

**Public Comments on Free Flow Power 101, LLC Goldendale Pumped
Storage Project Clean Water Act 401 Water Quality Certification
(FERC No. 14861)**

**Submitted on behalf of:
Columbia Riverkeeper
Washington State Chapter of the Sierra Club
American Rivers
Washington Environmental Council**

November 9, 2020

TABLE OF CONTENTS

I.	OVERVIEW OF THE PROJECT.....	2
II.	SUMMARY OF ECOLOGY'S AUTHORITY TO DENY RYE'S 401 CERTIFICATION.....	4
III.	ECOLOGY MUST CONSULT WITH AND ACCOUNT FOR INPUT FROM TRIBAL NATIONS.....	7
IV.	RYE'S APPLICATION IS INCOMPLETE.....	9
	A. Rye failed to submit a compensatory mitigation plan to address water quality impacts.....	10
	B. Rye's application is incomplete because it fails to adequately analyze water quality impacts from destroying and disturbing federal jurisdictional ephemeral streams and other "waters of the state.".....	11
	C. Rye's application is incomplete because Rye failed to submit the analysis required under WAC 173-201A-320(4).....	13
V.	ECOLOGY CANNOT CERTIFY THE PROJECT COMPLIES WITH WATER QUALITY STANDARDS.....	13
	A. Under both the 2020 401 rules and pre-2020 401 rules, Ecology must deny the 401 certification because it fails to meet the state's Tier II Antidegradation Policy Review.....	14
	a. <i>Once Rye files a complete application, Ecology must reopen the public comment period for the Tier II Antidegradation Review.....</i>	15
	b. <i>Ecology must examine measurable changes in water quality.....</i>	17
	c. <i>Ecology should deny the 401 certification because the lowering of water quality is not necessary and in the overriding public interest.....</i>	18
	B. Ecology cannot certify the Project complies with numeric and narrative water quality standards.....	21
	a. <i>Under the 2020 401 rules, Ecology must deny the 401 certification because Rye fails to demonstrate the "discharges" will comply with numeric and narrative water quality standards in WOTUS streams.....</i>	22
	b. <i>If the 2020 401 rules are overturned or withdrawn, Ecology should deny Rye's 401 based on violations of numeric and narrative water quality standards in ephemeral streams and a pond that qualify as "waters of the state.".....</i>	23
	c. <i>Ecology must analyze the Project's impacts to water quality in the Columbia River.....</i>	23

d.	<i>Ecology must consider whether the Project would violate numeric and narrative water quality standards in the Columbia in the event of reservoir failure</i>	24
e.	<i>Under the pre-2020 401 rules, Ecology must evaluate whether the Project would violate narrative and numeric water quality standards in the human-created reservoirs</i>	25
C.	The Project will harm designated uses	26
a.	<i>Under the 2020 401 rules, Ecology cannot certify Rye’s discharges would protect the designated uses for federal jurisdictional ephemeral streams</i>	26
b.	<i>Under the pre-2020 401 rules, Ecology must deny the 401 certification based on the Project’s impacts to fish, wildlife habitat, and aesthetic values</i>	27
VI.	STATE ENVIRONMENTAL POLICY ACT	29
VII.	CONCLUSION	31

November 9, 2020

Director Laura Watson
Washington Department of Ecology
300 Desmond Drive SE
Lacey, WA 98503

Deputy Director Heather Bartlett
Washington Department of Ecology
300 Desmond Drive SE
Lacey, WA 98503

Vince McGowan
Water Quality Program Manager
Washington Department of Ecology
300 Desmond Drive SE
Lacey, WA 98503

Breean Zimmerman
Hydropower Projects Manager
Washington Department of Ecology
1250 West Alder Street
Union Gap, WA 98903

Submitted via email

**RE: Public Comments on Free Flow Power (FFP) 101, LLC Goldendale
Pumped Storage Project 401 water quality certification, .**

Dear Director Watson, Deputy Director Bartlett, Mr. McGowan, and Ms. Zimmerman,

Rye Development (Rye), dba Free Flow Power 101, LLC, proposes the Northwest's largest pumped storage hydroelectric project along the Columbia River in Klickitat County, Washington, near the John Day Dam. The Goldendale Energy Storage Hydroelectric Project (Project) threatens irreplaceable tribal cultural and religious resources, water quality, fish, and wildlife. The Project would permanently destroy large segments of unique waterbodies, including "waters of the United States," in the scenic Columbia Hills and cause downstream impacts to perennial waterbodies. The Project requires withdrawing millions of gallons of Columbia River water, threatening designated uses and impacting water quality in an already degraded river. Tribal, federal, and state fish and wildlife agencies have raised significant concerns about the Project's impacts on water quality, fish, and wildlife. Those concerns are summarized below and in exhibits. Due to the relatively early phase of FERC review, Rye is many months, if not years, away from producing studies and endeavoring to respond to the significant concerns raised.

Columbia Riverkeeper, the Washington State Chapter of the Sierra Club, American Rivers, and the Washington Environmental Council (collectively Commenters) urge the Washington Department of Ecology (Ecology) to deny Rye's proposed Clean Water Act (CWA) 401 water quality certification. Ecology should deny the certification

because: (1) the application is incomplete, and (2) Rye's application fails to demonstrate the Project complies with water quality standards, including numeric and narrative standards, designated use protections, and the state's Tier II Antidegradation Policy review. Based on the impacts of Rye's "discharges" to "waters of the United States," Ecology must deny Rye's 401 certification regardless of whether the court-challenged 2020 U.S. Environmental Protection Agency (EPA) CWA 401 rules (hereafter 2020 401 rules), 85 Fed. Reg. 42,210 (July 13, 2020), remain in effect at the time Ecology acts on the 401 application. Due to the uncertain future of the 2020 401 rules, this comment details why Ecology must deny Rye's 401 certification under both the 2020 and pre-2020 401 certification rules and legal precedent (hereafter pre-2020 401 rules).

I. OVERVIEW OF THE PROJECT

The Project includes an off-stream, pumped-storage complex with an upper and lower reservoir. According to Rye, the Project consists of over 2,400 feet of maximum gross head that involve no river or stream impoundments, allowing for relatively small water conveyances. Other features include an underground water conveyance tunnel, underground powerhouse, 115 and 500 kilovolt transmission line(s), a substation/switchyard, and other appurtenant facilities. See Goldendale Pumped Storage Project CWA 401 Certification Application at 1 (June 23, 2020). Rye would site the Project's lower reservoir on lands that previously housed the CGA smelter (also known as Harvey Aluminum, Martin Marietta Aluminum, Commonwealth Aluminum, or Goldendale Aluminum), including contaminated lands and groundwater. *Id.* at 2.

The Project is expected to require 9,000 acre feet of Columbia River water for the initial fill and an additional 390 acre feet per year to offset evaporative losses. Goldendale Energy Storage Final FERC License Application, FERC Project No. 14862 (FLA) at 14.

To construct and operate the reservoirs, the Project would impact ephemeral streams, ponds, intermittent streams, and a seep. Rye's consultant, ERM, "delineated two ephemeral streams, two ponds, one intermittent stream and one seep within the study area (Figure 4-1)." FLA Appendix B at 10. Rye's FERC application states:

Based on the observations . . . from field investigations conducted in May 2019, ERM identified one wetland and six waterbodies existing within the study area. Two of the six waterbodies within the study area, S7 and S8 are likely jurisdictional waters of the U.S. as they connect to perennial streams

downstream of the project area and therefore are subject to regulation under Section 404 of the federal Clean Water Act. The remaining four waterbodies and one wetland are likely not jurisdictional waters of the U.S because they appear to be isolated and do not connect to the Columbia River.

FLA Appendix B at 14. The FLA describes how construction and creation of the reservoirs would impact the “waters of the United States” (WOTUS) and non-federal jurisdictional waters.

Construction of the upper reservoir will permanently impact approximately 890 linear feet of stream S7, 75 linear feet of stream S8, and the entirety of pond P2 (0.03 acre). An additional 800 linear feet of stream S8 will be temporarily impacted through construction of the temporary construction laydown area.

FLA Exhibit E at 13. The FLA, Exhibit E, also describes direct impacts to what Rye calls “non-jurisdictional” waters, referring to non-federal jurisdictional waters. The FLA and 401 application do not address the legal definition of “water of the state” and analyze state jurisdiction, an analysis relevant under the pre-2020 401 rules.

