

**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

Washington Environmental Council

Friends of the White Salmon

September 30, 2022



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Submitted electronically via: <https://sea.ecology.commentinput.com/?id=TGYKh>

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

Dear Department of Ecology:

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 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.

Columbia Riverkeeper, the Washington State Chapter of the Sierra Club, the Washington Environmental Council, and Friends of the White Salmon (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 requirements and other requirements of state law. Commenters incorporate by reference our previous comments on Rye’s 401 Certification request (dated November, 9, 2020), and all the attached documents.

Factual Background

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.

While located in Klickitat County, Washington, near the John Day Dam, the Project includes transmission facilities extending into Sherman County, Oregon. The Project would occupy 18.1 acres of land with a portion of the Project within an existing transmission right-of-way owned by the U.S. Army Corps of Engineers and administered by Bonneville Power Administration. The Project includes an off-stream, pumped-storage complex with: (1) a 61-acre upper reservoir formed by a 175-foot-high, 8,000-foot-long rockfill embankment dam at an elevation of 2,950 feet mean sea level (MSL) with a vertical concrete intake-outlet structure; and (2) a 63-acre lower reservoir formed by a 205-foot-high, 6,100-foot-long embankment at an elevation of 590 feet MSL with a horizontal concrete intake-outlet structure and vertical steel slide gates. *See* Scoping Document at 6.

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), now a Resource Conservation and Recovery Act contaminated site, which includes 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 14.¹

¹ The numbers in Rye’s FLA are higher than those in FERC’s Scoping Document, which read: “The initial fill would require 7,640 acre-feet of water and would be completed in about six months at an average flow rate of approximately 21 cubic feet per second (cfs) (maximum flow rate available is 35 cfs). It is estimated that the project would need 360 acre-feet of water each year to replenish water lost through evaporation.” Scoping Document 1 for the Goldendale Pumped Storage Project, FERC Project No. P-14861-002, at 7 (Oct. 29, 2020).

Legal Background

Under Section 401(a) of the CWA, any applicant for a Federal license or permit to conduct any activity that may result in a discharge to navigable waters in Washington must obtain a certification from Ecology stating that the discharge from the proposed action will comply with the requirements of the CWA. *See* 33 U.S.C. § 1341.

Before Ecology may certify the Project, it must have reasonable assurance that the Project as proposed will meet applicable water quality standards and other appropriate requirements of state law. The applicant must carry the burden of persuasion and the burden of proof in this review. As a result, the applicant must not only demonstrate that the activity will comply with water quality requirements, but it must also provide Ecology with adequate information supporting that position. Stated another way, Ecology must work from the presumption that the activity is not consistent with state water quality standards and other requirements of state law, and must require the applicant to prove otherwise and support its conclusion.

Under the statute, Ecology must consider the potential water quality impacts of the proposed project as a whole in its 401 certification analysis, not just the significant effects of the discharge itself. *PUD No. 1 of Jefferson County v. Washington Department of Ecology*, 511 U.S. 700, 712 (1994); 40 C.F.R. § 121.2(a)(3) (requiring the state to find “a reasonable assurance that the activity will be conducted in a manner which will not violate applicable water quality standards”).

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.

RCW 90.48.010. To these ends, 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). Water quality standards include three elements: (1) one or more designated “uses” of a waterway; (2) numeric and narrative “criteria” specifying the water quality

conditions, such as maximum amounts of toxic pollutants, maximum temperature levels, and the like, that are necessary to protect the designated uses; and (3) an antidegradation policy that ensures that uses dating to 1975 are protected and high quality waters will be maintained and protected. 33 U.S.C. §§ 1313(c)(2), 1313(d)(4)(B); 40 C.F.R. Part 131, Subpart B. Compliance with water quality standards requires protection of all three of these components.

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 promulgating 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.

