



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

September 30, 2022

FILED ELECTRONICALLY

Sage Park, Regional Office Director
Washington Department of Ecology
Central Region Office
Attn: Goldendale Energy DEIS
1250 W. Alder Street
Union Gap, WA 98903-0009

RE: YAKAMA NATION COMMENTS ON WATER QUALITY CERTIFICATION APPLICATION FOR
PROPOSED GOLDENDALE ENERGY STORAGE PROJECT (FERC P-14861-002).

Dear Regional Director Park,

Included herein are comments on behalf of the Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”) on the Application for State of Washington Section 401 Water Quality Certification (“WQC”), Aquatics ID No. 139382, issued by the Washington Department of Ecology (“Ecology”), on August 15, 2022. This letter preserves, incorporates, and reasserts the Yakama Nation’s concerns regarding the Project made known to Ecology, the Federal Energy Regulatory Commission (“FERC”), and the Free Flow Power Project 101, LLC (“Project Applicant(s)” or “FFP”) through previous communications.¹ This letter further agrees with and incorporates corresponding comments submitted by the Columbia Riverkeeper on the WQC. The Yakama Nation opposes FFP’s proposed construction of the Northwest’s largest pumped storage hydroelectric project along the Columbia River in Klickitat County, Washington (“Project”). The Yakama Nation urges Ecology to deny this WQC under Ecology’s delegated authority to determine that this Project’s destruction of the aquatic and cultural environment, which are linked in Yakama law and tradition, cannot be mitigated, avoided, or reversed.

¹ See Exhibit A – Attached prior comments and correspondence from the Yakama Nation.

I. Background.

The 1855 Treaty between the United States and the Yakamas (“Treaty”) reserved a 1.3 million acre Reservation “for the exclusive use and benefit” of the Yakama people.² The Treaty expressly reserves rights for Yakamas to exercise “in common with” citizens of the United States at all usual and accustomed places within the Treaty Territory.³ A federal treaty is considered the supreme Law of the Land under the U.S. Constitution.⁴ Pursuant to its status as a sovereign Native Nation and its Treaty-reserved authority, Yakama Nation acts as a Co-Manager of the Columbia River fishery, which has also been recognized by federal courts,⁵ for the protection of all natural and cultural resources in Yakama Nation’s Treaty Territory. The Yakama Nation Treaty Territory encompasses usual and accustomed fishing sites, root and berry grounds, cultural areas, and ceremonial locations from the mouth of the Columbia River upstream north of the 49th parallel.

The Yakama Nation’s enrolled membership exceeds 11,000 people whose history, culture, and way of life are intertwined with Nch'i Wa'na (the Columbia River), and its host of salmon, fish, root plants, natural medicines, and animals. Protecting the land adjacent to and the waters of the Columbia River is critical for ensuring the Yakama Nation’s Treaty-reserved resources and rights, and ultimately to the health and welfare of the Yakama people.

The Yakama Nation has been ‘sounding the alarm’ about the irreversibly destructive impacts from this type of Project development at Juniper Point, known to Yakama People through legendary stories as *Push-pum*. The Yakama Nation has consistently opposed this Project since it was proposed and voiced similar objections to prior development proposals at this location due to the numerous natural and cultural resources that are incompatible with industrial-scale development.

Only the Yakama Nation can determine what is a Traditional Cultural Property (“TCP”) based upon extensive working knowledge of the Treaty Territory. The TCP’s at the Project location have been geographically-connected to the water, plants, fish, and birds as part of the Yakama way of life for millennia, which can never be replaced after development. The streams and aquatic resources at Juniper Point contribute to a natural environment where TCP’s developed over thousands of years as integrated pieces to the Columbia Hills archaeological district. The Yakama Nation’s law and policy preserves, protects, and perpetuates significant natural and cultural resources like those at *Push-pum*.

² See Treaty with the Yakamas, U.S. – Yakama Nation, June 9, 1855, 12 Stat. 951, art. II, cl. 3.

³ See *Id.* at art. III, cl. 2.

⁴ See U.S. Const. art. VI, cl. 2.

⁵ See *United States v. Washington*, 384 F. Supp. 312, 382 (W.D. Wash. 1974), *aff’d*, 520 F.2d 676 (9th Cir. 1975); see also *U.S. v. State of Oregon*, 666 F.Supp. 1461 (D. Or. 1987).

II. Project Description.

The Project is primarily located in Klickitat County, Washington on the north side of the Columbia River. The Project aerially spans the Columbia River into Oregon and contains an area in Sherman County where the transmission line will be located. The Project facilities include: *a.* an upper reservoir consisting of a rock fill embankment dam approximately 175 feet high, 8,000 feet long, a surface area of about 61 acres, storage of 7,100 acre-feet, at an elevation of 2,940 feet above mean sea level; *b.* a lower reservoir consisting of an embankment approximately 205 feet high, 6,100 feet long, a surface area of about 63 acres, storage of 7,100 acre feet, and an elevation of 590 average mean sea level; and *c.* an underground water conveyance tunnel and underground powerhouse and 23-kilovolt transmission line(s). The rated (average) gross head of the Project is 2,400 feet, and the rated total installed capacity is 1,200 megawatts.

The large quantities of water needed for the Project will be leased from Public Utility District No. 1 of Klickitat County (“KPUD”), who owns an existing water right and conveyance system adjacent to the proposed Project. The Project’s lower reservoir area is located on lands that previously housed the Columbia Gorge Aluminum (“CGA”) smelter. Soil and groundwater contamination resulting from operations at the CGA smelter remain in the Project area. It is estimated that the Project would need 360 acre-feet of water each year to replenish water lost through evaporation and seepage.

III. Direct Project Impacts to Yakama Nation Treaty Resources.

i. Traditional Cultural Properties

The Yakama Nation’s TCPs at *Push-pum* include a legendary site and documented National Register of Historic Places-eligible (“NRHP”) archaeological resources. The Yakama Nation is resolute in protecting this culturally significant site for its people – these legendary resources will be destroyed through initial construction and ongoing operation of this proposed Project. The Yakama Nation agrees with the Ecology’s Draft Environmental Impact Statement determination that this Project will cause significant and unavoidable adverse impacts.

Yakama ancestors provide oral teachings that tell stories of our people and this land. Yakama teachings instruct us on the value of the resources that have lived on this land for thousands of years in a state of balance. Yakamas who lived with the land also practiced our religion and respected the landforms that have provided resources for sustenance and livelihood. The encroachment of energy development threatens to destroy this Yakama way of life today.

The Yakama teachings describe the connectivity between all life – the water, land and air, and sun that watches over all things. All living animals show interconnectivity and care by providing food, tools, and clothing. Some animals serve as protectors, providing warnings from danger, or provide guidance through Yakama teachings. Our identity as Yakama People is intrinsically interwoven into the cultural resources in the Treaty Territory. 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. These plant resources include buckwheats, balsamroots, 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.

All the birds have a purpose and sacredness about them in Yakama beliefs. The birds carry messages to the Creator and the presence of feathers can be seen as interpretations of great spiritual significance. Raptors have unique significance where every bone and feather have a purpose and traditional use. Yakamas use every bone, feather, beak, and talon. Eagle remains are sacred and are ceremonially gifted for both spiritual purposes and as a great honor and achievement in a person’s life.

Juniper Point is associated with several Yakama TCPs that each tell stories and provide geophysical references for passing knowledge on to future generations. These teachings pertain to traditional foods and medicine, legendary events, legendary figures, and important teachings. Standing on Juniper Point, the viewshed includes other sacred sites that provide teachings and cultural orientation to the traditional cultural landscape (now Washington and Oregon). This view is expansive and focuses on the legendary aspects of the mountains and their connectivity. Destruction of this viewshed also damages the geographically specific TCPs at the Project site.

The Project threatens all of these TCPs of legendary cultural importance to the Yakama Nation. The Project would result in visual and aesthetic impacts on the landscape in connection with the impacts on TCPs. This Project would permanently damage or destroy nine culturally significant sites. There is no mitigation that can replace the destruction of Yakama ancestral sites still used today to observe ceremonial and cultural practices.

a. Unacceptable Limits On Cultural Use And Access.

The Project development would impede and disrupt on-going root and plant gathering access by Yakama members.⁶ Yakama members regularly benefit from the roots and medicines growing within the Project area as individuals who exercise Treaty-rights to gather, and to practice religious and cultural ceremonies at all usual and accustomed areas. The Programmatic Agreement preserves and recognizes the critical archaeological and cultural resources within the Project site.

The Yakama Nation is aware of a declaration made by a private Project proponent and land owner asserting that no tribal members or groups have requested site access since

⁶ See Exhibit A – Programmatic Agreement Among The Bonneville Power Administration, The Washington State Historic Preservation Officer, And The Advisory Council On Historic Preservation (May 1997).

2007. Regardless of the basis or accuracy of such Project proponents' statements, the Yakama Nation's historical and future Treaty-reserved right to gather at usual and accustomed root grounds, protect the streams in the Columbia River basin, and exercise religious and cultural teachings remain unchanged since the time that Yakama Treaty-signers met at the Walla Walla conference in 1855 and that Treaty was ratified by the United States government.

ii. Aquatic Resources.

Calling the Project, a "closed-loop" system is disingenuous and misleading. Approximately 2.93 million gallons of water will be drawn from Columbia River to fill the Project's two reservoirs. The Columbia River fishery already suffers from the negative impacts of over-allocated water resources. Salmonids and other aquatic species require stable water quantity, quality, and temperature for survival.

Effects of construction of the upper reservoir on waterbodies would result in degradation of ecological function of the aquatic habitat, including native animal and plant diversity in the riparian areas, water temperature regulation, erosion control, water infiltration, and organic inputs to the aquatic food web. Impacts to these waterbodies would reduce wetland functions and aquatic habitat and result in degradation of ecological functions in downstream waters. Further, the excavation and backfilling in streams, ponds, and wetlands may cause mortality, injury, or disturbance to the normal behavior of amphibians or turtles using these habitats.

The Project's upper reservoir will impact or destroy several ephemeral waterbodies, including 1,985 linear feet of two intermittent streams. Those impacted streams connect to perennial streams downstream of the Project area and therefore must be studied and regulated as part of the cumulative negative Project impact.

Impacted streams connect to Swale Creek, approximately two miles north of the Project area. Swale Creek is a perennial tributary of the Klickitat River, which is integral to the Yakama Nation's fishing and co-management of the Columbia River basin. Furthermore, state law protects the ephemeral or seasonal waterbodies injured by this Project, which provide a critical source of seasonal water for many plant and animal species living in this dry climate and relying on seasonal water. Ephemeral or seasonal waterbodies also slow surface water and stormwater runoff reducing erosion and flood impacts and allow for water to infiltrate to replenish groundwater. The loss of all these streams and waterways negatively impact the active and contemporary fishing, hunting, and gathering activities of Yakama Nation members.

a. Negative Impacts to Surface Water and Groundwater.

The proposed water quality monitoring plan does not clarify how water quality in the reservoirs will be maintained to meet Washington State water quality standards necessary for the protection of aquatic and terrestrial resources. Additionally, the FERC License application suggests that the Project proponent is expecting leakage from the reservoirs. Leakage implies that water from the reservoirs may enter surface water bodies or infiltrate to groundwater which may compromise water quality in existing streams and

wetlands and groundwater. It is unclear what actions will be implemented in the event reservoir waters do not meet Washington State water quality standards and result in contamination of surrounding streams and wetlands.

The reservoirs will negatively impact groundwater benefits from precipitation infiltration. The precipitation infiltration will be reduced due to rainwater intercepted within the reservoir footprints. This will alter the surface water hydrology, particularly adjacent to the Columbia River, and negatively impact downgradient wetlands. Alteration of surface water hydrology will negatively impact existing wetlands A, B, C, and D and Spring 6 during times of drier conditions and cause loss of function, habitat loss, and potential mortality to amphibians, turtles, and other wetland species. The WQC needs to require a better description of how capture of precipitation will impact surface water hydrology.

The WQC needs to consider how a breach of either of the reservoirs' large above-grade embankments (175 feet high for upper reservoir, 205 feet high for lower reservoir) would release water down the outer face of the embankment. For low rates of discharge, water would infiltrate to shallow groundwater, and for higher rates of discharges that overwhelm the surrounding soils' infiltration capacity, the runoff would be stormwater. The reservoir water quality is expected to degrade over time and the discharge of water from a breached embankment could adversely impact the quality of groundwater and wetlands downstream of the breach location.

In the area surrounding the upper reservoir, shallow and disconnected groundwater conditions mean that any breach is less likely to result in a significant adverse impact to water quality. But, in the area surrounding the lower reservoir, the existing groundwater is contaminated. Therefore, in the event of a low-volume discharge from a breach of the lower reservoir, the primary impact would be temporarily altered flow direction of the existing contaminated groundwater, potentially toward the Columbia River. A higher-volume discharge from a larger breach of the reservoir embankments would be expected to run off to adjacent intermittent stream channels, eventually flowing into Swale Creek from the upper reservoir area or the Columbia River from the lower reservoir area.

In either location, the degree of impact would depend on the rate of discharge entering a surface waterbody. High rates of breach discharge would scour and erode surface soils adjacent and downstream of the breach, delivering high levels of suspended solids (turbidity) to the receiving waters that, depending on specific conditions, could constitute a significant water quality impact to aquatic species. Depending on where in the lower reservoir embankment a large breach might occur, the erosion may entrain and transport contaminated surface soils associated with the historical smelter operations, which could result in significant temporary water quality impacts to aquatic species and long-term impacts to Columbia River sediments.

Additionally, it is unclear what the impacts will be if one or both reservoirs' earthen dams are damaged, breach or completely fail. Based on previous review of the FERC License application, it is Yakama Nation's understanding that the Project proponent will need to acquire a reservoir permit and water diversion permit from Ecology and may

require a dam safety review. To our knowledge this process has not started. As a result, it is unclear how the WQC could be granted without information related to these permits.

iii. Columbia Gorge Aluminum Smelter Cleanup

The Project's lower reservoir is located within the West Surface Impoundment ("WSI"), an area associated with the former Columbia Gorge Aluminum ("CGA") smelter. In 2016, FERC denied another project application primarily due to existing soil and groundwater contamination at the former CGA smelter site. FERC concluded that the CGA site should complete the cleanup before licensing a new development. Ecology should deny this WQC using the that same precedential reasoning and concern for reservoir contaminants due to the unfinished cleanup.

Project plans call for the pumped-water storage system's lower reservoir and conveyance piping to be filled once at the end of construction, and then periodic fills to recharge the system (i.e., make-up water) as needed to offset evaporative and leakage losses from the system. Leakage from the reservoir and conveyance tunnels would impact the existing West Spent Pot Liner ("SPL"), remaining contaminated soils, or contaminated soils/fill material used in embankments. Water contributing to this leakage would likely have degraded water quality and could adversely impact downgradient wetlands. The WQC needs to consider this contamination to surrounding waterbodies.

The Project anticipates dewatering will be required for construction and there is a potential for surface water to infiltrate into the tunnels as they are being constructed, which could drain wetlands and streams on the overlying surface. Water loss through infiltration may continue beyond the construction phase into the operations phase of the project and result in loss of wetlands, buffers, habitat, and plants and aquatic species. The WQC cannot be completed without further plans to ensure full removal of contaminated materials from the CGA and confirmation of groundwater monitoring. The FFP expects the CGA Potentially Liable Person ("PLPs") to conduct clean-up work at the lower reservoir site, but that work is incomplete. The WQC should be denied because there is no adequate plan for groundwater remediation in the groundwater plume in the vicinity of the WSI, SPL, and the Drainage Ditch. Additionally, significant erosion of contaminated materials left behind at the WSI, SPL, Plant Construction Landfill, or other parts of the site (if contaminated material have not been fully excavated and removed offsite) could transport contamination into the Columbia River. An adequate plan must include discussion of how groundwater remediation will occur in conjunction with removal of the soil contaminants and how that work and schedule will be coordinated.

The WQC must also consider the negative impacts of leakage from both reservoirs, and from the three tunnels, that would result in significant changes to the groundwater and/or causes the spread of contaminants in soil and groundwater in the vicinity of the WSI, SPL, or other areas at the CGA smelter site. Additionally, consideration must be given to the possibility of a catastrophic failure of either the upper or lower reservoirs that would impact contaminants at the CGA smelter site. Any plan that fails to line both reservoirs with an impermeable synthetic liner against failure or leakage should be denied.

iv. Plant and Animal Resources

Construction of the reservoirs will result in loss of terrestrial species and habitats, as well as lost habitat for plant species important to the Yakama Nation and hunting and gathering activities.

Combined, the two proposed reservoirs would result in over 120 acres of surface water body attraction to birds and bats which may result in more interactions with wildlife and an increase in birds and bats being wounded or killed by wind turbines. Additionally, these water bodies are expected to further alter laminar wind currents which are already influenced by existing wind farms. In its comment on the FERC Ready for Environmental Analysis, the U.S. Department of Interior identified that golden eagles are known to occur within the project boundary and in the project vicinity within the John Day Dam territory, with up to three historic golden eagle nest locations documented by Washington Department of Fish and Wildlife (“WDFW”) within the project area west of the proposed lower reservoir on the cliff face between the proposed reservoirs. Additionally, to the three historic golden eagle nest locations, there are four historic nest locations to the east of the project boundary and just below the access road.

Known golden eagle nest locations within the project boundary were surveyed by WDFW in June 2013, where they noted that one hunting adult was present with an unrepaired nest (WDFW 2014); surveys also occurred in 2014 and observations included one adult flying and the nest was unrepaired. Detailed analysis of home range use of a male golden eagle showed use largely within remaining open habitats including the proposed lower reservoir project area (WDFW 2015). The Project’s alteration of aquatic resources will likely increase golden eagle kills in the Project area and further harm related Yakama traditional and cultural activities.

v. Soils and Geology.

Geologic mapping conducted by Phillips and Walsh (1987) shows evidence of a past landslide(s) adjacent to the proposed project.⁷ The project occurs within an area further patterned by faulting along the boundary of the proposed project footprint. 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.

Project construction activities could moderately increase geologic and seismic hazards, including the potential for landslides. There is a concern that those landslides could cause damage or breach to the lower reservoir, the Columbia Riverbank, and/or the John Day Dam area. This impact to the adjacent river needs to be included in the WQC

⁷ See Exhibit B – 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).

analysis and the Applicant needs to provide a better understanding for the distribution of contaminants if they moved during a seismic event or landslide.

The WQC needs to further consider the consequences of a local or regional earthquake that could cause liquefaction in the vicinity of the lower reservoir, potentially resulting in damage to the reservoir embankment or other project elements. The Project could encounter multiple areas of instability in both the above- and below-ground portions of the site. Most of those areas are associated with uncertain conditions in the underlying basalt formation layers, particularly in those locations where faults cross the Project area and in locations where unconsolidated deposits occur. The WQC needs to include additional mitigation information that will address this potential failure.

vi. Climate Change.

Another area of water quality uncertainty is the magnitude of the future effects of climate change and how the changing climate will affect water availability in the Columbia River and supply to the reservoirs. Historic drought conditions and recent rapid declines in water levels are being observed in Lake Mead, Lake Powell, the Great Salt Lake, and other water resources in the Western United States. Current methods of assessing the impacts of climate change are likely no longer sufficient given that the United States has been unable to meet its greenhouse gas emissions reduction goals. Ecology must consider the known and future impacts of climate change in the Columbia River basin in the context that approximately 1.2 million gallons of water per year will be required from the Columbia River to offset the Project's evaporation and leakage losses.

vii. Expand WQC Assessment.

Ecology must ensure that the WQC assessment includes conditions related to the entire Project footprint and study area, which includes the Columbia River and its Oregon shore to ensure the entirety of the Project is in compliance with numeric and narrative state water quality standards, designated beneficial uses, and antidegradation policy. The materials provided for this WQC application have reduced the study area to only include a small fraction of the larger Project footprint and to only consider immediate construction related impacts and no impacts from forever altered land and natural processes. This splitting apart of the Project assessment fails to protect or consider overall impacts to water quality and habitat function in Study Area. It is imperative that the entirety of the Project footprint and future Project operation be evaluated and considered in this WQC review, including the Columbia River and non-jurisdictional waters of the U.S. that may have protections under Washington State law.

viii. Notice of Insufficient Consultation.

The Yakama Nation defines effective consultation to be a process that is agreed upon with the Yakama Nation Tribal Council as the governing body of a sovereign Native Nation. The regulatory body for the full Project application, FERC, has a federal trust responsibility to the Yakama Nation. Under Yakama law, no government-to-government consultative process can be delegated to a non-governmental project applicant or

consultant. This comment provides notice to Ecology that the Yakama Nation maintains an ongoing dispute with the FERC about inadequate consultation policies.⁸

The Washington Department of Archaeology and Historic Preservation notified the Project Applicant that mitigation measures are premature under the sequential process required by Section 106 and 36 CFR 800.⁹ As previously mentioned, Yakama Nation finds that this project cannot be mitigated and is opposed to the project due to the irreparable harm that it will cause to its people and future generations.

IV. Conclusion.

The Yakama Nation is opposed to the Project and no mitigation can replace this resource or the impacts of the project. The Project adds to the cumulative sacrifice zone that has burdened the Yakama Nation's resources for nearly a century for the advancement of energy development. Other energy infrastructure, including the hydro-electric dam system, the Hanford Nuclear Site, and many distinct utility-scale wind turbine and solar facilities have flooded, contaminated, or restricted access to traditional fishing sites, villages, burial sites, ceremonial gathering places, root and medicine grounds, and cultural landmarks up and down the Columbia River.

The Yakama Nation's Treaty-reserved cultural and natural resources will be irrevocably damaged or destroyed due to the Project construction and location on top of a culturally and environmentally sensitive area. The Project does not protect Yakama Nation's Treaty resources or the Yakama members who rely these resources.

For further comments or questions please contact Phil Rigdon, Interim Tribal Administrative Director, at phil_rigdon@yakama.com, (509) 865-5121, ext. 4655 and Jerry Meninick, Deputy Director of Cultural Services, jerry_meninick@yakama.com, (509) 865-5121, ext. 6007.

Respectfully,



DELANO SALUSKIN, CHAIRMAN
YAKAMA NATION TRIBAL COUNCIL

cc: Kimberly Bose, Secretary, Federal Energy Regulatory Commission
Rob Whitlam, State Archaeologist, Washington Department of Archaeology &
Historical Preservation
Dennis Griffin, State Archaeologist, Oregon State Historic Preservation Office
William Dancing Feather, ACHP Native American Program Analyst

⁸ See Exhibit C – Communication From The Federal Energy Regulatory Commission To The Yakama Tribal Council Chairman.

⁹ See Exhibit C – Communication From Robert Whitlam, State Archaeologist, To Mike Trust And Erik Steimle.

EXHIBIT A

Attached Prior Comments And Correspondence From The Yakama Nation

Exhibit Coversheet Only.

[Paginated separately.]

1. Comment From Yakama Tribal Council Chairman To Ecology (August 9, 2022)
2. Letter From Yakama Tribal Council Chairman To FERC Secretary (May 23, 2022)
3. Programmatic Agreement Among The Bonneville Power Administration, The Washington State Historic Preservation Officer, And The Advisory Council On Historic Preservation (May 1997).



May 23, 2022

FILED ELECTRONICALLY

Kimberly Bose, Secretary
Federal Energy Regulatory Commission
888 First Street NE
Washington, D.C. 20426

RE: YAKAMA NATION COMMENT(S), RECOMMENDATION(S), AND PRESCRIPTION(S) TO
NOTICE OF APPLICATION READY FOR ENVIRONMENTAL ANALYSIS FOR THE
GOLDENDALE ENERGY STORAGE PROJECT (P-14861-002).

Dear Secretary Bose,

The Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”), an inherently sovereign Native Nation that is federally recognized pursuant to the Treaty with the Yakamas, U.S. – Yakama Nation, June 9, 1855, 12 Stat. 951 (“Treaty”), is responding herein to the Federal Energy Regulatory Commission’s (“FERC”) Notice of Application Ready for Environmental Analysis (“REA”), dated March 22, 2022, regarding Project No. 14861-002 (“Project”). The following comment(s), recommendation(s), and/or prescription(s) to the REA are based on the Yakama Nation’s strong objection to the issuance of a license for the Project and the preliminary information provided by the Project Applicant, such that the Yakama Nation reserves the right to amend this response based on the results of additional information and conclusions developed during the FERC’s Project Application review.

The Yakama Nation preserves, incorporates, and reasserts its previous written concerns regarding this Project.¹ This letter further agrees with and incorporates corresponding comments submitted by the Columbia Riverkeeper on the Project REA.

I. Yakama Protection Of Resources At *Pushpum*.

The Treaty reserved a 1.3 million acre Reservation “for the exclusive use and benefit” of the Yakama people.² The Treaty further designated reserved rights for Yakamas to exercise “in common with” citizens of the United States at all usual and accustomed places within the Treaty Territory.³ A federal treaty is considered the supreme Law of the

¹ See Exhibit A – Letters from the Yakama Nation regarding Project comments and concerns.

² See Treaty with the Yakamas, U.S. – Yakama Nation, June 9, 1855, 12 Stat. 951, art. II, cl. 3.

³ See *Id.* at art. III, cl. 2.

Land under the U.S. Constitution.⁴ Pursuant to its status as a sovereign Native Nation and its Treaty-reserved authority, Yakama Nation acts as a Co-Manager of the Columbia River fishery, as recognized by federal courts,⁵ for the protection of environmental resources in Yakama Nation’s Treaty Territory. The Yakama Nation’s inherent right has existed since time immemorial and is still a Treaty-reserved right for Yakama members to exercise the root gathering, fishing, practice of ceremony, and passing on cultural tradition at *Pushpum* (Juniper Point), where the Project proposes to permanently destroy legendary Yakama cultural resources. The Yakama Nation opposes the Project “development at *Pushpum* to avoid irreparable damage and destruction to the Yakama Nation’s cultural resources and Treaty-reserved root gathering rights.”⁶

II. Project Description.

The Project consists of proposed development of: a 61-acre upper reservoir formed by a 175-foot-high, 8,000-foot-long rockfill embankment dam; a 63-acre lower reservoir formed by a 205-foot-high, 6,100-foot-long embankment; and an underground conveyance tunnel system connecting the two reservoirs consisting of a 2,200-foot-long, 29-foot diameter, vertical shaft. Additional tunnels include: a 3,300-foot-long, 29-foot-diameter, tunnel; a 200-foot-long, 22-foot-diameter, manifold tunnel; three 600-foot-long, 15-foot-diameter, penstocks; three 200-foot-long, 20-foot-diameter, draft tube tunnels; a 200-foot-long, 26-foot-diameter, low-pressure tunnel; and a 3,200-foot-long, 30-foot-diameter tailrace tunnel. Additionally, there is a proposed underground powerhouse and a 0.48-acre underground transformer cavern adjacent to the powerhouse connected to a 0.84-mile-long, 115-kV underground transmission line that emerges to an outdoor 7.3-acre substation/switchyard. The voltage would be stepped up to a 3.13-mile-long, 500-kV transmission line routed from the substation/switchyard south across the Columbia River and connecting to Bonneville Power Administration’s existing John Day Substation.

III. Recommend Suspending The REA To Cure Procedural And Technical Deficiencies.

i. Recommendation To Give ‘Equal Consideration’ To Environmental Concerns

Justification. Under 16 U.S.C. §§ 797(e) and 803(a) the FERC “shall give equal consideration to the purposes of . . . the preservation of other aspects of environmental quality.” Equal consideration is provided under those statutes for recommendations from resource agencies to weigh concerns of environmental quality on balance with a Project Application’s power and development purpose. To be clear, only the Yakama Nation can determine the significance of its cultural resources. However, consistent with the FERC’s deference to the specific expertise of resource agencies, the Washington Department of Archaeology & Historic Preservation (“SHPO”) informed the Project Applicant in writing on

⁴ See U.S. Const. art. VI, cl. 2.