Rye chose to site the upper reservoir within and directly adjacent to an existing wind turbine complex. *Id.* at 5 (Figure 2.1-1A). The upper reservoir and the 62-wind-turbine complex, are located on land that is leased by the Tuolumne Wind Project Authority (TWPA) and contains TWPA’s wind turbines, which TWPA uses to supply energy and capacity to the Turlock Irrigation District (TID). TID is an irrigation district organized under the laws of the State of California (California Water Code §§ 20500-29978) and supplies electric power and energy to the residents and businesses within its service area. See Turlock Irrigation District, Comment to FERC, (Mar. 11, 2020), *In* FERC Docket No. 1486 (Exhibit 6). TID raised five concerns regarding the Project. Specifically, TID raised concerns that the Project would: (1) redirect the wind used by the turbines, which would reduce their energy output; (2) increase wind turbidity, which would reduce their energy output and increase wear and tear on the turbines; (3) saturate and thereby weaken the foundations of some of the turbines; (4) increase the wildlife around the turbines, which will increase animal strikes and interfere with TWPA’s operations and output; and (5) interfere with the operations of the turbines’ underground power lines when constructing the Project’s underground components. *Id.* at 2–3. The concerns raised by TID are relevant to Ecology 401 certification review, which is discussed in greater detail below.

According to Rye, “[t]he Project is not expected to cause any impacts to water quality within or adjacent to the Project area, including to intermittent streams or the Columbia River.” *Id.* at 3. Rye does not propose any water quality mitigation.

Rye’s conclusion on water quality impacts is unfounded and does not align with the administrative record. For the reasons explained below, Rye fails to demonstrate the Project, and associated discharges to federal- and state-jurisdictional waters, will comply with water quality standards.

II. SUMMARY OF ECOLOGY’S AUTHORITY TO DENY RYE’S 401 CERTIFICATION

Under § 401(a) of the CWA, “[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable water[s] shall provide the licensing or permitting agency a certification from the State in which the discharge originates . . .” 33 U.S.C. § 401(a)(1). A state’s § 401 power to deny or condition federal environmental permits allows a state to influence—or simply veto—certain federal activities. *See, e.g., PUD No. 1 of Jefferson County v. Washington Dept. of Ecology*, 511 U.S. 700, 712 (1994) (holding that states have authority to restrict federal activity pursuant to § 401(d)); *S.D. Warren Co. v. Maine Bd. of Environmental Protection*, 547 U.S. 370 (2006) (noting that states have the “primary responsibilities and rights . . . to prevent, reduce, and eliminate pollution.”).

The purpose of § 401 is to give states a measure of control over federally permitted projects within their jurisdiction that may harm water quality. *S.D. Warren Co.*, 547 U.S. at 380 (citing S. Rep. No. 92-414, p. 69 (1971) (provision must have “a broad reach” if it is to realize the Senate’s goal: to give states the authority to “deny a permit and thereby prevent a Federal license or permit from issuing to a discharge within such State.”)). Because the Rye’s project will discharge into waters of the United States, it requires a permit from FERC, and such permit cannot be issued without the required water quality certification from Ecology. *See City of Fredericksburg v. FERC*, 876 F.2d 1109, 113 (4th Cir. 1989).

Under U.S. Supreme Court precedent, arising in a case argued by Ecology, § 401 authority is broad, and it allows a state agency to condition or deny a project based on *any* adverse impact to water quality—not just the discharge that triggers § 401 oversight. *PUD No. 1*, 511 U.S. at 710-13 (“[O]nce the threshold condition, the

existence of a discharge, is satisfied . . . the certifying state or tribe may consider and impose conditions on the project activity in general, and not merely on the discharge, if necessary to assure compliance with the CWA *and any other appropriate requirement of state or tribal laws*"). The *PUD No. 1* holding also confirms that § 401 authority may be used to prevent or mitigate violations of *all* the elements of state water quality standards—not just numeric criteria. 511 U.S. 700 at 714-15.

Washington has adopted water quality standards to protect “public health and public enjoyment of the waters and the propagation and protection of fish, shellfish, and wildlife.” WAC 173-201A-010(1). Surface waters are protected by “numeric and narrative criteria, designated uses, and an antidegradation policy.” *Id.* “Surface waters of the state include lakes, rivers, ponds, streams, inland waters, saltwaters, wetlands, and all other surface waters and water courses within the jurisdiction of the state of Washington.” WAC 173-201A-010(2).

Ecology’s water quality certifications are issued as administrative orders under Washington State’s Water Pollution Control Act, 90.48 RCW. The goal of the act is to:

maintain the highest possible standards to insure the purity of all waters of the state consistent with public health and public enjoyment; the propagation and protection of wild life, birds, game, fish and other aquatic life; and the industrial development of the state. And to that end requires the use of all known available and reasonable methods by industries and others to prevent and control the pollution of the waters of the state of Washington.

In addition to the state’s Water Pollution Control Act, anyone who wishes to divert or store surface waters must get a water right permit from the state. According to Ecology’s *Water Quality Certifications for Existing Hydropower Dams* manual, “flow may still be regulated under other authorities like the CWA Water Quality Certifications and CZM [Coastal Zone Management] Act.” See *Water Quality Certifications for Existing Hydropower Dams* at 6. Moreover, while a hydropower project requires a state permit that is subject to SEPA (e.g., a water right or shoreline permit), the entire project, even the 401 Certification, which would be exempt, is subject to SEPA. *Id.* at 7.

On July 13, 2020, the U.S. Environmental Protection Agency (EPA) published a final rule revising the regulations implementing Section 401. Clean Water Act Section 401 Certification Rule, 85 Fed. Reg. 42,210 (July 13, 2020). As Ecology explained in comments on the draft rule, among the many flaws in the Final Rule, the EPA unlawfully

narrows the applicability of Section 401; circumscribes the scope of review of the certifying state or tribe; limits the information on the proposed federal project made available to states, tribes, and the public to inform the certification determination; restricts the conditions the state or tribe may impose to ensure state or tribal laws are met; and empowers the federal licensing or permitting agency to effectively overrule a state or tribal determination of whether such laws are met. Letter, M. Bellon, Director, Ecology to A. Wheeler, EPA, re: EPA's Proposed Rule, Updating Regulations on Water Quality Certification (Docket ID No. EPA-HQ-OW-2019-0405) (Oct. 21, 2019).

On July 21, 2020, the State of Washington, along with other states, challenged EPA's regulations as unlawful. The states' complaint alleged that the regulations are inconsistent with the CWA and EPA acted arbitrarily and capriciously when promulgated the rules. In addition, and importantly, the states also specifically challenged EPA's authority to promulgate regulations controlling the scope and process of a state's review under section 401 of the CWA. The states argue that section 401 does not grant EPA any rulemaking authority for procedures and responsibilities expressly reserved for states, and section 501(a) of the CWA limits EPA to prescribing "such regulations as are necessary to carry out [the Administrator's] functions under [the] Act." 33 U.S.C. § 1361.

Ecology may decide to limit its analysis to conform with EPA's new regulations. It could do this in two situations. First, Ecology may conclude it must acquiesce to the unlawful limits and conditions imposed by EPA's regulations and apply those regulations until they are vacated and set aside by EPA or a court. For the reasons described below, even under the 2020 401 rules, Ecology retains authority to deny Rye's 401 certification. Second, before it issues a decision in this matter, in order to comply with EPA's new regulations, Ecology may revisit its regulations, change its regulations to conform to EPA's regulations, and determine that those new state regulations are controlling for currently pending applications. In either case, because any such limitation would be inconsistent with the Ecology's authority and duty to ensure that the activity will not violate the applicable provisions of the CWA and any other appropriate requirement of state law, Ecology must expressly reserve the ability to revisit and revise the terms and conditions imposed on the Project. As it has done in past 401 Certifications, Ecology must clearly state that it may amend the Project's 401 certification in the event of changes or amendments to the state water quality, ground water quality, or sediment standards, or changes in or amendments to the state Water Pollution Control Act (RCW 90.48) or the federal Clean Water Act and implementing regulations.

Due to the 2020 401 rule's uncertain future, Commenters present arguments for denying Rye's 401 certification under both the 2020 401 rules and the pre-2020 401 rules and legal precedent.

III. ECOLOGY MUST CONSULT WITH AND ACCOUNT FOR INPUT FROM TRIBAL NATIONS

Ecology must fully account for Tribal Nations' input on Rye's proposal. Rye sited the Project in an area of incalculable significance for Tribal Nations, an area that includes multiple documented Traditional Cultural Properties (TCPs) and tribal-access agreements. Moreover, Rye has, for years, failed to change the Project's location over the objections of sovereign Tribal Nations.

The Confederated Tribes and Bands of the Yakama Nation (Yakama Nation) have opposed the Project since its inception. Yakama Nation also opposed earlier iterations of a pumped-storage hydroelectric proposed at the site.

According to the Yakama Nation, Rye's development would destroy archeological, ceremonial, burial, petroglyph, monumental, and ancestral use sites—and cause significant harm to the Yakama way of life. Letter from Yakama Nation to Erik Steimle (Feb. 14, 2018), *In* FERC Docket No. 14861 (Exhibit 10). A Yakama Nation representative explained the Tribe's opposition at a Washington State Senate hearing in early 2020:

As you're aware, the Columbia River was dammed over the last century. In doing so, that impacted many of our rights, interests and resources. All of these things have been impacted: our fish sites, our villages, our burial sites up and down the river. This is another example of energy development, development in the West, that comes at a cost to the Yakama Nation.

