaces. CDF supporters live, recreate, and own businesses in areas that depend on the Colorado River System in eastern Utah. Because the Flaming Gorge Pipeline would adversely affect this region, CDF has a direct interest in the permitting proceeding.

Glen Canyon Institute

The Glen Canyon Institute (GCI) is a nonprofit organization with an office in Salt Lake City, Utah. GCI addresses water and natural resource management issues in the Colorado River Basin on behalf of its 1,500 members and supporters. In particular, GCI is concerned about impacts associated with the loss of ecological integrity in Glen Canyon and the Grand Canyon, and the Colorado River Basin of which they are a part. GCI has extensive experience participating in environmental reviews for water projects affecting the Colorado River System. The Flaming Gorge pipeline's water withdrawals would adversely affect the Green and Colorado River ecosystems downstream from the dam, including Glen Canyon National Recreation Area and Grand Canyon National Park. GCI has members in all of the Colorado River Basin states and

its members have an interest in the sustainable management of the water resources and ecosystems of the Colorado River System.

Living Rivers: Colorado Riverkeeper

Living Rivers is a nonprofit organization based in Moab, Utah, next to the Colorado River. Living Rivers represents 300 members in the United States and sustains networks with 200 nonprofit organizations. Since its inception, Living Rivers has been engaged in advocating for responsible management of the Colorado River System.

Living Rivers was designated as the Colorado Riverkeeper in 2002 by the Waterkeeper Alliance, comprised of 200 affiliate “Waterkeepers” on six continents. Living Rivers’ trustees, partners, and members live, work, and recreate on the Colorado Plateau and stretches of the Green and Colorado Rivers that the Flaming Gorge Pipeline would directly affect. Living Rivers has a substantial interest in assuring that federal and state regulatory agencies study and consider potential environmental and financial impacts, as well as engineering feasibility, for projects affecting the Colorado River. Because demand for Colorado River water is already over-allocated, the Pipeline’s additional water diversion would adversely affect Living Rivers members’ interests. Living Rivers is also concerned that climate change will further diminish the Colorado River water supply, worsening the harmful impact of the Pipeline on eastern Utah.

Utah Rivers Council

The Utah Rivers Council (URC) is a nonprofit organization based in Salt Lake City, Utah, with approximately 1,500 members throughout the state. URC protects Utah’s rivers and clean water sources for today’s citizens, future generations, and wildlife. The organization implements this mission through grassroots organizing, direct

advocacy, research, education, community leadership, and litigation on behalf of rivers and the public. URC members frequently fish, raft, hike, camp, swim, and enjoy fish and wildlife at Flaming Gorge, Lake Powell, the Green River, the Colorado River, and other locations that the project may impact. URC and its members are particularly concerned about impacts to the Green River and Colorado River systems, including, among other areas, Red Creek, Gates of Lodore, Dinosaur National Monument, fisheries of the Yampa and Price Rivers, and Desolation, Stillwater, Labyrinth, Cataract, and Westwater Canyons.

II. The Conservation Coalition's Intervention Is In The Public Interest

Pursuant to 18 C.F.R. § 385.214(b)(2)(iii), intervention by the Conservation Coalition is in the public interest. The Conservation Coalition represents a cross-section of interests with offices and members located throughout the Upper Colorado River Basin, particularly the sub-basins of the Green, Colorado, and Laramie Rivers, and other rivers affected by this Pipeline. The Conservation Coalition has specific interests in protecting, restoring, and enjoying these rivers and streams and the fish, wildlife, and plants that depend on them. These organizations also have specific interests in protecting wildlands, wetlands, and other wildlife habitat along the proposed Pipeline's route through southern Wyoming. Their members use and enjoy these areas for recreation and aesthetic enjoyment, including boating, fishing, hunting, camping, biking, photography, wildlife viewing, and enjoyment of the outdoors. Many members rely on these waterways and wetlands for their recreational, scientific, educational, conservation, and economic interests. The Flaming Gorge Pipeline would directly affect these interests. No other party will adequately represent these same interests.

In addition, Sierra Club, Citizen's for Dixie's Future, Glen Canyon Institute, Living Rivers: Colorado Riverkeeper, and Utah Rivers Council have special knowledge regarding Commission permitting proceedings, hydropower development, and water pipeline impacts because they intervened in the Lake Powell Pipeline preliminary permit and licensing proceedings (Project No. P-12966-001). The Lake Powell Pipeline, like the Flaming Gorge Pipeline, involves a large water supply pipeline in the Upper Colorado River Basin, hydropower development, and multiple federal agencies, led by the Commission. Moreover, the project has similar adverse effects on fish, wildlife, and plants, including endangered species and their habitats, water availability, and recreation on the Colorado River and surrounding public lands. These groups and their members have developed knowledge and relevant experience regarding water pipeline and hydroelectric projects that will benefit the public interest in the Flaming Gorge Pipeline proceedings.

The Conservation Coalition will actively participate in this preliminary permitting process and in any subsequent licensing proceeding to ensure the protection of the Green River, adequate stream flows in the Upper Colorado River Basin and southern Wyoming, and protection of the fish, wildlife, and plant species that depend on these flows and other wetlands. This participation will lead to more informed decision making, develop a more complete record, and be in the public interest. Accordingly, the Conservation Coalition organizations request intervention on behalf of themselves and their members.