⁵ See *United States v. Washington*, 384 F. Supp. 312, 382 (W.D. Wash. 1974), *aff’d*, 520 F.2d 676 (9th Cir. 1975); see also *U.S. v. State of Oregon*, 666 F.Supp. 1461 (D. Or. 1987).

⁶ See Yakama Tribal Council Resolution T-089-21 (May 24, 2021).

January 5, 2022 that current Section 106 document(s) are “incomplete and does not provide the federal agency determination of eligibility nor the tribes’ concurrence and signature for documentation and release to [the SHPO].”⁷ The SHPO further asserts a prior “concur[ance] with an Adverse Effect Determination and the next step should be a collaborative consultation effort to develop a Programmatic Agreement with specific stipulations tailored to the particular historic, cultural, and archaeological properties . . .”⁸

The Yakama Nation has consistently expressed Project concerns that this Project will cause direct and irreversible harm to the environmental quality since the Project Application was filed. The Yakama Nation also expressed consistent public concern for a prior project proposal of a similar nature at this location. The Washington SHPO, a state agency with archaeological expertise, concurs with concerns that sequential steps prescribed in 36 C.F.R. 800 have not been followed by the Project Applicant. The procedural deficiency, as identified, equates to a less-than-equal consideration of environmental qualities at *Pushpum* by skipping conditions precedent to the REA and in conflict with 16 U.S.C. §§ 797(e) and 803(a).

ii. Recommendation That FERC Conduct Government-To-Government Consultation

Justification. Under 36 C.F.R. § 800.2(c)(4), the “agency official may authorize an applicant or group of applicants to initiate consultation with the SHPO/THPO and others, *but remains legally responsible for all findings and determinations* charged to the agency official . . . [f]ederal agencies that provide authorizations to applicants *remain responsible for their government-to-government relationships with Indian tribes.*” (emphasis added). Further under 18 C.F.R. § 2.1c the FERC acknowledges that it has a trust responsibility to tribes on a government-to-government basis. The Yakama Nation asserts that FERC has a government-to-government consultation obligation under express law and the principles of Trust responsibility unique to the federal-tribal relationship. The FERC has failed to accommodate government-to-government consultation, and has improperly attempted to deputize a private archaeological consultant to satisfy federal obligations – the result is that the Yakama Nation is still waiting for government-to-government consultation as a precondition to consideration of the REA.

On September 13, 2021, the Yakama Nation responded to the FERC’s August 13, 2021 letter addressed to Cristine Curran with the Oregon Parks and Recreation Department regarding FERC’s designation of the Project Applicant as the National Historic Preservation Act (“NHPA”) Section 106 consultation lead. The Yakama Nation disputed this designation of the Project Applicant in writing as impermissible under 36 C.F.R. § 800.2(c)(4), Yakama consultation law, and the FERC’s Trust responsibility. On December 9, 2021, following a public discussion on November 10, 2021 between FERC staff and Yakama Nation staff, the FERC provided written declination of the Yakama Nation’s government-to-government consultation request under Rule 2201 prohibiting off-the-record communications. Following that notice, the FERC has yet to provide the Yakama Nation

⁷ See Exhibit B – Letter from Robert G. Whitlam to Erik Steimle regarding Goldendale Energy Storage Project (Jan. 5, 2022).

⁸ See *Id.*

with a government-to-government consultative platform that protects the privileged and confidential cultural resources raised by the Yakama Nation since the Project's inception. The FERC has not equally considered cultural resource impacts as a result of failing to achieve the prescribed NHPA Section 106 consultation, and furthermore the Project Applicant's submission of a Historic Properties Management Plan cannot be completed for the Project Application.

iii. *Recommendation For Enforcement Of Programmatic Agreement For Access*


Justification. The avian and plant resources that would be negatively impacted by the proposed Project, specifically disturbance of traditional root fields and increased Golden Eagle mortalities, are intertwined and amplified in combination with their cultural significance to Yakama traditional and ceremonial practices. The right to exercise these practices is reserved under the Treaty. That reserved right was further observed by the State of Washington and the Bonneville Power Authority for on-going root and plant gathering access by Yakama members.⁹ Yakama members regularly access this site for root and medicing gathering, and to practice religious and cultural ceremonies. The Programmatic Agreement preserves and recognizes the critical archaeological and cultural resources within the Project area of potential effect.

IV. Conclusion.

The Yakama Nation's Treaty-reserved cultural and natural resources will be irrevocably damaged or destroyed due to the Project construction and location. The FERC is subject to a higher standard of consideration for these cultural resources than it has currently undertaken and the land at this proposed Project site is subjugated to higher federal Trust duty by virtue of being the Yakama Nation's Treaty Territory.

For further comments or questions please contact the Interim Tribal Administrative Director, Phil Rigdon, at phil_rigdon@yakama.com or at (509) 865-5121, ext. 4655.

Respectfully,



DELANO SALUSKIN, CHAIRMAN
YAKAMA NATION TRIBAL COUNCIL

cc: Erik Steimle, Vice President, Rye Development, FFP Project 101, LLC
Phil Rigdon, Superintendent, Yakama Nation Department of Natural Resources
Rob Whitlam, State Archaeologist, Washington Department of Archaeology &
Historical Preservation
Dennis Griffin, State Archaeologist, Oregon State Historic Preservation Office

⁹ See Programmatic Agreement Among The Bonneville Power Administration, The Washington State Historic Preservation Officer, And The Advisory Council On Historic Preservation (May 1997).

EXHIBIT A

LETTERS FROM THE YAKAMA NATION REGARDING PROJECT CONCERNS

Exhibit Coversheet Only. [Paginated separately.]

1. Letter from the Yakama Nation Tribal Council Chairman to the Advisory Council on Historic Preservation regarding FERC concerns (Feb. 16, 2022).
2. Letter from the Yakama Nation Tribal Council Chairman to the Advisory Council on Historic Preservation regarding Project opposition (Jan. 4, 2022).
3. Letter from the Yakama Cultural Resource Program Manager to FERC regarding Section 106 Consultation (Sep. 13, 2021).
4. Letter from the Yakama Deputy Director for Cultural Resources to Washington Department of Ecology regarding comments for Environmental Impact Statement (Feb. 12, 2021).
5. Letter from the Yakama Nation Tribal Council Chairman to the Washington State Legislature regarding opposition to the Project (Jan. 20, 2021).
6. Letter from the Yakama Nation Superintendent of Natural Resources to FERC Secretary regarding comments on NEPA Scoping Document No. 1 (Dec. 28, 2020).
7. Letter from the Yakama Nation Superintendent of Natural Resources to Breean Zimmerman regarding comments on Application for Section 401 Water Quality Certification (Nov. 6, 2020).
8. Letter from the Yakama Nation Tribal Council Chairman to FERC Secretary regarding comments and recommendations for Additional Study (Mar. 11, 2020).
9. Letter from the Yakama Nation Tribal Council Chairman to FERC Secretary regarding Notification of Intent and Pre-Application (Feb. 21, 2019).
10. Letter from the Yakama Nation Deputy Director for Cultural Resources to Rye Development regarding Project Application (Feb. 14, 2018).



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

February 16, 2022

Sent via U.S.P.S. and Electronic Mail

Reid J. Nelson
Acting Executive Director
Advisory Council on Historic Preservation
401 F Street NW, Suite 308
Washington, DC 20001

Alyson Brooks
Washington State Archaeologist
Department of Archaeology and Historic Preservation
PO Box 48343
Olympia, WA 98504-8343

Valerie J. Grussing
Executive Director
National Association of Tribal Historic Preservation Officers
1255 22nd St. NW
No. 19189
Washington, DC 20036

SUBJECT: REGARDING THE YAKAMA NATIONS LIST OF FERC CONCERNS ON THE GOLDENDALE
PUMP ENERGY STORAGE PROJECT

Dear Mr. Nelson, Ms. Brooks, and Ms. Grussing:

The Yakama Nation appreciates the time and dedication from the ACHP and DAHP staff to understand the issues Yakama Nation is experiencing in the pursuit to protect our sacred resources. We have been navigating the National Environmental Policy Act (NEPA), National Historic Preservation Act (NHPA), Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), State Environmental Policy Act (SEPA), and Environmental Impact Statement (EIS) processes occurring simultaneously for the Goldendale Pump Energy Storage Project. Yakama Nation is dedicated to protecting this land where our resources have maintained a uniquely sacred connection to

us for thousands upon thousands of years. We do this not only for the future and well-being of our people today, but for those generations yet unborn. It is our understanding that if we do not continue to protect this resource we will face consequences from the Creator.

While a great deal of documentation has been accomplished at this location to show the significance of the archaeological and Traditional Cultural Properties (TCPs), we have additional TCP knowledge that we believe will add to the significance of this property and allow for further explanation of Yakama Nation's concerns. However, we have not been afforded the appropriate mechanism or federal trust responsibility by a lead federal agency to do so. In addition, we have compiled a bullet list of specific concerns with the project, highlighting the misapplication of NHPA by the involved parties who are subject to its procedures for Section 106 compliance. Please see the bullet list of issues below.

- **The Delegation of Consultation to Rye Development (the developer)**

In a letter dated September 23, 2021 FERC identifies: *"36 § C.F.R. 800.2(c)(4) allows agencies to authorize license applicants to initiate consultation as long as the agency notifies the SHPO or THPO of such authorization"*

However, 36 § C.F.R. 800.2(c)(4) specifically states: *"Applicants for Federal assistance, permits, licenses, and other approvals. An applicant for Federal assistance or for a Federal permit, license, or other approval is entitled to participate as a consulting party as defined in this part. The agency official may authorize an applicant or group of applicants to initiate consultation with the SHPO/THPO and others, but remains legally responsible for all findings and determinations charged to the agency official. The agency official shall notify the SHPO/THPO when an applicant or group of applicants is so authorized. A Federal agency may authorize all applicants in a specific program pursuant to this section by providing notice to all SHPO/THPOs. Federal agencies that provide authorizations to applicants remain responsible for their government-to-government relationships with Indian tribes."*

We believe that FERC's September 23, 2021 letter provides an interpretation that is not accurate and fails to address all of the responsibilities under 36 § C.F.R. 800.2(c)(4) and more specifically 36 § C.F.R. 800.2(2)(ii) and Section 101(d)(6)(B) which pertains to consultation with Indian Tribes and Native Hawaiian Organizations with historic properties of significance. These provisions require: *"...the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property."*

- **Resolving Adverse Effects**

The Department of Archaeology provided a letter which concurred with the APE, determinations of eligibility, and determination of Adverse Effect on September 30th 2021. Yakama Nation responded on November 29th 2021 notifying DAHP that no amount of mitigation could ever address the effect of this undertaking. Yakama Nation further identified that an effective mode of consultation had not been identified and indicated the knowledge of additional impacts which have not been understood. However, Historical Research Associates on behalf of Rye Development submitted HPMP plans to Yakama Nation December 15, 2021. The HPMP included an assessment of effects to resources and TCPs that is completely devoid of effective consultation with Yakama Nation and has does not appear to have input from the lead federal agency. In the absence of meaningful consideration to Yakama Nation's outright opposition of this project this was extremely premature. Rye Development and Historical Research Associates have no authority in this process to jump ahead into an HPMP. We do not feel that an HPMP has ever been contemplated nor has a meaningful discussion of the impacts occurred with FERC.

We feel that it is clear that 36 § C.F.R. 800.2(2)(ii)(a) applies to FERC which details: *"the agency official shall ensure that consultation in the section 106 process provides the Indian tribe or Native Hawaiian organization a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects...."*

- **Issue with FERCs Public Forum for Consultation.**

FERC has indicated that they recognize 18 § C.F.R. 2.1(c) acknowledges trust responsibility and endeavors to work with Tribes on a gov. to gov. basis to address effects to tribal rights and resources in consultation. However, they indicate that they have limitations on the nature and type of consultation that the Commission may engage in during contested hearings.

Specifically FERC cites to Rule 2201 of the Commission's Rules and Practice Procedure (18 § C.F.R. 385.2201) to explain why they are *"prohibited from off the record communications by or with staff discussing matters relevant to the merits of a contested proceeding that do not include all parties to the*

proceeding.” They further discuss how the filing requirements do not allow a nonpublic file protections. Instead, it is suggested that for sensitive cultural resource information a non-disclosure agreement is established early on in the process or sensitive information is redacted. These options are far from the requirements of NHPA or in line with the trust responsibility that the Federal Agency has to Yakama Nation. It appears that FERC selected and interpreted individual components of federal regulation to infer its obligations which indirectly impact Yakama Nation. For example 18 § C.F.R. 2.1(c) states “*The Commission will endeavor to work with Indian tribes on a government-to-government basis... and will seek to address the effects of proposed projects on tribal rights and resources through consultation pursuant to ...section 106 of the National Historic Preservation Act, and in the Commission's environmental and decisional documents.*”

In regards to NHPA 36 § C.F.R. 800.2(2)(ii)(a) states “*...It is the responsibility of the agency official to make a reasonable and good faith effort to identify Indian tribes and Native Hawaiian organizations that shall be consulted in the section 106 process. Consultation should commence early in the planning process, in order to identify and discuss relevant preservation issues and resolve concerns about the confidentiality of information on historic properties.*” It is clear that this was not met by FERC.

- **Protection of Sacred Information**

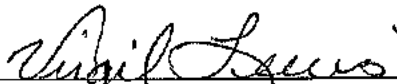
FERC's December 9th letter describes a process that does not protect information that is sacred and sensitive from disclosure. The commissions regulations under the Federal Power Act 18 § C.F.R. 388.112 is described to limit the ability for Yakama Nation to submit sacred information. Specifically they state: “*once the request is made, the Secretary of the Commission will place the document in a nonpublic file. If someone requests access to a document in a nonpublic file (for example through a Freedom of Information Act request), the Commission, in deciding whether to release the information, will first notify the person who submitted the document.*” This statement does not inspire confidence or represent a reasonable process for Yakama Nation to protect sacred and sensitive information. However, it does not preclude the Commission from a proper process which respects Yakama Nations sacred and sensitive information by denying the release of sacred information (see E.O.13007 and 5 U.S.C. § 552(b)(4)).

We find that the above list expresses a failure for FERC to conduct NHPA consultation. Further, the structure of NHPA consultation being utilized has occurred absent of input

from Yakama Nation and therefore, cannot effectively address adverse effects to our resources. The NHPA process should be halted until such time that FERC and Yakama Nation can satisfy a format, method, and projected timeline for initial consultation. The formation of appropriate steps to consider affects to cultural resources should therefore be conceived with input from Yakama Nation. No further consultation from the developer, contracted archaeologist, or otherwise should occur until this important piece of NHPA is satisfied. We find that contractors and developers do not have a place in our Nations federal consultation. This vital consultation is our opportunity to meaningfully address traditional concerns. In this case, it is our ability to express why this project should not proceed. We need to be meaningfully incorporated in a decision making process with the U.S. Government who has a legal and moral obligation to uphold, including the protection of valuable and sacred information.

We thank you for your valued attention to these concerns and look forward to continued consultation on this important cultural resource matter.

Sincerely,



f. DELANO SALUSKIN, CHAIRMAN
YAKAMA NATION TRIBAL COUNCIL

Cc: Yakama Nation Cultural Committee

Jerry Meninick, Yakama Nation Deputy Director of Culture

Phil Rigdon, Yakama Nation Deputy Director DNR

Noah Oliver, Yakama Nation Cultural Resource Program Archaeologist

Jessica Lally, Yakama Nation Cultural Resource Program

Anthony Aronica, Yakama Nation Office of Legal Counsel

William Dancing Feather, ACHP Native American Program Analyst

Rob Whitlam, Washington State Department of Archaeology and Historic Preservation

2. Letter from the Yakama Nation Tribal Council Chairman to the Advisory Council on Historic Preservation regarding Project opposition (Jan. 4, 2022).

[Coversheet Only. Paginated separately.]



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

January 4th, 2022

Sent via U.S.P.S. and Electronic Mail

Reid J. Nelson
Acting Executive Director
Advisory Council on Historic Preservation
401 F Street NW, Suite 308
Washington, DC 20001

Alyson Brooks
Washington State Archaeologist
Department of Archaeology and Historic Preservation
PO Box 48343
Olympia, WA 98504-8343

**SUBJECT: REGARDING THE YAKAMA NATION'S OPPOSITION TO THE GOLDENDALE PUMP
ENERGY STORAGE PROJECT**

Dear Mr. Nelson and Ms. Brooks:

I write on behalf of the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") to inform you of a deeply concerning situation. Yakama Nation is strongly opposed to the Goldendale Energy Storage Project (see attached). This project is occurring in our sacred lands vital to our culture and way of life. No amount of mitigation could ever address the impacts of this project to our culture today or for our future generations.

A great number of resources, archaeological sites, and traditional cultural properties have been identified and documented not only by our staff and tribal elders, but by outside contract archaeological firms over the years. Due to the sacredness of this resource this development would destroy the lives of our tribal members.

We are engaged in a complicated series of state and federal procedural processes that are running in tandem and without proper or meaningful consultation. FERC has delegated

consultation to the developer and in addition consultation has been received from Historical Research Associates (HRA) despite our objection to the delegation of this federal consultation responsibility and our attempts to redirect. We have been forced to participate in a public forum to discuss our concerns with FERC. All of this is occurring during a global pandemic and at a time when the Yakama Nation's Ceded Lands are experiencing record growth and development. We are therefore requesting your attention to this matter and would greatly appreciate a follow up meeting with our Cultural Resource Program to discuss our concerns.

Sincerely,



DELANO SALUSKIN, CHAIRMAN
YAKAMA NATION TRIBAL COUNCIL

Cc: Yakama Nation Cultural Committee
Jerry Meninick, Yakama Nation Deputy Director of Culture
Phil Rigdon, Yakama Nation Deputy Director DNR
Noah Oliver, Yakama Nation Cultural Resource Program Archaeologist
Jessica Lally, Yakama Nation Cultural Resource Program
Anthony Aronica, Yakama Nation Office of Legal Counsel
Rob Whitlam, Washington State Department of Archaeology and Historic Preservation



ititamapama'

Yakama Nation Cultural Resource Program

Na-Mi-Ta-Man-Wit Nak-Nu-Wit Owt-Nee At-Tow

Confederated Tribes and Bands of the Yakama Nation

Post Office Box 151

Toppenish, WA 98948

MEMORANDUM

To: Yakama Nation Culture Committee

Through: Jerry Meninick, Deputy Director of Cultural Services

From: Casey Barney, Cultural Resource Program Interim Manager
Casey Barney

Date: January 4th, 2022

Letter to ACHP and DAHP on Goldendale Pump Storage Energy Project

A letter was prepared to clearly or bluntly indicate our opposition to the proposed Goldendale project. We hope that through this letter and through discussions with ACHP and DAHP we can gain additional support in our fight against the development. Please review the attached.



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

For immediate release:

October 6, 2021

YAKAMA NATION ADVOCATES FOR PROTECTION OF CULTURAL SITES; OPPOSES PROPOSED GOLDENDALE PUMP STORAGE PROJECT

YAKAMA NATION AGENCY, YAKAMA RESERVATION – On Wednesday, October 6, 2021, the Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”) met with Rye Development company, proponents of the proposed Goldendale Pump Storage Project (“Project”) to advocate for the protection of Yakama cultural, ceremonial, and traditional resources at Juniper Point. The Project’s proposed construction in the area known as *Pushpum* has exceptional cultural importance to the Yakama Nation, including nine archaeological sites, two of which are National Register of Historic Places-eligible and one multiple property documentation. “*Pushpum* has been a sacred site for Yakama ceremonies, legend, and the gathering of traditional roots and medicines since time immemorial” stated Tribal Council Cultural Committee Chair George Selam. The proposed Project includes two reservoirs exceeding 120 acres in surface area and 14,000 linear feet of rockfill embankment. The industrial-scale Project anticipates a generating capacity of 1,200 megawatts.

Yakama members continue annual gathering practices in the proposed development area for traditional foods and medicines. “For generations, regional utility infrastructure has been developed in the Yakama Nation’s Treaty-territory, blasting customary fishing sites, flooding traditional villages, and seeping radioactive pollution into subsistence and medicinal root fields” said Yakama Tribal Councilman Jeremy Takala. The Yakama Nation Treaty of 1855 with the United States reserved a 1.3 million acre Reservation for the exclusive use and benefit of the Yakama people and reserved rights to exercise usual and accustomed fishing, hunting, and gathering across the more than 10 million acre Treaty-territory of the Pacific Northwest region. Councilman Takala further commented, “For thousands of years Yakama culture and religion has balanced human stewardship of the land for generations yet unborn.”

Yakama Tribal Council Vice Chairman Virgil Lewis chaired the discussion, further noting “In the next ten years, the Pacific Northwest will be pressured by a multi-billion dollar energy industry for more infrastructure development. This new technology must be developed ethically without destroying the cultural resources and gathering sites that are part of the Yakama way of life.” The proposed Project license application was accepted by the Federal Energy Regulatory Commission in June 2020 with anticipated regulatory review until 2023.

For additional information or comment, please contact Yakama Nation Cultural Resources Director Jerry Meninick at (509) 865-5121, or Lead Attorney Ethan Jones at (509) 865-7268.

///



T-089-21

RESOLUTION

WHEREAS, the Confederated Tribes and Bands of the Yakama Nation is a federally recognized Nation pursuant to the Treaty of 1855 (12 Stat. 951); and

WHEREAS, the Yakama Tribal Council is the governing body of the Confederated Tribes and Bands of the Yakama Nation, by the authority delegated by the Resolution of February 1944 and Resolution T-38-56; and

WHEREAS, the Tribal Council has the duty and responsibility according to the Resolution T-38-56 and T-10-61 to protect and preserve the Treaty Rights of the Yakama Nation, and

WHEREAS, centuries of oppression by the United States against Native Nations under the Doctrine of Discovery, affirmed by United States Supreme Court through *Johnson v. M'Intosh*, and implemented through Congressional policies of allotment and termination, have cost Native Nations hundreds of millions of acres of homelands of ancestral, spiritual, and ceremonial significance; and

WHEREAS, *Pushpum*, known as Juniper Point, is within the Yakama Nation's Treaty territory under Article I of the Treaty of 1855 and has been a site of religious, ceremonial, and cultural importance to the Yakama People since time immemorial; and

WHEREAS, *Pushpum* is a place where Yakama People continue to exercise Treaty-reserved rights to gather traditional roots and medicines under Article III of the Treaty of 1855 and has been a site of sovereign food gathering since time immemorial; and

WHEREAS, Rye Development proposes to construct an industrial-scale pump storage project at Juniper Point, including the construction of two reservoirs totaling 124-acres of surface area and more than 14,000 linear feet of rockfill embankments; and

WHEREAS, the proposed pump storage development violates the Yakama Nation's inherent sovereignty and Treaty-reserved rights through direct, permanent, and adverse destruction of nine Traditional Cultural Properties of religious and ceremonial significance, and the reduction and elimination of access to gather food and medicine roots, which results in an irreplaceable loss of cultural resources and negative environmental degradation to several ephemeral waterbodies, and aquatic and terrestrial resources.


NOW, THEREFORE, BE IT RESOLVED, by the Executive Committee of the Yakama Tribal Council, acting under authority delegated by Section III-A of the Rules of Procedures, approved by Yakama Nation Tribal Council Resolution T-10-61, dated July 13, 1960, and meeting at the Governmental Headquarters of the Yakama Nation, that the Yakama Nation opposes pump storage development at *Pushpum* to protect sacred religious and ceremonial places of inherent importance to Yakama culture.

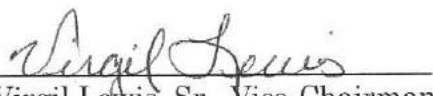
BE IT FURTHER RESOLVED, that the Yakama Nation opposes pump storage development at *Pushpum* to avoid irreparable damage and destruction to the Yakama Nation's cultural resources and Treaty-reserved root gathering rights.

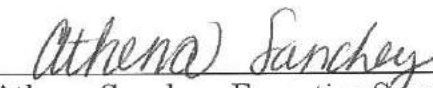
BE IT FURTHER RESOLVED, that the Yakama Nation opposes all federal or state actions that authorize, approve, or permit extractive and exploitative energy technology that threatens to, or is likely to, damage or destroy Traditional Cultural Properties in the Yakama Nation's Treaty territory, including, but not limited to, on usual and accustomed lands and open and unclaimed lands where the Yakama Nation reserved and exercises its Treaty-reserved rights.

BE IT FINALLY RESOLVED, that the Yakama Nation does not waive, alter, or otherwise diminish our Sovereign Immunity, whether expressed or implied, by virtue of this resolution for any and all administrative or legal action which may arise directly or indirectly from the same; nor does the Yakama Nation waive, alter, or otherwise diminish our rights, privileges, remedies or services guaranteed by the Treaty of 1855.

DONE AND DATED on this 24th day of May, 2021, by the undersigned members of the Executive Committee of the Yakama Tribal Council.


Delano Saluskin, Chairman
Yakama Nation Tribal Council


Virgil Lewis, Sr., Vice-Chairman
Yakama Nation Tribal Council


Athena Sanchey, Executive Secretary
Yakama Nation Tribal Council

Cc: File
Cultural Ca#071-2021-10



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

Statement From Councilman Takala:

June 22, 2021

**YAKAMA NATION OPPOSES PROPOSED GOLDENDALE PUMP STORAGE;
APPLAUDS WATER QUALITY CERTIFICATION DENIAL**

YAKAMA NATION AGENCY, YAKAMA RESERVATION – “As a member of the Yakama Nation Tribal Council Fish & Wildlife Committee, I applaud the Washington State Department of Ecology's denial of a water quality certification for the Goldendale Pumped Storage Project. While marketed as "green energy," the Goldendale Pumped Storage Project represents large-scale resource exploitation that directly threatens our Yakama Nation Treaty-reserved cultural and archaeological sites, and food and medicine gathering sites. The Yakama Nation Tribal Council passed a Resolution strongly opposing this project, and we will continue to stand against this project through all available avenues to protect our culture and environment for future generations.” – Councilman Jeremy Takala

For additional information or comment, please contact Yakama Nation Tribal Councilman Jeremy Takala at (509) 865-5121, or Lead Attorney Ethan Jones at (509) 865-7268.

///

3. Letter from the Yakama Cultural Resource Program Manager to FERC regarding Section 106 Consultation (Sep. 13, 2021).

[Coversheet Only. Paginated separately.]



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

September 13, 2021

Suzanne Novak, Cultural Resources Coordinator
Office of Energy Projects
Division of Hydropower Licensing
Federal Energy Regulatory Commission
Washington D.C. 20426

David Turner, Northwest Branch Chief
Office of Energy Projects
Division of Hydropower Licensing
Federal Energy Regulatory Commission
Washington D.C. 20426

Regarding: Section 106 Consultation Authorization, Goldendale Energy Storage Project (P-14861)

Dear Ms. Novak and Mr. Turner,

We received your letter addressed to Cristine Curran with the Oregon Parks and Recreation Department dated August 13, 2021. The letter attempts to notify consulting parties and the developer of a designation and authorization pertaining to the Goldendale Energy Storage Project (P-14861). The Yakama Nation objects to this Section 106 consultation authorization for the Goldendale Energy Storage Project (P-14861). Consultation regarding a proposed authorization has not occurred with Yakama Nation. The Federal Energy Regulatory Commission (FERC) does not have the authority to authorize the FFP Project 101, LLC as a consultation lead. The FERC has a trust responsibility to Yakama Nation. Under the provisions set forth in the National Historic Preservation Act (NHPA), an agency may not delegate consultation with Indian tribes to an applicant unless the affected tribes have agreed to such an arrangement in advance. Yakama Nation has not and does not agree to this presumed authorization. Appropriate consultation has not occurred.

Under 36CFR800.7(c)(4) of the NHPA regulations require FERC as the lead agency to take comments and information into account in reaching a final decision on the undertaking. As a requirement of Section 110(a)(1) of NHPA, you may not delegate this responsibility.

If you have any questions or concerns please contact Anthony Aronica with the Yakama Nation Office of Legal Counsel by phone at (509) 833-9350 or by e-mail to anthony@yakama-olc.org. Thank you for your time and understanding regarding this important matter.