Courtney Flatt, OPB, *Northwest Clean-Energy Advocates Eye Pumped Hydro to Fill Gaps, with Tribes Noting Concerns* (July 27 2020) (Exhibit 9). The Project's destruction of TCPs and other impacts to Tribal Nations is relevant to Ecology's Tier II Antidegradation Review. *See infra* at Section V.A.

Rye has repeatedly misstated Yakama Nation's position on the Project, which has confused federal and state agencies, as well as public understanding of the Tribe's position. Yakama Nation in comment letters to FERC, has gone as far as to say that

Rye is not operating in good faith. A letter submitted by Yakama Nation in February 2019 states:

The Yakama Nation does not believe that Rye Development conducted the pre-application in a good faith effort. This is the first time that the Yakama Nation has been afforded the opportunity to read any preliminary studies conducted by Rye Development. Nor were we aware that a draft Historic Properties Management Plan was being drafted as part of this document.

Confederated Tribes and Bands of the Yakama Nation, Comment to FERC, (Feb. 21, 2019), *In* FERC Docket No. 1486.(Exhibit 2).

Yakama Nation's archaeological resource survey, completed in 2019, concluded that multiple sites of cultural and religious importance are located within the Project boundary.¹ According to Rye's Draft License Application, "the proposed Project area is within a NRHP-eligible [National Register Historic Properties] TCP (Traditional Cultural Property) (Push-pum) and a NRHP-eligible Multiple Property Documentation TCP (Columbia Hills) and one Archaeological District (Columbia Hills District)." FLA Exhibit E at 78. The FLA states:

The entire Columbia Hills and the archaeological sites contained within are significant to the understanding of how Yakama people lived and utilized the land. Information yielded from 'archaeological' resources is important to Yakama elders to determine what kinds of activities took place at a specific location. It also lends itself useful in identifying what kinds of resources are present.

FLA Exhibit E at 76. While Yakama Nation has filed tribal cultural resource surveys as "confidential" with FERC, available information, including FLA Appendix G, details how the Project area's importance for tribal cultural and religious resources.

The Yakama Nation is not the only affected Tribal Nation. The Confederated Tribes of the Umatilla Indian Reservation (CTUIR) has also weighed in on the development. While letters submitted by CTUIR have been filed confidentially to protect

¹ The Yakama Nation is still in the process of completing their 2020 Cultural Resources Survey of the Project area.

tribal cultural resources,² the Tribe has publicly said that “the proposed undertaking is within a historic property of cultural and religious significance,” and are poised to conduct their own cultural resources survey of the area. On October 16, 2020, the Nez Perce Tribe requested that Rye conduct an ethnographic study to identify any Nez Perce-specific resources in the Project area that could be affected by construction of the project, stating that because the Tribe did not know about the development they did not have the opportunity to submit study requests to determine detrimental impacts to their Tribe. Letter from Patrick Baird to FERC (Oct. 16, 2020), *In* FERC Docket No. 14861 & Telephone Memo from Suzanne Novak to FERC (Oct. 7, 2020), *In* FERC Docket No. 14861 (Exhibit 7). On October 29, 2020, FERC directed Rye to conduct that survey.

Both CTUIR and the Nez Perce Tribe have not been afforded the opportunity to identify tribal cultural and religious resources that may be impacted by the Project.

In addition to the cultural resources impacted within the Project footprint, Project construction and operation would impact off-site, adjacent tribal and non-tribal use of an irreplaceable cultural and historic treasure: an array of over 60 bear-paw petroglyphs on the basalt walls above the Columbia River. Located in the channel of the John Day Dam Lock, the petroglyphs are open to public viewing. Rye’s application fails to mention, let alone analyze, how Project construction and operations would impact the experience of tribal and non-tribal members who view and reflect on the renowned petroglyph collection.

IV. RYE’S APPLICATION IS INCOMPLETE

Rye’s application is incomplete because it has not produced a compensatory wetland or water quality mitigation plan nor completed the required Tier II Antidegradation Review analysis. Rye’s failure to produce a compensatory mitigation proposal is grounds for Ecology to deny the 401 certification under both the 2020 401 rules and the pre-2020 401 rules. Under the 2020 401 rules, Rye’s “discharges” would violate water quality standards in federal jurisdictional waters. *See infra* Section V. Moreover, under the pre-2020 401 rules, Ecology’s scope of analysis expands to the “activities” and impacts to “waters of the state.” For the reasons explained below, under

² See Exhibit 12 and 13, for historical context surrounding the treatment of Indian remains and cultural property in the United States resulting in the need for tribes to file cultural resource information confidentially.

either 401 legal regime, Ecology must deny the 401 application because it cannot certify that the “discharges” or Project complies with water quality standards absent a compensatory mitigation plan and Tier II Antidegradation analysis.

A. Rye failed to submit a compensatory mitigation plan to address water quality impacts.

According to Rye, construction of the upper reservoir will permanently destroy segments of two “likely” federal jurisdictional waterbodies: two ephemeral streams. Rye’s Final License Application (FLA) to FERC states:

Two of the six waterbodies within the study area, S7 and S8[,] are likely jurisdictional waters of the U.S. as they connect to perennial streams downstream of the project area and therefore are subject to regulation under Section 404 of the federal Clean Water Act. The remaining four waterbodies and one wetland are likely not jurisdictional waters of the U.S because they appear to be isolated and do not connect to the Columbia River.

FLA, Appendix B at 14. Rye determined that the remaining four waterbodies and one wetland are not jurisdictional under federal law. The FLA fails to analyze whether the remaining four water bodies are jurisdictional under state law. For example, Rye’s proposal will destroy a 0.3 acre ephemeral pond.

A compensatory mitigation plan is warranted because Rye’s proposal will permanently destroy waterbodies located in a semi-arid climate and result in violations of water quality standards. Rye’s FLA states:

Construction of the upper reservoir will permanently impact approximately 890 linear feet of stream S7, 75 linear feet of stream S8, and the entirety of pond P2 (0.03 acre). An additional 800 linear feet of stream S8 will be temporarily impacted through construction of the temporary construction laydown area.

FLA Exhibit E at 13. Rye deems destroying 890 linear feet of stream S7, 75 linear feet of stream S8, and the entirety of pond P2 (0.03 acre) as “relatively minor.” Rye draws this conclusion by comparing stream length destroyed to overall stream length. Rye fails to address the streams’ functionality after construction and the downstream water quality impacts of destroying and disturbing large sections of ephemeral streams.

Rye's FLA includes a "Wildlife Mitigation Plan." The Wildlife Management Plan, however, is not a wetland or water quality mitigation plan. Moreover, the Wildlife Management Plan fails to address the significant concerns raised by state and federal wildlife agencies about the Project's wildlife impacts.³

Ecology must deny the 401 certification because it cannot assure the "discharges" to WOTUS or broader Project impacts, including impacts to "waters of the state" will comply with water quality standards.

If Rye produces a compensatory mitigation proposal, Commenters request that Ecology reopen the comment period to provide for public input.

B. Rye's application is incomplete because it fails to adequately analyze water quality impacts from destroying and disturbing federal jurisdictional ephemeral streams and other "waters of the state."

Ecology must consider the unique water quality and habitat values of the ephemeral streams the Project will impact. "Intermittent or ephemeral streams make up a large percentage of all stream habitats and may have significant roles in spawning, foraging, refugia, and early life history habitat for many fishes." Zachary E. Hooley Underwood et al., *An Intermittent Stream Supports Extensive Spawning of Large-River Native Fishes*, Transactions of the American Fisheries Society, 426 (2018) (Exhibit 11). Rye's 401 application concludes the Project will not impact water quality or designated uses. See FLA Exhibit 13. The scientific literature does not support this cursory conclusion. See Sullivan, S. M. P., M. C. Rains, A. D. Rodewald, W. W. Buzbee, and A. D. Rosemond. 2020. *Distorting science, putting water at risk*. Science 369 (6505): 766–768 (Exhibit 17); Leslie M. Reid and Robert R. Ziemer, *Evaluating the Biological Significance of Intermittent Streams*, USDA Forest Service, Pacific Southwest Research Station" (1994) ("Intermittent channels which support distinctive riparian vegetation are most important biologically; the major biological role of smaller channels is likely to be their influence on the supply of sediment, water, and organic materials to downstream

³ The FLA describes future plans to "[m]itigate for habitat loss by conserving a compensatory mitigation parcel approved by USFWS and WDFW." FLA, Exhibit E at 48. Rye states, "The parcel will be of similar quality as the golden eagle foraging habitat impacted by the Project's permanent features. *Id.* Rye fails, however, to provide a compensatory wetland or water quality mitigation plan.

channels.”) (Exhibit 18). Ephemeral streams provide important ecosystem services, particularly in the semi-arid climate encompassed by the Project area.

Rye concludes the Project’s impacts to federal-jurisdictional ephemeral streams will not impact water quality based on a simplistic mathematical comparison. Specifically, Rye compares “stream length lost” to “total stream length,” see FLA Exhibit E at 13–18, and concludes the Project will not impact water quality. This grossly over simplistic “analysis” ignores the fundamentals of limnology, ecology, and conservation biology.

