

November 1, 2023

Bureau of Reclamation  
Attn: LTEMP SEIS Project Manager  
125 South State Street, Suite 800  
Salt Lake City, UT 84138

Via Email only – [LTEMPSEIS@usbr.gov](mailto:LTEMPSEIS@usbr.gov)

**RE: NOTICE OF INTENT TO PREPARE A SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE DECEMBER 2016 RECORD OF DECISION ENTITLED GLEN CANYON DAM LONG-TERM EXPERIMENTAL AND MANAGEMENT PLAN (NOI) – 88 FR 191, October 4, 2023**

Dear LTEMP SEIS Project Manager:

On behalf of Arizona Electric Power Cooperative, Inc. (“AEPCO”) and the Distribution Member Cooperatives that it serves with the resources provided by the Colorado River Storage Projects (“CRSP”) including the Glen Canyon Project, I am providing comments in response to the request for public comment on the Notice of Intent to Prepare a Supplemental Environmental Impact Statement for the December 2016 Record of Decision entitled Glen Canyon Dam Long-Term Experimental and Management Plan (“LTEMP SEIS”) published by the Bureau of Reclamation (“Bureau”) on October 4, 2023.<sup>1</sup>

AEPCO is a nonprofit generation and transmission (“G&T”) cooperative providing power, transmission, and market services to distribution cooperatives and public power members in Arizona, California, and Nevada. AEPCO owns and operates the Apache Station power facility in southeastern Arizona and has a diverse portfolio of power resources including natural gas, utility scale solar and battery, coal powered generation, and federal hydro contracts. AEPCO partners with Alliances for Cooperative Energy Services Power Marketing (“ACES”) to operate the Western Regional Trading Center (“WRTC”) at its headquarters in Benson, Arizona, supporting electric cooperatives and public power utilities throughout the Western Electricity Coordinating Council (“WECC”) and the California Independent System Operator (“CAISO”). And, through its partnership with WAPA Desert Southwest, AEPCO operates a 24-hour dispatch center for its metered subsystem, supporting electric cooperatives and public power utilities throughout Arizona.

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<sup>1</sup> Federal Register, Vol. 88, No. 191 at 68667 (Oct. 4, 2023).

## I. BACKGROUND

Given AEPCO's interests set forth above, AEPCO has a substantial interest in this National Environmental Policy Act ("NEPA") proceeding. As such, AEPCO submitted comments March 10, 2023, asserting that the proposed Smallmouth Bass Draft Environmental Assessment ("Draft EA") failed to meet legal and regulatory standards required by NEPA and associated executive orders. AEPCO incorporates those comments here by reference and further agrees with and supports the comments filed by the Colorado River Energy Distributors Association ("CREDA").

## II. COMMENTS

Although AEPCO supports the Bureau's decision to prepare the LTEMP SEIS, AEPCO nonetheless continues to have concerns regarding the Bureau's efforts in analyzing the impacts of the Preliminary Proposed Action as well as the Purpose and Need associated with the Preliminary Proposed Action.<sup>2</sup> Failure on behalf of the Bureau to resolve such concerns may result in a final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" in violation of NEPA.<sup>3</sup> As discussed in detail below, the Bureau must identify the impacts, including direct, indirect, and cumulative, associated with hydropower customers acquiring replacement resources. Additionally, the Bureau should revise the Purpose and Need so that structural option alternatives may be analyzed in order to meet the Need and accomplish the Preliminary Proposed Action.

### a. **The Bureau must identify direct, indirect, and cumulative impacts associated with hydropower customers acquiring replacement resources and discuss mitigation measures.**

Failure on behalf of the Bureau to take the requisite 'hard look' which "requires consideration of both foreseeable direct and indirect effects, as well as cumulative impacts" may result in a violation of NEPA.<sup>4</sup> In accordance with Ninth Circuit precedent, "[a] proper consideration of the cumulative impacts of a project requires some quantified or detailed information; . . . general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided."...We emphasized that a

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<sup>2</sup> Federal Register, Vol. 88, No. 191 at 68668 (Oct. 4, 2023) ("Preliminary Proposed Action. Reductions in water temperature combined with changes in flow velocity may be vital tools that can be used to disrupt smallmouth bass from successfully spawning and establishing a population. As such, Reclamation has determined that an SEIS is necessary to pursue implementation of additional flow options at Glen Canyon Dam. A range of reservoir releases with temperature and flow velocity combinations will be analyzed to determine efficacy of their ability to disrupt and prevent smallmouth bass spawning behavior. Reclamation will also analyze the sediment accounting periods and implementation windows associated with the HFE protocol analyzed in LTEMP.").

<sup>3</sup> *Native Ecosystems Council v. United States Forest Serv.*, 428 F.3d 1233, 1238 (9th Cir. 2005) citing 5 U.S.C. § 706(2)(A); *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998).

<sup>4</sup> *Mont. Env't Info. Ctr. v. Haaland*, No. CV 19-130-BLG-SPW, 2022 U.S. Dist. LEXIS 179417, at \*16 (D. Mont. Sep. 30, 2022) citing *Idaho Sporting Congress*, 305 F.3d at 973.

cumulative impacts analysis ‘must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of *past, present, and future projects.*’<sup>5</sup>

As such, in addition to direct impacts, included in the LTEMP SEIS must be an analysis and discussion of the effects, both indirect and cumulative, associated with hydropower customers acquiring replacement resources if less hydropower generation occurs at Glen Canyon Dam as a result of the alternatives considered.