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 Project area is within ceded Yakama Nation land and the area has historically been used by the Yakama Nation, Confederated Tribes of the Umatilla Indian Reservation (CTUIR), the Confederated Bands of the Warm Springs Reservation of Oregon (Warm Springs), and the Nez Perce Tribe for hunting, traditional gathering, fishing, camping, and traditional ceremonies. As a result, there is a dense concentration of archaeological sites in the area. Ecology's Draft Environmental Impact Statement (DEIS) states that, according to the Department of Archaeology and Historic Preservation, 79% of the study area is within high risk or very high risk areas for the possibility of encountering archaeological sites. (DAHP (Department of Archaeology and Historic Preservation), 2022a. Probability of Encountering Archaeological Resources within the Goldendale Energy Storage Project Area. Map Authors: A. Hsu, M. McLemore. March 22, 2022.)

The Yakama Nation has identified two TCPs in the area; *Pushpum* and *Nch'ima*. Warm Springs supports the Yakama Nation on the significance of these TCPs. *Pushpum* is the location of ongoing harvests of traditional resources and of ceremonies and other traditions. *Nch'ima* is a traditional fishing ground and village site. CTUIR identified two TCPs: one is *Pushpum* and the other is confidential to non-Tribal members. CTUIR has indicated that they have used the other

TCP area for traditional activities since time immemorial. The Nez Perce Tribe provided documentation to Ecology demonstrating a similar evaluation of the importance of traditional gathering and ritual activities in the Project area. Warm Springs supports the Nez Perce Tribe on the significance of these TCPs.

Beyond the archeological sites and TCPs, First Foods are also abundantly present in the Project area. Plants and root gathering in the Project area is an essential cultural practice. Yakama Nation describes,

The plants that survive at Push-pum uniquely provide Yakama people with important medicines and nourishment. Push-pum is known to the Yakama as “the mother of roots” and the culturally significant plants found here are endemic to this region. This is a resource that cannot be replaced because Push-pum is the natural seed bank for these plant resources.

Yakama Nation Comments on Ecology’s Draft Environmental Impact Statement at 5, Aug. 9, 2022 (hereinafter “Yakama Nation DEIS Comments”). Ecology has documented smooth desert parsley, biscuitroot, and serviceberry as some of the important plant species in the area. Yakama Nation elaborates

These plant resources include buckwheats, balsam roots, lomatiums, yarrow, sumac, lupin, dogbane, rose, onion, thistle, serviceberry, sagebrush, junipers, and many others. These plants and combinations of them are used by Yakama People to treat illness in the body and spirit. These plants have served for thousands of years as poultice, tea, bandages, pacifiers, drums, needles, rope, nets, and food. They are important to traditional ceremonies and religious practices.

Yakama Nation DEIS Comments at 5. Culturally significant animal species are also present in the area. Several aquatic species such as salmon, trout, and lamprey are present in the area, as are deer, elk, porcupines, waterfowl, birds, raptors and other small mammals.

In consulting with impacted Tribes, Ecology must also understand and acknowledge the ongoing inadequacy with consultation, at the federal level. “The Yakama Nation defines effective consultation to be a process that is agreed upon by Yakama Nation Tribal Council as the governing body of a sovereign tribal entity.” Yakama Nation DEIS Comments at 10. To date this level of consultation has not happened for this Project. FERC delegated consultation responsibility to Rye, a private company, and Rye hired an outside private consultant, who has repeatedly asked for information and knowledge that the Tribe cannot and will not share regarding cultural resources and practices. This is unacceptable. The exploitation, destruction, and theft of Tribal cultural and religious resources requires the specific location and details to be shared privately in the consultation process and not made publicly accessible in order to protect these resources. *See generally*, Kathleen Sharp, *An Exclusive Look at the Greatest Haul of Native American Artifacts, Ever*, Smithsonian Magazine (Nov. 2015) <https://www.smithsonianmag.com/history/exclusive-greatest-haul-native-american-artifacts-looted-180956959/> (last visited Aug. 8, 2022) (Describing the largest artifacts sting operation in 2009

that arrested 32 and recovered hundreds of thousands of Native American artifacts that had been illegally stolen and unearthed, violating the federal Archaeological Resources Protection Act and the Native American Graves Protection and Repatriation Act, among other laws.) (Exhibit 1). Furthermore,

The regulatory body for the full Project application, FERC, has a federal trust responsibility to the Yakama Nation. These elements of the government-to-government consultative process cannot be delegated to the Project applicant over the Yakama Nation's objections. If FERC cannot consult with the Yakama Nation adequately, they need to provide solutions on how to receive the information they need rather than putting a burden on the Tribe and requiring the Tribe to share this sensitive information publicly.

