

**160 FERC ¶ 62,198**  
**UNITED STATES OF AMERICA**  
**FEDERAL ENERGY REGULATORY COMMISSION**

Merchant Hydro Developers, LLC

Project No. 14816-000

**ORDER ISSUING PRELIMINARY PERMIT  
AND GRANTING PRIORITY TO FILE LICENSE APPLICATION**

(Issued September 1, 2017)

1. On January 11, 2017, Merchant Hydro Developers, LLC (Merchant Hydro) filed an application for a preliminary permit, pursuant to section 4(f) of the Federal Power Act (FPA),<sup>1</sup> to study the feasibility of the proposed Nockamixon Pumped Storage Hydroelectric Project No. 14816 (Nockamixon Project or project) to be located near the unincorporated town of Kintersville in Bucks County, Pennsylvania.

**I. Project Proposal**

2. The proposed project would consist of the following: (1) a new upper reservoir with a surface area of 150 acres and a storage capacity of 2,250 acre-feet at a surface elevation of approximately 700 feet above mean sea level (msl) created through construction of a new roller-compacted concrete or rock-filled dam; (2) a lower reservoir using the existing Delaware Canal with a surface elevation of 170 feet msl; (3) a new 3,575-foot-long, 48-inch-diameter penstock connecting the upper and lower reservoirs; (4) a new 150-foot-long, 50-foot-wide powerhouse containing two turbine-generator units with a total rated capacity of 125 megawatts; (5) a new transmission line connecting the powerhouse to a nearby electric grid interconnection point with options to evaluate multiple grid interconnection locations; and (6) appurtenant facilities. The proposed project would have an annual generation of 356,839 megawatt-hours.

**II. Background**

3. The Commission issued public notice of Merchant Hydro's permit application on May 25, 2017, establishing a deadline of July 24, 2017, to file comments, motions to intervene, notices of intent to file competing development applications, and competing permit applications. On July 10, 2017, the Delaware Riverkeeper Network filed a timely motion to intervene.<sup>2</sup> On July 24, 2017, the U.S. Department of the Interior (Interior) filed comments on the proposed project.

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<sup>1</sup> 16 U.S.C. § 797(f) (2012).

<sup>2</sup> Timely, unopposed motions to intervene are granted by operation of Rule 214 of  
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### III. Discussion

#### A. Wild and Scenic Rivers Act

4. Section 7 of the Wild and Scenic Rivers Act (Rivers Act) precludes the Commission from licensing project works “on or directly affecting” any part of a river designated in section 1274 of the Rivers Act.<sup>3</sup> The Commission is also precluded from licensing any project work above or below a wild or scenic river that would, in the Commission’s judgment, “invade” or “unreasonably diminish scenic, recreational, and fish and wildlife values present....”<sup>4</sup>

5. Although the Rivers Act prohibits licensing project works that would fall within these categories, it does not prohibit issuance of a preliminary permit.<sup>5</sup> The Commission has issued preliminary permits for proposed projects near a Wild and Scenic River (not directly on) unless it has been clear that the proposed project could not be configured in any way to avoid conflicting with the Rivers Act.<sup>6</sup>

6. The portion of the Rivers Act enumerating the rivers that are components of the national wild and scenic rivers system includes 67.3 miles of river segments along the Lower Delaware River and its tributaries, including “the [river] segment from a point just south of the Gilbert Generating Station to a point just north of the Point Pleasant Pumping Station....”<sup>7</sup> The lower reservoir of the proposed Nockamixon Project would include a portion of the Delaware Canal – a historic towpath canal – that parallels the Lower Delaware River just upstream of the Gilbert Generating Station (i.e., the point from which the designated river segment commences). Interior states that the National Park Service (Park Service), based on the permit application for the Nockamixon Project, has determined that portions of the project boundary overlay, and project works as well

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the Commission’s Rules of Practice and Procedure. 18 C.F.R. § 385.214(c) (2017).