LEGAL BACKGROUND

The Federal Power Act (FPA) governs private hydropower projects on federal land. 16 U.S.C. § 797(e). The overarching purpose of the FPA is to promote balanced

and responsible hydropower development. The FPA requires the Commission to weigh the power generation and developmental goals of a project against impacts to fish, wildlife, recreation, and other resources before issuing a license. Id.; Udall v. Fed. Power Comm’n, 387 U.S. 428, 450 (1967); Am. Rivers v. Fed. Energy Regulatory Comm’n, 201 F.3d 1186, 1191 n.6 (9th Cir. 2000); Symbiotics, LLC, 99 FERC ¶ 61,100, at 61,417 (2002).

The FPA also authorizes the Commission to issue preliminary permits for potential hydropower projects. 16 U.S.C. § 798; 18 C.F.R. § 4.80. According to the Commission, the “purpose of a preliminary permit is to encourage hydroelectric development” by providing a permittee a first-in-time right to file a license application to construct and operate a hydropower project while the permittee determines the feasibility of the project and prepares the license application. Mt. Hope Waterpower Project LLP, 116 FERC ¶ 61,232, at ¶ 4 (2006).

The Commission has discretion to determine whether to issue a preliminary permit. Preliminary Permits for Wave, Current, and Instream New Technology Hydropower Projects (Docket No. RM07-08-000), at 3 n.9 (Feb. 15, 2007) (“[N]othing in the FPA requires the Commission to issue a preliminary permit; whether to do so is a matter solely within the Commission’s discretion.”). Although the Commission’s general policy is to defer analysis of a project’s impacts until the later licensing proceedings, the Commission has discretion to deny a preliminary permit application at any time, so long as “it articulates a rational basis for denial.” Symbiotics, 99 FERC ¶ 61,100, at 61,417 n.13; see also Mt. Hope Waterpower Project, 116 FERC ¶ 61,232, at ¶ 4 (“We may, however, make exceptions to established policies if we articulate a rational basis for

doing so, and we have recently done so with regard to issuance of preliminary permits in other proceedings.”).

The Commission has exercised this discretion on a number of occasions. For example, the Commission will deny a preliminary permit application when there is a legal bar that would prevent the Commission from granting a license for the project. See, e.g., Energie Group, LLC v. Fed. Energy Regulatory Comm’n, 511 F.3d 161, 164 (D.C. Cir. 2007); Seneca Nation of Indians, 134 FERC ¶ 62,148, at 64,246 (2011); Appalachian Rivers Res. Enhancement, LLC, 113 FERC ¶ 62,100, at 64,288 (2005).

The Commission has also denied permits where it found that the proposed project – or further study of the proposed project – would be contrary to the public interest. See, e.g., Stillaquamish River Hydro, 40 FERC ¶ 62,207, at 63,356 (1987) (proposed project not in the public interest because it would interfere with military communications and threaten national security); see also Mt. Hope Waterpower Project, 116 FERC ¶ 61,232, at ¶¶ 5, 12, 13, 15–17 (public interest served by denying preliminary permit to allow competition).

The public interest can be implicated – and undermined – in several ways. The Commission has denied a preliminary permit as contrary to the public interest where the “information already available indicates no license will result.” Energie Group, 511 F.3d at 164. For example, in Symbiotics, L.L.C. v. Federal Energy Regulatory Commission, 110 F. App’x 76, 81 (10th Cir. 2004), the Commission denied a preliminary permit because a prior environmental analysis determining a project was not appropriate for that site was “analogous” to a legal barrier and indicated no license would likely result.

Similarly, the public interest is undermined where an applicant demonstrates a lack of “fitness” for a license, based on a prior history of delay or noncompliance with Commission orders. See, e.g., Energie Group, 511 F.3d at 164 (“In deciding whether to grant a permit, FERC . . . has discretion to consider the fitness of the applicant.”); Appalachian Rivers Res. Enhancement, 113 FERC ¶ 62,100, at 64,288 (applicants are generally deemed unfit when there is an “unsatisfactory compliance record as a licensee or exemptee”); see also Pac. Energy Res., LLC, 128 FERC ¶ 62,154, at 64,460 (2009) (denying preliminary permit application because applicant failed to pursue the specific project at issue with “due diligence and good faith”); Ebb Lake Mut. Elec. Co., 44 FPC 1160, 1161–62 (1970) (denying preliminary permit application when applicant was insufficiently responsive to Commission requests for additional information). As with all denials of preliminary permits, FERC’s purpose in evaluating the applicant’s history is to avoid tying-up hydropower sites and wasting the valuable staff time and resources of the Commission. See, e.g., Pac. Energy Res., 128 FERC ¶ 62,154, at 64,460.

ARGUMENT AND STATEMENT OF POSITION

I. The Commission Should Deny Wyco’s Preliminary Permit Application

The Commission should not be drawn into serving as the lead agency for a project that is (1) primarily a water supply project, and (2) unlikely to be licensed. The Pipeline proposes to take more water than Reclamation has previously found can be removed and still protect endangered fish species downstream, it will drain a massive amount of water from the Green River and affect the fish, wildlife, and recreation downstream of Flaming Gorge Dam, it crosses an Inventoried Roadless Area, two National Wildlife Refuges, and a Federal Game Refuge, and it will require Clean Water Act permits from an agency that

has already terminated its review of the Pipeline without granting such a permit. As a result, there are substantial legal and policy barriers in place that will make this Pipeline extremely unlikely to be licensed. Accordingly, the Commission should deny Wyco's preliminary permit application for the Flaming Gorge Pipeline.