Sincerely,

Handwritten signature of Casey Barney in cursive script.

Casey Barney, Manager
Yakama Nation Cultural Resource Program

CC: Delano Saluskin, Yakama Nation Tribal Council Chairman
Yakama Nation Tribal Council Cultural Committee
Jeremy Takala, Yakama Nation Tribal Council Member
Jerry Meninick, Yakama Nation Director of Cultural Services
Ethan Jones, Yakama Nation Office of Legal Council
Allyson Brooks, Department of Archaeology and Historic Preservation
Rob Whitlam, Department of Archaeology and Historic Preservation

4. Letter from the Yakama Deputy Director for Cultural Resources to Washington Department of Ecology regarding comments for Environmental Impact Statement (Feb. 12, 2021).

[Coversheet Only. Paginated separately.]



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

February 12, 2021

SUBMITTED ELECTRONICALLY

Sage Park
Washington Department of Ecology
1250 West Alder Street
Union Gap, WA 98903-0009
Attn: Goldendale Scoping

RE: YAKAMA NATION COMMENTS FOR ENVIRONMENTAL IMPACT STATEMENT ON
PROPOSED GOLDENDALE PUMPED STORAGE PROJECT.

Dear Ms. Park,

Included herein are comments on behalf of the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") in response to the January 14, 2021 State Environmental Policy Act ("SEPA") Determination of Significance ("DS") Request for Comments on Scope of Environmental Impact Statement ("EIS") in response to the proposed FFP Project 101, LLC pumped storage project under Federal Energy Regulatory Commission ("FERC") License Application No. 14861 ("Project"). The Yakama Nation's comments below demonstrate for the Washington Department of Ecology's ("DOE") Project EIS review that the proposed action will have significant adverse environmental impacts, many of which cannot be avoided or mitigated if Project implementation is permitted. 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 ancestral sites that are still used to observe ceremonial and cultural practices. This letter preserves, incorporates, and reasserts the Yakama Nation's concerns regarding the Project made known to the FERC and Project Applicants through previous communications.¹ This letter further agrees with and incorporates corresponding EIS comments submitted by the Columbia Riverkeeper.

¹ See Exhibit A - Letter From the Yakama Nation Superintendent of Natural Resources to FERC Secretary, Comments on NEPA Scoping Document No. 1 (Dec. 28, 2020) with incorporated concurring comments; Letter From the Yakama Nation Superintendent of Natural Resources to Breean Zimmerman, Comments on Application For Section 401 Water Quality Certification (Nov. 6, 2020) with incorporated concurring comments; and, Letter From Yakama Nation Tribal Council

I. Background.

The 1855 Treaty between the United States and the Yakamas (“Treaty”) reserved a 1.3 million acre Reservation “for the exclusive use and benefit” of the Yakama people.² The Treaty further designated reserved rights for Yakamas to exercise “in common with” citizens of the United States at all usual and accustomed places within the Treaty Territory.³ A federal treaty is considered the supreme Law of the Land under the U.S. Constitution.⁴ Pursuant to its status as a sovereign Native Nation and its Treaty-reserved authority, Yakama Nation acts as a Co-Manager of the Columbia River fishery, as recognized by federal courts,⁵ for the protection of all natural and cultural resources in Yakama Nation’s Treaty Territory. The Yakama Nation Treaty Territory encompasses usual and accustomed fishing sites, cultural areas, and ceremonial locations from the mouth of the Columbia River upstream north of the 49th parallel.

The Yakama Nation’s enrolled membership exceeds 11,000 people whose history, culture, and way of life are intertwined with Nch’i Wa’na (the Columbia River), and its host of salmon, fish, plants, medicines, and animals. Protecting the land adjacent to and the waters of the Columbia River is critical for ensuring the Yakama Nation’s Treaty-reserved resources and rights, and ultimately to the health and welfare of the Yakama people.

The Yakama Nation has expressed strong concerns, even before Project proponents filed a FERC draft license application, that this Project would have significant adverse impact on cultural, terrestrial, and aquatic resources. Reservoir construction over the top of Traditional Cultural Properties (“TCP”) and National Register of Historic Places (“NRHP”)-eligible sites creates an acute loss to Yakama people that cannot be replaced or off-set. Previously, the Yakama Nation opposed similar project proposals at this location due to the numerous natural and cultural resources that are incompatible with industrial development because it will permanently destroy TCPs and continuing access to ceremonial sites, loss of terrestrial and aquatic resources, and has the potential to exasperate existing soil and groundwater contamination from the former Columbia Gorge Aluminium (“CGA”) smelter site.

II. Project Description.

The Yakama Nation’s understanding of the Project is consistent with the description summarized in the DOE Request for Comments on Scope of EIS, dated January 14, 2021, based on the FERC License Application, dated June 23, 2020.

Chairman to FERC Secretary, Comments and Recommendations for Additional Study (Mar. 11, 2020).

² See Treaty with the Yakamas, U.S. – Yakama Nation, June 9, 1855, 12 Stat. 951, art. II, cl. 3.

³ See *Id.* at art. III, cl. 2.

⁴ See U.S. Const. art. VI, cl. 2.

⁵ See *United States v. Washington*, 384 F. Supp. 312, 382 (W.D. Wash. 1974), *aff’d*, 520 F.2d 676 (9th Cir. 1975); see also *U.S. v. State of Oregon*, 666 F.Supp. 1461 (D. Or. 1987).

III. Direct Adverse Impacts To Yakama Nation Treaty Resources.

i. Cultural Properties

The Project Area of Potential Effect (“APE”) is in an area of exceptional cultural importance to the Yakama Nation. The Project cumulatively adds to other energy infrastructure, including hydro-electric dams and utility-scale wind turbine facilities, that devastate and destroy Yakama Nation’s traditional fishing sites, villages, burial sites, ceremonial gathering places, root and medicine harvests, and cultural landmarks up and down the Columbia River. This Project development directly damages and alters nine culturally significant sites or TCP’s. Two of those sites impacted by the APE are NRHP-eligible TCP sites, including a NRHP-eligible multiple property documentation TCP, and a nationally-designated Archaeological District. Allowing the TCPs to be damaged will materially diminish their NRHP-eligibility by destroying the plants and features associated with Yakama legends. Further, diminishing the multiple property documentation TCP also compromises other documented TCPs nearby because the ‘multiple property’ aspect is culturally affiliated with, and draws enhanced meaning from, the network of associated sites.

The archaeological and TCP sites are irreplaceable to the Yakama Nation’s cultural resource inventory as a source of significant cultural and spiritual meaning for Yakama people. Yakamas exercised ancestral harvest and ceremonial practices at these sites, as they *still* do today. The EIS must recognize the scale of negative impact to these cultural resources, including the insufficiency of proposed mitigation effects. Ultimately the construction of a pump storage facility at this proposed site unavoidably destroys cultural resources through earthworks and reservoir storage. Only the Yakama Nation can determine what is culturally significant to its people.

a. Unacceptable Limits On Cultural Use And Access

The Project development would impede and disrupt an existing Programmatic Agreement between the State of Washington and the Bonneville Power Authority for on-going root and plant gathering access by Yakama members.⁶ Yakama members regularly access this site for root and medicing gathering, and to practice religious and cultural ceremonies. The Programmatic Agreement preserves and recognizes the critical archaeological and cultural resources within the Project APE. This Project will also directly and indirectly restrict access and use at the adjacent North Shore Treaty fishing Access Site which is a Treaty-fishing location in the Zone 6 Fishery.

Additionally, a decommissioning plan cannot possible replace or restore TCP’s to their ancestral condition – the cultural resource is forever decimated. The nature and character of the cultural resources within the APE will be significantly harmed or lost

⁶ See Exhibit B - Programmatic Agreement Among The Bonneville Power Administration, The Washington State Historic Preservation Officer, And The Advisory Council On Historic Preservation (May 1997).

forever if construction occurs. This irreplaceable loss seriously injures ongoing cultural access for the sites' integral meaning to the Yakama people's religious and ceremonial practices.

ii. Terrestrial and Aquatic Resources.

Calling the Project, a "closed-loop" system is disingenuous and misleading. Approximately 2.93 million gallons of water will be drawn from Columbia River to fill the Project's two reservoirs. These open air reservoirs must be continuously replenished at a rate of approximately 1.2 million gallons of water per year from the Columbia River to offset losses from evaporation and leakage. Emptying of these reservoirs for maintenance and repair will require additional water to replace lost volumes. The Columbia River fishery already suffers from the negative impacts of over-allocated water resources. Salmonids and other aquatic species require stable water quantity, quality, and temperature for survival. This Project, when combined with the impacts from existing dams and their impoundments, and the comorbidities of climate change, may irreversibly tilt the ecological scales long-term survival of the Columbia River fishery.

The Project's upper reservoir will permanently destroy several ephemeral waterbodies including approximately 965 linear feet of streams. These streams are perennial tributaries of the Klickitat River located approximately 2.4 miles north of the survey area. The upper reservoir represents a source of potential contamination to the surrounding streams and wetlands. Additionally, it is unclear what the impacts will be if earthworks at either proposed reservoir gets damaged, breeched, or completely fails.

Combined, the two proposed reservoirs would result in over 120 acres of surface water features to attract birds and bats which may result in more interactions with wildlife and an increase in birds and bats being wounded or killed by wind turbines. Additionally, these water bodies are expected to further alter laminar wind currents which are already influenced by existing wind farms. The Project area is home to bald eagle, golden eagle, and prairie falcon nesting, which combined with foraging and rearing habitat makes this area unique for these species. Eagle nesting, rearing, and foraging habitat would be degraded during both the construction phase and upon completion of the two reservoirs. The area also provides habitat and supports plant species important to Yakama Nation for gathering and food sovereignty practices.

Ephemeral and seasonal waterbodies at the site are important sources of seasonal water for many plant and animal species living in this otherwise dry region. The seasonality of the water supply is necessary for those plants and animals to complete life cycle phases. Ephemeral or seasonal waterbodies also slow surface water and stormwater runoff reducing erosion and flood impacts and allow for water to infiltrate to replenish groundwater. Possible leakage from the reservoirs will contaminate and adversely impact these interconnected terrestrial and aquatic resources.

iii. Columbia Gorge Aluminium Smelter Cleanup

The Project's lower reservoir is proposed over the former Columbia River Gorge Aluminum ("CGA") Smelter, which is now a Resource Conservation and Recovery Act

("RCRA") contaminated site that is subject to ongoing management and clean-up by the DOE under the state Model Toxics Control Act. The Project Applicant has not characterized or developed an actual plan to address the soil contaminants that would be excavated during construction of the lower impoundment. The Applicant must have a plan for properly disposing of that material in accordance with applicable law if hazardous or dangerous material is excavated during construction.


Previously FERC has denied the development of pump storage at this location because of necessary cleanup activities that are still ongoing and imperative for environmental recovery.⁷ Additionally, the consequence of a potential leak or breach in the lower reservoir, adjacent to the Columbia bank, compounds concerns over existing soil contaminants.

IV. Conclusion.


The Yakama Nation's Treaty-reserved cultural and natural resources will be irrevocably damaged or destroyed due to the Project construction and location on culturally and environmentally sensitive areas. Project development attacks and threatens Yakama Nation's Treaty resources and the Yakama members who rely these resources. The decades-long industrial development of utility-scale energy facilities have had targeted harm on the Yakama Nation's Treaty resources, far beyond the balance of interests for other non-Yakama entities. SEPA protects of these jeopardized resources and the EIS tool must incorporate the regulatory responsibility to preserve irreplaceable resources.

For further comments or questions please contact phil_rigdon@yakama.com and jerry_meninick@yakama.com or at (509) 865-5121, exts. 4655 and 6323.

Respectfully,



JERRY MENINICK, DEPUTY DIRECTOR
YAKAMA NATION CULTURAL RESOURCES



PHIL RIGDON, SUPERINTENDENT
YAKAMA NATION DEPARTMENT OF NATURAL RESOURCES

⁷ See *Public Utility District No.1 of Klickitat County, Washington, Clean Power Development, LLC*, 155 F.E.R.C. ¶ 61,056 (2016).

cc: Erik Steimle, Vice President, Rye Development, FFP Project 101, LLC
Rob Whitlam, State Archaeologist, Washington Department of Archaeology &
Historical Preservation
Dennis Griffin, State Archaeologist, Oregon State Historic Preservation Office

EXHIBIT A

1. **Letter From the Yakama Nation Superintendent of Natural Resources to FERC Secretary, Comments on NEPA Scoping Document No. 1 (Dec. 28, 2020) with incorporated concurring comments.**
2. **Letter From the Yakama Nation Superintendent of Natural Resources to Breean Zimmerman, Comments on Application For Section 401 Water Quality Certification (Nov. 6, 2020) with incorporated concurring comments.**
3. **Letter From Yakama Nation Tribal Council Chairman to FERC Secretary, Comments and Recommendations for Additional Study (Mar. 11, 2020).**

Exhibit Coversheet Only.

[Paginated separately.]

EXHIBIT B

Programmatic Agreement Among The Bonneville Power Administration, The Washington State Historic Preservation Officer, And The Advisory Council On Historic Preservation

Exhibit Coversheet Only.

[Paginated separately.]

MAY 05 1997

Historic Preservation

**PROGRAMMATIC AGREEMENT AMONG
THE BONNEVILLE POWER ADMINISTRATION,
THE WASHINGTON STATE HISTORIC PRESERVATION OFFICER,
AND
THE ADVISORY COUNCIL ON HISTORIC PRESERVATION**

Regarding the Power Purchase Agreement
before the Bonneville Power Administration
for the Conservation and Renewable Energy System
Columbia Wind Farm #1
located in the Columbia Hills,
Klickitat County, Washington

WHEREAS, the Bonneville Power Administration (BPA) may enter into a Power Purchase Agreement with Conservation and Renewable Energy System (CARES) for the Columbia Wind Farm #1 (the Project);

WHEREAS, BPA, pursuant to 36 CFR 800.4(a) has determined that the Area of Potential Effect (APE) of the Project, as defined in 36 CFR 800.2(c), is that geographic area encompassed by the proposed Project boundary shown on Figure 1 in Appendix A and includes Juniper Point;

WHEREAS, BPA has determined that the Project may affect historic properties, including the Juniper Point traditional cultural property;¹

WHEREAS, BPA has conducted a historic sites assessment of the APE contained in a report by Archaeological and Historical Services, Eastern Washington University, dated February 1995;²

WHEREAS, BPA has afforded the Confederated Tribes and Bands of the Yakama Indian Nation (CYN) opportunities for consultation and has invited the CYN to concur in this Programmatic Agreement;³

WHEREAS, BPA has consulted with the Washington State Historic Preservation Officer (SHPO) and the Advisory Council on Historic Preservation (Council) pursuant to the regulations, 36 CFR 800.13, implementing Section 106 of the National Historic Preservation Act, 16 USC 470f (Section 106); and

WHEREAS, Klickitat County has issued a permit to CARES for the Project under Conditional Use Application CU-95-09, which includes Conditions of Approval (CUP) as shown in Appendix B;

¹ "Traditional" Yakama Peoples consider the term "cultural resources" to include the intermeshed physical, spiritual, and cultural components of the entire landscape--rocks, water, fish, roots, and other resources. The non-Yakama legal use of the term primarily designates prehistoric, historic, and traditional cultural sites and objects. The term "cultural sites" is used herein to indicate archaeological, historical, and traditional cultural properties, the last as defined in National Register Bulletin 38 (produced by the National Park Service, 1990).

² Boreson, Keo, Fred Crisson and Craig Holstine. February 1995. *A Cultural Resources Study of the Proposed CARES Columbia Wind Farm #1, Klickitat [sic] Washington*. Short Report 444. Archaeological and Historical Services, Eastern Washington University, submitted to Jones and Stokes Associates, Bellevue, Washington.

³Indigenous human cosmologies often consider animals and plants to be "Native Americans" or "Peoples". This Programmatic Agreement will use the term "Native Americans" to refer to human beings.

NOW, THEREFORE, the BPA, the SHPO, and the Council agree that the Project will be implemented with the following stipulations in order to take into account the effects of the Project on archaeological, historical, and traditional cultural sites.

STIPULATIONS

BPA will carry out the following measures or ensure through its Power Purchase Agreement with CARES that the following measures are carried out:

1. ADDITIONAL CULTURAL SITES SURVEY

- 1.1. The Project 115-kV transmission line location has not yet received a cultural sites survey. Following Section 3.1 of the CUP, CARES will conduct a cultural sites survey of the transmission line corridor that follows the survey procedures documented in *A Technical Report: A Cultural Resources Study of the Proposed CARES Columbia Wind Farm #1, Klickitat [sic] County, Washington.*²
- 1.2. The survey will include a preliminary evaluation of the eligibility of any identified cultural sites for listing in the National Register of Historic Places. This preliminary evaluation will eliminate cultural sites that clearly do not appear to be eligible for National Register listing based on information collected during the background research for the Project and during the cultural sites survey. Cultural sites not eliminated will be considered potentially eligible for listing in the National Register.
- 1.3. Following Section 12.4.3 of the CUP, CARES will attempt to locate construction areas to avoid cultural sites considered potentially eligible for listing in the National Register. If construction cannot avoid effects on these sites, CARES will, following Section 3.2 of the CUP, conduct additional investigations as needed to determine whether the sites are eligible for listing. BPA will conduct the Determination of Eligibility in consultation with the SHPO, following 36 CFR 800.4 (c) (1 through 5).
- 1.4. These investigations could include historical research, oral interview, archaeological testing, or some combination of these methods. BPA recognizes that the CYN objects to archaeological testing, and BPA will attempt to minimize the use of this method. BPA will also ask the CYN about its views on the National Register eligibility of the sites and include the information it provides in the Determination of Eligibility.
- 1.5. BPA will submit the Determination of Eligibility to the SHPO for review in accordance with 36 CFR Section 800.4(c) and will obtain SHPO consensus on Determinations of Eligibility for potentially eligible cultural sites where adverse effects cannot be avoided.

2. ASSESSMENT OF PROJECT EFFECTS ON NATIONAL REGISTER-ELIGIBLE CULTURAL SITES

BPA will apply the Criteria of Effect and Adverse Effect in 36 CFR 800.9 to any National Register-eligible cultural sites that have not been previously evaluated for Project effects.

BPA will also ask CYN about its views on Project effects on National Register-eligible cultural sites and include the information it provides in the assessment of effects. BPA will afford the SHPO, CYN, and Council an opportunity to review and comment on the findings of effect.

For any portion(s) of the Project where construction will have no direct effect on any National Register-eligible cultural site, BPA may provide authorization to proceed with construction in such area(s), subject to the conditions of the Monitoring Plan (see Stipulation 4).

3. TREATMENT

- 3.1. BPA, in consultation with SHPO and CYN, will develop a Treatment Plan for the treatment of historic properties within the Project's Area of Potential Effect. BPA will submit the draft Treatment Plan to the SHPO, CYN, and Council for review and comment on how accurately and completely the substance of the Treatment Plan reflects this stipulation. SHPO, CYN, and Council will have 30 days to review the draft Treatment Plan, after which BPA will produce a final Treatment Plan that takes SHPO, CYN, and Council comments into consideration. BPA will ensure that CARES implements the Treatment Plan.
- 3.2. The signatories to this Programmatic Agreement recognize that, where feasible, preservation in place is the preferred treatment for cultural sites that are eligible for listing in the National Register, and the Treatment Plan will reflect this perspective.
- 3.3. The Treatment Plan will be consistent with the Secretary of Interior's Standards and Guidelines for Archaeology and Historic Preservation (48 FR 44716*et seq.*) and the Advisory Council's *Handbook on the Treatment of Archaeological Properties*. The Treatment Plan will provide for a research design and site-specific data recovery plans for data recovery efforts, including analysis and reporting.
- 3.4. BPA shall ensure that CARES makes a good-faith effort to acquire an access easement on private lands in the APE from the landowner where construction occurs to allow members of the CYN to conduct traditional plant gathering activities and other traditional uses. BPA will inform SHPO, Council, and the CYN of progress made in this regard. Any access agreement developed for this purpose will be submitted to each signatory and attached to this PA upon implementation.
- 3.5. As required by the CUP, CARES will develop a Decommissioning Plan for the Project. This Plan will provide for the removal of towers and foundations up to 4 to 6 inches below grade level, restoration of the topography, and reseeding with plants. The plants, to be approved by Klickitat County, will include species similar to the dominant native species within the plant communities on the Project site.
- 3.6. Any disputes that arise regarding preparation and implementation of the Treatment Plan will be resolved in accordance with Stipulation 8 of this Agreement.

4. CONSTRUCTION MONITORING

- 4.1. As part of its Construction Environmental Protection and Monitoring Plan, required under Section 6 of the CUP, CARES, in consultation with the SHPO and CYN, will prepare a Cultural Sites Monitoring Plan. BPA will submit the draft Monitoring Plan to the SHPO, CYN, and the Council for review and comment on how accurately and completely the substance of the Plan reflects this stipulation. SHPO, CYN, and Council will have 30 days to review the Plan, after which BPA will produce the final Plan that takes the SHPO, CYN, and Council comments into consideration.**
- 4.2. The Monitoring Plan will specify construction areas that will be monitored. The Monitoring Plan will also address actions to be taken if previously unidentified cultural sites or Native American burials are discovered during construction. The Monitoring Plan will set forth the means by which the immediate area of the find will be secured from construction and other disturbance, who is responsible for notifying SHPO and CYN, how much time these parties have to consult, how much time will be made available to treat the find, and when construction can move forward.**
- 4.3. The Monitoring Plan will specify the location of the National Register-eligible cultural sites to be avoided and the means by which they will be marked and avoided. Following Section 2.2 of the CUP, CARES will precisely locate any cultural sites considered eligible for listing in the National Register, which are identified during the work outlined in Stipulation 2 above using property surveys or other means so that the final design of roads along the turbine strings and placement of the turbines can avoid the identified sites and isolates where feasible. Disturbance of identified sites or isolates, or any additional sites or isolates discovered during construction activities, will not occur until Stipulations 2 and 3 have been met.**
- 4.4. Following Section 6.3 of the CUP, CARES will train construction workers on the importance of cultural sites, how to identify cultural sites, the need to avoid damage to cultural sites, and procedures to follow if previously unidentified cultural sites, including Indian graves, are encountered during construction. Trainers will include one or more archaeologists qualified under the Secretary of Interior's Standards and Guidelines for Archaeology and Historic Preservation (48 FR 44716 *et seq.*) and one or more members of the CYN, if it chooses to participate.**
- 4.5. Following Section 6.2 of the CUP, CARES will use Klickitat County and BPA-approved cultural sites specialists and one or more tribal monitors, if appointed by the CYN, as independent cultural sites monitors to ensure that flagged cultural sites are avoided.**
- 4.6. The Monitoring Plan will set forth the methods and interval(s) for long-term monitoring of cultural sites in the APE considered eligible for National Register listing to confirm that Project operation will have no adverse effects on them. If monitoring reveals adverse effects, BPA will ensure that CARES takes any actions that may be needed to confirm that affected sites are eligible for the National Register, to evaluate Project effects on such sites, and to mitigate adverse effects in accordance with the Treatment Plan.**

4.7. In the case of inadvertent discovery of Native American burials or Native American human remains during construction, archaeological fieldwork, or laboratory analysis, CARES will halt construction activities in the immediate area of the discovered deposit, take reasonable action to secure such area, and promptly notify the BPA, SHPO, Council, and CYN. BPA will consult with the SHPO, Council, and include the CYN, if such archaeological deposits are related to Native Americans or if the source of the archaeological deposits is unknown, regarding evaluation and treatment of the deposits in accordance with 36 CFR 800.11.

4.8. Any disputes that arise regarding preparation of the Cultural Sites Monitoring Plan will be resolved in accordance with Stipulation 8 of this Agreement.

5. REPORTING

5.1. BPA will produce one or more reports as needed on the additional cultural sites survey, Determination of Eligibility, assessment of Project effects, treatment of cultural sites, and construction monitoring. The report(s) will discuss the methods and results of the work that is the subject of the report. If archaeological testing, data recovery excavations, or salvage excavations are needed at more than three cultural sites, BPA will produce a final synthetic report for the Project for submittal to appropriate repositories for cultural sites professionals and the public.

5.2. The report(s) will follow the Secretary of Interior's Standards and Guidelines for Archaeology and Historic Preservation (48 FR 44716 *et seq.*) and the Advisory Council's *Handbook on the Treatment of Archaeological Properties*. BPA will submit draft reports to the SHPO, CYN, and Council for review and comment on how accurately and completely the substance of the report reflects the Programmatic Agreement stipulation or plan under which the report was prepared. SHPO, CYN, and Council will have 30 days to review each draft report, after which BPA will produce final reports that take SHPO, CYN, and Council comments into consideration. All final reports will be completed within eight months after the completion of the construction monitoring set forth in Stipulation 4.

5.3. Any disputes that arise regarding preparation of the Project reports will be resolved in accordance with Stipulation 8 of this Agreement.

6. CURATION

BPA will ensure that the records and materials resulting from identification and data recovery efforts are curated according to the Secretary of Interior's Standards and Guidelines for Archaeology and Historic Preservation (48 FR 44716 *et seq.*) and the Advisory Council's *Handbook on the Treatment of Archaeological Properties*, taking into consideration 36 CFR Part 79. Human skeletal remains and associated artifacts are to be reburied at the discretion of the CYN after consultation among BPA, SHPO, and CYN regarding the need for any basic forensic analysis. BPA designates the CYN Heritage

Center, as an institution qualified under 36 CFR Part 79, as the repository for curating records and materials on cultural sites for the Project.

7. AMENDMENT OF THE PROGRAMMATIC AGREEMENT

If a signatory to this Programmatic Agreement determines that the terms of the Programmatic Agreement cannot be met or believes a change is necessary, such party may request the signatories to consider an amendment to the Programmatic Agreement in accordance with 36 CFR 800.5(c)(5). Such an amendment will be executed in the same manner as the original Programmatic Agreement; parties invited to concur in the Programmatic Agreement will be invited to concur in any such amendment.

8. DISPUTE RESOLUTION

Should any party to this agreement object within 30 days to any plans provided for review or actions proposed pursuant to this Agreement, the BPA shall consult with the objecting party to resolve the objection. If the BPA determines that the objection cannot be resolved, the BPA shall forward documentation relevant to the dispute to the Council. Within 30 days after receipt of all pertinent documentation, the Council will either:

1. provide the BPA with recommendations, which the BPA shall take into account in reaching a final decision regarding the dispute; or
2. notify the BPA that it will comment pursuant to 36 CFR Section 800.6(b), and proceed to comment. Any Council comment provided in response to such a request will be taken into account by the BPA in accordance with 36 CFR Section 800.6(c)(2) with reference to the subject of the dispute.
3. Any recommendation or comment provided by the Council will be understood to pertain only to the subject of the dispute; the BPA's responsibility to carry out all actions under this agreement that are not the subjects of the dispute will remain unchanged.
4. At any time during implementation of the measures stipulated in this agreement, should an objection to any such measure or its manner of implementation be raised by any member of the public, the BPA will take the objection into account and consult as needed with the objecting party, the SHPO, or the Council to resolve the dispute. In no event shall such objection and consultation provide grounds for postponing or delaying the conduct of the undertaking or the terms of this agreement.

9. TERMINATION

BPA, the SHPO, or the Council may terminate this Programmatic Agreement by providing thirty (30) days' prior written notice to the other signatories; provided, however, that during the thirty-day period, the signatories will consult to seek agreement or amendment or other actions that would avoid termination of the Programmatic Agreement. In the event the parties are unable to avoid termination, BPA will comply with 36 CFR 800.4 through 800.6 with regard to any elements of the Project that have not previously been taken into account by BPA.

CONCLUSION

Execution of this Programmatic Agreement by the BPA, the SHPO, and the Council, and implementation of its terms are evidence that BPA has taken into account the effects on cultural sites of the CARES Columbia Wind Farm #1 in accordance with Section 106 of the National Historic Preservation Act.