<sup>3</sup> 16 U.S.C. §1278(a) (1976).

<sup>4</sup> *Id.*

<sup>5</sup> *Modesto Irrigation District*, 17 FERC ¶ 61,144 (1981).

<sup>6</sup> *See City of Rohnert Park, California*, 26 FERC ¶ 61,137 (1984) (denying rehearing for the issuance of a preliminary permit that is located outside of the designated wild and scenic river system).

<sup>7</sup> 16 U.S.C. § 1274(a)(165)(A)(ii) (2012).

as proposed water withdrawals appear to potentially impact, a portion of the Lower Delaware Scenic and Recreational River designated under the Rivers Act.

7. The Rivers Act does not prohibit the Commission from issuing a preliminary permit to study a proposal that may or may not ultimately prove inconsistent with the Rivers Act. Merchant Hydro is on notice that the Commission is without authority to license project works that would “invade” or “unreasonably diminish” rivers that have been included in the Rivers Act. To that end, Merchant Hydro is advised to study all feasible schemes that would develop the hydroelectric potential of the water resources involved in a manner consistent with the requirements of the Rivers Act.

#### **B. Issues Related to Project Construction and Operation**

8. Interior expresses concern that the proposed project may adversely affect existing fish and wildlife resources and their habitats, including federally threatened and endangered species. Interior recommends that Merchant Hydro be required to coordinate with the U.S. Fish and Wildlife Service (FWS) to consider development and operations that would be compatible with existing fish and wildlife resources.

9. Noting that the proposed project would require a significant amount of forest removal, Interior states that avian mortality from habitat destruction and alteration could occur. Interior explains that the footprints of the proposed upper reservoir and most of the penstock would fall within core habitat of the Rapp Creek, Lake Warren and Coffman Hill Natural Heritage Area, and that the penstock would bisect core habitat within the Nockamixon Cliffs Natural Heritage Area. Interior also reports that a peregrine falcon nest was identified within a short distance of the proposed penstock alignment. To avoid and minimize the risk to birds, Interior recommends that several site-specific factors be considered during project siting, including: avian abundance; the quality, quantity, and type of habitat; geographic location; type and extent of bird use (e.g., breeding, foraging, migrating, etc.); and landscape features. To avoid and minimize impacts to migratory birds, Interior recommends that the project proponent: (1) perform clearing and maintenance activities between September 1 and March 31 (i.e., outside the nesting season for most native birds); (2) minimize land and vegetation disturbance by collocating infrastructure and clustering development features; (3) avoid permanent habitat alterations in high bird concentration areas and sizable structures along known bird migration pathways; (4) avoid fragmenting large, contiguous tracts of wildlife habitat and, where practicable, concentrate construction activities on previously altered lands; and (5) develop a habitat restoration plan.

10. Interior states that the construction of the proposed penstock and upper reservoir would eliminate forest immediately upstream of two Pennsylvania trout stocking streams. According to Interior, the surface water withdrawal to fill the upper reservoir and the substantial amount of forest clearing to construct the upper reservoir and penstock could

adversely affect hydrology, water quality, and temperatures in these Delaware River tributaries.

11. In addition, Interior states that the proposed water withdrawals and construction of certain project works would potentially impact the Delaware Canal State Park, a designated National Historic Landmark. To evaluate potential impacts, Interior would need additional information on the specific locations of project works, construction activities, and any adjacent access roads that would be constructed or modified, as well as operational information.

12. A preliminary permit does not authorize a permittee to undertake construction of the proposed project. The purpose of a preliminary permit is to study the feasibility of the project, including studying potential impacts. The concerns raised in the comments are premature at the preliminary permit stage, in that they address the potential effects of constructing and operating the proposed project. Should the permittee file a license application, these issues will be addressed in the licensing process.