A. The Commission Is Not The Appropriate Lead Agency For This Pipeline

As detailed above, the proposed Pipeline is a water supply project that would consume more energy than it could possibly generate. Indeed, Wyco's president has publicly stated that a net increase in power generation is "not realistic in any scenario." Exh. 12 at 2. No further studies by Wyco on the feasibility of the project will change the topography of the route between Flaming Gorge Reservoir and Colorado's Front Range, which necessarily makes this project a net energy loser.⁵

Because the Pipeline is primarily a water supply project, other agencies have far more authority over the fate of this project than the Commission. See 76 Fed Reg. at 65719 ("[C]onstruction of substantial parts of this proposed pipeline may require permits from other federal agencies." (emphasis added)). Indeed, as noted above, the hydropower components may comprise as little as 5% of the footprint of the Pipeline and associated reservoirs, and the pipeline can go forward without the hydropower components. Exh. 1 ¶ 54 (Pflug Decl.). The fate of this project, therefore, is in the hands of other agencies. For example, Reclamation has jurisdiction over the diversions from Flaming Gorge Reservoir and National Recreation Area, and the Corps has jurisdiction over all impacts to "waters of the United States." See Exh. 6 at 24; 33 U.S.C. § 1344. Either of these

⁵ See also Exh. 1 ¶ 42 (Pflug Decl.); WRA Motion at section III(C)(i) (providing overview of the energy consumption and production capacities of the Pipeline).

agencies would be more appropriate as the lead agency than the Commission because they have more extensive jurisdiction over the project and more experience with water diversions. See 40 C.F.R. § 1501.5 (listing factors for determining lead agency, including the magnitude of involvement and expertise regarding the environmental effects); Consolidated Salmonid Cases, 688 F. Supp. 2d 1013, 1022 (E.D. Cal. 2010) (“Reclamation, as the federal project operator, with extensive experience evaluating the environmental impacts of water deliveries, is the more appropriate agency to bear the NEPA burden” in a case regarding water diversions).⁶

However, Wyco has not pursued the requisite approvals from these agencies, except for the aborted process with the Corps. As a result, if Wyco takes the next step and applies for a license, the Commission’s ensuing review of the proposal under NEPA must be of the whole project, not simply the hydropower elements. Nat’l Wildlife Fed. v. Fed. Energy Regulatory Comm’n, 912 F.2d 1471, 1478 (D.C. Cir. 1990) (NEPA review must “focus on the impact of the particular proposal at issue”); San Juan Citizens Alliance v. Stiles, 654 F.3d 1038, 1043 (10th Cir. 2011) (noting that EIS studied the entirety of a single proposal); see also 40 C.F.R. 1502.3 (2011) (agency must prepare an EIS for every proposal). Accordingly, the Commission should deny the preliminary permit and encourage Wyco to first seek approvals from the agencies with jurisdiction over the vast majority of the Pipeline.

⁶ Many more agencies have jurisdiction over aspects of the Pipeline and must issue permits or approvals for the Pipeline to be constructed. A non-exhaustive list of these permits is attached as Exh. 13.

B. The Flaming Gorge Pipeline Is Unlikely To Ever Be Licensed

The Commission should also deny the preliminary permit because exploration of the Pipeline is a waste of time and resources. As set forth below, there are a series of legal hurdles before this Pipeline could be approved or licensed, many of which appear insurmountable.

1. Wyco's Proposed Diversions Are Inconsistent With ESA Requirements

The Pipeline is inconsistent with Reclamation and other agencies' Endangered Species Act (ESA) obligations. First, the diversions from the Green River and Flaming Gorge Reservoir are far greater than the amount Reclamation has previously stated can be removed consistent with its ESA obligations. Second, approval of these diversions would upend decades of work and more than \$200 million spent attempting to recover the four endangered fish species downstream.

a. The Pipeline Would Take 50% More Water Than Reclamation Has Stated Is Available For ESA Compliance And Hydropower Generation

The Commission should deny the preliminary permit because – according to Reclamation's prior findings – Wyco's proposed diversions for the Pipeline would make it impossible to meet both the Dam's hydropower needs and ESA requirements. See, e.g., *Energie Group*, 511 F.3d at 164; *Seneca Nation of Indians*, 134 FERC ¶ 62,148, at 64,246. As such, Reclamation and U.S. Fish and Wildlife Service (FWS) approval of the Pipeline is impossible.

The Green River system downstream of Flaming Gorge Dam in Colorado and Utah is home to four fishes listed as “endangered” under the ESA: the Colorado pikeminnow, humpback chub, razorback sucker, and bonytail. Exh. 14 at 18, 24 (Muth et

al.); Exh. 15 at 5 (Flaming Gorge Dam BO).⁷ In 1994, FWS designated portions of the Green and the Colorado Rivers, including downstream of the confluence of the two rivers, as “critical habitat” for these fishes. 59 Fed. Reg. 13374 (Mar. 21, 1994). As such, these stretches of river have been deemed “essential” to the species’ recovery under the ESA. See 16 U.S.C. § 1532(5)(A).

Reclamation must release specific flows over Flaming Gorge Dam in order to comply with section 7 of the ESA, id. § 1536(a)(2), as set forth in FWS’s 2005 Biological Opinion and Reclamation’s 2005 Final Environmental Impact Statement and 2006 Record of Decision (ROD) on Dam operations. See Exh. 15 (Flaming Gorge Dam BO); Exh. 16 at 17 (Flaming Gorge Dam EIS); Exh. 17 at 4 (Flaming Gorge Dam ROD) (Reclamation’s adoption of these flows); see also Exh. 14 at 28–66 (Muth et al. discussing scientific basis for flows). The flows are designed to vary from year to year and during the course of each year, depending on the season and on precipitation, in order to mimic the historic patterns in the Green River system and protect and restore the habitat for these fishes. Exh. 15 at 10–11 (Flaming Gorge Dam BO); Exh. 14 at 28–32 (Muth et al.). If Reclamation fails to release the flows required in the 2006 ROD and the 2005 Biological Opinion, Reclamation will be in violation of the ESA.