Signatory Parties:

BONNEVILLE POWER ADMINISTRATION

By: *Stephanie A. Smith* Date: 3/13/97

WASHINGTON STATE OFFICE OF ARCHAEOLOGY AND HISTORIC PRESERVATION

By: *Shirley* ACTING SHPO Date: 5.12.97

THE ADVISORY COUNCIL ON HISTORIC PRESERVATION

By: _____ Date: _____

Concurring Party:

CONFEDERATED TRIBES AND BANDS OF THE YAKAMA INDIAN NATION

By: _____ Date: _____



December 28, 2020
Kimberly Bose, Secretary
Federal Energy Regulatory Commission
888 First Street NE
Washington, D.C. 20426

Submitted electronically via: <https://ferconline.ferc.gov/FERCOOnline.aspx>.

RE: NEPA Scoping Comments on the Proposed Goldendale Pumped Storage Project (P-14861-002).

Dear Secretary Bose,

The following comments are submitted on behalf of Columbia Riverkeeper, Friends of the White Salmon River, and Washington Chapter of the Sierra Club (together “Commenters”) in response to the Federal Energy Regulatory Commission’s (FERC) request to assist the agency in identifying issues that must be addressed during the environmental review process. On October 29, 2020, FERC issued a Notice Soliciting Scoping Comments for the Goldendale Pumped Storage Project (FERC No. 14861-002) (hereinafter “Scoping Document”) pursuant to the National Environmental Policy Act (NEPA). 40 C.F.R. §§ 1500-1508. For reasons described below, this scoping process is premature and FERC must conduct an Environmental Impact Statement (EIS) for this development.

I. Statement of Interest and Background on the Goldendale Pumped Storage Project.

Riverkeeper is a 501(c)(3) non-profit organization whose mission is to protect and restore the water quality of the Columbia River and all life connected to it from the headwaters to the Pacific Ocean. The organization’s strategy for protecting the Columbia River and its tributaries includes working in river communities and enforcing laws that protect public health, salmon, and other fish and wildlife. Riverkeeper has been actively engaged in Rye Development (Rye), dba

Free Flow Power 101, LLC's proposed Goldendale Energy Storage Hydroelectric Project (Project) since 2017 and closely followed other pumped storage projects proposed in this area, the most recent iteration rejected by FERC in 2016. *See* Public Utility District No.1 of Klickitat County, Washington & Clean Power Development, LLC, 155 F.E.R.C. ¶ 61,056 (2016).

Commenters appreciate the opportunity to provide these comments and supporting materials, including the Appendices with this letter. Our expectation is that the relevant documents, included in with this comment, will also be included in the administrative record for this decision.

Rye proposes the Northwest's largest pumped storage hydroelectric project along the Columbia River in Klickitat County, Washington, near the John Day Dam, with 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. 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. 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), now a Resource Conservation and Recovery Act (RCRA) contaminated site, which include 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).

The 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. *See* Columbia Riverkeeper et. al, Public Comments on Free Flow Power 101, LLC Goldendale Pumped Storage Project Clean Water Act 401 Water Quality Certification, (Nov. 9, 2020) (Appendix 1). The Project requires withdrawing millions of gallons of Columbia River water, threatening designated uses and impacting water quality in an already degraded river. *Id.* Tribal, federal, and state fish and wildlife agencies have raised significant concerns about the Project’s impacts on water quality, fish, and wildlife. *Id.* All of these issues, discussed in greater detail below, must be addressed in FERC’s NEPA process.

Like many people in the Pacific Northwest and nationally, Riverkeeper is deeply concerned about a decision that will authorize the construction of a Project with such detrimental and unavoidable environmental justice concerns. At a time when our nation is supposedly reconciling with its deeply ingrained systemic racism, pushing forward an alleged “green-energy” project of this magnitude that will obliterate tribal cultural and religious resources; hinder, if not prohibit, tribal access; and continue the nation’s pattern of deep disregard for tribal cultural resources, is unacceptable. As the state of Washington sets de-carbonization goals, projects with such blatant disregard for environmental justice cannot be allowed a fast track through the licensing process. Green energy cannot be built on the backs of tribal nations.

II. FERC’s Application of the New CEQ Regulations is Premature.

According to FERC’s Scoping Document, FERC intends to apply the Council of Environmental Quality (CEQ) new final rule, issued on July 15, 2020, revising the regulations under 40 C.F.R. §§ 1500-1508 that federal agencies use to implement NEPA (New CEQ Regulations). *See* Scoping Document at FN 3. The use of the new NEPA regulations is premature and not necessary for this project. FERC holds the authority to determine whether or not to apply the new CEQ Regulations to any ongoing activities begun before September 14, 2020, such as the Project. *See Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 Fed. Reg. 43,304 § 1506.13. However, FERC has yet to issue publicly available guidance on how it intends to apply the New CEQ Regulations, making the application of the New CEQ Regulations in this process unnecessarily vague. FERC guidance on the New CEQ Regulations is necessary and extremely helpful in the NEPA review process because it allows stakeholders the opportunity to provide FERC with the information that FERC interprets as necessary and vital to the NEPA process. It also allows stakeholders insight into how FERC will apply the New CEQ Regulations and how that application is different or similar to FERC’s application of past CEQ Regulations. Without this new FERC guidance, stakeholders are in the dark when it comes to FERC’s application of the

New CEQ Regulations, making this NEPA process unnecessarily vague. The New CEQ Regulations do not automatically apply to the Project, which has been in the FERC docket since 2017. Given the lack of clarity set forth by FERC on how it plans to follow NEPA, application of the New CEQ Regulations is premature.

Furthermore, it is not practicable to begin scoping at this time for three reasons. First, as discussed above, FERC's push to use the New CEQ Regulations during this scoping process is premature. These new rules have not been in effect for more than six months and the current transition of Presidential administrations begs the question of whether these regulations will be in effect for the rest of the year. This Project commenced prior to these regulations and its NEPA scoping process should not proceed with the New CEQ Regulations. Given that the Project is not sufficiently developed at this time, it is impractical to begin scoping now and even more impractical to begin scoping under New CEQ regulations that are vague at best, and temporary at worst.

Second, the COVID-19 pandemic continues to devastate tribal governments, Indigenous people, and communities with a direct stake in the area where the project is proposed to be built. For example, the Yakama Nation Reservation and surrounding ceded lands have been devastated by the pandemic, with tribal resources and attention directed to relief response. In Yakima County, there have been 19,981 cases of COVID-19 reported and 310 deaths.² Under 40 C.F.R. § 1501.9(c), "As part of the scoping process the lead agency may hold a scoping meeting or meetings, publish scoping information, or use other means to communicate with those persons or agencies who may be interested or affected, which the agency may integrate with any other early planning meeting." For this process FERC decided that, "[d]ue to concerns with large gatherings related to COVID-19, we do not intend to conduct a public scoping meeting and site visit in this case." Scoping Document at 2. FERC offers no alternative to this public meeting, such as a virtual meeting for stakeholders. If COVID-19 proves enough of a concern to limit FERC's communications with the public on this Project, it also proves enough to make the scoping process impracticable at this time.

Third, the Project was recently bought by Copenhagen Infrastructure Partners (CIP), with Rye continuing to lead development of the Project until construction begins. Kelly Bork, COPENHAGEN INFRASTRUCTURE PARTNERS, *CIP acquires Swan Lake and Goldendale, 393 MW and 1,200 MW pumped storage hydro projects located in Oregon and Washington, USA*, (Nov. 11, 2020) (Appendix 2). So far this update has not been put into the FERC docket, nor has Rye informed Project stakeholders. It is unclear how this change of ownership will alter the Project or the environmental and energy issues at stake. It is further unclear how an environmental analysis can move forward when the Project's new owner and operator is not

² View current Washington statistics here: <https://www.google.com/search?q=yakima+county+covid+19+cases&oq=Yakima+County+Covid&aqs=chrome.1.0l8.4503j0j7&sourceid=chrome&ie=UTF-8> (last visited Dec. 28, 2019).

involved in the FERC process. Any commitments made by Rye, at this point or until the start of construction, may not hold CIP accountable in the future. FERC must address how this change of ownership impacts the FERC licensing process and how CIP will be held accountable moving forward with Project construction.

III. Rye’s Final License Application is Not Sufficiently Developed for Agency Consideration at This Time.

The Project is not sufficiently developed for agency consideration at this time to allow for a thorough identification of significant and non-significant issues. Under 40 C.F.R. § 1501.9(a), “[s]coping may begin as soon as practicable after the proposal for action is sufficiently developed for agency consideration.” Several reasons exist as to why the Project is not sufficiently developed. Numerous archeological and cultural resource surveys of the area have yet to be conducted, finished, and filed with FERC.

First, the Confederated Tribes and Bands of the Yakama Nation (Yakama Nation), who have been actively involved in the project since 2017, and were contracted by Rye to conduct archaeological and cultural resource surveys of the area, have yet to conclude and submit the final cultural resource survey. Rye’s FLA states that “the APE (Area for Potential Effect) has been surveyed for archaeological and historic architectural resources, as well as TCPs (Traditional Cultural Properties) that are significant to the *Yakama Nation*. [emphasis added]. FLA Exhibit E at 78. But, the FLA goes on to list numerous cultural resource surveys that have yet to be finished by the Tribe including:

- Conducting additional survey to correct the boundary of the Push-Pum TCP so that it properly incorporates connected plant resources as documented in 1995 and 2019 (per the recommendation of Yakama Nation);
- Evaluating the Columbia Hills Multiple Property Documentation (MPD) TCP under NRHP Criterion B, C, and D (per the recommendation of Yakama Nation);
- Evaluating Sites 45KL566, 45KL567, 45KL570, 45KL744, 45KL746, and LS-3 for the NRHP both individually and for their contribution to the Push-Pum TCP, Columbia Hills MPD TCP, and Columbia Hills Archaeological District assessing Project effects to the Push-Pum TCP, Columbia Hills MPD TCP, the Columbia Hills Archaeological District.

FLA Exhibit E at 78.

Second, the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) have yet to conduct their cultural and archaeological surveys of the area, despite participating in the FERC process early.³ Rye's FLA includes the following as surveys yet to be conducted, including

- Identifying historic properties of religious and cultural significance to the Confederated Tribes of the Umatilla Indian Reservation (CTUIR);
- any identified historic properties of religious and cultural significance to the CTUIR, and any of the archaeological resources that are determined to be eligible for the NRHP.

FLA Exhibit E at 78.

Third, 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. On October 29, 2020, FERC directed Rye to conduct that survey.

Lastly, it is unclear if Rye has contacted or been in sufficient contact with representatives from the Confederated Tribes of Warm Springs (Warm Springs) to allow the Tribe time to contribute surveys of the area if appropriate.

At this time, Yakama Nation, CTUIR, Nez Perce, and Warm Springs, the four Columbia River Treaty Tribes, have not been afforded the opportunity to identify tribal cultural and religious resources that risk destruction from the Project. Rye's FLA states, "[o]nly the Yakama Nation can determine what is significant to the tribe," presumptively this suggests that Rye would agree that only CTUIR, Nez Perce, and Warm Springs can determine what is significant to their tribes. Conducting the scoping process now will undermine these surveys because without them it is near impossible that FERC will be able to identify all significant issues that the Yakama Nation, CTUIR, Nez Perce, and Warm Springs will raise.

IV. An EIS is Required for the Project.

A. The National Environmental Policy Act.

³ See Letter from Kristen Tiede to FERC (Jan. 21, 2018), In FERC Docket No. 14861. Letters submitted by CTUIR have been filed confidentially to protect tribal cultural resources.

Section 102(2)(C) of the National Environmental Policy Act establishes an “action-forcing” mechanism to ensure “that environmental concerns will be integrated into the very process of agency decisionmaking.” *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979). Pursuant to that statutory provision, “all agencies of the Federal Government shall ... include in every recommendation or report on ... major Federal actions significantly affecting the quality of the human environment, a detailed statement” known as an environmental impact statement (“EIS”) addressing “the environmental impact of the proposed action, any adverse environmental impacts which cannot be avoided ..., alternatives to the proposed action,” and other environmental issues. 42 U.S.C. § 4332.

NEPA has two fundamental purposes: (1) to guarantee that agencies take a “hard look” at the consequences of their actions before the actions occur by ensuring that “the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impact,” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); and (2) to ensure that “the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision,” *id.* at 349. NEPA “emphasize[s] the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that ‘the agency will not act on incomplete information, only to regret its decision after it is too late to correct.’” *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998).

B. FERC Must Define the Proper Purpose and Need for the Project and Consider an Appropriate Range of Alternatives.

The consideration of alternatives is the heart of the NEPA review process. It is through the identification of reasonable alternatives, the examination of the environmental impacts that will result under each alternative, and the comparison of those impacts, that the agency and the public can fully understand the impacts of a proposed project. As such, an agency may not undermine this process by defining a project's purpose so narrowly as to preclude consideration of reasonable alternatives. *Cf. Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 814 n.7 (9th Cir. 1999).

1. The Purpose and Need.

“The stated goal of a project necessarily dictates the range of reasonable alternatives and an agency cannot define its objectives in unreasonably narrow terms.” *Carmel by the Sea v. U.S. Dept. of Trans.*, 123 F.3d 1142, 1155 (9th Cir. 1997). Thus, the first step in the NEPA process is for the agency to “briefly specify the underlying purpose and need for the proposed action.” 40 C.F.R. § 1502.13. Here, the purpose and need must be based on the “the goals of the applicant and the agency’s authority.” *Id.*

According to Rye, the purpose of and need for this project is to assist Washington, Oregon, and California in meeting their “carbon reduction and environmental policy goals,” and specifically Washington’s goal of ensuring that “all of its electricity come from carbon-free sources by midcentury.” FLA at 2. Stated differently, Rye’s goal, and thus the “underlying purpose and need” for the project, is to “facilitate the transition to Washington’s clean energy future.” *Id.* at 3. Commenters agree this laudable goal is the true purpose of this project. As such, FERC must assess all reasonable alternatives that will support this goal. To do less would be to artificially restrict the purpose and need for this project to no other end than to prevent the consideration of reasonable alternatives.

Arguably, this project is limited to the development of “utility-scale storage to solve the operational challenges of integration.” *Id.* at 2. If FERC accepts this more limited purpose and need for this project, it must conduct an corresponding alternative analysis. Indeed, Rye admits that there are other “viable, least-cost energy storage options available,” in addition to its preferred pumped storage technology. *Id.* FERC is obligated to identify these alternatives and explore the relative environmental impacts of implementing these technologies to meet Washington’s goal of moving to all renewable electricity generation.

2. Reasonable Alternatives.

NEPA requires federal agencies to “study, develop, and describe appropriate alternatives to recommended courses of action.” 42 U.S.C. § 4332(2)(E). This provision applies whether an agency is preparing an EIS or an EA. *Native Ecosystems Council v. US Forest Serv.*, 428 F.3d 1233, 1245 (9th Cir. 2005). Viable alternatives are those that are feasible and either meet the stated goals of the project, or are reasonably related to the purposes of the project. First, as required by the law and to establish the baseline against which any environmental impact of any specific alternative can be compared, FERC must consider a no action alternative. Next, given Rye’s broadly stated project goal, FERC must consider alternatives that look well beyond the four corners of this specific project, to include alternatives that ensure Washington can meet its energy generation goals and to explore alternatives for utility-scale storage. In any case, FERC must identify and analyze reasonable alternatives to the specific proposed project. This analysis must examine alternative locations for this project and alternative designs at the chosen site.

i. No Action Alternative.

FERC must define and explain impacts of not licensing this project, or any project, at this location. This the no action alternative. *See* 40 C.F.R. § 1501.7(e)(2) and § 1502.14(c). The NEPA regulations require the agency to “present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis

for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.1. This description of the impacts of various alternatives, and the comparative analysis allowed by the development of such information, is the true benefit of the NEPA process. To be meaningful the NEPA document must include the information necessary to allow a thorough and objective assessment of the alternatives. To this end, the identification and review of a no action alternative is essential. Indeed, the no action alternative acts as the starting point for the comparison of the impacts, be they beneficial or adverse, of the proposal and reasonable alternatives.

Here, because this is a new project, the not action alternative is not permitting this project to go forward. Thus, FERC must describe the value of the site as it exists and the ecological, cultural, recreational, and commercial benefits and activities the site does and could support if the project is not developed.

ii. The EIS must consider clean energy alternatives.

FERC must evaluate alternatives to the Project. 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) (Appendix 3). 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.

In considering alternatives, FERC 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, FERC 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.

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)(Appendix 4). 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. Overall, FERC must analyze alternatives to the Project, including alternative site locations, designs, and developments.

iii. FERC must consider alternatives to pumped storage to provide utility-scale storage to solve the operational challenges of integration.

In support of its application Rye claims that “[o]f the viable, least-cost energy storage options available, pumped storage is the best-proven, least-cost energy storage technology at scale.” This raises precisely the question FERC must answer: what other “viable, least-cost energy storage options” are available? The answer to this question must be found in FERC’s analysis of the reasonable alternative to the Project. In the FLA, Rye briefly analyzes wind, solar, and Lithium Ion batteries as potential green energy alternatives to pumped storage. FLA Exhibit C at 7. In comparing pumped storage to wind and solar energy, Rye quickly concludes that “[p]umped hydro storage is the only asset that provides large-scale, cost-effective renewable energy storage capacity and a range of essential grid reliability services, the value of which will increase as penetration of intermittent renewable resources rises.” FLA Exhibit C at 8. However, comparing renewable energy generation to storage is like comparing apples to oranges. Thus, Rye’s only adequate alternative analyzed is Lithium Ion batteries. That being said, FERC must include an analysis of Lithium Ion batteries as an alternative to pumped storage. In addition, there are several other renewable energy storage technologies that Rye’s FLA failed to analyze and that FERC must include in its analysis. These include, but are not limited to:

1. Stacked Blocks, which store energy by “automating a six-armed robotic crane to stack thousands of purpose-built, 35-metric-ton monoliths into a Babel-like tower and drop them down again...to release the power.” Julian Spector, GREEN TECH MEDIA, *The 5 Most Promising Long-Duration Storage Technologies Left Standing* (March 31, 2020). This technology adapted pumped hydro’s gravity storage in a format with more geographic diversity. *Id.*
2. Liquid Air, a mechanism that “cools down air and stores it in pressurized above-ground tanks,” and uses them for grid storage. *Id.*
3. Underground Compressed Air, whereby you “use excess electricity to pump compressed air into a suitable underground formation that acts like a giant storage tank. Releasing the pressurized air allows the plant to re-generate electricity when needed.” *Id.*
4. Flow Batteries, particularly Avalon Batteries, which found a way around material cost challenges associated with flow batteries. *Id.*

iv. FERC must analyze alternative sites for a pumped storage project.

When the purpose of a project is not, but its own terms, tied to specific location, the agency must assess alternative locations for the project. *Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1098 (9th Cir. 2006). The history of tribal opposition to developments in this area and the extensively documented cultural resources should have made this location a non-starter for Rye. Despite this, the location alone does not represent the sole location for siting of this Project. The proliferation of proposed pumped storage projects on the West Coast alone demonstrates this. See Generally Courtney Flatt, NORTHWEST PUBLIC BROADCASTING, *New Energy Storage Project on Upper Columbia Brings Jobs — and Concerns from Colville Tribes* (Dec. 23, 2019), Julian Spector, GREEN TECH MEDIA, *Montana Developer Ready to Build Modern-Day Pumped Hydro Storage* (Aug. 13, 2019), Brian Gailey, KLAMATH FALLS NEWS, *CIP Acquires Swan Lake pumped hydro project* (Nov. 11, 2020), Sammy Roth, LA TIMES, *Environmental Disaster or to a Clean Energy Future? A New Twist on Hydropower* (Mar. 5, 2020), Bloomberg News Editors, RENEWABLE ENERGY WORLD, *In quest for bigger batteries, California mulls pumped hydro* (Jun. 10, 2019). Furthermore, studies have undertaken “to develop a series of advanced Geographic Information System algorithms to locate prospective sites for off-river pumped hydro across a large land area such as a state or a country.” Bin Lu, et al., *Geographic information system algorithms to locate prospective sites for pumped hydro energy storage*, 222 APPLIED SCIENCE 300, (2018). The Project need not be built at this site and FERC must look at alternative sites for the Project.

v. FERC must consider alternative project designs.

Finally, FERC must explore alternatives to design and proposed operations of the facility as proposed. In its application Rye discusses its efforts to “evaluate the cost-benefit of various reservoir sizes.” FLA Exhibit A at 8. This analysis falls well short of what is required under NEPA. For example, Rye claims that it merely changed the size of the reservoirs, but retained “a total generating capacity of 1,200 megawatts (MW), which is considered most appropriate for the site and market conditions.” *Id.* Alternative generating capacities, and the resulting impact on the footprint of the Project must also be explored. Further, FERC must consider the locations of the reservoirs, and the potential alternatives for other locations within the property boundary. Moving the various elements of the facility within the Project site will likely change the on-the-ground impacts. These alternatives must be considered.

The same is true for the other equipment and infrastructure that will be needed to run the facility. FERC must consider and disclose the impacts for alternative designs and layouts.

In addition, FERC must consider the impact from alternative operational parameters for the project. According to Rye’s application, “The Project is designed to generate for 12 hours a day of full power generation, at a maximum of 1,200 MW and a minimum of 100 MW, and

pump water from the lower reservoir to the upper reservoir in about 15 hours.” FLA, Exhibit B at 6. In order for the Project to produce the maximum amount of energy (1,200MW), it will need to generate power (run all water from the upper reservoir to the lower) for 12 hours. FERC must require the development of alternative operational patterns and reveal and discuss the potential resulting impacts to the environment.

Finally, FERC must explore alternatives that mitigate the known adverse impacts that will result from the Project, as proposed. As discussed in detail below, the Project will have significant impacts on the environment, including but not limited to, direct, indirect, and reasonably foreseeable negative impacts to the people, fish, and wildlife in the vicinity of the proposed facility.

C. FERC Must Prepare an EIS for the Project because it will Significantly Affect the Quality of the Human Environment.

FERC must prepare an EIS for the Project. “NEPA requires that agencies “prepare an EIS for federal actions that will ‘significantly affect the quality of the human environment.’” *Columbia Riverkeeper v. United States Army Corp of Eng’rs*, 2020 U.S. Dist. LEXIS 219535, *4 (W.D. Wa. Nov. 23, 2020) (quoting *Bark v. United States Forest Serv.*, 958 F.3d 865, 868 (9th Cir. 2020)(quoting *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755, 763 (9th Cir. 2014). Under 40 C.F.R § 1501.5(a), an Environmental Assessment (EA) is only appropriate, “for a proposed action that is not likely to have significant effects or when the significance of the effects is unknown.” Here, the Project will have significant effects which are known. According to NEPA, “both the context and intensity of the action must be considered when an agency is considering whether a proposed action significantly affects the environment.” *Umpqua Watersheds v. United States Forest Serv.*, 725 F. Supp. 2d 1232, 1241 (OR Dist. Ct. 2010), *see* 40 C.F.R. § 1508.27. Context refers to the area of “the affected region, the affected interests and the locality.” 40 C.F.R. § 1508.27(a). “In evaluating intensity, the NEPA regulations require that an agency consider ten significance factors.” *Umpqua Watersheds*, 725 F.Supp. 2d at 1241. The factors include the following:

1. Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
2. The degree to which the proposed action affects public health or safety.
3. Unique characteristics of the geographic area such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
4. The degree to which the effects on the quality of the human environment are likely to be highly controversial.

5. The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
6. The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
7. Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.
8. The degree to which the action may adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.
9. The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.
10. Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.

40 C.F.R. §§ 1508.27(b)(1)-(b)(10). Courts have stated that, “**If any** of these factors [are] present, an **EIS is required**,”[emphasis added] and have furthered explained that “Intensity “refers to the severity of the impact” and is evaluated based on a number of “significance” factors.” *Umpqua Watersheds*, 725 F.Supp. 2d at 1241, *Or. Natural Dessert Ass’n v. BLM*, 2014 U.S. Dist. LEXIS 143403, *70 (Or. Dist. Ct. Mar. 17, 2014). But that “A court may find a substantial risk of a significant effect based on just one of these factors.” *Or. Natural Dessert Ass’n*, U.S. Dist. LEXIS 143403, *70 citing *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 865 (9th Cir. 2004). Several of these significance factors are present with this Project and therefore compel an EIS.

The intensity, or severity of the impacts from this Project are high, with several significance factors present. Given the extraordinary cultural and archeological resource issues at stake with the Project, limited and deficient information in the FLA⁴, the highly controversial nature of the Project, the Project’s obliteration of numerous sites eligible for inclusion in the National Register, and future implications, there is a substantial risk of significant effect on the human environment from this Project. Commenters urge that the Commission conduct an EIS. Section VI , below outlines the pertinent issues that FERC must analyze as part of its

⁴ See Letter from FERC to Erik Steimle (Dec. 17, 2020), In FERC Docket No. 14861 (stating that the request to use the Expedited Licensing Process is denied due to deficient information in the FLA and failure to provide information in response to FERC request.).

environmental review and support the Commission preparing an EIS for this Project because of the significant effects to the environment.

V. FERC is Legally Obligated to Evaluate Direct, Indirect, and Cumulative Impacts as part of the EIS.

Under NEPA, an EIS must consider direct effects, indirect effects, and cumulative effects. “Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.” 40 C.F.R. § 1508.8. The direct effects of an action are those effects “which are caused by the action and occur at the same time and place.” 40 C.F.R. § 1508.8(a). The indirect effects of an action are those effects “which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8(b). For example, “[i]ndirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.” *Id.* These types of growth-inducing impacts must be analyzed, even when they are characterized as “secondary.” *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975) (requiring EIS to address growth-inducing impacts of freeway interchange planned in agricultural area on the edge of urban development). Section VI, below outlines the direct, indirect, and cumulative impacts that FERC must evaluate as part of the EIS.

VI. Specific and Pertinent Issues to Address in the NEPA Document.

A. Tribal Archaeological and Cultural Resources.

FERC must fully account for tribal nations’ input on Rye’s proposal in the EIS. Rye sited the Project in an area of incalculable significance for tribal nations, an area that includes multiple documented Traditional Cultural Properties (TCPs), tribal-access agreements, and TCP’s either: 1) eligible for inclusion on the National Historic Register of Historic Places (NHR); or 2) already included. Moreover, Rye has, for years, failed to change the Project’s location over the objections of sovereign tribal nations.

Yakama Nation has opposed the Project since its inception. Yakama Nation also opposed earlier iterations of a pumped-storage hydroelectric proposed at the site.

According to the Tribe, 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. 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) (Appendix 5).

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.

Yakama Nation's archaeological resource survey, completed in 2019, concluded that multiple sites of cultural and religious importance are located within the Project boundary.⁵ According to Rye's FLA, "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 Appendix G at 12. 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. The proposed Project will also have a serious impact on the health and safety of the Yakama people, who use the Push-pum site to gather traditional medicines. Rye's

⁵ The Yakama Nation is still in the process of completing their 2020 Cultural Resources Survey of the Project area.

FLA states that, “[w]ithin that Project area, there is a stipulation for BPA to create a plan that will allow tribal members to access Push-pum to gather foods and medicine significant to the tribe.” FLA Exhibit E at 78. However, there is no discussion of how construction or management of the Project will interfere with this access or interfere with the integrity of the foods and medicines gathered.

The significance of this area to the Yakama Nation cannot be overlooked. While the Yakama Nation has filed tribal cultural resource surveys as “confidential” with FERC, available information, including FLA Appendix G, details the Project area’s importance for tribal cultural and religious resources.

The Yakama Nation is not the only affected Tribal Nation. CTUIR has also weighed in on the development. While letters submitted by CTUIR have been filed confidentially to protect tribal cultural resources,⁶ 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. 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. *See infra* at Section III.

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.