The federal jurisdictional ephemeral streams (S8 and S7) are tributaries to Swale Creek, a perennial, salmon-bearing tributary to the Klickitat River. Swale Creek is listed as a Category 5 “impaired” waterbody for temperature, pH, and dissolved oxygen. See Ecology Water Quality Assessment Listing IDs 7962 (temperature); 70966 (pH); 72907 (temperature); 72913 (temperature); 77925 (dissolved oxygen). Swale Creek is also listed as Category 4C for stream flow. See Ecology Water Quality Assessment Listing ID 6206 (Exhibit 19). Studies document the important ecology and existing water quality conditions in Swale Creek. See Aspect Consulting Inc., 2011 Swale Creek Subbasin Water Level Monitoring Summary, WRIA 30 (June 29, 2011) (Exhibit 20); Watershed Professionals Network, LLC and Aspect Consulting Inc., *Swale Creek Water Temperature Study* (Sept. 2004) (Exhibit 21); See Aspect Consulting, *Riparian Vegetation Assessment, Little Klickitat River and Swale Creek* (June 30, 2009) (Exhibit 22). Rye’s 401 application, and the FLA it incorporates, fail to analyze the downstream effects of reduced flow to Swale Creek, such as impacts to stream flow, temperature, pH, dissolved oxygen, and associated impacts on aquatic life and other designated uses. Instead, Rye summarily concludes the impact “to the watershed” from the upper reservoir will be minimal because the upper reservoir covers a relatively small area of the entire watershed. See FLA Exhibit E at 13. Notably, the 401 application and FLA ignore studies in WRIA 30, including specific studies on Swale Creek, as well as multiple 303(d) listings in Swale Creek. Commenters provide those studies as exhibits to this comment.

Ecology should deny the 401 certification based on Rye’s woefully incomplete application.

C. Rye’s application is incomplete because Rye failed to submit the analysis required under WAC 173-201A-320(4).

Ecology must conduct a Tier II Antidegradation Review. See *infra* Section V.A. Under WAC 173-201A-320(4), “[o]nce an activity has been determined to cause a measurable lowering in water quality, then an analysis must be conducted to determine if the lowering of water quality is necessary and in the overriding public interest.” WAC 173-201A-320(4) puts the onus on the applicant to provide information to conduct the analysis. WAC 173-201A-320(4) states “information to conduct the analysis must be provided by the applicant seeking the authorization, or by the department in developing a general permit or pollution control program, and must include” the analysis set forth in WAC 173-201A-320(4)(a)–(b). Under WAC 173-201A-320(5), “[t]he department retains the discretion to require that the applicant examine specific alternatives, or that additional information be provided to conduct the analysis.” Ecology must deny the 401 certification because Rye failed to file a complete application. See *infra* at Section V.A. (explaining that Rye’s application lacks information to conduct an Antidegradation Review).

If Rye provides the required Antidegradation Review analysis, Ecology must reopen the comment period to provide for public comment on the Tier II Antidegradation Review. See *infra* Section V.A. (explaining that Ecology’s 401 certification public notice did not mention Tier II Antidegradation Review, which is inconsistent with the state’s Antidegradation program and agency guidance).

V. ECOLOGY CANNOT CERTIFY THE PROJECT COMPLIES WITH WATER QUALITY STANDARDS

Ecology cannot certify Rye’s proposal to build the Northwest’s largest pumped-storage hydroelectric development will comply with water quality standards. First, the Project will permanently destroy large sections of two federal-jurisdictional ephemeral streams, important habitat in the semi-arid Columbia Hills; the project will also destroy multiple “waters of the state,” including ephemeral streams and a 0.3 acre pond.⁴ Second, the Project will create two, large reservoirs that, due to Rye’s operations, will concentrate pollutants and violate state water quality standards, and potentially impact groundwater. Third, the Project will consume large quantities of

⁴ Commenters request that Ecology verify Rye’s conclusions on the federal and state jurisdiction of waters impacted by the Project.

Columbia River water, exacerbating existing water quality problems in the Columbia. Rye failed to meet its burden to demonstrate Project withstands Tier II Antidegradation Policy Review, complies with numeric and narrative water quality standards, and protects designated uses. Ecology must deny Rye's 401 certification.

A. Under both the 2020 401 rules and pre-2020 401 rules, Ecology must deny the 401 certification because it fails to meet the state's Tier II Antidegradation Policy Review.

Ecology must deny Rye's 401 certification under the state's Tier II Antidegradation Policy Review. WAC 173-201A-300 states:

The purpose of the antidegradation policy is to:

- (a) Restore and maintain the highest possible quality of the surface waters of Washington;
- (b) Describe situations under which water quality may be lowered from its current condition;
- (c) Apply to human activities that are likely to have an impact on the water quality of a surface water;
- (d) Ensure that all human activities that are likely to contribute to a lowering of water quality, at a minimum, apply all known, available, and reasonable methods of prevention, control, and treatment (AKART); and
- (e) Apply three levels of protection for surface waters of the state, as generally described below:
 - (i) Tier I is used to ensure existing and designated uses are maintained and protected and applies to all waters and all sources of pollution.
 - (ii) Tier II is used to ensure that waters of a higher quality than the criteria assigned in this chapter are not degraded unless such lowering of water quality is necessary and in the overriding public interest. Tier II applies only to a specific list of polluting activities.
 - (iii) Tier III is used to prevent the degradation of waters formally listed in this chapter as 'outstanding resource waters,' and applies to all sources of pollution.

Ecology evaluates the applicability of Tier I and II under a pollutant-by-pollutant approach. Letter from U.S. Environmental Protection Agency to Ecology, “EPA Review of 2003 Water Quality Standards Regulations for Antidegradation” at 5 (May 2, 2007), http://www.ecy.wa.gov/Programs/wq/swqs/epa-antideg_policy_approval.pdf.

Ecology must conduct a Tier II Antidegradation Policy Review for Rye’s proposal. See WAC 173-201A-320(2)(c) (stating “A Tier II will only be conducted for new or expanded actions conducted under the following authorizations[,]” which includes “Federal Clean Water Act Section 401 water quality certifications.”). Ecology’s Tier II Antidegradation guidance states: “New or expanded projects requiring a 401 certification that will potentially cause a measurable [sic] change in water quality will be required to undergo a Tier II analysis for antidegradation (for example, a new hydropower project).” *Water Quality Program Guidance Manual—Supplemental Guidance on Implementing Tier II Antidegradation*, Wash. Dept. of Ecology at 5 (Sept. 2011) (hereafter Ecology Tier II Antidegradation Guidance).

The Project will cause a measurable change in water quality, as defined in WAC 173-201A-320(3)(d), (e), and (f). Ecology, therefore, must reach a “necessary and overriding public interest determination” pursuant to WAC 173-201A-320(4) and implementing guidance. See WAC 173-201A-320(4) (“Once an activity has been determined to cause a measurable lowering in water quality, then an analysis must be conducted to determine if the lowering of water quality is necessary and in the overriding public interest.”). Specifically, Ecology must conduct a Tier II analysis on pollutants including: temperature, pH, turbidity, dissolved gas, toxic substances, and narrative criteria (WAC 173-201A-260(2)).

Under the 2020 401 rules and pre-2020 401 rules, Ecology’s review under a Tier II analysis must conclude that the lowering of water quality is not necessary and in the overriding public interest. Whether Ecology looks at the “discharges,” as required under the challenged 2020 401 rules, or the “activities” (i.e., the Project), Ecology’s Tier II analysis cannot conclude that the “lowering of water quality is necessary and in the overriding public interest.”

//
//

- a. *Once Rye files a complete application, Ecology must reopen the public comment period for the Tier II Antidegradation Review.*

Commenters request that Ecology offer a public comment period on Ryes' Tier II Antidegradation Review. Ecology's 401 certification public notice is silent on Tier II Antidegradation Review. However, Ecology's Tier II Antidegradation Guidance contemplates: (1) notice of Tier II Review applicability, and (2) the opportunity for public input on the Tier II Review. Specifically, Ecology's Tier II Antidegradation Guidance states:

In accordance with section II of the rule, public involvement for the Tier II review should be included as a part of the public involvement process associated with the Ecology authorization being conducted. This means that the Tier II requirements must be adequately discussed as a part of those other public involvement mechanisms. For example, in a permit application notification, specific mention of the water body affected, the need to find that any lowering of water quality is necessary and in the public interest, and the openness to receiving public comment on these issues, would initiate the appropriate public review process for Tier II. Where an existing mechanism for public review that can be used to incorporate the Tier II review issues does not exist, Ecology will need to create one that is unique to this purpose. This can be as simple as a public notice to the local community and established interest groups.

Regardless of the mechanism or form used, the public review process should include:

- A clear statement on the need to make a Tier II antidegradation determination.
- Sufficient information to identify the water body affected, the type of action being reviewed, and the constituents of concern.
- A description of the process for reviewing and selecting the least degrading alternatives which can be feasibly implemented.
- The method by which public comments will be considered.