Approval of the Pipeline would cause just such a violation. In a 2007 estimate responding to MCRG’s proposal to the Corps, Reclamation found that at most, 165,000 acre-feet of water could be removed each year from the Reservoir and still allow the Dam to continue its power operations and meet its ESA obligations. Exh. 18 at 2 (Letter from

⁷ This system “is one of the last remaining strongholds” for these fishes and “is considered vital to [their] recovery.” Exh. 14 at 28 (Muth et al.).

Reclamation to Upper Colorado River Commission).⁸ The Flaming Gorge Pipeline’s two diversions, totaling approximately 250,000 acre-feet per year, would take approximately 50% more than this limit. While only one diversion would come directly from the Reservoir, the 165,000 acre-feet per year limit applies to both. As Reclamation explained, “[The] diversion of ANY amount of water out of the Green River in Wyoming will affect inflows to Flaming Gorge Reservoir, which in turn will affect the quantity of water available from the reservoir itself.” Exh. 6 at 24 (emphasis in original).

Moreover, the amount of water available in the Reservoir is undoubtedly much smaller. Reclamation made clear in its estimate that the figure was only “preliminary.” Id. at 25; see also Exh. 31 at 13 (Reclamation Comments to the Commission on the Pipeline). In addition, it was never reviewed or approved by scientists in the Recovery Program, and it is now nearly five years old and could not account for the new diversions over that time. More importantly, Reclamation did not include the anticipated impacts from climate change. The Upper Colorado River Basin is heavily dependent on snowpack, which is expected to decrease as temperatures continue to warm. See Exh. 6 at 6; Exh. 19 at 17–40 (Reclamation SECURE Report); Exh. 20 passim (Gray & Anderson); Exh. 21 at 7 (Christensen & Lettenmaier). While the Green River is not as dependent on snowpack as other rivers, less snow in the Basin will likely mean less water in the tributaries to the Green downstream of the Dam, which will deplete the Green as

⁸ As FWS has noted, it is not simply the volume of water removed that would affect the Dam’s required flows; Reclamation must also have the flexibility to vary the flows during particular seasons and from year to year, which diminishes the chance even further that removing 250,000 acre-feet per year could be consistent with the ESA compliance. Exh. 6 at 5 (“[S]imply meeting the minimum recommended flows in all years is not adequate for recovery of the endangered fishes.”); Exh. 31 at 5 (same); Exh. 14 at 28–32 (Muth et al.).

well. See Exh. 6 at 6 (FWS comments to Corps discussing anticipated climate change impacts to Basin); id. at 41–42 (EPA comments to Corps listing recent climate change studies relevant to Basin); id. at 25 (Reclamation commenting to Corps that “[a]nalysis in the EIS will need to include the potential effects of climate change on the water supply for the project”). Thus, there is simply not enough water to allow the Pipeline’s diversions.⁹

Even without any new data since 2007, Reclamation has determined that 250,000 acre-feet is simply not available for hydropower generation consistent with the ESA. Accordingly, it is impossible for a license to issue for this project. See, e.g., Energie Group, 511 F.3d at 164.

b. The Pipeline Would End Two Decades Of Endangered Fish Recovery Efforts In The Upper Colorado River Basin

Approving the Pipeline would not only cause Reclamation to violate the ESA, it would upend the entire Recovery Program for these fishes in the Upper Colorado River Basin. The Recovery Program – formally called the “Upper Colorado River Endangered Fish Recovery Program” – was formed in 1987 by FWS, Reclamation, the Western Area Power Administration, Colorado, Utah, and Wyoming, and now includes Upper Colorado River Basin water users, environmental organizations, and the Colorado River Energy Distributors Association. Exh. 15 at 8 (Flaming Gorge Dam BO). The Recovery Program is supposed to provide both for recovery of the four endangered fishes in the

⁹ There are several other reasons, in addition to ESA water requirements, that the water required by Wyco is not physically or legally available. See, e.g., Exh. 6 at 20–21, 30 (Park Service and Department of Interior questioning whether 250,000 acre-feet of water is available for appropriation under relevant state water laws); WRA Motion at section III(B)(ii) (discussing how the Pipeline violates Colorado water law’s prohibition against speculation).

Upper Colorado River Basin and allow for new water depletions from the Basin. Id.; Exh. 14 at 18 (Muth et al.). Federal and State agencies have spent more than \$200 million on this Program since its inception. Ex. 22 at 10 (2010–2011 Highlights of Recovery Program).

One of the key elements of this Program is the fish flow requirements in the 2005 Biological Opinion and 2006 ROD on Flaming Gorge Dam’s releases. Exh. 23 at 3 (FWS Letter to Utah); Exh. 15 at 8 (Flaming Gorge Dam BO stating Dam flows a “high priority” element to recovery of endangered fishes). Projects across the Basin rely on these Dam releases to compensate for the impacts of their own depletions. And if Reclamation cannot release the required flows, water users across the Basin would have to find a different means of protecting these species – a feat that may be impossible.