When looking at the impacts to tribal cultural and religious resources from this Project the intensity, or severity of the impacts are high, with several significance factors present. Including the destruction of TCPs unique to this geographic location, the destruction of TCPs

⁶ *See* Appendix 6 and 7, 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.

eligible for, or already included, on the NRH, the serious impacts to public health and safety of Indian people who rely on foods and medicines in the area, the cumulative impacts that the Project will have on archeological and cultural resources of at least four tribes, and the future implications that developing this Project will have on this site, including opening the area to more development. 40 C.F.R. § 1508.27(b)(2), (3), (4), (5), (6), (7), (8). The effects of this Project are highly controversial and must be analyzed by FERC in an EIS. *See generally, Umpqua Watersheds*, 725 F.Supp. 2d at 1241.

FERC 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. FERC's EIS 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. *See infra* at Section IV.C.

B. Water Quality Issues.

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. The Project would also 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. Columbia Riverkeeper and other commenters submitted detailed technical comments to the Washington Department of Ecology on Rye's 401 water quality certification application, which outline in great detail the water quality issues from the Project and are incorporated herein by reference. *See* Columbia Riverkeeper et. al, Public Comments on Free Flow Power 101, LLC Goldendale Pumped Storage Project Clean Water Act 401 Water Quality Certification, (Nov. 9, 2020) (Appendix 1). FERC must analyze the water quality issues identified in Columbia Riverkeeper et al.'s 401 certification comments in the EIS.

C. Avian, Terrestrial, and Aquatic Wildlife Impacts.

The Project will have significant impacts on wildlife. 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. 14861; USFWS Comment to FERC (Mar. 3, 2020), *In* FERC Docket No. 14861.

Furthermore, the Oregon Department of Fish and Wildlife (ODFW) and Washington Department of Fish and Wildlife (WDFW) collectively identified four threatened, endangered, candidate, or proposed species, as well as one critical habitat within the project boundary.⁷ See Letter from U.S. Dep't of Interior Fish & Wildlife Service to FERC (Oct. 14, 2020), *In* FERC Docket No. 14861. Rye elected to site its Project 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.

USFWS Comment to FERC (Mar. 3, 2020), *In* FERC Docket No. 14861. 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. 14861. USFWS and WDFW comments detail the direct and indirect wildlife-habitat impacts from the Project’s infrastructure,

⁷ ODFW and WDFW collectively identified the following species: 1. The Western Distinct Population Segment of Gray Wolf; 2. Gray Wolf; 3. Yellow-Billed Cuckoo; and 4. Bull Trout. WDFW also identified Bull Trout critical habitat as within the project boundary.

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).

FERC's EIS must address the Project's impacts on wildlife, including the loss of habitat as a result of the new development, the future implications of siting a large scale development here on wildlife, the increase in avian mortality from wind turbines as a result of increased avian activity next to reservoirs, and the impacts to threatened, endangered, candidate, and/or proposed species.

D. Wind Turbines near Proposed Project.

Rye chose to site the upper reservoir within and directly adjacent to an existing wind turbine complex. FLA Exhibit E 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. 14861. 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 must be analyzed by FERC in their environmental review because they involve unique risks on the environment in this geographic location. *See* 40 C.F.R. § 1508.27(b)(5).

Furthermore, Rye has failed to provide adequate information in response to Commission staff's request for more information following Rye's deficient FLA. Specifically, FERC states that,

In order to assess the compatibility of the proposed project with existing land uses and the potential indirect effects of the proposed project on the golden eagle, staff requested in comments on the draft license application, that you conduct studies (e.g., modeling) to demonstrate how project construction and operation would influence air flow above the upper

reservoir and around the wind turbines and how it would affect wind turbine operation and generation and include the modeling results in the final license application.

Without elaboration, in the final license application, you acknowledge the potential influence of the project on wind turbine performance and wind flow, but state that a thorough analysis can only be performed during final project design.

Letter from FERC to Erik Steimle, (Jul. 23, 2020), *In* FERC Docket No. 14861. In a December 17, 2020 letter from FERC, the Commission denied Rye's request to use the Expedited Licensing Process because of the information deficiencies in the FLA, stating that "[b]ased on staff's analysis, FFP's November 20, 2020 and December 4, 2020 filings only partially address staff's July 23, 2020 and October 29, 2020 information requests." *Id.* at 12. One such filing was Rye's wind analysis, which it committed to expand by February 2021. *Id.* The results of this wind analysis must be analyzed by FERC because the presence of the wind turbines create and involve unique risks if this Project is implemented, including risks that would impact wildlife.

E. Aluminum Smelter Cleanup Site

According to the Scoping Document,

Portions of the project's proposed infrastructure (such as the proposed lower reservoir) would be located on the site of the former Columbia River Gorge Aluminum (CGA) Smelter, which is now a Resource Conservation and Recovery Act (RCRA) contaminated site that is currently owned by NSC Smelter, LLC, and is subject to ongoing management and clean-up by Washington Department of Ecology (Washington DOE).

Scoping Document at 1. Previously proposed pumped storage projects in the area have been denied licenses by FERC because of the ongoing cleanup activities associated with CGA RCRA cleanup. *See Public Utility District No.1 of Klickitat County, Washington, Clean Power Development, LLC*, 155 F.E.R.C. ¶ 61,056 (2016). Rye's FLA states that,

The impoundment has tested as having non-hazardous and non-dangerous material; however, this area will be characterized further prior to being excavated as part of the construction of the lower reservoir. Because the material is unsuitable fill, it will be excavated and properly disposed of pursuant to full characterization in collaboration with the Washington Department of Ecology.

It is concerning that Rye has not completed characterization of this area as part of the FLA, nor has the developer created a plan for dealing with the material excavated during construction, if further characterization conflicts with prior testing. If material is excavated during construction and tests as being hazardous or dangerous waste, Rye must have a plan in place for properly disposing of that material in accordance with state and federal law. That being said, FERC must include an analysis of the status of CGA as part of its environmental review, particularly focusing on any incremental benefits to cleanup that may occur from Project construction and adverse significant effects. 40 C.F.R. § 1508.27(b)(1). Additionally, FERC must analyze whether or not Project construction activities may threaten a violation of State, Federal, or local law in regards to ongoing cleanup of the CGA RCRA site. 40 C.F.R. § 1508.27(b)(10). Both of these are significant factors that FERC must consider and further support the Commission conducting an EIS for this Project.

F. Other Issues to Evaluate in the EIS

FERC must also examine the following issues in the EIS:

- The Project's environmental justice impacts, including the Project's direct, indirect and cumulative impacts to Tribal Nations and Indigenous people, described above, and low-income ratepayers.
- The Project's scenic and other aesthetic impacts, including the aesthetic impacts of additional transmission lines.
- The direct, indirect, and cumulative impacts of additional transmission lines in the Columbia Basin and in the Project vicinity.
- The Project's impacts on the reliability and capacity of the BPA transmission lines and the Northwest grid.
- The Project's construction and operational impacts on air quality and noise.
- The Project's post-operation site restoration plans, including enforceable funding requirements to ensure those plans are completed.
- The Project's impacts on the Columbia River in the event of a reservoir failure.
- The Project's impacts on recreation, including paragliding, fishing, boating, birdwatching, petroglyph viewing, hunting, hiking, windsurfing, kiteboarding, kayaking, and other forms of recreation.
- The Project's construction and post-construction traffic impacts.
- The Project's socioeconomic impacts, including impacts to ratepayers.

VII. Conclusion.

Commenters respectfully reiterate that, for reasons described above, the scoping process is premature at this time. If FERC proceeds with the NEPA review, FERC must conduct an EIS

for this development because the Project will significantly affect the quality of the human environment. Commenters identify pertinent issues that FERC must address in its environmental review and which emphasize that the intensity of this project, i.e. the severity of the impact, is extremely high, destroying irreplaceable tribal cultural and religious resources and archeological sites, infringing on tribal peoples' access to food and medicine gathered in the area, impeding access to culturally significant areas, and impacting water quality and wildlife. The severity of impacts from this Project necessitate an EIS and Commenters respectfully request that FERC conduct an EIS on this highly controversial Project.

Sincerely,



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**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

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November 9, 2020

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**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.”

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- 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.

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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 Programa 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).

5. Letter from the Yakama Nation Tribal Council Chairman to the Washington State Legislature regarding opposition to the Project (Jan. 20, 2021).

[Coversheet Only. Paginated separately.]



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

January 20, 2021

Sent via E-mail

Environment, Energy, and Technology Committee
Washington State Senate
416 4th Ave SE, Suite 309 A
Olympia, WA 98504

Re: Opposition To Goldendale Pumped Storage Project in SB 5126

Dear Senate Environment, Energy, and Technology Committee Members,

I write on behalf of the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") to express our vehement and continued opposition to the Goldendale Pumped Storage Project, and any pumped storage project that endangers the rights reserved by our ancestors in the Treaty of 1855. The Yakama Nation has made our opposition clear to both the project proponents and Washington State agencies in past written correspondence, which are attached for this Committee's review.

The Yakama Nation supports energy alternatives that will combat climate change, but we will never support a project that destroys our sacred and Treaty-reserved natural and cultural resources. We ask this Committee to respect the Yakama Nation's rights and interests by withholding legislative support for the Goldendale Pumped Storage Project in the proposed Washington Climate Commitment Act, SB 5126.

Respectfully,

Delano Saluskin, Chairman
Yakama Nation Tribal Council

Encl.: Yakama Nation Letter to Federal Energy Regulatory Commission (Dec. 28, 2020)
Yakama Nation Letter to Washington State Department of Ecology (Nov. 6, 2020)
Yakama Nation Letter to Federal Energy Regulatory Commission (March 11, 2020)
Yakama Nation Letter to Federal Energy Regulatory Commission (Feb. 21, 2019)
Yakama Nation Letter to Rye Development (Feb. 14, 2018)

6. Letter from the Yakama Nation Superintendent of Natural Resources to FERC Secretary regarding comments on NEPA Scoping Document No. 1 (Dec. 28, 2020).

[Coversheet Only. Paginated separately.]



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

December 28, 2020

FILED ELECTRONICALLY

Kimberly Bose, Secretary
Federal Energy Regulatory Commission
888 First Street NE
Washington, D.C. 20426

RE: YAKAMA NATION COMMENTS ON NEPA SCOPING DOCUMENT NO. 1 FOR PROPOSED
GOLDENDALE PUMPED STORAGE PROJECT (P-14861-002).

Dear Secretary Bose,

Included herein are comments on behalf of the Confederated Tribes and Bands of the Yakama Nation (“Yakama Nation”) Natural Resources Department in response to the October 29, 2020 Notice Soliciting Scoping Comments (“Scoping Document”) for the Goldendale Pumped Storage Project FERC No. 14861 (“Project”) pursuant to the National Environmental Policy Act, 40 CFR §§ 1500 – 1508 (“NEPA”). Consistent with the Yakama Nation’s comments below, the Federal Energy Regulatory Commission (“FERC”) must conduct an Environmental Impact Statement (“EIS”) of this Project and should extend a second Scoping Document with additional necessary complete information. This letter preserves, incorporates, and reasserts the Yakama Nation’s concerns regarding the Project made known to the FERC and Project Applicants through previous communications.¹ This letter further agrees with and incorporates corresponding comments submitted by the Columbia Riverkeeper on the Project Scoping Document.

I. Background.

The 1855 Treaty between the United States and the Yakamas (“Treaty”) reserved a 1.3 million acre Reservation “for the exclusive use and benefit” of the Yakama people.² The Treaty further designated reserved rights for Yakamas to exercise “in common with” citizens of the United States at all usual and accustomed places within the Treaty

¹ See Exhibit A - Letter From Yakama Tribal Council Chairman To FERC Secretary (Mar. 2020).

² See Treaty with the Yakamas, U.S. – Yakama Nation, June 9, 1855, 12 Stat. 951, art. II, cl. 3.

Territory.³ A federal treaty is considered the supreme Law of the Land under the U.S. Constitution.⁴ Pursuant to its status as a sovereign Native Nation and its Treaty-reserved authority, Yakama Nation acts as a Co-Manager of the Columbia River fishery, as recognized by federal courts,⁵ for the protection of all natural and cultural resources in Yakama Nation's Treaty Territory. The Yakama Nation Treaty Territory encompasses usual and accustomed fishing sites, cultural areas, and ceremonial locations from the mouth of the Columbia River upstream north of the 49th parallel.

The Yakama Nation's enrolled membership exceeds 11,000 people whose history, culture, and way of life are intertwined with Nch'i Wa'na (the Columbia River), and its host of salmon, fish, plants, medicines, and animals. Protecting the land adjacent to and the waters of the Columbia River is critical for ensuring the Yakama Nation's Treaty-reserved resources and rights, and ultimately to the health and welfare of the Yakama people.

The Yakama Nation has expressed concerns of direct negative Project impacts from its beginning. Previously, the Yakama Nation opposed similar project proposals at this location due to the numerous natural and cultural resources that are incompatible with invasive development, including but not limited to: irreparable destruction of Traditional Cultural Properties; loss of aquatic resources; harmful impacts to avian and wildlife populations; and, existing soil and groundwater contamination from the former Columbia Gorge Aluminium smelter site.

II. Project Description.

The Project will consist of an off-stream, closed-loop pumped-storage project with an upper and lower reservoir with over 2,400 feet of maximum gross head that involve no river or stream impoundments, allowing for water conveyances. Proposed facilities include: 1) an upper reservoir consisting of a rock fill embankment dam approximately 175 feet high, 8,000 feet long, and a surface area of about 61 acres at an elevation of 2,940 feet above mean sea level; 2) a lower reservoir consisting of an embankment approximately 205 feet high, 6,100 feet long, and a surface area of about 63 acres at an elevation of 590 average mean sea level; and 3) an underground water conveyance tunnel and underground powerhouse and 23-kilovolt transmission line(s). The Project requires approximately 9,000 acre feet of Columbia River water to be filled initially, and likely an additional 390 acre feet per year to recharge water loss.

III. Direct Project Impacts to Yakama Nation Treaty Resources.

i. Cultural Properties

The Project Area of Potential Effect ("APE") is in an area of exceptional cultural importance to the Yakama Nation. The Project cumulatively adds to other energy

³ See *Id.* at art. III, cl. 2.

⁴ See U.S. Const. art. VI, cl. 2.

⁵ See *United States v. Washington*, 384 F. Supp. 312, 382 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975); see also *U.S. v. State of Oregon*, 666 F.Supp. 1461 (D. Or. 1987).

infrastructure, including hydro-electric dams and utility-scale wind turbine facilities, that devastate and destroy Yakama Nation's traditional fishing sites, villages, burial sites, ceremonial gathering places, root and medicine harvests, and cultural landmarks up and down the Columbia River. This Project permanently damages and alters nine culturally significant sites or Traditional Cultural Properties. FERC's obligation in the Scoping Document requires actual consideration of (i) the effects of Project construction and (ii) alternative project plans for the protection, mitigation, and enhancement of Native American Traditional Cultural Properties, historic and archaeological resources, and access to exercise ceremonial practices and treaty rights.⁶

The Scoping Document is impermissibly vague regarding the protection of cultural resources and fails to establish criteria that could ensure Project accountability for cultural resource protection. The Scoping Document's only prescription is to:

"Develop and implement a Historic Properties Management Plan in consultation with the Washington and Oregon State Historic Preservation Officers and affected Native-American tribes to protect and manage cultural resources."⁷

This proposed environmental measure is insufficient for Scoping purposes because a management plan fails to consider alternatives to the proposed action up to and including alternative Project locations or other types of renewable energy technology. Ultimately the construction of a pump storage facility at this proposed site unavoidably destroys cultural resources through earthworks and reservoir storage. Only the Yakama Nation can determine what is culturally significant to its people – resource consultation in a management plan fails to protect the resources that will necessarily be destroyed through initial development and is insufficient legal protection required under NEPA.

The Applicant has not proposed a plan for mitigating impairment to Yakama Nation's access to, and use of critically significant cultural resources caused by the Project's construction and operation. Nor has the Applicant provided any acceptable plan addressing the consequences of damage, breach, or decommissioning of the proposed reservoirs and earthen dams.

a. Unacceptable Limits On Cultural Use And Access

The Project development would impede and disrupt an existing Programmatic Agreement between the State of Washington and the Bonneville Power Authority for on-going root and plant gathering access by Yakama members.⁸ Yakama members regularly access this site for root and medicing gathering, and to practice religious and cultural ceremonies. The Programmatic Agreement preserves and recognizes the critical archaeological and cultural resources within the Project APE. This Project will also directly

⁶ See Scoping Document § 4.1.7.

⁷ See Scoping Document § 3.2.3 at 15.

⁸ See Exhibit B - Programmatic Agreement Among The Bonneville Power Administration, The Washington State Historic Preservation Officer, And The Advisory Council On Historic Preservation (May 1997).

and indirectly restrict access and use at the adjacent North Shore Treaty fishing Access Site which is a Treaty-fishing location in the Zone 6 Fishery.

b. Decommissioning Cannot Replace Destroyed Cultural Property

The Project Applicants have not generated a decommissioning plan that replaces or restores Tribal Cultural Properties – presumably because this is not possible after such properties are destroyed. The nature and character of the cultural resources within the APE will be diminished or lost forever if construction is permitted. An adequate decommissioning plan must contain sufficient enforcement and funding mechanisms for achieving a return to pre-Project resources, which still fails to account for this site’s ancient and integral meaning to the Yakama people’s religious and ceremonial practices.

ii. Aquatics Resources.

Calling the Project, a “closed-loop” system is disingenuous and misleading. Approximately 2.93 million gallons of water will be drawn from Columbia River to fill the Project’s two reservoirs. These open air reservoirs must be continuously replenished at a rate of approximately 1.2 million gallons of water per year from the Columbia River to offset losses from evaporation and leakage. Emptying of these reservoirs for maintenance and repair will require additional water to replace lost volumes. The Columbia River fishery already suffers from the negative impacts of over-allocated water resources. Salmonids and other aquatic species require stable water quantity, quality, and temperature for survival. This Project, when combined with the impacts from existing dams and their impoundments, and the comorbidities of climate change, may irreversibly tilt the ecological scales long-term survival of the Columbia River fishery.

The Project’s upper reservoir will permanently destroy several ephemeral waterbodies including approximately 965 linear feet of streams. These streams are perennial tributaries of the Klickitat River located approximately 2.4 miles north of the survey area. It is unclear what actions the Applicant will implement in the event reservoir waters do not meet applicable water quality standards that would result in contamination of surrounding streams and wetlands. Additionally, it is unclear what the impacts will be if one or both of the proposed reservoirs earthen dams are damaged, breached, or completely fail.

iii. Plant and Animal Resources

Combined, the two proposed reservoirs would result in over 120 acres of surface water body attraction to birds and bats which may result in more interactions with wildlife and an increase in birds and bats being wounded or killed by wind turbines. Additionally, these water bodies are expected to further alter laminar wind currents which are already influenced by existing wind farms. According to United States Fish and Wildlife Service, bald eagle, golden eagle, and prairie falcon nesting occur in the area which combined with foraging and rearing habitat makes this area unique to these species. Eagle nesting, rearing, and foraging habitat would be degraded during both the construction phase and upon completion of the two reservoirs. The area also provides habitat and supports plant species important to Yakama Nation.

Ephemeral and seasonal waterbodies at the site are important sources of seasonal water for many plant and animal species living in this otherwise dry region. The seasonality of the water supply is necessary for those plants and animals to complete life history phases. Ephemeral or seasonal waterbodies also slow surface water and stormwater runoff reducing erosion and flood impacts and allow for water to infiltrate to replenish groundwater. The Project does not account for the impacts of expected leakage from the reservoirs, which is insufficient to prevent contamination of surrounding plant and terrestrial resources.

iv. Columbia Gorge Aluminium Smelter Cleanup

The Project's lower reservoir is proposed over the former Columbia River Gorge Aluminum ("CGA") Smelter, which is now a Resource Conservation and Recovery Act ("RCRA") contaminated site that is subject to ongoing management and clean-up by the Washington State Department of Ecology ("DOE"). Previously FERC has denied the development of pump storage at this location because of necessary cleanup activities that are still ongoing and imperative for environmental recovery.⁹ The Project Applicant has not characterized or developed an actual plan to address the soil contaminants that would be excavated during construction of the lower impoundment. The Applicant must have a plan for properly disposing of that material in accordance with applicable law if hazardous or dangerous material is excavated during construction. The Scoping process must also consider the status of CGA as part of its environmental review, including potentially significant adverse effects. Performing an EIS is necessary to provide such consideration within the context of applicable law.

IV. Conclusion.

The Yakama Nation's Treaty-reserved cultural and natural resources will be irrevocably damaged or destroyed due to the Project construction and location on top of a culturally and environmentally sensitive area. The Project does not protect Yakama Nation's Treaty resources or the Yakama members who rely these resources. The land at this Project site is subject to Federal Trust responsibility to preserve and protect the irreplaceable resources and FERC has a legal duty to extend the Scoping inquiry and require an EIS for the adequate protection of these resources.

For further comments or questions please contact me at phil_rigdon@yakama.com, Phil Rigdon or at (509) 865-5121, ext. 4655.

Respectfully,



PHIL RIGDON, SUPERINTENDENT

⁹ See *Public Utility District No.1 of Klickitat County, Washington, Clean Power Development, LLC*, 155 F.E.R.C. ¶ 61,056 (2016).

YAKAMA NATION DEPARTMENT OF NATURAL RESOURCES

**cc: Erik Steimle, Vice President, Rye Development, FFP Project 101, LLC
Phil Rigdon, Superintendent, Yakama Nation Department of Natural Resources
Rob Whitlam, State Archaeologist, Washington Department of Archaeology &
Historical Preservation
Dennis Griffin, State Archaeologist, Oregon State Historic Preservation Office**

7. Letter from the Yakama Nation Superintendent of Natural Resources to Breean Zimmerman regarding comments on Application for Section 401 Water Quality Certification (Nov. 6, 2020).

[Coversheet Only. Paginated separately.]



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

November 6, 2020

DELIVERED ELECTRONICALLY

Breean Zimmerman
Department of Ecology
Central Regional Office
1250 West Alder St.
Union Gap, WA 98903-0009
breean.zimmerman@ecy.wa.gov

RE: COMMENTS ON APPLICATION FOR SECTION 401 WATER QUALITY CERTIFICATION FOR PROPOSED GOLDENDALE PUMPED STORAGE PROJECT BY PROPONENT FFP PROJECT 101, LLC, APPLICATION FERC PROJECT No. 14861.

Dear Ms. Zimmerman,

Included herein are comments on behalf of the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") Natural Resources Department regarding the Application for a Section 401 Water Quality Certification ("WQC") for the Federal Energy Regulatory Commission ("FERC") review of License Application for Project No. 14861, the proposed Goldendale Energy Storage Project ("Project"), submitted by FFP Project 101, LLC ("Applicant"). These comments discuss Yakama Nation's specific interests and concerns related to the Project, confirm Yakama Nation's opposition to the Project, and encourage Washington to exercise its regulatory authority to safeguard important environmental resources located in the proposed Project area. These comments further adopt and incorporate corresponding comments submitted by the Columbia Riverkeeper on the Project WQC.

I. Background.

The 1885 Treaty between the United States and the Yakamas ("Treaty") reserved to the Yakamas fishing rights on the Columbia River and its tributaries, including "the right of taking fish at all usual and accustomed places . . ."¹ A federal treaty is considered the supreme Law of the Land under the U.S. Constitution.² Yakama Nation is a Co-Manager of the Columbia River fishery pursuant to its status as a sovereign Native Nation, authority

¹ See Treaty with the Yakamas, U.S. – Yakama Nation, June 9, 1855, 12 Stat. 951, art. III, cl. 2.

² See U.S. Const. art. VI, cl. 2.

within the Treaty, and recognition by federal courts.³ Yakama Nation's Treaty Territory encompasses usual and accustomed fishing sites from the mouth of the Columbia River upstream to beyond the 49th parallel. The Yakama Nation's history, culture, and the lives of our People are intertwined with Nch'i-Wa'na (the Columbia River), and the salmon, fish, plants, and animals that rely on its waters.

Protecting the waters of the Columbia River, its tributaries, and Yakama Nation's Treaty Territory is critical to the protection of the Yakama Nation's Treaty-reserved resources and rights, and ultimately to the health and welfare of our communities. For this reason, Yakama Nation has been opposed to this project from the beginning. Previously, Yakama Nation opposed similar project proposals at this location. In 2006, FERC denied a license application under a different applicant, primarily due to existing soil and groundwater contamination at the former Columbia Gorge Aluminum ("CGA") smelter site. FERC concluded then, that the CGA should be completely cleaned-up before securing a license for new development – a determination that has yet to occur.

II. Project Description.

The Project will consist of an off-stream, closed-loop pumped-storage project with an upper and lower reservoir with over 2,400 feet of maximum gross head that involve no river or stream impoundments, allowing for water conveyances. Proposed facilities include: 1) an upper reservoir consisting of a rock fill embankment dam approximately 175 feet high, 8,000 feet long, a surface area of about 61 acres, storage of 7,100 acre-feet, at an elevation of 2,940 feet above mean sea level; 2) a lower reservoir consisting of an embankment approximately 205 feet high, 6,100 feet long, a surface area of about 63 acres, storage of 7,100 acre feet, and an elevation of 590 average mean sea level; and 3) an underground water conveyance tunnel and underground powerhouse and 23-kilovolt transmission line(s).

Given the nature of the Project, it requires large quantities of water, projected to be supplied by the Public Utility District No. 1 of Klickitat County ("KPUD"), which owns an existing water right and conveyance system adjacent to the Project. The proposed lower reservoir area is located on lands that previously housed the CGA smelter. Soil and groundwater contamination resulting from operations at the CGA smelter remain in the Project area.

Project Impacts to Yakama Nation Treaty Resources

i. Aquatic Resources.

Calling the Project, a "closed-loop" system is disingenuous and misleading. Approximately 2.93 million gallons of water will be drawn from Columbia River to fill the Project's two reservoirs. These open air reservoirs must be continuously replenished at a rate of approximately 1.2 million gallons of water per year from the Columbia River to

³ See *United States v. Washington*, 384 F. Supp. 312, 382 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975); see also *U.S. v. State of Oregon*, 666 F.Supp. 1461 (D. Or. 1987).

offset losses from evaporation and leakage. Emptying of these reservoirs for maintenance and repair will require additional water to replace lost volumes. Taking water from the Columbia River has negative impacts to Yakama Nation's Treaty resources, including salmonids and other aquatic species whose survival is dependent on stable water quantity, quality, and temperature. This Project, when combined with the impacts from existing dams and their impoundments, and the comorbidities of climate change, may irreversibly tip the ecological scales in a way proves disastrous to critical Columbia River dependent aquatics, and in turn and diminishing the Yakama Nation's Treaty-reserved rights to these resources.

The WQC application is fundamentally incomplete because the Project's impacts to aquatic resources are not limited to the Columbia River or federal jurisdictional waters, but this Project also negatively impacts waters of the state. The Project area includes six waterbodies, of which two are ephemeral streams, two are ponds, one is an intermittent stream, and one seep. See Final License Application, Appendix B Wetland Delineation, Table 4-7-1 at 348 (June 23, 2020). According to the FERC License Application materials, two of the six waterbodies within the study area, S7 and S8, connect to perennial streams downstream of the Project which creates the threshold criteria for the state to exercise its full regulatory authority over the waters impacted by this Project. Washington law protects the remaining four waterbodies and one wetland, P1, P2, S17, S24, and W6, and the connectivity between those water features and their two corresponding watersheds. The Applicant's failure to address the impact or mitigation for these features constitutes an incomplete WQC application.

Yakama Nation is concerned that construction of the upper proposed reservoir will permanently destroy several ephemeral waterbodies including approximately 965 linear feet of streams (890 linear feet of stream S7 and 75 linear feet of stream S8). These streams, S7 and S8, feed into the Swale Creek, a perennial tributary of the Klickitat River, approximately 2.4 miles north of the survey area. Additionally, construction will temporarily negatively impact an additional 800 linear feet of stream S8. An entire 0.03 acre pond will be removed (pond P2) by construction of the lower proposed reservoir.