### **C. Consultation and Study Requirements under the Permit**

13. Noting that bald eagles are protected under the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act, Interior reports that an active bald eagle nest is located on Lynn Island, within 1,000 feet of the proposed powerhouse. Interior states that at least three additional active bald eagle nests are located in the vicinity of the proposed project. If bald eagles are present in the project area, Interior recommends that Merchant Hydro follow the Bald Eagle Management Guidelines found on FWS's website prior to construction.

14. Interior reports that the footprint of the proposed project falls within the known ranges of the following federally listed species: the endangered Indiana bat, the threatened northern long-eared bat, and the threatened bog turtle. Due to the potential presence of these federally listed species in the vicinity of the proposed project, Interior recommends further consultation with FWS. As part of this consultation, Interior recommends that Merchant Hydro submit to FWS detailed project plans and an analysis of alternatives to avoid and minimize adverse effects. Interior also recommends that Merchant Hydro screen the proposed project using the Pennsylvania Natural Heritage Program's Conservation Planning and Pennsylvania Natural Diversity Inventory Environmental Review tool.

15. Interior's comment includes a recommendation from the Bureau of Indian Affairs that the Delaware Tribe, the Delaware Nation, the Stockbridge-Munsee Community, and the Saint Regis Mohawk Tribe be consulted on the project because these tribes may have a historic interest in the area.

16. Interior recommends that Merchant Hydro design and conduct studies in cooperation with the Pennsylvania Fish and Boat Commission, the Pennsylvania Game

Commission, the Pennsylvania Department of Conservation and Natural Resources, FWS, the Park Service, and the Bureau of Indian Affairs or affected tribes to understand project effects on the reproduction and survival of aquatic and semi-aquatic fish and wildlife resources, recreational fishing, wetland and riparian wildlife, forest-dependent wildlife, rare plant species, and historic and archeological resources. Interior recommends that Merchant Hydro identify and evaluate general measures to avoid, offset, and/or reduce adverse project impacts on fish and wildlife resources.

17. The Commission has not sought to place all relevant study requirements in preliminary permits.<sup>8</sup> Rather, the studies to be undertaken by a permittee are shaped by the Commission's filing requirements for development applications. Potential development 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 the applications before they are filed.<sup>9</sup> 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.<sup>10</sup>

#### IV. Permit Information

18. 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,<sup>11</sup> 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.<sup>12</sup> 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.<sup>13</sup>

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<sup>8</sup> See, e.g., *Continental Lands Inc.*, 90 FERC ¶ 61,355 at 62,177 (2000).

<sup>9</sup> See 18 C.F.R. § 4.38 (2017).

<sup>10</sup> See *City of Richmond, Va.*, 53 FERC ¶ 61,342 at 62,247 (1990).

<sup>11</sup> 16 U.S.C. § 802 (2012).

<sup>12</sup> 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.").

<sup>13</sup> 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  
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19. Article 4 of this permit requires the permittee to submit a progress report no later than the last day of each six-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.

20. During the course of the permit, the Commission expects that the permittee will carry out prefilings consultation and study development leading to the possible development of a license application. The prefilings process begins with 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.<sup>14</sup> 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.<sup>15</sup> Should the permittee file a development application, notice of the application will be published, and interested persons and agencies will have an opportunity to intervene and to present their views concerning the project and the effects of its construction and operation.

21. 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.<sup>16</sup>

The Director orders:

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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).

<sup>14</sup> 18 C.F.R. §§ 5.5 and 5.6 (2017).

<sup>15</sup> *See* 18 C.F.R. § 5.3 (2017).

<sup>16</sup> *See City of Fayetteville*, 16 FERC ¶ 61,209 (1981).

(A) A preliminary permit is issued for the Nockamixon Pumped Storage Hydroelectric Project No. 14816 to Merchant Hydro Developers, 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.

(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. § 825l (2012), and section 385.713 of the Commission's regulations, 18 C.F.R. § 385.713 (2017).

John B. Smith, Chief  
Mid-Atlantic Branch  
Division of Hydropower Licensing

Form P-1 (Revised April 2011)

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 six-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.