First, Reclamation and FWS would be required to re-consult on Dam operations and find a new solution that would comply with the ESA, possibly requiring changes in hydropower generation to avoid driving the fish species closer to extinction. See 50 C.F.R. § 402.16(b), (c).

Second, many ongoing projects would have to undergo new consultations, potentially stopping them in the meantime. See id. (requiring re-consultation under certain circumstances). This would be a monumental task: since 1998, FWS has consulted on 1,993 projects depleting water from the Upper Colorado River Basin. Exh. 24 at 2 (summary of section 7 consultations). FWS would also likely have to re-consult on several biological opinions on major river systems, including the Yampa, Gunnison, and Duchesne, because they too rely on Flaming Gorge Dam flows. See Exh. 6 at 5

(FWS comments to Corps); Exh. 25 (Gunnison, 15-mile, and Duchesne Biological Opinions).

Third, new water depletions would come to a halt while FWS scrambled to find a new method to compensate for the loss of these flows and protect the endangered fish species.

Federal and state agencies that have spent more than \$200 million over the last two decades attempting to recover these fishes and allow for increased water depletions are unlikely to approve a project that would destroy these efforts and threaten the fate of four endangered fishes. Accordingly, the Commission should deny this preliminary permit.

2. The Pipeline Is Likely To Be Blocked By The Roadless Rule

The Pipeline is also unlikely to be licensed because it may be barred by the Forest Service's 2001 Roadless Rule. See 66 Fed. Reg. 3244 (Jan. 12, 2001) (to be codified at 36 C.F.R. §§ 294.10–.14); see also Wyoming v. U.S. Dep't of Agric., --- F.3d ---, Nos. 08-8061, 09-8075, 2011 WL 5022755, at *48 (10th Cir. Oct. 21, 2011) (upholding the 2001 Roadless Rule).¹⁰ The Roadless Rule generally prohibits road construction and reconstruction in Inventoried Roadless Areas (IRAs) identified by the Forest Service. See 66 Fed. Reg. at 3244, 3272. There are only a handful of limited exceptions to the Roadless Rule's prohibition on road construction, such as when roads are needed for

¹⁰ A nationwide, permanent injunction currently prohibits the U.S. Forest Service from approving any project that would violate the Roadless Rule. Cal. ex rel. Lockyer v. U.S. Dep't of Agric., 575 F.3d 999 (9th Cir. 2009) (affirming District Court injunction ruling). While a conflicting injunction was issued by the District Court for the District of Wyoming in 2008, the Tenth Circuit recently reversed that decision, upheld the Roadless Rule, and ordered that the Wyoming injunction must be vacated. Wyoming, 2011 WL 5022755, at *48. The Tenth Circuit's mandate vacating the Wyoming injunction is expected to become effective shortly.

public health and safety reasons, environmental remediation and restoration actions, to access mineral leases existing prior to promulgation of the Rule, or if “a road is needed . . . as provided for by statute or treaty.” 66 Fed. Reg. at 3272–73; 36 C.F.R. § 294.12(b). The Roadless Rule on its face contains no provision explicitly exempting roads needed to construct or operate hydropower projects. See id.








Nonetheless, Wyco’s proposal relies on road construction in an IRA. According to the preliminary permit application, the embankment of the upper reservoir of the Lake Hattie pumped storage component and associated access roads would be located in the Sheep Mountain IRA west of Laramie, Wyoming. Wyco Prelim. Permit Application at 15; Exh. 1 ¶ 23 (Pflugh Decl.).¹¹ The Forest Service is unlikely to approve a project in this IRA. See Energie Group, 511 F.3d at 164.