Ecology Tier II Antidegradation Review Guidance at 9–10. Because the 401 certification public notice did not include the requisite information, and Rye failed to produce “measurable change” analyses, Commenters request the opportunity to comment on Tier II Review in the future.

//

//

b. *Ecology must examine measurable changes in water quality.*

Ecology must examine if Rye's "discharges" or, if applying the pre-2020 rules the "activities," would result in a measurable change in water quality using a pollutant-by-pollutant analysis. WAC 173-201A-320(3) defines "measurable change," stating:

To determine that a lowering of water quality is necessary and in the overriding public interest, an analysis must be conducted for new or expanded actions when the resulting action has the potential to cause a measurable change in the physical, chemical, or biological quality of a water body. Measurable changes will be determined based on an estimated change in water quality at a point outside the source area, after allowing for mixing consistent with WAC 173-201A-400(7). In the context of this regulation, a measurable change includes a:

- (a) Temperature increase of 0.3°C or greater;
- (b) Dissolved oxygen decrease of 0.2 mg/L or greater;
- (c) Bacteria level increase of 2 cfu/100 mL or greater;
- (d) pH change of 0.1 units or greater;
- (e) Turbidity increase of 0.5 NTU or greater; or
- (f) Any detectable increase in the concentration of a toxic or radioactive substance.

Ecology's Tier II guidances states:

There are cost and complexity issues associated with making the Tier II eligibility determination. Estimating dilution factors, collecting any necessary ambient water quality data, predicting effluent concentrations, and determining how these factors all combine to lower water quality is not a trivial undertaking. A project proponent may choose to move straight to a Tier II "necessary and overriding public interest" analysis, rather than make these eligibility determinations. This may be a cost- and time-effective strategy where there is a reasonable probability that measurable degradation will likely occur.

Ecology Tier II Antidegradation Guidance at 7. Ecology must: (1) require that Rye conduct the Tier II "measurable change" analysis, or (2) ask if Rye will choose to move straight to a Tier II "necessary and overriding public interest analysis."

For turbidity, Rye cannot evade a Tier II analysis based on the "short term exceedance" exemption. Projects that may cause short term exceedances for turbidity during inwater construction are not required to go through the Tier II Antidegradation

test if they adhere to the requirements for turbidity criteria that are described in WAC 173-201A-200(1)(e)(i) and 173-201A-210(1)(e)(i). Here, whether Ecology evaluates the Project under the 2020 or pre-2020 401 rules, the turbidity exceedances will persist beyond the “short term”: the federal-jurisdictional waterbodies, S7 and S8, are permanently altered (i.e., excavated and destroyed to make way for a reservoir). In addition, under the pre-2020 rules, Rye will destroy “waters of the state,” 0.03 acre ephemeral pond.

In sum, Ecology must complete the “measurable change” analyses or, alternatively, ask Rye’s approval to proceed to the “necessary and in the overriding public interest” analysis.

- c. Ecology should deny the 401 certification because the lowering of water quality is not necessary and in the overriding public interest.*

Under both the 2020 and pre-2020 401 rules, Ecology cannot conclude that the lowering of water quality is “necessary and in the overriding public interest.” The Project will further scar a landscape already significantly impacted by wind and hydroelectric energy. These comments and attached exhibits detail Rye’s impacts to water quality, designated uses, and cultural resources.

As part of the “necessary and overriding public interest determination,” Ecology must consider “the benefits and costs of the social, economic, and environmental effects associated with the lowering of water quality.” WAC 173-201A-320(4)(A). In conducting the analysis, Ecology must consider costs of the social, economic, and environmental effects on:

- **Tribes and Native Americans, including the social and economic impacts to Tribes and Native Americans:** The Project would directly interfere with multiple culturally significant sites to the Yakama Nation, CTUIR, and Nez Perce Tribe. The Project would also impact tribal access. Cultural property is defined as “the tangible and intangible effects of an individual or group of people that define their existence, and place them temporally and geographically in relation to their belief systems and their familial and political groups, providing meaning to their lives.” *SHERRY HUTT ET AL., CULTURAL PROPERTY LAW, at xi (2004)*. Exhibits 12 and 13 detail costs to Tribal Nations and Native Americans.

- **Water Quality:** These comments and supporting exhibits detail water quality impacts from Rye’s direct “discharges” to at least two federal jurisdictional waters: S7 and S8. Those ephemeral streams are tributaries to Swale Creek, a perennial, salmon-bearing waterbody. Ecology must consider the water quality impacts of destroying large segments of ephemeral streams, particularly streams that discharge to water-quality impaired waterbodies. Under the pre-2020 401 rules, Ecology must also consider the Project’s direct and indirect impacts on “waters on the state” and the Columbia River.
- **Water Quantity:** The Project requires large quantities of Columbia River water. Ecology must consider the environmental costs of increased water withdrawals under current and future climate scenarios.
- **Wildlife and Recreation:** The Project will have significant impacts on wildlife and associated recreation. On March 10, 2020, comments to FERC, the Washington Department of Fish and Wildlife (WDFW) noted: “We disagree with the applicant’s opinion that the habitat near the upper reservoir is not unique or uncommon. The uniqueness of this habitat is linked to the close proximity to golden eagle and prairie falcon nesting habitat.” Comments by WDFW and the U.S. Fish and Wildlife Service (USFWS) detail the Project’s impacts to wildlife, including increased mortality of bats and raptors by nearby wind turbines, and wildlife habitat. WDFW Comment to FERC, (Mar. 10, 2020), *In* FERC Docket No. 1486 (Exhibit 5); USFWS Comment to FERC (Mar. 3, 2020), *In* FERC Docket No. 1486 (Exhibit 4). Recreation organizations, including Commenters, have weighed in, raising concerns about how the Project’s impacts to threatened, sensitive, or candidate species, species with intrinsic value and value for nature-based recreation. Rye acknowledges the Project area is included in the regional Columbia Hills Important Bird Area designated by the National Audubon Society. See FLA Appendix D at 2.
- **Other Economic Effects:** TID’s comments described the Project’s economic impacts to existing energy infrastructure. Turlock Irrigation District, Comment to FERC, (Mar. 11, 2020), *In* FERC Docket No. 1486 (Exhibit 6). Ecology should also analyze the economic costs associated with degraded water quality and reduced stream flows in Swale Creek.
- **Other Social and Environmental Effects:** Beyond impacts to wildlife, the Project will destroy segments of, and permanently alter, unique ephemeral streams and destroy an ephemeral pond. This will result in aesthetic

impacts in a landscape etched by time and reminiscent of the renowned landscape art of Georgia O’Keeffe. See [Georgia O’Keeffe Museum](#) (visited Oct. 31, 2020) (landscape art from the Southwest that bears a striking resemblance to the scenic Columbia Hills). The Columbia Hills capture the imagination of artists and inspire viewers. See [Columbia Gorge Magazine](#) (Spring 2019) (cover art capturing the Columbia Hills to the west of the Project area). As the seasons change and shadows shift, the Columbia Hills and their streams remain a revered scenic vista of Washington state.

Ecology must also consider the applicant’s unsubstantiated conclusions on the Project’s benefits.

First, Washington’s Deep Decarbonization Analysis does not call out the Project as necessary energy infrastructure to meet the state’s decarbonization goals. See Evolved Energy Research, Washington State Energy Strategy Decarbonization Demand and Supply Side Results (Aug. 2020) (Exhibit 14). The state’s analysis is still underway and, to date, does not demonstrate a “need” for the Project. Even if large-scale pumped-storage hydroelectric power is called out as necessary to meet the state’s deep decarbonization goals, it is not clear Rye’s Project is necessary to meet that demand. For example, pumped storage at a different location could meet that need. Furthermore, Governor Inslee, a national climate leader, has not taken a position in favor of the Project. Rye’s FLA includes “Letters of Support”; Rye did not produce a letter of support from the Governor’s Office.

Ecology must consult with the Governor’s Office, the Washington Department of Commerce, Ecology staff, and other experts on the state’s deep decarbonization efforts to verify if Rye’s alleged “benefits” pencil out.

Even if the Project would provide climate benefits, Ecology must consider: (1) the lengthy permitting and construction timeline for pumped storage in general, (2) the added complexity for Rye’s Project due to scale of tribal cultural tribal resources, and (3) the need for the Project a decade or more in the future given the rapidly-changing and dynamic nature of energy markets. For example, if Ecology finds a substantial climate benefit (*i.e.*, need) in 2020 or 2021, Ecology must evaluate if that benefit remains under future energy planning scenarios (*i.e.*, 2030 and beyond).

Second, according to a third-party economic analysis, the Project cannot provide renewable energy integration and replacement capacity to support regional

decarbonization goals affordably and reliably. Anthony Jones, Critique of the Goldendale Energy Storage Hydroelectric Project, Notification of Intent (December 3, 2019) (Exhibit 15). The Rocky Mountain Econometrics analysis concludes that a combination of rising construction costs and decreasing open-market energy prices undercut Rye's claims that the project is necessary to meet the state's decarbonization goals.