Yakama Nation DEIS Comments at 10. President Biden's January 26, 2021 memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, "charges all executive departments and agencies with engaging in regular, meaningful, and robust consultation with Tribal officials in the development of Federal policies that have Tribal implications." FERC has not complied with this memorandum and needs to engage in meaningful consultation with the Tribe. Handing off the consultation responsibility to an outside private consultant is insulting to tribal sovereignty and threatens sensitive cultural resources. Ecology must acknowledge the ongoing failure of FERC to meet these important consultation obligations and should assess the impact these ongoing failures may have on the Tribes and the Project.

Ecology Failed to Provide the Public with a Meaningful Opportunity to Comment on a Complete Application

The process for the public notice and comment has been fundamentally flawed from the beginning. When Ecology first provided public notice of this new certification application, it failed to release all of the applicant materials. This forced the public, including Commenters, to point this shortcoming out to the agency and request additional time to review the limited information that was available. In response, Ecology initially suggested to at least one party that a public records request was necessary to receive the complete set of application materials. This cannot be the case. Ecology is required to provide public notice of any 401 Certification application and allow time for the public to comment on the application. WAC 173-225-030. Inherent in that mandate is the requirement that the public have access to all of the information in and supporting the application. Ecology cannot reasonably expect each person interested in a particular project to submit a public records request for that information. Nor presumably would Ecology want to process those requests. Going forward Ecology must, as a matter of course, make publicly available any application, all of the materials supporting the application, and any other information Ecology has that will aid the public in commenting on the proposed project.

Ecology eventually did make public the attachments Rye submitted in support of its application. However, Ecology violated the letter and intent of its implementing regulations by failing to provide the public with adequate notice and time to comment. First, after the close of business on September 12, 2022, Ecology circulated an email indicating that it had placed the application materials on a publicly accessible website. In addition, while it appears that Ecology updated the Public Notice on its Aquatics Public Viewer website, it did not include this information as part of the Application available on that site. This could lead to continued confusion among the interested public trying to comment on this project. Ecology must, going forward, ensure that this type of information is readily available and easily accessible for all interested parties.

Second, by failing to provide this information earlier, Ecology has effectively shortened the public comment period to 18 days. Ecology's regulations state that "any person desiring to present views on the application in relation to water pollution control considerations shall do so by providing the same in writing to the regional office of the department of ecology identified in the notice of application within 20 days after notice of the application was last published or such longer period of time as the director may determine. . . ." WAC 173-225-030(2). Under this rule, Ecology must hold open the comment period for no less than 20 days, regardless of its authority to specifically identify the date by which comments are due. *See id.* Here, in fact, given the nature and complexity of this Project, and the significant impacts the proposed project will have on a variety of important resources and areas, Ecology should have allowed additional time, beyond the minimum twenty days, not less.

Finally, notwithstanding all of the attention this process has brought to the application and the supporting materials, the application remains incomplete. For example, Rye's materials do not include the required Tier II Antidegradation Review analysis and materials addressing the impacts to the Columbia River. As such, 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.

Ecology Cannot Certify The Project Complies With Water Quality Standards

Ecology cannot certify that 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.² Second, the Project will create two, enormous reservoirs that, due to Rye's operations, will concentrate pollutants and violate

² Commenters request that Ecology verify Rye's conclusions on the federal and state jurisdiction of waters impacted by the Project.

state water quality standards and potentially impact groundwater. Third, the Project will consume large quantities of 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), <https://www.epa.gov/sites/default/files/2017-10/documents/wawqs-letter-05022007.pdf>. (Exhibit 2).