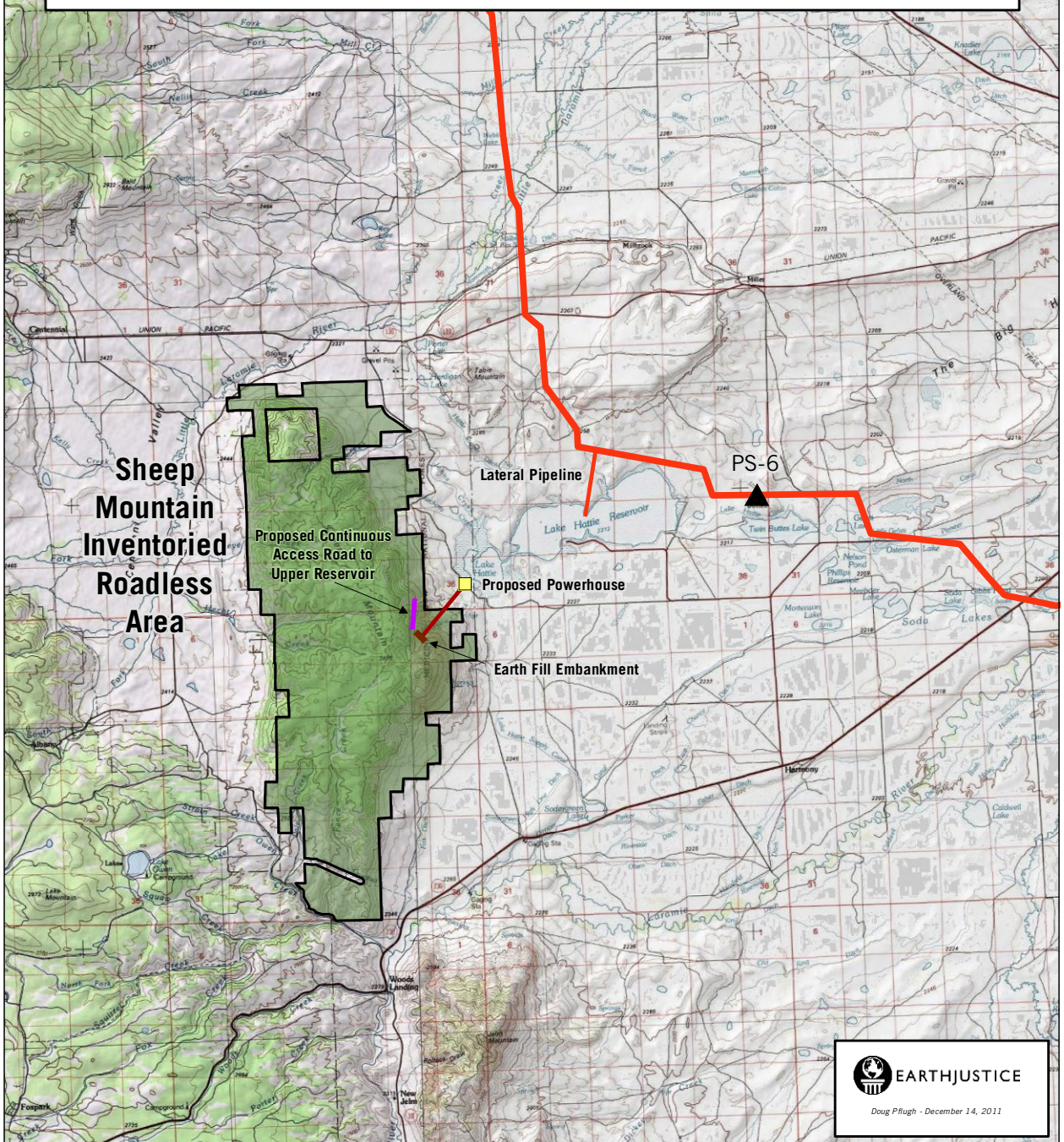
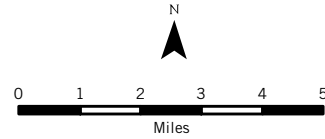
¹¹ The Sheep Mountain IRA encompasses over 17,000 acres surrounding Sheep Mountain in the Medicine Bow National Forest. Exh. 26 (Forest Service Resource Mgmt. Plan for Medicine Bow-Routt Nat’l Forest).

Figure 2 Regional Watershed Supply Project - Lake Hattie Pumped Storage Hydroelectric Development

The proposed Regional Water Supply Project as depicted in the Preliminary Permit application and supporting documents submitted in September and October 2011. Locations depicted here are based on digitization of the application maps and should be viewed as approximate.

RWSP Components - Lake Hattie Vicinity

- | | |
|--|---|
|  Pipeline |  Embankment |
|  Pump Station |  Access Road |
|  Lateral Pipeline |  Penstock |
|  Powerhouse | |



3. The Project Would Be Inconsistent With Management Plans For National Forests And National Wildlife Refuges

The Pipeline is also unlikely to be constructed because it would be inconsistent with numerous federal land management plans and protected areas. The FPA states that the Commission shall issue a license within any reservation of the United States only if it finds that the project will not interfere or be inconsistent with the purpose of the reservation. 16 U.S.C. § 797(e).

Here, the Forest Service commented to the Commission that the Pipeline – and any feasibility studies conducted under a preliminary permit – “appear[s] to be in direct conflict with existing management standards.” Exh. 27 at 9 (Forest Service Comments to the Commission on the Pipeline) (emphasis added). Although Wyco’s planned route through Wyoming – and the upper reservoir for the Lake Hattie pumped storage component – goes through the Medicine Bow-Routt National Forest, the Forest Plan prohibits new electric sites and utility corridors. Id. In addition, within the Forest, the proposed Pipeline crosses Sheep Mountain Federal Game Refuge (FGR). The designation of the Sheep Mountain FGR Primitive Area states that “the only permanent improvements in the area” will be the trail system as it existed in 1932, and “[t]he construction of reservoirs for the impounding of water will not be encouraged.” Id. at 8. As a result, the Forest Service is unlikely to issue the necessary permits for the Pipeline because its approval of any project that is inconsistent or in direct conflict with a Forest Plan could only occur after an amendment to the plan. See id. at 8–9.

Similarly, the Pipeline would also cross and potentially conflict with two National Wildlife Refuges along its route in Wyoming: Mortensen Lake and Hutton Lake National Wildlife Refuges, both located outside Laramie. Mortensen Lake contains the last known

breeding populations of the Wyoming Toad, an endangered species thought extinct until the discovery of toads at the lake in 1987. Exh. 28 at 21 (FWS Comprehensive Conservation Plan for Bamforth, Hutton Lake, and Mortenson Lake NWRs).¹² The management plan for these refuges requires that “[n]o action that the Service or public takes may conflict” with the purpose of the Refuges to protect the Wyoming Toad and other wildlife. Id. at 9, 21. The Pipeline would likely do exactly that, however, as it appears to cross – and would require construction and other infrastructure – on both refuges.