It is unclear what actions the Applicant will implement in the event reservoir waters do not meet Washington State water quality standards and result in contamination of surrounding streams and wetlands. Additionally, it is unclear what the impacts will be if one or both of the proposed reservoirs earthen dams are damaged, breeched, or completely fail. It is Yakama Nation's understanding that the Project proponent will need to acquire a reservoir permit and water diversion permit from Ecology and may require a dam safety review. To our knowledge this process has not started.

ii. Plant and Terrestrial Resources

Combined, the two proposed reservoirs would result in over 120 acres of surface water body attraction to birds and bats which may result in more interactions with wildlife and an increase in birds and bats being wounded or killed by wind turbines. Additionally, these water bodies are expected to further alter laminar wind currents which are already influenced by existing wind farms. According to United States Fish and Wildlife Service, bald eagle, golden eagle, and prairie falcon nesting occur in the area which combined with

PAGE 3 OF 6 - COMMENTS ON APPLICATION FOR SECTION 401 WATER QUALITY CERTIFICATION FOR PROPOSED GOLDENDALE PUMPED STORAGE PROJECT BY PROPONENT FFP PROJECT 101, LLC, APPLICATION FERC PROJECT NO. 14861.

foraging and rearing habitat makes this area unique to these species. Eagle nesting, rearing, and foraging habitat would be degraded during both the construction phase and upon completion of the two reservoirs. The area also provides habitat and supports plant species important to Yakama Nation.

Further, the above-detailed ephemeral and seasonal waterbodies are important sources of critical seasonal water for many plant and animal species living in this otherwise dry region. The seasonality of the water supply is necessary for those plants and animals to complete life history phases. Ephemeral or seasonal waterbodies also slow surface water and stormwater runoff reducing erosion and flood impacts and allow for water to infiltrate to replenish groundwater. The Applicant is expecting leakage from the reservoirs. Leakage implies that water from the proposed reservoirs may enter surface water bodies or infiltrate to groundwater and can compromise water quality in existing streams, wetlands, and groundwater. It is unclear how the Applicant proposes to maintain water quality in the reservoirs, what actions the Applicant will implement to prevent contamination of surrounding streams and wetlands from leakage, and how the Applicant intends to ensure the protection of affected plant and terrestrial resources. Further, it is unclear how the Applicant plans to address the habitat impacts caused by the Applicant's planned destruction and removal of streams and ponds.

iii. Cultural Resources

The Project Area of Potential Effect ("APE") is in an area of exceptional cultural importance to the Yakama Nation. The proposed Project is yet another energy project, when combined with hydro-electric dams and utility-scale wind turbine facilities, that disproportionately impacts or destroys Yakama Nation's fishing sites, villages, burial sites, ceremonial gathering places, root and medicine gathering fields, and cultural markings up and down the river. The destruction of cultural property for Columbia River energy infrastructure includes at least nine culturally significant sites or Traditional Cultural Properties. The Project is in an area with an existing Programmatic Agreement between the State of Washington and the Bonneville Power Authority for on-going root and plant gathering access by Yakama members. The Programmatic Agreement preserves and protects the significance of archaeological and cultural resources within the APE. A Project of this size and intensity will also impact Yakama Nation's Treaty fishing rights and the North Shore Treaty fishing Access Site adjacent to the Project in the Zone 6 Fishery. The Applicant has provided no acceptable proposal for how it will mitigate impairment to Yakama Nation's access to, and use of critically significant cultural resources caused by the Project's construction and operation. Nor has the Applicant provided any acceptable plan addressing the consequences of damage, breach, or complete failure of the proposed reservoirs earthen dams and resulting impacts to cultural resources.

III. Clean Water Act Section 401 Water Quality Certification Rule.

As detailed above, Yakama Nation has strong concerns about potential discharges from the Project reservoirs, either through unintended spill or unaccounted seepage into the adjacent Columbia River and the two watersheds that the Project reservoirs would be constructed in. The discharge of pollutants into the Columbia River threatens some of the

most vital Pacific Northwest salmon fisheries and all of the related human activities that occur along the Columbia River.

Due to the ongoing *Coronavirus* public health pandemic, Yakama Nation has struggled to staff the review of the thousands of pages of Project specific background information, and analyze all of the content in the Applicant's final FERC license application. As a result, the Yakama Nation adopt and incorporates corresponding comments submitted by the Columbia Riverkeeper on the Project WQC, the Clean Water Act, section 401 requirements, and State regulatory requirements.

IV. Government-to-Government Consultation.

Yakama Nation's policy is to preserve, protect, and perpetuate all significant natural and cultural resources within its Treaty territory. The entirety of this Project lies within Yakama Nation homelands. Additionally, Yakama Nation has a sacred right and solemn duty to engage with the State in decisions that are likely to have direct negative impacts to Treaty Resources throughout the Columbia River Basin.

Yakama Nation notes that official consultation has not been conducted with the Department of Ecology for this Project. The Department of Ecology is urged to assign appropriate value to the environmental resources at risk of being damaged or destroyed through the construction and/or operation of this Project. Please be aware that official government-to-government consultation with the Yakama Nation takes place between Yakama Nation Tribal Council and the decision maker from the agency proposing an action. However, before Yakama Nation can assess and consider the key elements of consultation, a staff-level technical briefing is required to discuss the CWA Section 401 certifications, FERC license application, National Environmental Protection Act (NEPA) and Endangered Species Act (ESA) Section 7 consultation actions.

V. Conclusion.

As detailed above, the Yakama Nation's Treaty-reserved interests in certain cultural and natural resources will be disproportionately affected, damaged, or destroyed due to the Project construction and location on top of a culturally and environmentally sensitive area. Moreover, Yakama Nation is substantially involved in fisheries and natural resource management throughout the Columbia River Basin. The Project does not protect Yakama Nation's Treaty resources or the Yakama members who rely these environmental features from reservoir seepage, leaking, discharge, or unplanned failure. Furthermore, if Washington State is going to have clean energy, then that energy should truly be "clean" and not occur at the detriment of Yakama Nation's significant environmental, cultural, and Treaty resources. The land at this Project site is subject to Federal Trust Responsibility to preserve and protect the irreplaceable resources that Yakama Nation's people. Resources that have been relied upon since time immemorial for traditional and cultural practices.

For further comments or questions please contact me at phil_rigdon@yakama.com, Phil Rigdon or at (509) 865-5121, ext. 4655.

Respectfully,



PHIL RIGDON, SUPERINTENDENT
YAKAMA NATION DEPARTMENT OF NATURAL RESOURCES

cc: Erik Steimle, Vice President, Rye Development, FFP Project 101, LLC
Phil Rigdon, Superintendent, Yakama Nation Department of Natural Resources
Elizabeth Sanchey, Manager, Yakama Nation Environmental Program
Ernest Rasmussen, Tribal Liaison, Washington Department of Commerce
Rob Whitlam, State Archaeologist, Washington Department of Archaeology &
Historical Preservation
Dennis Griffin, State Archaeologist, Oregon State Historic Preservation Office

8. Letter from the Yakama Nation Tribal Council Chairman to FERC Secretary regarding comments and recommendations for Additional Study (Mar. 11, 2020).

[Coversheet Only. Paginated separately.]



March 11, 2020

FILED ELECTRONICALLY

The Honorable Kimberly D. Bose
Secretary
Federal Energy Regulatory Commission
888 First Street, NE
Washington, DC 20426

RE: Comments and Recommendations for Additional Study on the Goldendale Energy Storage Project Draft License Application, FERC Project No. 14861

Dear Secretary Bose,

I write on behalf of the Confederated Tribes and Bands of the Yakama Nation ("Yakama Nation") to submit the following comments and requests for additional study on the Draft License Application for the Goldendale Energy Storage Project ("Project"), Federal Energy Regulatory Commission ("FERC") Project No. 14861, submitted by FFP Project 101, LLC ("Applicant"). This letter preserves, incorporates, and reasserts the concerns of and opposition to the Project previously recorded in the Yakama Tribal Council Chairman's letter, dated February 21, 2019 and filed as FERC Submittal No. 20190228-5314, and previously recorded in the Yakama Nation Cultural Resources letter to the Project Applicant dated February 14, 2018.

I. Background.

The 1855 Treaty between the United States and the Yakamas ("Treaty") reserved a Reservation "for the exclusive use and benefit" of the Yakama constituent tribes and bands. The Treaty further reserved rights in common with citizens of the United States at all usual and accustomed places within the Treaty Territory. *See Treaty with the Yakamas, U.S. – Yakama Nation, June 9, 1855, 12 Stat. 951, art. II, cl. 3, and art. III, cl. 2.* A federal treaty is considered the supreme Law of the Land under the U.S. Constitution. *See U.S. Const. art. VI, cl. 2.*

Yakama Nation's Treaty Territory, south of the 1.3 million-acre Yakama Reservation, encompasses usual and accustomed fishing sites, cultural areas, and historical locations of religious worship from the mouth of the Columbia River upstream to beyond the 49th parallel. Yakama Nation's enrolled membership exceeds 11,000 people who rely on

the ceremonial, cultural, and subsistence resources found within the proposed Project Area of Potential Effect (“APE”).

As noted in Yakama Nation’s 2018 and 2019 letters, and also during Rye Development’s in-person meeting with the Yakama Nation Tribal Council on September 4, 2018, Yakama Nation concludes this Project will have a detrimental impact on archaeological sites and Traditional Cultural Properties (“TCP”) documented under federal and state laws. More importantly, Yakama Nation regards the sites and TCPs as more than simply sources of research data. Rather, they serve as ultimate evidence of our tribal history that represents the connection of the modern Yakama people to the region defined as their home in both a physical and spiritual sense. For this reason, only Yakama Nation can determine what constitutes its significant cultural or natural resources. Yakama Nation believes that the proposed Project’s damage to the sacred TCPs and archaeological sites therein cannot be mitigated by merely producing historical documentation because the proposed Project will cause significant harm to Yakama peoples’ way of life.

II. Draft License Application App. ‘H’: Cultural Resources Report.

The Applicant contracted with the Yakama Nation Cultural Resources Program to conduct a cultural resources survey of the proposed Project APE. This survey is reported in the Draft License Application Appendix H, Cultural Resources Report (“Cultural Report”), a privileged document under the FERC guidelines. The Cultural Report identified six archaeological sites within the proposed Project area, plus three additional archaeological sites outside of the proposed Project area but still within the Project APE. Additionally, the Cultural Report identifies that the proposed Project area is within two National Register of Historic Places (“NRHP”)-eligible TCP sites, one of which is a NRHP-eligible multiple property documentation (“MPD”) TCP. The proposed Project area is also within a nationally-designated Archaeological District. *See* National Park Service (“NPS”) Form 10-900-a Columbia Hills and NPS Form 10-900 Juniper Point certified by Maryann Armbrust, Bonneville Power Administration (Apr. 8, 1997). Combined, these nine archaeological sites in the proposed Project APE, the NRHP-eligible TCP and MPD-TCP, and Archaeological District can be described here as Yakama Nation’s cultural inventory that has been documented under state and federal laws within the proposed Project APE.

i. Project Comments.

The archaeological sites and TCPs that comprise the cultural inventory here provide significant archaeological information, and more importantly exist as a source of significant cultural and spiritual meaning and instruction to the Yakama Nation and the Yakama people. The Cultural Report documents lithic tools in the APE that evidence Yakamas connection to the subsistence resources in the APE that were regularly and consistently harvested for food, medicinal, and spiritual purposes. FERC should adhere to the Cultural Report recommendation that the proposed Project avoid disruption of the archaeological sites and TCPs in the proposed Project area.

The proposed Project will compromise the existing TCP by diminishing that TCP’s NRHP-eligibility through the destruction of sacred plants in the locale associated with Yakama legend and creation. The proposed Project will further compromise the existing

MPD-TCP by diminishing that MPD-TCP's documented association with additional nearby cultural properties.

Additionally, FERC should stipulate that the proposed Project is prohibited from breaching the existing Programmatic Agreement between the Washington State Historic Preservation Office and the Bonneville Power Administration as stipulated to allow Yakama Nation members to access and harvest traditional foods and medicines from the TCP within the proposed Project APE.

ii. Recommendation For Additional Study.

The proposed Project area is located within an existing MPD-TCP, which means that this site shares documented interconnectivity with other TCPs along the Columbia River, and the MPD-TCP is eligible for the National Register of Historic Places ("NRHP") under the NRHP criterion that the MPD-TCP be associated with significant events. See GAIL THOMPSON, THE TRADITIONAL CULTURAL IMPORTANCE OF THE YAKAMA INDIAN PEOPLE (1997). However, the MPD-TCP was not evaluated under the NRHP's other three criteria, for association with significant individuals, the presence of design, construction, or artistic expression, and the cultural information potential. Additionally, subsurface deposits have not been identified or analyzed at this MPD-TCP. Yakama Nation recommends evaluating this MPD-TCP under NRHP Criterion B – D, along with analysis of subsurface deposits. Yakama Nation further recommends general evaluation of the archaeological sites be evaluated for their eligibility and contribution to the existing TCP, MPD-TCP, and Archaeological District.

Additional survey is also recommended to correct the boundary of the existing TCP so that it properly incorporates the connected plant resources as documented in 1995 and 2019.

III. Draft License Application App. 'G': Historic Properties Management Plan.

The proposed Project's negative impacts include damage during construction activities and permanent loss through land use conversion. Construction or operational activities will disrupt or preclude future traditional use associated with the archaeological sites and TCPs within the proposed Project area. Yakama Nation advises FERC to make a finding of adverse effect under the 36 Code of Federal Regulations ("CFR") 800.5 criteria regarding the archaeological sites and TCPs within the proposed Project area because the archaeological sites and TCPs will be altered, damaged, and negatively impacted by construction and operational activities.

IV. Draft License Application App. 'E': Vegetation Management and Monitoring Plan.

The plants and roots found within the APE are pieces of the Yakama creation legend. Yakama people have returned to the sites and TCP for millennium in observance of our origin stories to gather the foods and medicines that remain at the proposed Project site today. Protecting Yakama members' access to exercise the traditional harvest of subsistence plants for foods and medicines must be a goal of the Vegetation Management and Monitoring Plan ("VMMP"). Yakama Nation understands this access for cultural

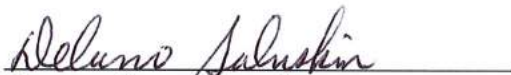
PAGE 3 OF 4 - COMMENTS AND RECOMMENDATIONS FOR ADDITIONAL STUDY ON THE GOLDENDALE ENERGY STORAGE PROJECT DRAFT LICENSE APPLICATION, FERC PROJECT NO. 14861.

purposes to mean both that the VMMP prohibits the destruction or removal of traditional plants from the proposed Project APE and that Yakama members' harvest practices are not prohibited within the proposed Project area. Accordingly, best management practices to protect native vegetation cannot only preserve the minimum number of plant specimens for survival, but must also account for traditional and cultural gathering activities as is provided by the existing pre-Project conditions.

V. Conclusion.

It is Yakama Nation's policy to preserve, protect, and perpetuate all significant natural and cultural resources, particularly the archaeological sites and TCPs within this proposed Project APE. The federal government, including FERC, has a Federal Trust Responsibility to preserve and protect the irreplaceable resources that Yakama Nation's people have relied upon since time immemorial for traditional and cultural practices at this proposed Project site. For further comments or questions please contact the Yakama Nation Lead Archaeologist, Jon Shellenberger, (509) 865-5121 ext. 6323 or by electronic mail at jon_shellenberger@yakama.com .

Respectfully,



DELANO SALUSKIN, CHAIRMAN
YAKAMA NATION TRIBAL COUNCIL

cc: Erik Steimle, Vice President, Rye Development, FFP Project 101, LLC
Phil Rigdon, Superintendent, Yakama Nation Department of Natural Resources
Elizabeth Sanchey, Manager, Yakama Nation Environmental Program
Rob Whitlam, State Archaeologist, Washington Department of Archaeology &
Historical Preservation
Dennis Griffin, State Archaeologist, Oregon State Historic Preservation Office

9. Letter from the Yakama Nation Tribal Council Chairman to FERC Secretary regarding Notification of Intent and Pre-Application (Feb. 21, 2019).

[Coversheet Only. Paginated separately.]



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

February 21, 2019

Kimberly Bose
Federal Energy Regulatory Commission
888 First Street NE
Washington, DC 20426

Re: Notification of Intent and Pre-Application Document for the Goldendale Energy Storage Project,
FERC No. 14861

Ms. Bose,

The Confederated Tribes and Bands of the Yakama Nation (Yakama Nation) have reviewed a letter and Pre-Application Document sent to the Federal Energy Regulatory Commission from Rye Development under FERC No. 14861. The proposed project Area of Potential Effect (APE) is within the Ceded Area of the Yakama Nation pursuant to the Treaty of 1855 (12 stat., 951) and is the Supreme Law of the Land pursuant to Article 6 of the U.S. Constitution (i.e. Supremacy Clause). The FERC has a Federal Trust Responsibility to preserve and protect resources significant to the Yakama Nation. Only the Yakama Nation can determine what is significant to the Tribe. Based on review of the letter and pre-application, the Yakama Nation has several concerns with this project.

The Yakama Nation Cultural Resources Program filed a letter of opposition to this project on February 14, 2018. This letter of opposition was regarding the detrimental impact this project will have on a previously recorded Traditional Cultural Property (TCP). Based on review of the pre-application packet, there is mention of a cultural resources survey conducted by the Yakama Nation within the APE in 2013, however neither the results of this investigation nor the Traditional Cultural Property recorded were mentioned in the packet. Rye Development visited the Yakama Nation Tribal Council on September 4, 2018. Concerns were raised regarding the letter of opposition from the Yakama Nation Cultural Resources Program, however no resolution was provided aside from stating the desire to contract with the Program. Hiring a Yakama Nation program to provide technical expertise is not a resolution to the concerns brought forth by the Tribe to date. While it will provide the Program's expertise to further elaborate on the significance of the TCP, it has not resolved the issue that there will be detrimental impacts to this resource.

After reading the letter, it appears that Rye Development finds that pursuant to Section 5.3(c)(1)(i) and (ii) under item (B) it reads:

The Applicant believes that, while significant and obviously important, the resource issues of the Project are both simple and minimal compared to other projects of this scale. Concomitantly, the likelihood of significant dispute over studies is also minimal.



The Yakama Nation strongly disagrees with that statement. The resource issues involving this project are not minimal and are not simple, they are all encompassing and unavoidable. Furthermore, the likelihood of a significant dispute over studies is expected due to the significance of the sacred site and associated resources.

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 the document. Had the Yakama Nation been afforded the opportunity to review and comment on these documents, further information could have been brought forth to inform the application process. The Yakama Nation has informed the applicant and previous applicants under Docket P-1333, that this is project is within a TCP that was recorded in 2013. Therefore, the Yakama Nations questions the accuracy of the letter and corresponding application document.

The method of how this application process continues to progress is going in a direction where the Yakama Nation will inevitably be required to mitigate a sacred site. At no time has FERC provided a stop-gap measure that would allow for consideration of its Federal Trust Responsibility to protect this TCP. Rye Development's execution of the National Environmental Policy Act and 18 CFR Subchapter B, Part B has not been a process in concert with our Nation's concerns and documented facts, but rather has been moving forward despite them.

For these reasons, the Yakama Nation is formally opposed to this project as it will damage a sacred TCP and will cause significant impacts to the Yakama way of life.

Sincerely,

JoDe Goudy
Yakama Nation Tribal Chairman

Cc: YN Cultural Committee
Jerry Meninick, YN Culture Division Deputy Director
Rob Whitlam, State Archaeologist, DAHP
Dennis Griffin, State Archaeologist, Oregon SHPO

10. Letter from the Yakama Nation Deputy Director for Cultural Resources to Rye Development regarding Project Application (Feb. 14, 2018).

[Coversheet Only. Paginated separately.]



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

Erik Steimle,
Rye Development,
745 Atlantic Ave. 8th Floor
Boston, MA 02111,
(503) 998-0230.

February 14, 2018

RE: FERC Docket 14861-000, Goldendale Energy Storage Project

Erik Steimle,

The Confederated Tribes and Bands of the Yakama Nation (Yakama Nation) received a notice of application from the Federal Energy Regulatory Commission in regards to the proposed Goldendale Energy Storage Project. The proposed project is within the Ceded Area of the Yakama Nation as set forth in the Treaty of 1855 (12 stat., 951) signed with the United States of America, The Treaty is considered the Supreme Law of the Land according to Article 6 of the U.S. Constitution. It is the policy of the Yakama Nation to preserve, protect, and perpetuate all significant natural and cultural resources. Only the Yakama Nation can determine what is significant to the Tribe.

Upon review of the proposed project and based upon extensive working knowledge of the proposed project area, the Yakama Nation is opposed to this undertaking as it would cause detrimental impacts to significant cultural resources near the John Day Dam and the Columbia Hills. These cultural resources are sacred to the Yakama Nation and include archaeological, ceremonial, burial, petroglyph, monumental, and ancestral use sites. These sites are commonly called Traditional Cultural Properties (TCPs). The TCPs present within the proposed project area are but a remnant of what once was along the Columbia River. It is the responsibility of the Yakama Nation to protect those resources now and in the future for the benefit of those not yet born.

If you have any questions or comments please contact Gregg Kiona at (509) 865-5121 x4603 or Nick Finley at (509) 790-8958.

Sincerely,

Lonnie Selam
Deputy Director
Yakama Nation Cultural Resources



Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

Cc: JoDe Goudy, YN Tribal Council Chairman
Yakama Nation Culture Committee
Phil Rigdon, YN DNR Superintendent
Elizabeth Sanchez, YN Environmental Program Manager
Kimberly Bose, FERC
Rob Whitlam, DAHP State Archaeologist
Jon Shellenberger, YN Archaeologist
File

EXHIBIT B
LETTER FROM ROBERT G. WHITLAM TO ERIK STEIMLE REGARDING
GOLDENDALE ENERGY STORAGE PROJECT (JAN. 5, 2022)

Exhibit Coversheet Only.

[Paginated separately.]



Allyson Brooks Ph.D., Director
State Historic Preservation Officer

January 5, 2022

Mr. Erik Steimle
Rye Development
220 NW 8th Ave.
Portland, OR 97209

Mr. Mike Tust
FERC
888 First Street
Washington, DC 20426

Re: Goldendale Energy Storage Project
Log No. : 2020-08-05202-FERC

Dear Mr. Steimle and Mr. Tust:

We are in receipt of the Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Traditional Use Study for the proposed Goldendale Energy Storage Project, Klickitat County, Washington.

As we stated in our letter to Mr. Steimle of December 15, 2021, the Section 106 process details a clear sequential step wise process stipulated in 36 CFR 800 that requires meaningful consultations between the parties and the federal agency, and the submission of supporting documents and determinations in a specific sequence.

This document, without benefit of a cover letter from the lead federal agency, and missing any official signature from either the federal agency or tribal government, continues an unacceptable and knowing pattern of ignoring federal law and regulations stipulated in 36CFR800.

The current document is incomplete and does not provide the federal agency determination of eligibility nor the tribes' concurrence and signature for documentation and release to our Department. We have worked collaboratively with concerned tribal governments to create a secure and digital Traditional Cultural Places template to assure all legal protocols are followed. The current document drop does not confirm to those requirements.

This current document drop continues a pattern of providing incomplete submissions without a cover letter and any official determination as required by federal law.

We have previously concurred with an Adverse Effect Determination and the next step should be a collaborative consultation effort to develop a Programmatic Agreement with specific stipulations tailored to the particular historic, cultural, and archaeological properties, and now CTUIR traditional cultural properties effected by this undertaking.

This current document clearly has significance information and implications for decision making and a Historic Properties Management Plan that is a product of that consultations and it is



developed from an outline that the consulting craft as part of the ongoing Section 106 process. That has not happened.

We believe it is important for the FERC to establish the consultative and collaborative forum so the legal required Agreement documents may be crafted in the proper sequence. This requires FERC to require and host a meeting for all the parties to participate in an informed consultation.

Also, considering the Executive Order on Sacred Sites recently issued by the current Administration, it is even more imperative that FERC hold government to government meetings with the consulting tribes.

The Federal government has a Trust responsibility to tribal nations and as a federal agency FERC has a paramount obligation to uphold the unique federal-tribal relationship that is distinct and separate from consultation with the general public

We would also request receiving any correspondence or comments from concerned tribes or other parties that you receive as you consult under the requirements of 36CFR800.4(a)(4). These comments are based on the information available at the time of this review and on behalf of the State Historic Preservation Officer in compliance with the Section 106 of the National Historic Preservation Act, as amended, and its implementing regulations 36CFR800.4. Should additional information become available, our assessment may be revised. Thank you for the opportunity to comment and we look forward to further consultation.

Sincerely,



Robert G. Whitlam, Ph.D.
State Archaeologist
(360) 890-2615
email: rob.whitlam@dahp.wa.gov



Letter from the FERC to the Yakama Nation Tribal Council Chairman regarding
Information About Off-the-Record Communications (Dec. 9, 2021).

[Coversheet Only. Paginated separately.]

FEDERAL ENERGY REGULATORY COMMISSION
WASHINGTON D.C. 20426
(December 9, 2021)

OFFICE OF ENERGY PROJECTS

Project No. 14861-002 – Washington
and Oregon
Goldendale Energy Storage Project
FFP Project 101, LLC

VIA USPS First Class Mail

Delano Saluskin, Chairman
Confederated Tribes and Bands of
The Yakama Nation
401 Fort Road
P.O. Box 151
Toppenish, Washington 98948

RE: Information About Off-the-Record Communications and Filing Confidential Information

Dear Chairman Saluskin and Councilmembers:

On November 10, 2021, Commission staff met with representatives of the Confederated Tribes and Bands of the Yakama Nation (Yakama Nation) regarding the licensing of FFP Project 101, LLC's Goldendale Energy Storage Project No. 14861. During the meeting, we discussed the Commission's rules prohibiting off-the-record, or ex parte, communications and the requirements for filing confidential and sensitive cultural resources information as privileged in the Commission's record for the licensing proceeding. Yakama Nation's legal counsel requested a letter from Commission staff explaining the Commission's ex parte rules and requirements for filing confidential and sensitive cultural resources information.

As provided in the Commission's policy statement on consultation with Tribes (18 C.F.R. § 2.1c), the Commission acknowledges that it has a trust responsibility to Tribes and endeavors to work with Tribes on a government-to-government basis to address the effects of proposed projects on tribal rights and resources through consultation. As discussed below, the Commission's status as an independent regulatory agency places some limitations on the nature and type of consultation that the Commission may engage in during a contested proceeding. Nevertheless, the Commission endeavors, to the extent

authorized by law, to reduce procedural impediments to working directly and effectively with tribal governments.

Off-the-Record Communications

Rule 2201 of the Commission's Rules of Practice and Procedure (18 C.F.R. § 385.2201), which implements section 557(d) of the Administrative Procedure Act, prohibits Commission staff from engaging in off-the-record communications in any contested on-the-record proceeding. Specifically, the rule prohibits communications by or with staff discussing matters relevant to the merits of a contested proceeding that do not include all parties to the proceeding. The rule does not prohibit staff from addressing procedural inquiries. Matters are relevant to the merits of the proceeding if the information discussed could affect the outcome of the proceeding, influence a decision, or provide an opportunity to influence a decision on any issue in the proceeding. The rule defines contested proceeding, in relevant part, as any proceeding before the Commission to which there is a right to intervene and in which an intervenor disputes any material issue. Where it applies, the prohibition on ex parte communications in licensing proceedings remains in effect until the Commission issues an order acting on a license application and the 30-day period for filing a request for rehearing of that order has passed with no rehearing request being filed, or the Commission has acted on the merits of any rehearing request. Because this licensing proceeding is one in which an intervenor has disputed a material dispute, it is considered contested and the Commission's prohibition on ex parte communications applies.

Basic Filing requirements under the Federal Power Act

Under the Commission's regulations (18 C.F.R. § 388.112), any person, including a Tribe, that submits a document to the Commission may request privileged treatment by claiming that some or all the information in the document should be withheld from public disclosure. The regulations explain the procedures for making a request for privileged treatment. Once the request is made, the Secretary of the Commission will place the document in a nonpublic file. If someone requests access to a document in a nonpublic file (for example through a Freedom of Information Act request), the Commission, in deciding whether to release the information, will first notify the person who submitted the document.