Third, Ecology should evaluate the benefit of an environmental cleanup at the former CGA smelter site by evaluating the incremental *increased* benefit Rye brings to the cleanup. Whether the Project moves forward or not, state and federal law require CGA site cleanup. In turn, Ecology must evaluate the Project's benefit by comparing the baseline cleanup requirements to the "add on" cleanup Rye promises when it builds the lower reservoir. Ecology should only include the "add on" cleanup in the proverbial benefits bucket.

Finally, Rye's jobs numbers demonstrate that, while the Project will produce construction jobs, the Project supports a relatively small number of permanent jobs (20 to 30 jobs per year post-construction in Washington). See FLA Exhibit E at 85. Ecology must consider whether the 20 to 30 permanent jobs per year outweighs sweeping and permanent cultural resource and environmental impacts.

On balance, Ecology should conclude that the Project's substantial costs far outweigh the Project's purported benefits.

B. Ecology cannot certify the Project complies with numeric and narrative water quality standards.

Ecology should deny Rye's 401 certification under the 2020 401 rules and pre-2020 rules because Rye's application fails to demonstrate the "discharges" and broader "activities" will comply with numeric and narrative water quality standards. USFWS, in comments to FERC, summarizes the Project's impacts to water quality, stating:

The Service is concerned about project effects on existing populations of fish, amphibians, and other aquatic fauna and flora and the habitat that supports them We are also concerned about potential project effects on geomorphology, substrate, sediment transport, woody debris transport, streamflow regimes, flow release timing, flow fluctuation, water quality, water temperature, nutrients, and fish passage in the study area.

Letter from U.S. Fish & Wildlife to FERC, Attachment A at 4 (May 30, 2019), *In* FERC Docket No. 14861 (Exhibit 16). In the following subsection, Commenters describe why Rye’s application fails to demonstrate that the “discharges” and broader “activities” comply with water quality standards. Commenters divide this analysis by waterbody type: (1) ephemeral waterbodies, (2) the Columbia River, and (3) the human-created reservoirs. Ecology must deny the 401 certification under both the 2020 401 rules or, if the 2020 rules are withdrawn or vacated, the pre-2020 rules.

- a. *Under the 2020 401 rules, Ecology must deny the 401 certification because Rye fails to demonstrate the “discharges” will comply with numeric and narrative water quality standards in WOTUS streams.*

The Project requires “discharges” to two WOTUS streams (S8 and S7) by “point sources” (bulldozers or other construction equipment), which would violate numeric and narrative water quality standards. Rye fails to demonstrate that permanent destruction of unique aquatic habitats meets numeric and narrative water quality standards. Rye claims “[t]he Project is not expected to cause any impacts to water quality within or adjacent to the Project area, including to intermittent streams or the Columbia River.” FLA Exhibit E at 15. This statement is factually inaccurate. Permanently destroying large segments of WOTUS waterbodies will impact water quality because: (1) the 890 linear feet and 75 linear feet stream segments will cease to exist, and (2) S7 and S8 will cease to function as connected, intact waterbodies that discharge to Swale Creek. In short, Rye ignores the upstream and downstream water quality impacts of ephemeral waterbody destruction.

As discussed above, *supra* at Section VI.A., Rye’s application does not demonstrate that destroying large sections of WOTUS streams would comply with numeric and narrative water quality standards, including: temperature, turbidity, total dissolved gas, pH, deleterious materials (WAC 173-201A-200(4)(a)), aesthetic values designated uses and criteria (WAC 173-201A-200(4)(b)), and toxics and aesthetics criteria (WAC 173-201A-260(2)). The applicant bears the burden to demonstrate compliance.

Under the 2020 401 rules, Ecology has authority to deny the 401 certification based on “discharges” to federal jurisdictional waters. See 85 Fed. Reg. at 42235 (explaining “the EPA is concluding that section 401 is a regulatory provision that creates federally enforceable requirements, and for this and other reasons, its application must

be limited to point source discharges into waters of the United States.”). Here, Rye fails to demonstrate point source discharges to two WOTUS waterbodies would comply with narrative and numeric water quality standards. See *supra* at Section IV.A. In turn, Ecology must deny the 401 certification.

b. If the 2020 401 rules are overturned or withdrawn, Ecology should deny Rye’s 401 based on violations of numeric and narrative water quality standards in ephemeral streams and a pond that qualify as “waters of the state.”

In addition to federal jurisdictional waters, the Project would destroy “waters of the state.” Under the pre-2020 401 rules, Ecology may consider the Project’s impacts to “waters of the state.” See 2010 EPA Interim Handbook at 5 (2010) (“Note, however, that once § 401 has been triggered due to a potential discharge into a water of the U.S., additional waters may become a consideration in the certification decision if it [sic] is an aquatic resource addressed by ‘other appropriate provisions of state [or tribal] law.’”). Like the federal jurisdictional waters, Ecology should deny the 401 certification based on the discharges’ and the broader Project’s violations of numeric and narrative water quality standards in “waters of the state.”

c. Ecology must analyze the Project’s impacts to water quality in the Columbia River.

Ecology must verify Rye’s claim that the Project does not include “discharges” to the Columbia River. Ecology cannot complete its analysis under the 2020 401 rules absent a factual determination on the question of “discharges” to the Columbia.

Under the pre-2020 401 rules, Ecology must evaluate the Project’s impacts to water quality in the Columbia River. See *PUD No. 1*, 511 U.S. at 710-13 (“[O]nce the threshold condition, the existence of a discharge, is satisfied . . . the certifying state or tribe may consider and impose conditions on the project activity in general, and not merely on the discharge, if necessary to assure compliance with the CWA *and any other appropriate requirement of state or tribal laws*”); see also RCW 90.48.422(3) (describing Ecology authority with respect to water diversions and 401 certifications). USFWS raised concerns about the impacts to water quality in the Columbia River from diverting water, stating:

Diverted flows could affect chemical constituents such as dissolved oxygen, pH, salinity, turbidity, and others. A study should be conducted to characterize water quality at different flow levels to detect changes in water chemistry that may be

caused by project construction and operation. Altered instream water temperatures can also affect oxygen concentration and availability for fish and aquatic organisms. Any changes in water temperature should also be evaluated to determine effects on aquatic organisms.

Letter from USFWS to FERC, Attachment A at 4 (May 30, 2019) (Exhibit 16). Ecology must evaluate if Rye has developed the requested study and, if not, request that Rye complete the USFWS-requested water quality analysis.

- d. Ecology must consider whether the Project would violate numeric and narrative water quality standards in the Columbia in the event of reservoir failure.*

Under the pre-2020 401 rules, Ecology must evaluate the Project's water quality impacts in the event of reservoir failure. The U.S. Army Corps of Engineers (Corps) raised concern about the potential for reservoir failure, stating:

[T]he Corps has concerns regarding a failure of the storage pond and if it fails will the material wash into the river. If material does wash into the river, has Rye Development evaluated the impacts of the material to impact or stop navigation or use of the John Day Lock and Dam? We would request that such failure be analyzed and addressed to ensure no impacts to either the John Day Lock and Dam or the federal navigation channel.

Letter from Corps to FERC at 1 (July 12, 2019). To date, Rye has not completed the requested analysis. Ecology must evaluate water quality impacts to the Columbia in the event of reservoir failure.

- e. Under the pre-2020 401 rules, Ecology must evaluate whether the Project would violate narrative and numeric water quality standards in the human-created reservoirs.*

Ecology must consider water quality in the reservoirs, which would qualify as "waters of the state" once built. See WAC 173-201A-260(3)(f) ("Numeric criteria established in this chapter are not intended for application to human-created waters managed primarily for the removal or containment of pollution. This special provision also includes private farm ponds created from upland sites that did not incorporate natural water bodies."). The Project's reservoirs do not meet the "human created waters" exemption in WAC 173-201A-260(3)(f); therefore, Ecology must certify that the water quality in the reservoirs will meet state water quality standards. For the reasons

explained below, Ecology cannot develop conditions to certify compliance and, therefore, must deny 401 certification.

The human-created reservoirs would concentrate pollutants, threatening birds that USFWS and WDFW surmise would flock to the new, large waterbody. In 2020 comments on the Project, the USFWS raised concerns about water quality in the reservoirs. USFWS's comments state:

The annual loss of water from the reservoir due to evaporation is 42-acre ft. per year. Evaporation over extended periods of time may concentrate any solutes present in the water source, potentially causing the reservoir to become toxic to terrestrial and avian wildlife utilizing the Project waters. The Applicant proposes an operational adaptive water quality monitoring management program and yet there is no apparent implementing plan in the DLA containing specific, enforceable measures. We recommend the development and implementation of a reservoir water quality monitoring and management plan to ensure the water is safe for wildlife resources. This plan should include specific methods to annually monitor levels of dissolved solids, nutrients, and heavy metals in the project reservoirs and a schedule for annually reporting the monitoring results and any proposed measure addressing deteriorating water quality based on monitoring results should be developed.