In addition, the reduction in releases from Flaming Gorge Dam that would result from the Pipeline would harm important habitat for fish and wildlife protected by two downstream national wildlife refuges. On the Green River, the FWS-managed Ouray and Browns Park national wildlife refuges are critical components of the Upper Colorado River Basin ecosystem and provide vital habitat for wildlife, fish, and plants. See, e.g., Exh. 29 at 5 (FWS Comprehensive Conservation Plan for Ouray NWR). They both rely on Reclamation to release flows in compliance with Reclamation’s 2006 ROD. For example, in Ouray National Wildlife Refuge in Utah, FWS depends on Green River flows to adequately flood important wetlands and critical floodplain habitat for

¹² The Pipeline would cause many additional impacts not detailed here that raise serious questions about its feasibility. For example, the Pipeline would cross more than 50 miles of sage grouse habitat in Wyoming that the state specifically set aside in order to conserve the sage grouse and avoid having the bird listed under the ESA, which would set in motion another set of requirements. Exh. 1 ¶ 24 (Pflugh Decl.). In addition, Wyco’s proposed reservoirs raise significant concerns: (1) Wyco’s proposed site for Cactus Hill reservoir is just one mile from a proposed uranium mining site and overlaps with rapidly developing oil and gas fields and hydraulic fracturing (“fracking”) operations, raising significant water quality concerns; and (2) the proposed “Terminus Reservoir” would require flooding of the wetland habitats in Fountain Creek. Id. ¶¶ 44, 46. These impacts and others are described in more detail in the declaration of Doug Pflugh, Exh. 1.

endangered fish. See id. at 5, 16, 17, 19. In Browns Park National Wildlife Refuge in Colorado, FWS is trying to restore the river to pre-dam conditions. Exh. 30 at 8 (FWS Comprehensive Conservation Plan for Browns Park NWR). The Pipeline’s diversions – rendering the Dam’s required releases impossible and depleting the Green’s flows substantially – would make both of these goals impossible. Moreover, the Pipeline’s diversions would be inconsistent with a FERC-recognized 1986 FWS comprehensive plan, called the North American Waterfowl Management Plan, such that a license for the project would be contrary to section 10(a) of the Federal Power Act. 16 U.S.C. § 803(a) (the Commission must consider the extent to which a project is consistent with a comprehensive plan).

Again, the agencies with jurisdiction over these areas – here, FWS and the Forest Service – are unlikely to give their required approvals. Moreover, it is not in the public interest, nor consistent with the FPA, to explore the feasibility of a project that, on its face, would be in direct conflict with the protective purpose and management plans of a National Forest, a Federal Game Refuge and at least two, and perhaps four, National Wildlife Refuges.

4. The Corps’ Termination Of The Flaming Gorge Pipeline Indicates Wyco Is An “Unfit” Applicant

A permit is also not in the public interest because Wyco’s president demonstrated a lack of due diligence and repeatedly failed to meet agency deadlines and requirements for a nearly identical project. See Pac. Energy Res., 128 FERC ¶ 62,154, at 64,460; Appalachian Rivers Res. Enhancement, 113 FERC ¶ 62,100, at 64,288. Indeed, these failures are apparently the reason Wyco has applied to the Commission; the Corps terminated its review of an earlier version of the Pipeline. The Corps cited MCRG’s

failure to provide a sufficient “purpose and need for the [project],” its two stop-work requests, and its repeated failure to meet deadlines. Exh. 11 at 2–3 (Schenk Letter); see also Energie Group, 511 F.3d at 162–63 (Commission considers whether the management or shareholders of the applicant company have previously headed other entities that failed to comply with deadlines and order). As the Corps explained in a letter mailed to Mr. Million:

Since the start of the EIS process, the Corps has spent much time dealing with delays on the part of [Million Conservation Resource Group]. As per regulations, the Corps has designated a single staff person to orchestrate a multitude of tasks, and we simply cannot continue to devote staff resources to a project with an uncertain and variable project purpose. The Corps is also guided by regulations found at 33 CFR 325.2(d)(5) to allow applicants sufficient time to respond to requests, not to exceed 30 days, unless justifiable reasoning for more time is provided. We have been more than accommodating in that regard.

Exh. 11 at 3 (emphases added). There is no evidence that this pattern will change in front of the Commission.

Indeed, Wyco’s preliminary permit application and response to the deficiency notice show a similar pattern. These documents have numerous inconsistencies, similar to the lack of responsiveness that prompted the Corps to terminate its review of the project. See id. at 2–3 (noting that Million Conservation Resource Group was not sufficiently responsive to requests for updates and more definite information). To the extent that Wyco’s response to the Commission’s notice of deficiency alleviated problems raised by the Commission, it presented even more. For example, the Project Elevation Changes chart does not show the complete Pipeline route. Exh. 1 ¶ 39 (Pflugh Decl.). Similarly, the Pipeline’s route through Colorado varies between Wyco’s permit application and its response to the deficiency notice, again without explanation. Id. ¶

15. In addition, the elevation of the Pipeline according to Wyco's application materials does not match U.S. Geological Survey (USGS) data, and the discrepancy ranges up to 400 feet in elevation. Id. ¶ 49. Such unexplained inconsistencies and inaccuracies raise serious questions regarding the feasibility of this project. Given that three years have passed since MCRG proposed this Pipeline to the Corps, it would seemingly be far more developed if it was feasible at all.

Given MCRG's poor track record with the Corps, and the time and resources wasted during the two and a half year process, it undermines the public interest for the Commission to waste even more time and resources on a nearly identical project. Accordingly, the Commission should deny the preliminary permit. See, e.g., Pac. Energy Res., 128 FERC ¶ 62,154, at 64,460.