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. *Ecology must reopen the comment period after publicly releasing the complete application.*

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, Warm Springs 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).*

- **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 3)*; USFWS Comment to FERC (Mar. 3, 2020), *In FERC Docket No. 1486 (Exhibit 4)*. In 2022, WDFW reiterated concerns that the construction of reservoirs may attract birds to the Project area and increase the likelihood of mortality events. WDFW Preliminary Recommendations For Terms and Conditions For The Goldendale Energy Storage Project, FERC Project No. 14861 (Exhibit 5). WDFW further requested surveying the Project area for the Dalles Sideband Snail and Juniper Hairstreak Butterfly, two species brought to WDFW’s attention as inhabiting the area. *See Id.* 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 FEA Appendix D at 2.*

- **Other Economic Effects:** As discussed below, there is substantial evidence that the proposed project may not be economically viable. Ecology must carefully examine the economic analysis and justifications for this project and assess its long term viability. Ecology must account for the very real possibility that the project will not operate as intended, for as long as intended, when considering the speculative value of the project against the known, unavoidable impacts.

In addition, 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 7). 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, (3) the need for the Project a decade or more in the future given the rapidly-changing and dynamic nature of energy markets, and (4) future hydro changes due to climate change.

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 8). 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 9).

Similarly, the National Marine Fisheries Services (NMFS), in turn, has identified the Project's impacts to water quality, stating

The proposed Project is a 'closed-loop' system, with one major initial water fill and periodic make-up refills to account for evaporative and seepage losses. With this design, resident reservoir water will likely concentrate nutrients and solids over time. Additionally, water will warm more quickly in the Project reservoirs compared to the adjacent flowing Columbia River. This measure is necessary to prevent the degradation of salmonid habitats through the discharge of warm, nutrient-rich water into the Columbia River.

Letter from National Marine Fisheries Services to FERC, at 16 (May 23, 2022), *In* FERC Docket No. 1461 (Exhibit 10). As a result, NMFS recommended terms and conditions to FERC for effluent flow, which included

The licensee should not release effluent discharge into the Columbia River at any point during Project construction or operation. Though the Applicant states this intent in Section 2.2.3 of the Final License Application, NMFS requests that FERC include this term as an explicit license condition. If not possible, NMFS requests consultation to ensure water quality standards are met if releasing recycled water back to the Columbia River and into the critical habitat of ESA-listed salmonids becomes necessary over time.

Id. In short, Rye's application fails to demonstrate that the "discharges" and broader "activities" comply with water quality standards.

- 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 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. Permanently destroying large segments of 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, Rye's application does not demonstrate that destroying large sections of these 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. 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.

Exhibit 9, Attachment A at 4. Ecology must evaluate if Rye has developed the requested study and, if not, request that Rye complete the USFWS-requested water quality analysis.

In addition, Ecology must further analyze the potential slope failure at the Project construction site and the impacts this failure could have on the water quality of the Columbia. Yakama Nation raised these concerns

Geologic mapping conducted by Phillips and Walsh (1987) shows evidence of a past landslide(s) adjacent to the proposed project. The project occurs within an area further patterned by faulting along the boundary of the proposed project footprint. Please discuss the potential for slope failure through a formal slope susceptibility study that includes the DEIS impacts in sections 4.1, 4.8, and 4.9. Specifically, there are factors involved in the Project construction and implementation phases that should be considered in terms of how they affect slope susceptibility. Activities such as excavation, drilling, boring, and blasting for underground infrastructure along the oversteepened, horizontally bedded, and tilted strata created enhanced risks to environmental and cultural resources.

Yakama Nation DEIS Comments at 6, *See also* William M. Phillips and Timothy J. Walsh, Geologic Map of the Northwest Part of the Goldendale Quadrangle, Washington, Washington Division of Geology and Earth Resources, Open File Report 87-13 (Nov. 1987) (Exhibit 11). Ecology must complete this request as any potential for slope failure may result in impacts to water quality in the Columbia.

- 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) (Exhibit 12). 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.

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. 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 3 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.”).