U.S. Fish & Wildlife Services, Comment to FERC, (Mar. 3, 2020), *In* FERC Docket No. 1486 (Exhibit 4). For purposes of 401 certification under the pre-2020 401 rules, a monitoring plan is not sufficient for Ecology to certify that the Project would not violate water quality standards. Notably, Rye acknowledges that the reservoirs would concentrate pollutants. See FLA Exhibit E at 15 (stating "Residence in the proposed Project reservoirs for extended periods of time may concentrate any solutes present in source waters."). However, Rye concludes that "any concentrated solutes would not impact surface waters as the Project will not discharge to any surface waters." *Id.* Rye fails to acknowledge that human-created reservoirs are (1) "surface waters" within the meaning of "waters of the state," and (2) 401 certification jurisdiction extends to water quality in the reservoirs under the pre-2020 401 rules.

Ecology must evaluate whether the reservoirs will meet narrative and numeric water quality standards. This includes groundwater standards. Under the pre-2020 401 rules, if Ecology concludes the reservoirs would violate narrative and numeric standards, Ecology should deny, rather than condition, the 401 certification. Rye's operations hinge on using the reservoirs in a way that would concentrate pollutants. Therefore, Ecology cannot develop a feasible condition to mitigate violations of numeric

and narrative water quality standards. USFW and WDFW provided detailed comments to FERC detailing how the reservoirs will attract birds, including migrating waterfowl and raptors. In turn, under the pre-2020 401 rules, Ecology must deny the 401 certification based on numeric and narrative water quality standard violations in the reservoirs, as well as protection of designated uses, described in greater detail below.

C. The Project will harm designated uses.

Under both the 2020 401 rules and pre-2020 401 rules, Ecology should deny Rye's 401 certification because Ecology cannot certify the "discharges" or broader Project would protect designated uses.

- a. Under the 2020 401 rules, Ecology cannot certify Rye's discharges would protect the designated uses for federal jurisdictional ephemeral streams.*

Ecology cannot certify the "discharges" would protect the designated uses for fish, wildlife habitat, aesthetic values, and water supply. Designated uses for the segments of WOTUS-jurisdictional ephemeral streams destroyed by the Project include, but are not limited to:

- salmonid spawning, rearing, and migration;
- primary contact recreation;
- domestic, industrial, and agricultural water supply;
- stock watering;
- wildlife habitat;
- harvesting; and
- aesthetic values.

See WAC 173-201A-600(1) (stating "All surface waters of the state not named in Table 602 are to be protected for the designated uses of: Salmonid spawning, rearing, and migration; primary contact recreation; domestic, industrial, and agricultural water supply; stock watering; wildlife habitat; harvesting; commerce and navigation; boating; and aesthetic values.").

Rye's "discharges" would destroy 890 linear feet of jurisdictional stream S7 and 75 linear feet of jurisdictional stream S8. These stream segments would no longer support wildlife habitat, aesthetic values, or other designated uses. See *supra* at Section IV.A. (describing the fish and wildlife habitat and water quality benefits of

ephemeral streams). Ecology must consider impacts to designated uses in the ephemeral streams and downstream, in Swale Creek, caused by the destruction of large segments of ephemeral stream.

In addition, the Columbia Hills are renowned for their scenic beauty. Rye's discharges will destroy the aesthetic values of the ephemeral streams.

The "discharges" could also impact designated uses of domestic, industrial, and agricultural water supply in Swale Creek, which is water-quality impaired for instream flow. For example, Rye will destroy over 890 feet of ephemeral stream to build the upper reservoir. This will alter the quality and quantity of water that would otherwise flow from the Columbia Hills to Swale Creek. Rye's 401 application and FLA summarily conclude that the Project will not impact instream flows in Swale Creek by comparing the size of the ephemeral streams to the watershed. This analysis is insufficient to certify protection of designated uses.

Overall, Ecology cannot certify the "discharges" comply with water quality standards for designated use protection.

b. Under the pre-2020 401 rules, Ecology must deny the 401 certification based on the Project's impacts to fish, wildlife habitat, and aesthetic values.

Under the pre-2020 401 rules, Ecology must look more broadly at the Project's impacts on designated uses. State and federal agencies have described in detail the Project's impacts on fish, wildlife habitat, and wildlife. See Exhibit 5 at 2 ("The need for compensatory mitigation is supported by the evidence of a large amount of diversity of wildlife species that potentially reside in the Project."). Rye elected to site its proposal adjacent to and, in the case of the upper reservoir, within a wind turbine complex. In multiple comments to FERC, USFWS and WDFW describe how building large reservoirs will attract birds—including threatened, sensitive, and candidate species—and, in turn, increase birds killed by the wind turbine complex. USFWS explains:

As recently as January 2020, a golden eagle wind turbine strike mortality occurred southwest of the proposed Project (Figure 1). Five additional golden eagle mortalities have been documented to the northeast of the proposed Project. Two golden eagle nests also occur within close proximity to the proposed Project. This history of mortalities shows a landscape already compromised by wind power infrastructure. Currently golden eagles appear to

have a difficult time navigating the wind currents affected by existing wind power infrastructure near the project area. The potential of the proposed Project to further the remaining laminar wind currents lends credence that resulting impacts to avian species would not be exclusive to wind power production in the area.

Exhibit 4 at 3. USFWS also notes that radio telemetry data collected in 2007 for eight months “indicates significant use of the entire project area” by golden eagles. *Id.* at 2. USFWS explains: “Since prey availability is a primary factor in governing habitat selection of golden eagles . . . the habit in the area of the proposed upper reservoir is a determining factor in golden eagle nesting preference for the area.” *Id.* at 2 - 3 (internal citations omitted). The Project also threatens bats. WDFW notes:

The construction of a new body of water at the upper reservoir, will likely provide habitat for and attract insects in close proximity to wind turbines. In turn the insect[s] will attract foraging bats to the area, putting them in close proximity to the wind turbines. Bats are also attracted to water features to drink from. Bat fatalities have been found to be caused by wind turbine blade strikes and bats flying close to the turbine blades in an effort to avoid them resulting in barotrauma. There are no available bat survey data specific to the Project upper reservoir site. Bats are known to have a long life span and slow reproductive rate. Loss of large numbers of bats may have significant impacts to local or regional populations.

WDFW, Comment to FERC, (Mar. 10, 2020), *In* FERC Docket No. 1486 (Exhibit 5). USFWS and WDFW comments detail the direct and indirect wildlife-habitat impacts from the Project’s infrastructure, and how the Project’s location, adjacent to a large wind turbine complex, will harm threatened, sensitive, or candidate species.

Both WDFW and USFWS provided detailed recommendations for the Project’s Draft License Application compensatory wildlife mitigation plan. To date, Rye has yet to produce a mitigation plan that incorporates key agency recommendations. See FLA Appendix D, *Wildlife Mitigation Plan* (June 2020). Moreover, Rye’s Wildlife Mitigation Plan details voluntary measures. *Id.* at 1 (“The purpose of this draft Wildlife Management Plan (WMP) is to develop voluntary guidelines that FFP Project 101, LLC (the Applicant and eventual Licensee) will adopt to reduce impacts to wildlife (including avian species) associated with the construction and operations of the Goldendale Energy Storage Project No. 14861 (Project).”).

The Wildlife Mitigation Plan fails to account for critical input from WDFW on the Draft License Application Wildlife Mitigation Plan. WDFW submitted detailed comments

on the inadequacy of the Draft License Application Wildlife Mitigation Plan. WDFW summarized its analysis, stating:

WDFW is concerned with the lack of compensatory mitigation for temporary and permanent impacts of the project to wildlife habitat discussed in the DLA and the Wildlife Management Plan (WMP) found in Appendix D of the DLA. Compensatory mitigation should be in the form of land acquisition and management of the land for wildlife resources. WDFW recommends no net loss of habitat function or values, consistent with our state's Growth Management Act.

WDFW, Comment to FERC, (Mar. 10, 2020), *In* FERC Docket No. 1486 (Exhibit 5). To date, Rye has not identified off-site mitigation, further hindering Ecology's ability to certify the Project's protection of designated uses. See FLA Appendix D at 9–10. Rye acknowledges that the Wildlife Mitigation Plan is in the early stages, stating "This draft WMP will be updated in consultation with the United States Fish and Wildlife Service (USFWS), the Washington Department of Fish and Wildlife (WDFW), and the Oregon Department of Fish and Wildlife Consultation will be ongoing throughout the licensing and license implementation phases of the Project." Overall, the voluntary Wildlife Mitigation Plan is in its infancy, a state that prevents Ecology from certifying compliance with designated uses.

VI. STATE ENVIRONMENTAL POLICY ACT

SEPA is Washington's core environmental policy and review statute. SEPA broadly serves two purposes: first, to ensure that government decision-makers are fully apprised of the environmental consequences of their actions and, second, to encourage public participation in the consideration of environmental impacts. *Norway Hill Preservation and Prot. Ass'n v. King Co*, 87 Wn.2d 267, 279 (1976). For decades, SEPA has served these purposes effectively, requiring full environmental reviews for projects with significant environmental impacts.