Information involving sensitive cultural resources matters is often treated as confidential and placed in a nonpublic file. If the information concerns cultural resources that are eligible or listed historic properties in the National Register of Historic Places, Section 304 of the National Historic Preservation Act and its implementing regulations require the Commission to keep the information confidential if specified conditions are met. As discussed above, the Commission's ex parte rules forbid the Commission from receiving information regarding the merits of a contested proceeding that is not available

to other parties to the proceeding. Therefore, information in the nonpublic file may need to be shared with persons on a restricted service list established by the Commission for the proceeding or otherwise made available to a limited number of the parties' representatives. In other words, the information will be disclosed only to state and federal agencies with responsibilities for protecting cultural resources and to the applicant and any other entities on a "need to know" basis. Thus, if a person files sensitive cultural resource information that it wants the Commission to consider in reaching a decision, that information must be shared with at least some participants in the proceeding.

Options for Filing Sensitive Cultural Resources Information

If any cultural resources information to be filed with the Commission is deemed sensitive, the filer can request that any person seeking access to the information must first sign a non-disclosure agreement, in which the person will agree to keep the information confidential and to use it only for the purpose of the proceeding. It is preferable that the entities involved in a proceeding negotiate the terms of a non-disclosure agreement early in a proceeding before any sensitive information is likely to be filed.

Another option would be for the filer to redact sensitive information from a filing. Redaction would allow a filer to protect such things as site-specific information but would also mean that the Commission would not be able to consider the more detailed information in reaching a decision.

Finally, an entity could choose to withhold any information it feels is too sensitive to be revealed to any other stakeholders. In such circumstances, the Commission would be unable to take the information into account in reaching its decision.

We look forward to our continued consultations with the Yakama Nation regarding the potential licensing of the Goldendale Energy Storage Project. If you have any further questions regarding the handling of confidential information or any other issue related to the licensing process for the project, please contact Michael Tust at (202) 502-6522 or michael.tust@ferc.gov.

Sincerely,

Vince Yearick
Director
Division of Hydropower Licensing

cc: VIA Electronic Mail

Anthony Aronica
Office of Legal Counsel
Yakama Nation
anthony@yakama-olc.org

Carl Merkle
Department of Natural Resources
Confederated Tribes of the Umatilla
Indian Reservation
carlmerkle@ctuir.org

Patrick Baird
Tribal Historic Preservation Officer
Nez Perce Tribe
keithb@nezperce.com

Allyson Brooks
State Historic Preservation Officer
Washington Department of Archaeology
and Historic Preservation
Allyson.Brooks@DAHP.WA.GOV

Christine Curran
Deputy State Historic Preservation Officer
Oregon Parks and Recreation Department
Chrissy.curran@oregon.gov

cc: VIA FERC Service

Erik Steimle
Vice President
Rye Development
745 Atlantic Avenue
Boston, Massachusetts 02111

May 23, 2022

Kimberly Bose, Secretary
Federal Energy Regulatory Commission
888 First Street NE
Washington, D.C. 20426

Submitted electronically via: <https://ferconline.ferc.gov/FERCOOnline.aspx>.

RE: FFP PROJECT 101, LLC, PROJECT NO. P-14861; NOTICE OF APPLICATION READY FOR ENVIRONMENTAL ANALYSIS AND SOLICITING COMMENTS, RECOMMENDATIONS, TERMS AND CONDITIONS, AND PRESCRIPTIONS

Dear Secretary Bose:

Enclosed for filing in the above-referenced proceeding are comments and recommendations from Columbia Riverkeeper, Washington Chapter of the Sierra Club, and Washington Environmental Council (together “Commenters”) on the Goldendale Energy Storage Project. Copies of this filing have been served on all parties of record to this proceeding. Due to the lack of an Environmental Impact Statement and the inadequate analysis in the record, this filing contains only preliminary comments and recommendations. The Commenters reserve the right to amend these comments and recommendations based on the results of information and conclusions developed during the Commission's environmental analysis.

Please contact me at 541-399-5312 or via email at simone@columbiariverkeeper.org for further information or if you have any questions.

Sincerely,

Simone Anter
Staff Attorney
Columbia Riverkeeper

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

FFP Project 101, LLC) Project No. 14861
)
For an Original Major License)
Goldendale Pumped Storage Project in Klickitat)
County, Washington)

I. Introduction

By notice dated March 24, 2022, the Federal Energy Regulatory Commission (“Commission”) provided Notice of Application Ready for Environmental Analysis (“REA”) and Soliciting Comments, Recommendations, Terms and Conditions, and Prescriptions on the Final License Application (“FLA”) of the Goldendale Energy Storage Project proposed by Rye Development (“Rye”), dba Free Flow Power 101, LLC (“FFP”), FERC No. 14861. Columbia Riverkeeper previously submitted National Environmental Policy Act (“NEPA”) scoping comments to the Commission on December 28, 2022, Comments on the Draft License Application on March 12, 2020, and Comments on Rye’s request to use the Traditional Licensing Process on February 28, 2019. These comments are attached here and incorporated by reference.

Commenters provide these additional comments and recommendations in response to the Commission’s REA Notice. It is our view that the project is not ready for environmental analysis. However, we have included preliminary recommendations based on the information to date.

II. Comments

A. Rye Has Failed to Provide Sufficient Information to Allow the Commission’s Environmental Review to Proceed

The information presented by the FFP in both the FLA submitted on June 23, 2020, and in response to the Additional Information Request (“AIR”) is insufficient to allow for a comprehensive and adequate assessment of the proposed project, to evaluate project impacts fully, or to move forward with the Commission’s environmental analysis.

1. Rye Has Failed to Develop the Information Necessary to Ensure the Commission Will Protect Cultural Resources

The Commission has failed to take the steps necessary to ensure the region’s significant cultural and religious resources are identified and protected through this process. For example, two comments in the AIR concerned deficient information provided by Rye on cultural resources. Comment 1.1 requested that Rye “complete an ethnographic survey to identify, evaluate, and assess effects to resources that are of religious and cultural significance to the Confederated Tribes of the Umatilla Indian Reservation (“CTUIR”) and Nez Perce Tribe (“Nez

Perce”) and to file the survey results, proposed cultural mitigation measures, and Historic Properties Management Plan (“HPMP”).¹ In a letter dated January 25, 2022, Rye indicated that it had filed that information with the Commission, and because of the sensitive nature of the information requested it is no surprise that the response was filed as privileged with FERC. However, what is a surprise is the lack of analysis from the Commission about the contents of that filing, is the HPMP sufficient? Was Rye’s response sufficient? Did the CTUIR and Nez Perce have a chance to review and sign-off on the plan that will affect their Tribal cultural and religious resources? Did the Tribes provide input or conduct the surveys? These questions remain unanswered. In fact, the last filings from CTUIR and Nez Perce in the FERC docket were on December 29, 2020 and October 16, 2020, respectively. Because of this Developer’s history of muddling public perception concerning Tribal Nation support and engagement on the Project, this application should not be allowed to proceed with environmental review without sign off from the Tribal Nations involved.

Comment 2.1 requested Rye provide the Commission with additional details on the Confederated Tribes and Bands of the Yakama Nation’s (“Yakama Nation”) Tribal member access to the area where the Project is proposed for root and plant gathering.² Rye’s four

¹ Goldendale Energy Storage Project, FERC Project No. 14861, RESPONSE TO THE COMMISSION’S REQUEST FOR ADDITIONAL INFORMATION, Rye Development (Jan. 25, 2022). (Comment 1.1 states: “Our April 12, 2021, letter requested that you complete an ethnographic survey to identify, evaluate, and assess effects to resources that are of religious and cultural significance to the Confederated Tribes of the Umatilla Indian Reservation (Umatilla Tribe) and Nez Perce Tribe and to file the survey results, proposed cultural mitigation measures, and Historic Properties Management Plan (HPMP) with the Commission within 90 days. Your July 2, 2021, filing includes the results of the ethnographic survey conducted with the Nez Perce Tribe and specific mitigation you propose for a cultural site identified from a cultural resources survey conducted by the Yakama Nation (labeled site 45K1746). However, you state that the Umatilla Tribe ethnographic survey and updated cultural resources mitigation measures and HPMP will not be available until the fourth quarter of 2021 or the first quarter of 2022. While you do propose to conduct post-licensing excavation and curation of site 45K1746, you also state that other mitigation measures will likely be needed at this site but you do not describe such measures. Staff need the following information to evaluate project effects on cultural resources and determine appropriate mitigation measures: (1) the results of the Umatilla Tribe ethnographic survey; and (2) a revised HPMP that identifies all cultural resources within the Area of Potential Effect, an evaluation of the National Register eligibility of all identified resources, a discussion of project effects on these resources, and proposed measures to avoid, protect and/or mitigate project impacts on these resources, including the estimated costs of these measures. We remind you that you must provide the study results and HPMP to the Washington State Historic Preservation Office (Washington SHPO), Oregon State Historic Preservation Officer (Oregon SHPO), the U.S. Army Corps of Engineers, the Yakama Nation, the Nez Perce Tribe, and the Umatilla Tribe and allow these entities 30 days to review and comment on the documents before filing them with the Commission. Your filing must provide documentation of consultation with these entities and the bases for not adopting recommendations provided by these entities.”).

² *Id.* (Comment 2.1 states: “Comment 2.1, “Our April 12, 2021, letter asked that you describe: (1) the area where the project footprint overlaps with the areas covered under an existing 1997 Programmatic Agreement (PA) between Washington SHPO and the Bonneville Power Administration (BPA) that provides the Yakama Nation members on-going access for root and plant gathering activities, as well as other cultural practices; (2) how project construction and operation would affect the ability of the Yakama Nation members to access these lands and for BPA to fulfill the provisions of the 1997 PA, including the types of activities that would be affected; and (3) how you propose to mitigate any project effects on access by tribal members to the area covered by the PA. Your July 2, 2021, response only includes a copy of the 1997 PA. It does not describe the land covered by the PA, contain any analysis of how project construction and operation may affect tribal access to the land, and what you would do to mitigate these effects. Staff needs this information to determine how the project would affect the ability of tribal members to

sentence response merely states that a 1997 Programmatic Agreement (“PA”) which provides Yakama Nation Tribal members with on-going access for gathering, does not include an analysis of how Project construction would impact that access. This response does not address the question. How could a 25 year old document contain that information? Rye has not even bothered to analyze the impacts of its own Project. Furthermore, Rye states that they only “inquired with the Washington Department of Archaeology and Historic Preservation (DAHP),” there is no indication that they contacted any of the impacted Tribes, that they analyzed any Tribal surveys of the area to reduce impacts to on-going access, or that that they otherwise made any effort to answer the Commission’s AIR in comment 2.1. To allow the application to move forward with environmental review, when the Developer has so blatantly ignored the Commission’s own requests for AIRs is a slap in the face and should not be allowed.

Additionally, Rye’s FLA states that “the APE (Area for Potential Effect) has been surveyed for archaeological and historic architectural resources, as well as TCPs (Traditional Cultural Properties) that are significant to the Yakama Nation.” FLA Exhibit E at 78. But, the FLA goes on to list numerous cultural resource surveys that have yet to be finished by the Tribe including:

- Conducting additional survey to correct the boundary of the Push-Pum TCP so that it properly incorporates connected plant resources as documented in 1995 and 2019 (per the recommendation of Yakama Nation);
- Evaluating the Columbia Hills Multiple Property Documentation (MPD) TCP under NRHP Criterion B, C, and D (per the recommendation of Yakama Nation);
- Evaluating Sites 45KL566, 45KL567, 45KL570, 45KL744, 45KL746, and LS-3 for the NRHP both individually and for their contribution to the Push-Pum TCP, Columbia Hills MPD TCP, and Columbia Hills Archaeological District assessing Project effects to the Push-Pum TCP, Columbia Hills MPD TCP, the Columbia Hills Archaeological District.

FLA Exhibit E at 78. The status of these surveys is still unclear, making environmental review impossible at this time and making it impossible for Interested Parties to suggest license terms at this time.

Similarly, Rye’s FLA includes the following as surveys yet to be conducted by CTUIR, including:

- Identifying historic properties of religious and cultural significant to the Confederated Tribes of the Umatilla Indian Reservation (CTUIR);
- Any identified historic properties of religious and cultural significance to the CTUIR, and any of the archaeological resources that are determined to be eligible for the NRHP.

exercise treaty rights and conduct traditional cultural practices. Therefore, please file this information with the Commission.”

FLA Exhibit E at 78. FERC must ensure that CTUIR is allowed to complete these surveys, consult with CTUIR to understand the impact of the project, and require Rye to make the changes to the project to resolve CTUIR's concerns.

Additionally, 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 the 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. On October 29, 2020, the Commission directed Rye to conduct that survey. In a letter dated November 3, 2020, Rye offered the Tribe an opportunity to conduct those surveys, yet only gave the Tribe until the end of November to respond with a plan and schedule. Moreover, this letter was addressed to only one individual at the Tribe and the incredibly short timeline for a response from a sovereign Tribal government really emphasizes this Developer's complete disregard for the Tribes its project will impact. It is unclear if Nez Perce was in receipt of this letter and whether or not they had time to reply and conduct those studies. Again more information is necessary.

Lastly, on November 2, 2021, the Confederated Tribes of the Warm Springs Reservation of Oregon ("Warm Springs") submitted comments on the draft treatment plan for the Project. This comment was submitted confidentially. Commentators are unclear if Rye has contacted or been in sufficient contact with representatives from Warm Springs or responded to the Tribe's comments. It seems unlikely that Rye adequately incorporated and responded to the Tribe's comments in only six months.

At this time, Yakama Nation, CTUIR, Nez Perce, and Warm Springs, the four Columbia River Treaty Tribes, have not been afforded the opportunity to identify Tribal cultural and religious resources that risk destruction from the Project. Rye's FLA states, "[o]nly the Yakama Nation can determine what is significant to the tribe," presumptively this suggests that Rye would agree that only CTUIR, Nez Perce, and Warm Springs can determine what is significant to their Tribes. Without the appropriate and required surveys by the Tribes, it is impossible that the Commission will be able to identify all significant issues that the Yakama Nation, CTUIR, Nez Perce, and Warm Springs will raise. As a result, the REA Notice is premature.

2. The Commission has Woefully Ignored it's Consultation Responsibilities

The federal government has a trust responsibility to Tribal Nations, the foundations of which can be traced back to the Marshall Trilogy. *See Johnson v. M'Intosh*, 21 U.S. 543 (1823); *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); and *Worcester v. Georgia*, 31 U.S. 515 (1832). This trust responsibility extends to all federal agencies as they work and interact with sovereign Tribal Governments. Here, the Commission has shirked its responsibilities owed to the Tribal governments involved in this process.

On August 13, 2021, the Commission notified the Deputy State Historic Preservation Officer for the Oregon Parks and Recreation Department that

We are again notifying you that we are designating FFP [Rye] as our representative and authorizing FFP to initiate consultation with the Oregon State Historic Preservation Officer, appropriate Native American tribes, and other consulting parties, pursuant to 36 CFR Part 800.2(c)(4) of the National Historic Preservation Act.

Letter from FERC to Christine Curran (Aug. 13, 2021), *In* FERC Docket No. 14861. The Commission designated its consultation authority to Rye, without agreement from or even discussion with involved Tribes. Yakama Nation stated in a letter dated September 13, 2021

The Yakama Nation objects to this Section 106 consultation authorization for the Goldendale Energy Storage Project (P-14861). Consultation regarding a proposed authorization has not occurred with Yakama Nation. The Federal Energy Regulatory Commission (FERC) does not have the authority to authorize the FFP Project 101, LLC as a consultation lead. The FERC has a federal trust responsibility to Yakama Nation. Under the provisions set forth in the National Historic Preservation Act (NHPA), an agency may not delegate consultation with Indian tribes to an applicant unless the affected Tribes have agreed to such an arrangement in advance. **Yakama Nation has not and does not agree to this presumed authorization. Appropriate consultation has not occurred.** [emphasis added].

Letter from Yakama Nation to FERC (Sept. 13, 2021), *In* FERC Docket No. 14861. For FERC to delegate its consultation authority to a corporation, without Tribal agreement is an insult. Federal agencies, including the Commission, must recognize and understand that government to government consultation acknowledges inherent Tribal sovereignty. For the Commission to delegate this authority to a corporation, emphasizes the lack of interest or respect that this process has had for the Tribes involved.

Furthermore, in January 2022, the Washington Department of Archaeology and Historic Preservation (“WDAHP”) blasted both the Commission’s and Rye’s navigation of the Section 106 process stating:

The Section 106 process details a clear sequential step wise process stipulated in 36 CFR 800 that requires meaningful consultations between the parties and the federal agency, and the submission of supporting documents and determinations in a specific sequence. This document, without benefit of a cover letter from the lead federal agency, and missing any official signature from either the federal agency or tribal government, **continues an unacceptable and knowing pattern of ignoring federal law and regulations** stipulated in 36CFR800. The current document is incomplete and does not provide the federal agency determination of eligibility nor the tribes’ concurrence and signature for documentation and release to our Department... **The Federal government has a Trust responsibility to**

tribal nations and as a federal agency FERC has a paramount obligation to uphold the unique federal-tribal relationship that is distinct and separate from consultation with the general public. [emphasis added].

Letter from the Washington Department of Archaeology and Historic Preservation to Eric Steimle and FERC (Jan. 5, 2022), *In* FERC Docket No. 14861. This letter indicated that WDAHP received CTUIR's Traditional Use Study of the area but that it was incomplete. Was this ever completed?

To further illustrate a pattern of bad faith, the Advisory Council of Historic Preservation ("ACHP") requested "that FERC provide us with a summary of the status of its Section 106 review and the consultation it has carried out for Goldendale with the Washington and Oregon State Historic Preservation Officers (SHPOs), the Yakama Nation and other federally recognized tribes, and other consulting parties." Letter from Advisory Council of Historic Preservation to Vince Yearick (Jan. 18, 2022), *In* FERC Docket No. 14861. Along with other documents, ACHP's letter to FERC came as a response to a letter ACHP received from the Yakama Nation, which ACHP summarized as stating

Chairman Saluskin indicated that the Yakama Nation is strongly opposed to the referenced project. He noted that that the Area of Potential Effects (APE) for the undertaking contains cultural resources, including archaeological sites and traditional cultural properties (TCPs), of great significance for the Yakama Nation. He also expressed concerns regarding FERC's delegation of consultation under Section 106 to the project proponent and its consultants, and distress that the Yakama Nation must, according to FERC, share with the other parties to the FERC license review any information regarding cultural resources of concern that it wishes to be considered in FERC's Section 106 review and in its decision regarding licensing the project.

Id. FERC provided the requested information to ACHP on March 1, 2022. This REA notice was issued on March 24, 2022, less than a month after ACHP received the requested documents and well before it would have time to review and follow up. Again it is unclear if FERC provided ACHP with all requested information. Again this REA is premature.

As this project is fast tracked through the FERC licensing process we are seeing a pattern of bad faith emerge on the part of the Commission and Rye as they navigate the legal requirements of consultation with the Tribes involved. Again and again we have seen a lack of information and complete disregard for the issues that the Tribes have repeatedly stated.

3. Proposed Project Does Not Comply with Washington's Water Quality Requirements

In the REA Notice, the Commission noted that under its regulations, Rye must, in compliance with section 401 of the Clean Water Act ("CWA"), 33 U.S.C. § 1341, provide "evidence of the date on which the certifying agency received the water quality certification

request; (2) a copy of the water quality certification; or (3) evidence of waiver of water quality certification." REA Notice at 4. As the Commission is aware, on June 22, 2021, the Washington Department of Ecology ("Ecology") denied Rye's request for certification under section 401 of the CWA. Ecology, Section 401 Water Quality Certification Denial without Prejudice, Order No. 20153, FERC No. 14861, Goldendale Energy Storage Project, Klickitat County, Washington; eLibrary no. 20210623-5009 (June 23, 2021). Ecology denied the application because Rye failed to provide Ecology with the "necessary information" to demonstrate that the "project will meet state water quality laws." *Id.* This finding, and Rye's subsequent failure to submit the additional, required information to Ecology in support of a new 401 Certification, is evidence that FERC's REA notice is premature, at best.

Under section 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 section 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.")). Here, the Commission cannot issue the license without the required water quality certification from Ecology.

A state's section 401 authority is broad. It allows a state agency to condition or deny a project based on any adverse impact on water quality—not just the discharge that triggers section 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."). 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).

Ecology has repeatedly noted that in exercising its authority under 33 U.S.C. § 1341, the department must review an application for a 401 Certification for:

1. Conformance with the state water quality standards contained in Chapter 173-201A WAC and authorized by 33 U.S.C. §1313 and by Chapter 90.48 RCW, and with other applicable state laws;
2. Conformance with applicable water quality-based, technology-based, and toxic or pretreatment effluent limitations as provided under 33 U.S.C. §§1311, 1312, 1313, 1316, and 1317; and

3. Conformance with the provision of using all known, available, and reasonable methods to prevent and control pollution of state waters as required by RCW 90.48.010.

Ecology may issue a certificate only when there is a reasonable assurance that a project will not violate these requirements. 40 C.F.R. § 121.2(a)(4). As discussed in detail in Commenters' previous comments,³ this standard is not and cannot be met here because Rye has failed to provide the necessary information and because the project will violate the state's water quality requirements.

4. The Proposed Project Is Not Clearly Defined

Significant questions remain about the operation of this development. Until answered, the REA is premature. FPA section 10(a)(1), 16 U.S.C. § 803(a)(1), requires that any license be, in the Commission's judgment, "best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat), and for other beneficial public uses, including irrigation, flood control, water supply, and recreational and other purposes"

The statute "requires the Commission to consider *all* beneficial public uses when it grants a license." *Confederated Tribes and Bands of Yakima Indian Nation v. FERC*, 746 F.2d 466, 471 (1984) (emphasis added). FPA section 15(a)(2), 16 U.S.C. § 808(a)(2), expressly requires that "[a]ny new license issued under this section shall be issued to the applicant having the final proposal which the Commission determines is best adapted to serve the public interest"

FPA section 15(a)(2) requires that "any new license . . . shall be issued to the applicant having the final proposal which the Commission determines is best adapted to serve the public interest." 16 U.S.C. § 808(a)(2). This echoes the requirement under FPA section 10(a)(1) that the Commission show, based on a thorough study of alternatives, that the new license is *best* adapted to a comprehensive plan of development for the Columbia River, and the surrounding area, for all beneficial uses over the term of the license. *See Scenic Hudson*, 354 F.2d 608, 612 (2d Cir. 1965); *Green Island Power Auth. v. FERC*, 577 F.3d 148, 168 (2d Cir. 2009). Rye has provided sufficient information to allow the Commission to determine whether the project, as proposed, is best adapted to serve the public interest. In the alternative, based on the existing record, commenters do not believe that the Commission could make such a finding given the significant outstanding issue regarding the viability and utility of the project.

According to Rye's application, the Project "is designed to generate for 12 hours a day of full power generation, at a maximum of 1,200 MW and a minimum of 100 MW, and pump water from the lower reservoir to the upper reservoir in about 15 hours." FLA, Exhibit B, p. 6. In response to this statement, several commenters raised questions regarding the validity of Rye's claims of reliably generating the maximum 14,745 megawatt-hours per day, seven days a week,

³ See Public Comments on Free Flow Power 101, LLC Goldendale Pumped Storage Project Clean Water Act 401 Water Quality Certification (FERC No. 14861) (Nov. 9, 2020) (Attachment A).

when an entire generating-pumping cycle could be completed in approximately 27 hours. In its response to the Commission's Request for Additional Information on this issue, eLibrary No. 20210702-5024, Rye suggested that it could meet the 14,745 megawatt-hours per day output while needing only 12 hours to refill the upper reservoir. Rye, however, has provided no explanation for this change in its contentions regarding the generating-pumping cycle.

In addition, in 2019, Rocky Mountain Econometrics (RME) concluded that “while the project may be technically able to serve in the stated capacity for a portion of each day, it will not be able to serve in that capacity for a large portion of each day when its upper reservoir has been partially or wholly used for power production and needs to be refilled.” RME, Critique of the Goldendale Energy Storage Hydroelectric Project (FERC No. 14861) (Dec. 3, 2019), at 2 (Attachment B). As a result of this and other fundamental flaws with the project’s design and supporting rationale, RME believed “it is also extremely unlikely that Goldendale will be financially viable.” RME based this conclusion on the well-understood parameters of pump storage project operations, and its understanding that “the Goldendale project is very unlikely to operate profitably given the state of current and future west coast and northwest energy pricing.” *Id.* Simply put, “Goldendale’s challenge is that to service its debt and cover the cost of [maintenance and operation], as well as the cost of filling its supply reservoir as a prerequisite to generate power, Goldendale will have to charge almost double the going rate of peak hour open market (NP15) energy.” *Id.* As a result, RME concluded:

It is possible that the Goldendale Pump Storage Project is being proposed with full knowledge that it will fail. Further, bankruptcy may be an unstated but integral part of the Goldendale business plan as a means of shedding sufficient debt to survive in the current wholesale power market. These results, as detailed in the report’s Appendix Alternative Debt Structures, give us pause as to whether any adverse impacts to public values such as water quality, water quantity, flow regime, fish and wildlife, tribal and cultural resources, surrounding communities, and/or recreation are worth the risk and generated energy storage.

Id. at 20. As a result, Rye appears to be proposing at best a speculative project that likely will not contribute to the state’s decarbonization objectives, but that will result in the loss of irreplaceable cultural resources and cause significant environmental harm.

Until Rye addresses these fundamental issues, on the record, the REA Notice is premature.

5. Rye Has Failed to Provide the Information Required Regarding the CGA Smelter Site

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 (“RCRA”) contaminated site, which include contaminated lands and groundwater. *Id.* at 2. Rye's failure to document, disclose, and address the contamination at the site must be cured before the environmental analysis can continue. According to the Scoping Document,

Portions of the project's proposed infrastructure (such as the proposed lower reservoir) would be located on the site of the former Columbia River Gorge Aluminum (CGA) Smelter, which is now a Resource Conservation and Recovery Act (RCRA) contaminated site that is currently owned by NSC Smelter, LLC, and is subject to ongoing management and clean-up by Washington Department of Ecology (Washington DOE).

Scoping Document at 1. Previously proposed pumped storage projects in the area have been denied licenses by FERC because of the ongoing cleanup activities associated with CGA RCRA cleanup. *See Public Utility District No.1 of Klickitat County, Washington, Clean Power Development, LLC*, 155 F.E.R.C. ¶ 61,056 (2016). Rye's FLA states that,

The impoundment has tested as having non-hazardous and non-dangerous material; however, this area will be characterized further prior to being excavated as part of the construction of the lower reservoir. Because the material is unsuitable fill, it will be excavated and properly disposed of pursuant to full characterization in collaboration with the Washington Department of Ecology.

Rye's failure to complete the characterization of this area as part of the FLA means the REA notice is premature. Understanding the precise nature and extent of the contamination of the site is necessary to allow meaningful analysis of the potential environmental impacts of this project. Therefore, the Commission must require Rye to develop and publically release this information before proceeding with the environmental review. In addition, the Commission must require Rye to create and disclose its plan for dealing with the material excavated during construction. Such a plan must ensure Rye will be able to properly dispose of any hazardous or toxic material in accordance with state and federal law. That being said, the Commission must include an analysis of the status of CGA as part of its environmental review, particularly focusing on any incremental benefits to cleanup that may occur from Project construction and significant adverse effects. 40 C.F.R. § 1508.27(b)(1). Additionally, the Commission must analyze whether or not Project construction activities may threaten a violation of State, Federal, or local law in regards to ongoing cleanup of the CGA RCRA site. 40 C.F.R. § 1508.27(b)(10). Both of these are significant factors that the Commission must consider and further support the Commission conducting an EIS for this Project.