5. Wyco Is Unlikely To Again Seek, Let Alone Obtain, The Essential Permits From The Corps

Although the Corps has terminated the Pipeline's review process, the need for numerous Clean Water Act Section 404 permits has not changed. See 33 U.S.C. § 1344. Yet Wyco now apparently claims that the Pipeline will no longer require any Section 404 permits. Mr. Million informed the Corps that the Pipeline will result in no discharges of dredge or fill material into "[w]aters of the United States," which would require such a permit. See, e.g., Exh. 11 at 3 (Schenk Letter); Rapanos v. United States, 547 U.S. 715 (2006); 76 Fed. Reg. 24479 (May 2, 2011) (proposed guidance on identifying "waters of the United States").¹³ By all appearances and common sense, this is impossible.

¹³ To the extent Wyco could be relying on the Corps' general Nationwide Permit 12 to avoid applying for individual permits, the Nationwide Permit will not be available because the pipeline would "result in the loss of greater than ½ acre of waters of the United States." 72 Fed. Reg. 11092, 11182 (Mar. 12, 2007).

In fact, there is no question the Pipeline would need Section 404 permits to go forward. The diversion points alone will require construction in the Green River and Flaming Gorge Reservoir, which are indisputably “waters of the United States.” In addition, the Pipeline route crosses several significant waterways, including the North Platte, Medicine Bow, and Little Laramie Rivers. Exh. 1 ¶ 32 (Pflugh Decl.). These waterways also are “waters of the United States.” As a result, exploring the feasibility of this project is not in the public interest because Wyco seemingly has no intent to pursue a series of permits that the Pipeline plainly requires in order to move forward. And even if Wyco did apply for these permits, there is no evidence the Corps would re-instate its review process, let alone grant them. This presents yet another potentially insurmountable hurdle to this project. As such, the Commission should deny the preliminary permit application.

II. Alternatively, The Commission Should Require Wyco To Conduct Various Studies On The Pipeline And Allow The Conservation Coalition To Participate In Study Development

If the Commission grants a preliminary permit for the Flaming Gorge Pipeline, the Conservation Coalition requests that the Commission require Wyco to conduct studies that address, at a minimum, the issues described below. Also, the Conservation Coalition requests that they and all other parties and stakeholders be allowed to actively participate in the design and review of all studies.

1. If the Pipeline is constructed, is it possible to release flows from Flaming Gorge Reservoir that comply with the best available science regarding requirements for the protection and recovery of endangered fish species downstream, as required by the ESA?
2. Can Wyco obtain Reclamation authorization for the Pipeline, in light of Reclamation’s statements that the amount of water Wyco seeks is not available under the 2006 ROD on the operation of Flaming Gorge Dam?

3. How many and which ESA biological opinions would have to be revised if the Flaming Gorge Pipeline is constructed? How much would it cost federal agencies – in staff time and funding – to revise these biological opinions?
4. How will climate change impact future Green River flows? To what extent will the Flaming Gorge Pipeline exacerbate future water shortages in the Green and Colorado River basins for endangered fish?
5. Given that the Lake Hattie Pumped Storage Project is in an Inventoried Roadless Area, what alternative, if any, is feasible to provide the pumped storage capacity that this component was intended to provide?
6. How will Wyco be able to obtain the multiple federal, state, and local permits necessary to construct the Pipeline – from the U.S. Forest Service, Corps, Reclamation, BLM, the States of Wyoming, Utah, and Colorado, the City of Fort Collins, etc.?
7. How many “waters of the United States” will the Pipeline impact? Is it possible for Wyco to comply with the substantive standards of the Clean Water Act in the face of these impacts?
8. Can Wyco obtain rights to the water necessary for the Pipeline? If so, on what legal basis will Wyco obtain the water rights? Would such diversion and appropriation comply with the requirements of Wyoming, Colorado, and Utah state water law?
9. To what extent would the Flaming Gorge Pipeline enable further urban sprawl and discourage water conservation on the Colorado Front Range?
10. What is the “purpose and need” for this project? What other means does Colorado’s Front Range have for meeting its water needs, particularly through water conservation and efficiency?
11. What other sources of water that will not impact Green River flows and Flaming Gorge Reservoir levels and outflows are available for the Wild Horse Canyon Pumped Storage Project?

SERVICE

The Conservation Coalition requests that the undersigned counsel at Earthjustice be added to the service list for this proceeding.

CONCLUSION

For the foregoing reasons, the Conservation Coalition respectfully requests that the Commission grant its motion to intervene and deny Wyco's preliminary permit application for the Flaming Gorge Pipeline.

Respectfully submitted December 15, 2011,

/s/ McCrystie Adams

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Institute, Living Rivers: Colorado
Riverkeeper, and Utah Rivers
Council*

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December, 2011, I filed via the Commission's e-filing system the foregoing **MOTION TO INTERVENE BY SIERRA CLUB, CENTER FOR BIOLOGICAL DIVERSITY, ROCKY MOUNTAIN WILD, SAVE THE POUDDRE: POUDDRE WATERKEEPER, BIODIVERSITY CONSERVATION ALLIANCE, WYOMING OUTDOOR COUNCIL, CITIZENS FOR DIXIE'S FUTURE, GLEN CANYON INSTITUTE, LIVING RIVERS: COLORADO RIVERKEEPER, AND UTAH RIVERS COUNCIL**, which caused electronic delivery to the following parties:

Cheryl Mulder Interregional Hydropower Team U. S. D. A Forest Service USDA Forest Service Intermountain Regional Office, Land 324 25th St., Room 4016 Ogden, UTAH 84401 UNITED STATES cmulder@fs.fed.us	Aaron Million Wyco Power and Water Inc. 1436 West Oak Fort Collins, COLORADO 80521 UNITED STATES million_1@hotmail.com
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/s/ McCrystie Adams
McCrystie Adams