SEPA was enacted to "encourage productive and enjoyable harmony between humankind and the environment" and to "prevent or eliminate damage to the environment and biosphere." RCW 43.21C.010. Thus in adopting SEPA, the Washington legislature declared the protection of the environment to be a core state priority, "recognize[ing] that each person has a fundamental and inalienable right to a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." RCW 43.21C.020(3). This policy statement "indicates in the strongest possible terms the basic importance of

environmental concerns to the people of the state.” *Leschi v. Highway Comm’n*, 84 Wn.2d 271, 279–80 (1974).

SEPA is more than a purely “procedural” statute that encourages informed and politically accountable decision-making. SEPA requires agencies to integrate environmental concerns into their decision making processes by studying and explaining environmental consequences before decisions are made. *See Stempel v. Dep’t of Water Resources*, 82 Wn.2d 109, 117–18 (1973). In enacting SEPA, the state legislature gave decision-makers the affirmative authority to deny projects where environmental impacts are significant, cannot be mitigated, and collide with local rules or policies. SEPA provides substantive authority for government agencies to condition or even deny proposed actions—even where they meet all other requirements of the law—based on their environmental impacts. RCW 43.21C.060. As one treatise points out, when this premise was challenged by project proponents early in SEPA’s history, “the courts consistently and emphatically responded that even if the action previously had been ministerial, it became environmentally discretionary with the enactment of SEPA.”

SEPA requires an Environmental Impact Statement for “major actions having a probable significant, adverse environmental impact.” RCW 43.21C.031(1). “The primary function of an EIS is to identify adverse impacts to enable the decisionmaker to ascertain whether they require either mitigation or denial of the proposal.” *Victoria Tower P’ship v. City of Seattle*, 59 Wn. App. 592, 601(1990); WAC 197-11-400(2) (“An EIS shall provide impartial discussion of significant environmental impacts and shall inform decision makers and the public of reasonable alternatives, including mitigation, that would avoid or minimize adverse impacts or enhance environmental quality.”) The purpose of an EIS is to provide decision makers with “sufficient information to make a reasoned decision.” *Citizens Alliance To Protect Wetlands v. City of Auburn*, 126 Wn.2d 356, 362 (1995).

As noted above, the issuance of a 401 certification is exempt from SEPA. *See* WAC 197-11-800(9). However, if the Project includes “actions, physically or functionally related to each other, some of which are categorically exempt and some of which are not” the 401 Certification is not exempt. WAC 197-11-305(1)(b)(i); *Foster v. King County*, 83 Wn. App. 339, 348 (1996) (SEPA “categorical exemptions do not apply to actions that are a mixture of exempt and non-exempt activities”); *see also Water Quality Certifications for Existing Hydropower Dams* at 7. Therefore, Ecology must determine:

(1) if any non-SEPA exempt activities trigger SEPA, and (2) if SEPA applies, comply with SEPA before issuing the 401 certification decision.

VII. CONCLUSION.

Commenters respectfully request that Ecology deny Rye's request for a CWA 401 certification. Rye filed a woefully incomplete application, leaving Ecology without grounds to certify the Project will comply with water quality standards. Based on available information, Ecology must deny the certification because the Project cannot pass muster under the state's Tier II Antidegradation Review, violates narrative and numeric water quality standards, and fails to protect designated uses.

Rye prematurely asks Ecology to certify an energy development that would destroy irreplaceable tribal cultural resources and have wide ranging, significant impacts on water quality, fish, and wildlife. For the reasons explained herein and supported by exhibits to this comment, Ecology must deny the Project's 401 certification. Thank you in advance for considering Columbia Riverkeeper, the Washington Chapter of Sierra Club, American Rivers, and the Washington Environmental Council's input on this controversial energy development.

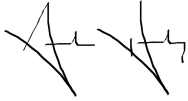
Sincerely,



Lauren Goldberg
Legal and Program Director
Columbia Riverkeeper



Simone Anter
Staff Attorney
Columbia Riverkeeper



Andrew Hawley
Staff Attorney
Western Environmental Law Center
On behalf of Columbia Riverkeeper



Margie Van Cleve
Sierra Club - Washington State Conservation Chair

Wendy McDermott
Director, Puget Sound - Columbia Basin
American Rivers

Rebecca Ponzio
Climate and Fossil Fuel Program Director
Washington Environmental Council

cc: Lauren McCloy, Governor's Office
Jennifer Hennessey, Governor's Office
Phil Rigdon, Yakama Nation
Rose Longoria, Yakama Nation
Anthony Aronica, Yakama Nation
Chris Marks, CTUIR
Carl Merkely, CTUIR
Nakia Williamson-Cloud, Nez Perce Tribe

Table of Exhibits
Columbia Riverkeeper et al. Public Comments on Rye Development's Goldendale Pumped Storage Project

Exhibit No.	Description
1	Columbia Riverkeeper & Friends of the White Salmon, Comment to FERC, (Mar. 12, 2020), <i>In</i> FERC Docket No. 1486.
2	The Confederated Tribes and Bands of the Yakama Nation, Comment to FERC, (Feb. 21, 2019), <i>In</i> FERC Docket No. 1486.
3	American Rivers, et al., Comment to FERC, (Mar. 12, 2020), <i>In</i> FERC Docket No. 1486. Filed on Mar. 12, 2020.
4	U.S. Fish & Wildlife Services, Comment to FERC, (Mar. 3, 2020), <i>In</i> FERC Docket No. 1486.
5	Wash. Dep't of Fish & Wildlife, Comment to FERC, (Mar. 10, 2020), <i>In</i> FERC Docket No. 1486.
6	Turlock Irrigation District, Comment to FERC, (Mar. 11, 2020), <i>In</i> FERC Docket No. 1486.
7	Letter from Patrick Baird to FERC (Oct. 16, 2020), <i>In</i> FERC Docket No. 14861 & Telephone Memo from Suzanne Novak to FERC (Oct. 7, 2020), <i>In</i> FERC Docket No. 14861
8	U.S. Fish & Wildlife, Updated list of threatened and endangered species that may occur in your proposed project location (Oct. 14, 2020), <i>In</i> FERC Docket No. 14861.
9	Courtney Flatt, OPB, Northwest Clean-Energy Advocates Eye Pumped Hydro to Fill Gaps, with Tribes Noting Concerns, Jul. 27 2020 https://www.opb.org/article/2020/07/27/pumped-hydro-power-columbia-river-gorge-renewable-energy/ .
10	Letter from The Confederated Tribes and Bands of the Yakama Nation to Erik Steimle (Feb. 14, 2018), <i>In</i> FERC Docket No. 14861.
11	Zachary E. Hooley Underwood et al., <i>An Intermittent Stream Supports Extensive Spawning of Large-River Native Fishes</i> , Transactions of the American Fisheries Society, 426 (2018)

12	Angela R. Riley, <i>Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection and Repatriation Act,</i> 34 Columbia Human Rights L. R. 49 (2002).
13	Jack F. Trope & Walter R. Echo-Hawk, The Native American Graves Protection and Repatriation Act: Background and Legislative History, in <i>Repatriation Reader: Who Owns American Indian Remains?</i> 123, 126 (Devon A. Mihesuah ed., 2000).
14	Evolved Energy Research, Washington State Energy Strategy Decarbonization Demand and Supply Side Results (Aug. 2020), https://www.commerce.wa.gov/wp-content/uploads/2020/08/2020-08-25-EER-DDP-Modeling-Advisory-Committee-Presentation.pdf .
15	Anthony Jones, Critique of the Goldendale Energy Storage Hydroelectric Project, Notification of Intent (Dec. 3, 2019).
16	Letter from U.S. Fish & Wildlife to FERC, Attachment A at 4 (May 30, 2019), <i>In</i> FERC Docket No. 14861.
17	Sullivan, S. M. P., M. C. Rains, A. D. Rodewald, W. W. Buzbee, and A. D. Rosemond, <i>Distorting Science, Putting Water at Risk</i> . <i>Science</i> 369(6505):766–768 (2020).
18	Leslie M. Reid and Robert R. Ziemer, <i>Evaluating the Biological Significance of Intermittent Streams</i> , USDA Forest Service, Pacific Southwest Research Station” (1994).
19	Ecology Water Quality Assessment Listing ID 6206, https://apps.ecology.wa.gov/approvedwqa/ApprovedPages/ViewApprovedListing.aspx?LISTING_ID=6206 (last visited Nov. 9, 2020).
20	Aspect Consulting Inc., 2011 Swale Creek Subbasin Water Level Monitoring Summary, WRIA 30 (June 29, 2011).

21	Watershed Professionals Network, LLC and Aspect Consulting Inc., <i>Swale Creek Water Temperature Study</i> (Sept. 2004).
22	Aspect Consulting, <i>Riparian Vegetation Assessment, Little Klickitat River and Swale Creek</i> (June 30, 2009).