The Project will likely impact a variety of fish species. The Columbia River, near the Project, provides habitat for numerous species including, but not limited to, chinook (*Oncorhynchus tshawytscha*), coho (*Oncorhynchus kisutch*), and sockeye salmon (*Oncorhynchus nerka*), steelhead (*Oncorhynchus mykiss*), Pacific lamprey (*Entosphenus tridentata*), river lamprey (*Lampetra ayresi*), American shad (*Alosa sapidissima*), white sturgeon (*Acipenser transmontanus*), bluegill, black crappie (*Pomoxis nigromaculatus*), largemouth bass, smallmouth bass, pumpkinseed (*Lepomis gibbosus*), walleye, white crappie (*Pomoxis annularis*), and yellow perch. Rye intends to purchase the water supply used to initially fill the reservoir, and any necessary make-up water for the project, from Klickitat Public Utility District (KPUD), which collects its water from an existing intake pond on the Columbia River. Rye and KPUD have offered several inconsistent and conflicting descriptions of the current intake and whether KPUD will install a fish screen that meets NMFS' criteria. As both FWS and WDFW have noted the current intake does not meet NMFS' criteria and the design likely is not sufficient to ensure native fish are not entrained or impinged at the facility. See U.S. Department of Interior Comment on Federal Energy Regulatory Commission's Notice of Application Ready for Environmental Analysis for the Goldendale Energy Storage Project, FERC No. 14861-002, Klickitat County, Washington, and Sherman County, Oregon (May 23, 2022) at 6 (Exhibit 13); Exhibit 5 at 8-9. Given the direct and indirect significant impacts the initial withdrawal and subsequent makeup withdrawals may have on Columbia River fish species, some of which are critically imperiled, Ecology must deny the 401 Certification.

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.

Exhibit 3. 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), *See also* Exhibit 5, (detailing additional information and studies needed for the mitigation plan.). 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.

Exhibit 3. In recent comments, WDFW continues to raise concerns and recommendations for the Wildlife Management Plan, including, the creation of a Bird and Bat Reservoir Deterrent Management Plan (BBDMP), stating

The objective of the BBDMP is a no net increase of birds and bats in the upper and lower reservoir areas for the time period prior to reservoir construction compared to post construction. The plan shall, in addition to measures currently

included in the WMP and FLA, include, but not be limited to the following elements: measures to deter birds and bat from using the reservoir and monitoring of bird and bat use of the reservoirs before and after deploying deterrents. Deterrent methods include shade balls and acoustic bat deterrents, other deterrent methods may also be considered. Acoustic monitoring shall be used year-round to monitor bat species and when they use the reservoir areas. Point count surveys shall be used to monitor bird species and when they use the reservoirs.

Exhibit 5. Furthermore, WDFW states that while Rye is

[W]orking with USFWS and WDFW to select an off-site property for compensatory mitigation of impacted wildlife habitat (i.e., golden eagle)... the mitigation land has not yet been purchased; therefore, the habitat quality of the land to be purchased is unknown. A management plan is needed to ensure the compensatory mitigation land habitat is maintained at equal or better quality than the habitat that was altered by the construction and operation of the Project to mitigate for Project impacts.

Exhibit 5. Thus, 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.

Finally, Ecology must consider the impact the Project will have on the aesthetic and visual qualities of the region. “Visual quality, or aesthetics, refers to natural and human landscapes and how people see them. Visual quality is the value that people place on observing their surrounding environment.” DEIS at 171. As Ecology noted in its DEIS “[t]here would also be impacts to Tribes from the view changes.” *Id.* Indeed, in an interview discussing the Goldendale project and other sacred sites that have been under threat, Jerry Meninick, Yakama Nation's deputy director of culture, stated “In this place... the slightest noise – voices from nearby hikers, feet crunching up a trail – would disturb the “pristine atmosphere.” (when referring to Laliik or Rattlesnake Mountain). Courtney Flatt, *It's Irreversible: Goldendale Green Energy Project Highlights a History of Native Dispossession*, NWPB (Apr. 2, 2021) (Exhibit 14).³ If slight noises are enough to disturb the atmosphere of another highly sacred site, construction and operation of the Northwest's largest pump storage project would significantly impact how Native people see this area.

³<https://www.nwpb.org/2021/04/02/its-irreversible-goldendale-green-energy-project-highlights-a-history-of-native-dispossession/> (last visited Sep. 30, 2022).

Meninick went on to compare the sacred site of Laliik to Notre Dame, “The whole world is in pain right now and in sorrow because of a fire (at Notre Dame). How do you think we feel? Because this, too, is like that church to us.” *Id.* No one would think to ignore the aesthetic/visual quality of Notre Dame, so why is it so easy to do so here? Ecology must consider the aesthetic/visual impacts of the Project on Tribal Nations and Native people.