Regarding cumulative impacts, greenhouse gas emissions must be adequately analyzed. Specifically, the LTEMP SEIS must include consideration of the greenhouse gas emissions associated with obtaining replacement power, as well as the impact on climate change. As explained by the Ninth Circuit, “[t]he impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.”<sup>6</sup>

Additionally, an indirect effect of the Preliminary Proposed Action is the cost associated with hydropower customers having to find replacement power. Indirect effects by definition are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.”<sup>7</sup> Furthermore, effects by definition may be economic, “[e]ffects include...economic...whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effects will be beneficial.”<sup>8</sup>

Once the Bureau has determined the impacts associated with hydropower customers acquiring replacement resources, specifically the greenhouse gas emissions as well as the economic cost, the Agency “must include a discussion of possible steps to mitigate environmental harm.”<sup>9</sup> As explained by the US Supreme Court:

[O]ne important ingredient of an EIS is the discussion of steps that can be taken to mitigate adverse environmental consequences. The requirement that an EIS contain a detailed discussion of possible mitigation measures flows both from the language of the Act and, more expressly, from CEQ's implementing regulations. Implicit in NEPA's demand that an agency prepare a detailed statement on ‘any adverse environmental effects which cannot be avoided should the proposal be implemented,’...§ 4332(C)(ii), is an understanding that the EIS will discuss the extent to which adverse effects can be avoided.”<sup>10</sup>

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<sup>5</sup> *Killgore v. SpecPro Pro. Servs., LLC*, 51 F.4th 973, 989 (9th Cir. 2022) (internal citations omitted) (emphasis original).

<sup>6</sup> *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008).

<sup>7</sup> 40 CFR 1508.1(g)(2).

<sup>8</sup> 40 CFR 1508.1(g)(4).

<sup>9</sup> *Japanese Vill., Ltd. Liab. Co. v. Fed. Transit Admin.*, 843 F.3d 445, 455 (9th Cir. 2016).

<sup>10</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351-52, 109 S. Ct. 1835, 1846-47 (1989)

The adverse effect of high costs associated with hydropower customers acquiring replacement resources may be mitigated by the creation and implementation of a funding mechanism.

**a. The Bureau should revise the Purpose and Need so that structural options may be reviewed, and adequate alternatives are analyzed.**

In defining the purpose of the proposed action as including only the analysis of additional flow options at the Glen Canyon Dam, the Bureau has ensured that no structural alternatives that may meet the need of the project will be analyzed.

The Draft EA considered four alternatives in addition to the statutorily required No Action alternative. However based on nearly 7,000 public comments received, the Bureau has revised their analysis and “anticipates” that in addition to the to the four actions initially analyzed, the Bureau will consider a “[h]ydropower flow option that does not include the use of bypass to reduce water temperatures” and “[i]ncluded in all but the No Action alternative will be a revised annual sediment accounting period and implementation window associated with the HFE protocol.”<sup>11</sup> As explained by the Ninth Circuit, “[t]he range of alternatives that an agency must consider under NEPA is based on the purpose and need of the proposed agency action.”<sup>12</sup> As such, a reviewing court will “begin[] by determining whether or not the Purpose and Need Statement was reasonable.”<sup>13</sup>

Accordingly, the purpose of the LTEMP SEIS is for the Bureau “to analyze additional flow options at Glen Canyon Dam in response to invasive smallmouth bass and other warmwater nonnatives recently detected directly below the dam.”<sup>14</sup> Additionally, the need is to “prevent the establishment of smallmouth bass below the Glen Canyon Dam (by preventing additional spawning), which could threaten core populations of threatened humpback chub in and around the Little Colorado River and its confluence with the Colorado River mainstem.”<sup>15</sup>

Although federal agencies “enjoy a good deal of discretion in framing the ‘purpose and need’ of an EA or EIS...the statement cannot ‘unreasonably narrow[] the agency’s consideration of alternatives so that the outcome is preordained.’”<sup>16</sup> Here, the Bureau has done just that. In defining the purpose as analyzing “additional flow options at Glen Canyon Dam” the agency has predetermined that no structural options may be considered as alternatives.

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<sup>11</sup> Federal Register, Vol. 88, No. 191 at 68668 (Oct. 4, 2023).

<sup>12</sup> *Audubon Soc’y of Portland v. Haaland*, 40 F.4th 967, 981 (9th Cir. 2022) (internal citations omitted).

<sup>13</sup> *Audubon Soc’y of Portland v. Haaland*, 40 F.4th 967, 981 (9th Cir. 2022) (internal citations omitted).

<sup>14</sup> Federal Register, Vol. 88, No. 191 at 68668 (Oct. 4, 2023).

<sup>15</sup> Federal Register, Vol. 88, No. 191 at 68668 (Oct. 4, 2023).

<sup>16</sup> *Env’tl. Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 876 (9th Cir. 2022) (internal citations omitted).

### III. CONCLUSION

Without question, the operations at Glen Canyon Dam face unprecedented challenges imposed by extensive and persistent droughts. While we were encouraged with a better water year last year, it remains clear that the Bureau will continue to restrict hydropower generation in upcoming years to maintain lake level elevations. The prudence of this decision is evident. However, depletion of water resources at Glen Canyon Dam to manage a non-native species is not well justified and would not appear to be prudent from an operating utility perspective absent appropriate mitigation measures.

We appreciate your consideration of our comments and the comments offered by the Colorado River Energy Distributors Association (“CREDA”) of which AEPCO is a member. Please contact me if you have any questions regarding our concerns and comments outlined above.

Sincerely,



Patrick Ledger  
Chief Executive Officer and Executive Vice President  
Arizona Electric Power Cooperative, Inc.