Ecology Cannot Certify That The Project Will Comply With The 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).

Here, Ecology’s DEIS concluded that there are serious adverse impacts to the environment that cannot be mitigated. This conclusion emphatically supports the denial of this Project’s 401 certification. On August 9, 2022, Commenters submitted detailed comments on the DEIS, which are incorporated herein by reference, and point out deficiencies in the DEIS that must be included in any final environmental impact statement. These deficiencies include failure to:

1. Include a discussion of reasonable project alternatives;
2. Discuss on-site design alternatives;
3. Acknowledge that the Project would permanently destroy large segments of unique waterbodies, including “waters of the United States” and “waters of the state” in the scenic Columbia Hills;
4. Acknowledge, much less address, the potential impacts to fish species from this project;
5. Conclude that the Project will have significant impacts on terrestrial species and their habitats;
6. Find significant adverse impacts to aesthetics/visual quality because Ecology excluded all aesthetics/visual quality impacts to Tribes and Native people, instead relegating these impacts to the cultural resources section of the DEIS;
7. Consider the uncertainty around the viability of this Project.
8. Perhaps most concerning, the DEIS found that there would be no significant and unavoidable adverse effects related to environmental justice and that there would be no disproportionate impact on communities of color or low-income populations, and therefore no mitigation is required. This conclusion is false. The Final EIS must analyze how the project’s construction and cultural resource destruction, cumulatively impacts the Yakama Nation, CTUIR, Nez Perce, and Warm Springs and must look at these impacts in conjunction with and through the lens of government sanctioned cultural genocide that has impacted these Tribes and threatened their life ways. Ecology’s environmental analysis must not and cannot take the Project’s destruction of archaeological and cultural resources out of the context of history, otherwise the cumulative and future impacts of the Project will evade analysis.

However, even if the Final EIS does not incorporate Commenters concerns, the DEIS concluded that **the proposed Project would result in significant and unavoidable adverse impacts related to Tribal and cultural resources, starting during construction and continuing**

through operation of the Project. The DEIS further states **that they have not received information about mitigation proposed or supported by the Tribes that would reduce the level of impact.** Instead, the Yakama Nation has stated that the proposed action will have significant impacts, many of which cannot be avoided or mitigated. The Yakama Nation specifically said, “The damage to the Yakama Nation’s cultural resources and the local aquatic and terrestrial resources disproportionately injures the heritage and traditional practices of Yakama people because mitigation cannot replace the destruction of ancestral sites that are still used to observe ceremonial and cultural practices.” DEIS at 164-165. To put it even clearer, the Yakama Nation stated in their DEIS comments, “The Yakama Nation is opposed to the Project and no mitigation can replace this resource or the impacts of the project.” Yakama Nation DEIS Comments at 11. On September 25, 2022, the Seattle Times published an op ed co-authored by Yakama Nation Council Member Jeremey Takala and Columbia Riverkeeper Executive Director, Lauren Goldberg which stated in part

The climate crisis does not absolve our moral and ethical responsibilities. Both tribal nations and environmental organizations have worked tirelessly to stop fossil fuel developments and secure monumental climate legislation in the Pacific Northwest. But we refuse to support a sacrifice zone to destroy Native American cultural and sacred sites in the name of combating climate change.

“Stop sacrificing Indigenous sacred sites in the name of climate change” Seattle Times (Sep. 25, 2022)

<https://www.seattletimes.com/opinion/stop-sacrificing-indigenous-sacred-sites-in-the-name-of-climate-change/> (Exhibit 15). The DEIS conclusion that there are significant unavoidable impacts to tribal cultural resources and Yakama Nation’s clear and unequivocal statement that no mitigation by the Developer could reduce this means that this Project cannot move forward. Ecology must deny this Project’s 401 application because of environmental harm.

CONCLUSION

Commenters respectfully request that Ecology deny Rye’s request for a CWA 401 certification. Rye filed an 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. In addition, because of the significant impacts, which cannot be avoided or mitigated, on tribal cultural resources and areas, Ecology must deny this certification.

Sincerely,

A handwritten signature in blue ink, appearing to read "Sik", is located at the bottom left of the page.

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