B. The Commission Must Comply with National Environmental Policy Act

1. The Commission Must Apply the Appropriate CEQ's Regulations

On April 20, 2022, the Council of Environmental Quality CEQ published a final rule completing the first stage of rulemaking to revise certain provisions of NEPA regulations. The final rule, which takes effect on May 20, 2022, is also called the Phase 1 final rule.⁴ *See National*

⁴ CEQ has announced that additional changes to NEPA regulations will occur during the Phase 2. During Phase 2 CEQ will consider the NEPA regulations comprehensively and assess whether to revise additional provisions reverting to the language of the 1978 regulations, or to propose other revisions.

Environmental Policy Act Implementing Regulations Revisions, 87 Fed. Reg. 23,453. The Phase 1 final rule addresses certain provisions from the previous CEQ final rule, issued on July 15, 2020, revising the regulations under 40 C.F.R. §§ 1500-1508 that federal agencies use to implement NEPA.

The Phase 1 final rule amends three provisions of its regulations implementing NEPA: First, CEQ revised the 2020 rule requirement for a purpose and need statement in an environmental impact statement. The revision clarifies that agencies have discretion to consider a variety of factors when assessing an application and removes the requirement that an agency base the purpose and need on the goals of an applicant and the agency's statutory authority. The final rule also makes a similar edit to the definition of “reasonable alternatives” in 40 C.F.R. § 1508.1(z). Second, CEQ removed language limit agencies' flexibility to adopt or revise procedures that may go beyond the CEQ regulatory requirements. Third, CEQ revises the definition of “effects” to include direct, indirect, and cumulative effects.

According to the REA Notice, the Commission intends to apply the 2020 CEQ final rule, which the Commission referred to as the “new” CEQ regulations. *See* REA Notice at 2. The use of these NEPA regulations is not appropriate for several reasons. First, the Commission has the authority not to apply the “new” CEQ regulations to any activities begun before September 14, 2020, such as the Project. *See Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act*, 85 Fed. Reg. 43,304 § 1506.13. Applying the regulations that were in place at the time the process began provides the Commission and the public with a clear process to understand and follow.

Second, the Commission has yet to issue publicly available guidance on how it intends to apply the “new” CEQ Regulations, making the application of those regulations in this process difficult, at best. The lack of guidance on how the Commission will implement the “new” CEQ Regulations will make this process unworkable. Even with the changes adopted by CEQ in the Phase I final rule, the “new” regulation represent a dramatic departure from the traditional NEPA process. As a result, before it can apply these regulations, FERC must explain how it intends to interpret and apply the new regulations, how stakeholders can participate in the process, and the differences between the new and old regulations. Without this guidance, stakeholders are in the dark when it comes to the Commission’s application of the New CEQ Regulations, making this NEPA process unnecessarily vague. The New CEQ Regulations do not automatically apply to the Project, which has been in the Commission docket since 2017. Given the lack of clarity set forth by the Commission on how it plans to follow NEPA, application of the New CEQ Regulations is premature.

Third, NEPA is a vitally important statute that guides agency decisions making and prioritizes sound environmental analysis before actions are taken in order to avoid unnecessary harm. It established a framework for agencies to base decisions in sound science, and focuses on balancing ecological, social, and economic well-being. It is a critical part of the process that cannot be glossed over.

Therefore, given the uncertainty around the 2020 CEQ final rule and the new Phase 1 final rule, the fact that the application process started before either rule, and because FERC’s

regulations are written based on the regulations prior to the 2020 CEQ final rule, the Commission should use the regulations that were in place prior to the 2020 final rule (the 1978 regulations). Alternatively, if the Commission is committed to applying the most current CEQ NEPA regulations, it has to incorporate the Phase 1 final rule changes that are in effect on May 20, 2022.

2. An EIS is Required for the Project.

NEPA has two fundamental purposes: (1) to guarantee that agencies take a “hard look” at the consequences of their actions before the actions occur by ensuring that “the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impact,” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); and (2) to ensure that “the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision,” *id.* at 349. NEPA “emphasize[s] the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that ‘the agency will not act on incomplete information, only to regret its decision after it is too late to correct.’” *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998).

Section 102(2)(C) of the National Environmental Policy Act establishes an “action-forcing” mechanism to ensure “that environmental concerns will be integrated into the very process of agency decisionmaking.” *Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979). Pursuant to that statutory provision, “all agencies of the Federal Government shall ... include in every recommendation or report on ... major Federal actions significantly affecting the quality of the human environment, a detailed statement” known as an environmental impact statement (“EIS”) addressing “the environmental impact of the proposed action, any adverse environmental impacts which cannot be avoided ..., alternatives to the proposed action,” and other environmental issues. 42 U.S.C. § 4332.

The 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. *See* Columbia Riverkeeper et. al, Public Comments on Free Flow Power 101, LLC Goldendale Pumped Storage Project Clean Water Act 401 Water Quality Certification, (Nov. 9, 2020) (Appendix 1). The Project requires withdrawing millions of gallons of Columbia River water, threatening designated uses and impacting water quality in an already degraded river. *Id.* Tribal, federal, and state fish and wildlife agencies have raised significant concerns about the Project’s impacts on water quality, fish, and wildlife. *Id.* All of these issues, discussed in greater detail below, must be addressed in the Commission’s NEPA process.

3. The Commission Must Define the Proper Purpose and Need for the Project

The consideration of alternatives is the heart of the NEPA review process. It is through the identification of reasonable alternatives, the examination of the environmental impacts that

will result from each alternative, and the comparison of those impacts that the agency and the public can fully understand the impacts of a proposed project. As such, an agency may not undermine this process by defining a project's purpose so narrowly as to preclude consideration of reasonable alternatives. *Cf. Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 814 n.7 (9th Cir. 1999).

“The stated goal of a project necessarily dictates the range of reasonable alternatives and an agency cannot define its objectives in unreasonably narrow terms.” *Carmel by the Sea v. U.S. Dept. of Trans.*, 123 F.3d 1142, 1155 (9th Cir. 1997). Thus, the first step in the NEPA process is for the agency to “briefly specify the underlying purpose and need for the proposed action.” 40 C.F.R. § 1502.13. Here, the purpose and need must be based on “the goals of the applicant and the agency's authority.” *Id.*

According to Rye, the purpose of and need for this project is to assist Washington, Oregon, and California in meeting their “carbon reduction and environmental policy goals,” and specifically Washington's goal of ensuring that “all of its electricity come from carbon-free sources by midcentury.” FLA at 2. Stated differently, Rye's goal, and thus the “underlying purpose and need” for the project, is to “facilitate the transition to Washington's clean energy future.” *Id.* at 3. Commenters agree this laudable goal is the true purpose of this project. As such, the Commission must assess all reasonable alternatives that will support this goal. To do less would be to artificially restrict the purpose and need for this project to no other end than to prevent the consideration of reasonable alternatives.

Arguably, this project is limited to the development of “utility-scale storage to solve the operational challenges of integration.” *Id.* at 2. If the Commission accepts this more limited purpose and need for this project, it must conduct a corresponding alternative analysis. Indeed, Rye admits that there are other “viable, least-cost energy storage options available,” in addition to its preferred pumped storage technology. *Id.* The Commission is obligated to identify these alternatives and explore the relative environmental impacts of implementing these technologies to meet Washington’s goal of moving to all renewable electricity generation.

4. The Commission Must Analyze a Reasonable Range of Alternatives.

NEPA requires federal agencies to “study, develop, and describe appropriate alternatives to recommended courses of action.” 42 U.S.C. § 4332(2)(E). This provision applies whether an agency is preparing an EIS or an EA. *Native Ecosystems Council v. US. Forest Serv.*, 428 F.3d 1233, 1245 (9th Cir. 2005). Viable alternatives are those that are feasible and either meet the stated goals of the project, or are reasonably related to the purposes of the project. First, as required by the law and to establish the baseline against which any environmental impact of any specific alternative can be compared, the Commission must consider a no action alternative. Next, given Rye’s broadly stated project goal, the Commission must consider alternatives that look well beyond the four corners of this specific project, to include alternatives that ensure Washington can meet its energy generation goals and to explore alternatives for utility-scale storage. In any case, the Commission must identify and analyze reasonable alternatives to the specific proposed project. This analysis must examine alternative locations for this project and alternative designs at the chosen site.

a. No Action Alternative.

The Commission must define and explain the impacts of not licensing this project, or any project, at this location. This is the no action alternative. *See* 40 C.F.R. § 1501.7(e)(2) and § 1502.14(c). The NEPA regulations require the agency to “present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.1. This description of the impacts of various alternatives, and the comparative analysis allowed by the development of such information, is the true benefit of the NEPA process. To be meaningful, the NEPA document must include the information necessary to allow a thorough and objective assessment of the alternatives. To this end, identifying and reviewing a no action alternative is essential. Indeed, the no action alternative acts as the starting point for the comparison of the impacts, be they beneficial or adverse, of the proposal and reasonable alternatives.

Here, because this is a new project, the no action alternative is not permitting this project to go forward. Thus, the Commission must describe the value of the site as it exists and the ecological, cultural, recreational, and commercial benefits and activities the site does and could support if the project is not developed.

b. The EIS must consider clean energy alternatives.

The Commission must evaluate alternatives to the Project. 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) (Appendix 3). 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.

In considering alternatives, the Commission 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, the Commission must consider: (1) the lengthy permitting and construction timeline for pumped storage in general, (2) the added complexity for Rye’s Project due to the scale of Tribal cultural and religious 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.

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) (Appendix 4). 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. Overall, the Commission must analyze alternatives to the Project, including alternative site locations, designs, and developments.

c. The Commission must consider alternatives to pumped storage to provide utility-scale storage to solve the operational challenges of integration.

In support of its application, Rye claims that "[o]f the viable, least-cost energy storage options available, pumped storage is the best-proven, least-cost energy storage technology at scale." This raises precisely the question the Commission must answer: what other "viable, least-cost energy storage options" are available? The answer to this question must be found in the Commission's analysis of the reasonable alternative to the Project. In the FLA, Rye briefly analyzes wind, solar, and Lithium Ion batteries as potential green energy alternatives to pumped storage. FLA Exhibit C at 7. In comparing pumped storage to wind and solar energy, Rye quickly concludes that "[p]umped hydro storage is the only asset that provides large-scale, cost-effective renewable energy storage capacity and a range of essential grid reliability services, the value of which will increase as penetration of intermittent renewable resources rises." FLA Exhibit C at 8. However, comparing renewable energy generation to storage is like comparing apples to oranges. Thus, Rye's only adequate alternative analyzed is Lithium Ion batteries. That being said, the Commission must include an analysis of Lithium Ion batteries as an alternative to pumped storage. In addition, there are several other renewable energy storage technologies that Rye's FLA failed to analyze and that the Commission must include in its analysis. These include, but are not limited to:

1. Stacked Blocks, which store energy by "automating a six-armed robotic crane to stack thousands of purpose-built, 35-metric-ton monoliths into a Babel-like tower and drop them down again...to release the power." Julian Spector, GREEN TECH MEDIA, *The 5 Most Promising Long-Duration Storage Technologies Left Standing* (March 31, 2020). This technology adapted pumped hydro's gravity storage in a format with more geographic diversity. *Id.*
2. Liquid Air, a mechanism that "cools down air and stores it in pressurized above-ground tanks.," and uses them for grid storage. *Id.*
3. Underground Compressed Air, whereby you "use excess electricity to pump compressed air into a suitable underground formation that acts like a giant storage tank. Releasing the pressurized air allows the plant to re-generate electricity when needed." *Id.*
4. Flow Batteries, particularly Avalon Batteries, which found a way around material cost challenges associated with flow batteries. *Id.*
5. Gravity Batteries, "when green energy is plentiful, use it to haul a colossal weight to a predetermined height. When renewables are limited, release the load, powering a

generator with the downward gravitational pull.” Alesdair Lane, BBC, *Can Gravity Batteries Solve our Energy Storage Problems?* (May 16, 2022).

d. The Commission must analyze alternative sites for a pumped storage project.

When the purpose of a project is not, but its own terms, tied to specific location, the agency must assess alternative locations for the project. *Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1098 (9th Cir. 2006). The history of tribal opposition to developments in this area and the extensively documented cultural and religious resources should have made this location a non-starter for Rye. Despite this, the location alone does not represent the sole location for siting of this Project. The proliferation of proposed pumped storage projects on the West Coast alone demonstrates this. *See Generally* Courtney Flatt, NORTHWEST PUBLIC BROADCASTING, *New Energy Storage Project on Upper Columbia Brings Jobs — and Concerns from Colville Tribes* (Dec. 23, 2019), Julian Spector, GREEN TECH MEDIA, *Montana Developer Ready to Build Modern-Day Pumped Hydro Storage* (Aug. 13, 2019), Brian Gailey, KLAMATH FALLS NEWS, *CIP Acquires Swan Lake pumped hydro project* (Nov. 11, 2020), Sammy Roth, LA TIMES, *Environmental Disaster or to a Clean Energy Future? A New Twist on Hydropower* (Mar. 5, 2020), Bloomberg News Editors, RENEWABLE ENERGY WORLD, *In quest for bigger batteries, California mulls pumped hydro* (Jun. 10, 2019). Furthermore, studies have undertaken “to develop a series of advanced Geographic Information System algorithms to locate prospective sites for off-river pumped hydro across a large land area such as a state or a country.” Bin Lu, et al., *Geographic information system algorithms to locate prospective sites for pumped hydro energy storage*, 222 APPLIED SCIENCE 300, (2018). The Project need not be built at this site and the Commission must look at alternative sites for the Project.

e. The Commission must consider alternative project designs.

Finally, the Commission must explore alternatives to design and proposed operations of the facility as proposed. In its application Rye discusses its efforts to “evaluate the cost-benefit of various reservoir sizes.” FLA Exhibit A at 8. This analysis falls well short of what is required under NEPA. For example, Rye claims that it merely changed the size of the reservoirs, but retained “a total generating capacity of 1,200 megawatts (MW), which is considered most appropriate for the site and market conditions.” *Id.* Alternative generating capacities, and the resulting impact on the footprint of the Project must also be explored. Further, the Commission must consider the locations of the reservoirs, and the potential alternatives for other locations within the property boundary. Moving the various elements of the facility within the Project site will likely change the on-the-ground impacts. These alternatives must be considered.

The same is true for the other equipment and infrastructure that will be needed to run the facility. The Commission must consider and disclose the impacts of alternative designs and layouts.

In addition, the Commission must consider the impact of alternative operational parameters for the project. According to Rye's application, "The Project is designed to generate for 12 hours a day of full power generation, at a maximum of 1,200 MW and a minimum of 100

MW, and pump water from the lower reservoir to the upper reservoir in about 15 hours." FLA, Exhibit B at 6. In order for the Project to produce the maximum amount of energy (1,200MW), it will need to generate power (run all water from the upper reservoir to the lower) for 12 hours. The Commission must require the development of alternative operational patterns and reveal and discuss the potential resulting impacts to the environment.

Finally, the Commission must explore alternatives that mitigate the known adverse impacts that will result from the Project, as proposed. As discussed in detail below, the Project will have significant impacts on the environment, including but not limited to, direct, indirect, and reasonably foreseeable negative impacts on the people, fish, and wildlife in the vicinity of the proposed facility.

5. Specific and Pertinent Issues to Address in the EIS.

a. Tribal Archaeological, Cultural, and Religious Resources.

The Commission must fully account for Tribal Nations' input on Rye's proposal in the EIS. Rye sited the Project in an area of incalculable significance for Tribes, an area that includes multiple documented Traditional Cultural Properties (TCPs), Tribal-access agreements, and TCP's either: 1) eligible for inclusion on the National Historic Register of Historic Places (NHR); or 2) already included. Moreover, Rye has, for years, failed to change the Project's location over the objections of sovereign Tribal Nations.

Yakama Nation has opposed the project since its inception. Yakama Nation also opposed earlier iterations of a pumped-storage hydroelectric project proposed at the site. According to the Tribe, 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. 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) (Appendix 5).

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 the Commission, 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.

Yakama Nation's archaeological resource survey, completed in 2019, concluded that multiple sites of cultural and religious importance are located within the Project boundary. According to Rye's FLA, "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 Appendix G at 12. 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. The proposed project will also have a serious impact on the health and safety of the Yakama people, who use the Push-pum site to gather traditional medicines. Rye's FLA states that, "[w]ithin that Project area, there is a stipulation for BPA to create a plan that will allow tribal members to access Push-pum to gather foods and medicine significant to the tribe." FLA Exhibit E at 78. However, there is no discussion of how construction or management of the Project will interfere with this access or interfere with the integrity of the foods and medicines gathered.

The significance of this area to the Yakama Nation cannot be overlooked. While the Yakama Nation has filed Tribal cultural resource surveys as "confidential" with the Commission, available information, including FLA Appendix G, details the Project area's importance for Tribal cultural and religious resources.

The Yakama Nation is not the only affected Tribal Nation. CTUIR has also weighed in on the development. While many letters submitted by CTUIR have been filed confidentially to protect Tribal cultural resources,⁵ the Tribe has publicly said that

The proposed Project is likely to have substantial, harmful impacts on tribal cultural resources, including sites and artifacts—potentially both those located in-water, or below the ordinary-highwater-line, and those above and beyond the shoreline...The CTUIR has also determined that the Project could have

⁵ See Appendix 6 and 7, 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.

significant implications for historic properties of religious and cultural significance to the CTUIR.

CTUIR DNR FFPP Comments on Goldendale Pumped Storage Project Scoping Document 1, Docket No. P-14861-002 (Dec. 28, 2020). The Nez Perce Tribe has also requested that an ethnographic study be conducted to identify any Nez Perce-specific resources. The FERC docket suggests that Rye sent a letter to one individual at Nez Perce giving the Tribe less than a month to respond with a plan to conduct the study. It is unclear if this letter was received by Nez Perce or whether the Tribe had sufficient time to respond. See 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 & Letter from Eric Steimle to Patrick Baird (Nov. 3, 2020), *In* FERC Docket No. 14861.

It is unclear the status of both CTUIR and Nez Perce's studies of the area as Rye's application goes through this REA process.

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.

When looking at the impacts on Tribal cultural and religious resources from this Project the intensity, or severity of the impacts are high, with several significance factors present. Including the destruction of TCPs unique to this geographic location, the destruction of TCPs eligible for, or already included, on the NRH, the serious impacts to public health and safety of Indian people who rely on foods and medicines in the area, the cumulative impacts that the Project will have on archeological and cultural resources of at least four Tribes, and the future implications that developing this Project will have on this site, including opening the area to more development. 40 C.F.R. § 1508.27(b)(2), (3), (4), (5), (6), (7), (8). The effects of this Project are highly controversial and must be analyzed by the Commission in an EIS. *See generally, Umpqua Watersheds*, 725 F.Supp. 2d at 1241.

The Commission 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. The Commission's EIS 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. With the proceeding of the REA at this point in time, despite the lack of clarity surrounding the various cultural resource surveys being conducted, it already seems that FERC is choosing to ignore the Project's obliteration of tribal cultural and religious resources. This is unacceptable.

b. Water Quality Issues.

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. The Project would also 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. Columbia Riverkeeper and other commenters submitted detailed technical comments to the Washington Department of Ecology on Rye’s 401 water quality certification application, which outline in great detail the water quality issues from the Project and are incorporated herein by reference. *See* Columbia Riverkeeper et. al, Public Comments on Free Flow Power 101, LLC Goldendale Pumped Storage Project Clean Water Act 401 Water Quality Certification, (Nov. 9, 2020) (Appendix 1). The Commission must analyze the water quality issues identified in Columbia Riverkeeper et al.’s 401 certification comments in the EIS.

c. Avian, Terrestrial, and Aquatic Wildlife Impacts.

The Project will have significant impacts on wildlife. On March 10, 2020, in comments to the Commission, 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. 14861; USFWS Comment to FERC (Mar. 3, 2020), *In* FERC Docket No. 14861. Furthermore, the Oregon Department of Fish and Wildlife (ODFW) and WDFW collectively identified four threatened, endangered, candidate, or proposed species, as well as one critical habitat within the project boundary.⁶ *See* Letter from U.S. Dep’t of Interior Fish & Wildlife Service to FERC (Oct. 14, 2020), *In* FERC Docket No. 14861.

Rye elected to site its Project adjacent to and, in the case of the upper reservoir, within a wind turbine complex. In multiple comments to the Commission, 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

⁶ ODFW and WDFW collectively identified the following species: 1. The Western Distinct Population Segment of Gray Wolf; 2. Gray Wolf; 3. Yellow-Billed Cuckoo; and 4. Bull Trout. WDFW also identified Bull Trout critical habitat as within the project boundary.

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.

USFWS Comment to FERC (Mar. 3, 2020), *In* FERC Docket No. 14861. 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. 14861. 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).

The EIS must address the Project’s impacts on wildlife, including the loss of habitat as a result of the new development, the future implications of siting a large scale development here on wildlife, the increase in avian mortality from wind turbines as a result of increased avian activity next to reservoirs, and the impacts to threatened, endangered, candidate, and/or proposed species.

d. Wind Turbines near Proposed Project.

Rye chose to site the upper reservoir within and directly adjacent to an existing wind turbine complex. FLA Exhibit E 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. 14861. 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 must be analyzed by the Commission because they involve unique risks on the environment in this geographic location. *See* 40 C.F.R. § 1508.27(b)(5).

Furthermore, Rye has failed to provide adequate information in response to the Commission staff's request for more information following Rye's deficient FLA. Specifically, the Commission states that,

In order to assess the compatibility of the proposed project with existing land uses and the potential indirect effects of the proposed project on the golden eagle, staff requested in comments on the draft license application, that you conduct studies (e.g., modeling) to demonstrate how project construction and operation would influence air flow above the upper reservoir and around the wind turbines and how it would affect wind turbine operation and generation and include the modeling results in the final license application.

Without elaboration, in the final license application, you acknowledge the potential influence of the project on wind turbine performance and wind flow, but state that a thorough analysis can only be performed during final project design.

Letter from FERC to Erik Steimle, (Jul. 23, 2020), *In* FERC Docket No. 14861. On December 17, 2020, the Commission denied Rye's request to use the Expedited Licensing Process because of the information deficiencies in the FLA, stating that “[b]ased on staff’s analysis, FFP’s November 20, 2020 and December 4, 2020 filings only partially address staff’s July 23, 2020 and October 29, 2020 information requests.” *Id.* at 12. One such filing was Rye’s wind analysis, which it committed to expand by February 2021. *Id.* The results of this wind analysis must be analyzed by the Commission because the presence of the wind turbines create and involve unique risks if this Project is implemented, including risks that would impact wildlife.

e. Aluminum Smelter Cleanup Site

As discussed above, Rye's failure to complete the characterization of this area as part of the FLA means the REA notice is premature. The Aluminum Smelter cleanup is an ongoing operation dealing with many varied pollutants and contaminants. Rye’s application fails to integrate the Project construction with the ongoing cleanup already being conducted by Ecology. For example, Ecology recently issued a notice for a public participation plan on the contamination present where the Project may be constructed. How is this public participation plan linked to the FERC licensing process without undermining public participation? Of even

more importance, how can the Commission analyze the environmental impact of the Project fully without the results of the Washington State investigation of the Aluminum Smelter site? These are significant factors that the Commission must consider and further support the Commission conducting an EIS for this Project.

f. Other Issues to Evaluate in the EIS

The Commission must also examine the following issues in the EIS:

- The Project's environmental justice impacts, including the Project's direct, indirect and cumulative impacts to Tribal Nations and Indigenous people, described above, and low-income ratepayers.
- The Project's scenic and other aesthetic impacts, including the aesthetic impacts of additional transmission lines.
- The direct, indirect, and cumulative impacts of additional transmission lines in the Columbia Basin and in the Project vicinity.
- The Project's impacts on the reliability and capacity of the BPA transmission lines and the Northwest grid.
- The Project's construction and operational impacts on air quality and noise.
- The Project's post-operation site restoration plans, including enforceable funding requirements to ensure those plans are completed.
- The Project's impacts on the Columbia River in the event of a reservoir failure.
- The Project's impacts on recreation, including paragliding, fishing, boating, birdwatching, petroglyph viewing, hunting, hiking, windsurfing, kiteboarding, kayaking, and other forms of recreation.
- The Project's construction and post-construction traffic impacts.
- The Project's socioeconomic impacts, including impacts to ratepayers.

III. PRELIMINARY TERMS AND CONDITIONS

The Commenters propose the following terms and conditions for this project subject to three caveats. First, Commenters do not see a viable path forward for this project. As discussed in great detail above, the location chosen for this project is completely inappropriate and will result in unmitigable destruction of tribal cultural and religious resources. Second, the record is still being developed. As discussed above, Rye has failed to provide much of the information needed for the Commission and the public to fully understand the potential impact of this project. As a result, the need for additional terms and conditions may become apparent once this information is developed and disclosed. As such, we have not settled on final recommendations for license conditions, but we recommend the Commission analyze the following alternatives in the EIS to address the effects described above and explained further below.

Third, Commenters believe that, if done correctly, the alternatives analysis in the upcoming EIS will further reveal the significant environmental impact of this project. As a result, this project's scope, design, and location will likely change substantially if this project is

meant to move forward. Pursuant to 18 C.F.R. § 4.34(b)(4), commenters expressly reserve the right to offer modified recommendations, terms and conditions or prescriptions.

Preliminary License Condition 1. Protection of Cultural Resources and Traditional Cultural Properties

Licensee shall ensure the protection of cultural resources and traditional cultural properties by developing a Cultural Resources Management Plan in consultation with and with the approval of all affected Tribes, including Yakama Nation, CTUIR, Nez Perce, and Warm Springs.

Explanation: As discussed above, this project as proposed will detrimentally destroy irreplaceable Tribal cultural and religious resources. Again, Commenters reiterate that they oppose this Project. However, if this Project continues through the licensing process, Commenters recommend as a condition of the preliminary license, that the Licensee must follow any and implement all recommendations from all Tribal surveys of the area. Furthermore, the Licensee shall be required to obtain pre-approval of any Project activities from all affected Tribes, including Yakama Nation, CTUIR, Nez Perce, and Warm Springs.

Preliminary License Condition 2. Protection of Tribal Member Access.

Licensee shall ensure that Tribal member access to the area for gathering purposes is not hindered, encumbered, or otherwise interfered with. This includes ensuring that roots, plants, and medicines in the Project area are not tampered with or destroyed, tribal members have access to their usual and accustomed areas where tribal gathering and subsistence and commercial fishing occur.

Explanation: In addition to the cultural resources impacted within the Project footprint, Project construction and operation would impact off-site, adjacent tribal use, including fishing and gathering. The Licensee must insure that Project construction, operation, and maintenance does not interfere with, hinder, or intimidate Tribal access. In addition, the CGA is fully within Yakama Nation's ceded lands, and the Columbia River adjacent to this site is part of the Usual and Accustomed area where tribal subsistence and commercial fishing is ongoing.

Preliminary License Condition 3. Protection of Surface Waters.

Licensee shall ensure that ongoing project operations do not result in violation of water quality standards or non-attainment of water quality criteria.

Explanation: As detailed extensively above, and in previous comments, this project will have significant impact on the various waterbodies. From the destruction of jurisdictional waters at the upper reservoir site, to the potential impacts the Columbia River, the project will have direct, significant impacts on these waterbodies, resulting in the violation of numeric and narrative criteria, harm to designated uses, and the violation of the state's antidegradation policy.

Preliminary License Condition 4. Protect the Columbia River and Groundwater Through a Complete Remediation of the CGA Smelter Site.

Licensee shall ensure that a complete remediation plan is created with the parties involved in the clean up of the CGA Smelter Site. This remediation plan must be created, synchronized, and in-place, prior to any Project construction or final license.

Explanation: The primary wastes produced by aluminum smelting facilities include carbon dioxide gas, and fluoride gasses (including highly acidic hydrogen fluoride) that are produced in each smelting pot. As a result of the sulfur in petroleum coke and petroleum pitch, some sulfur dioxide is also produced. Carbon dioxide and other coke-derived products such as PAHs are passed on to the primary pollution control scrubbers and then to the plant exhaust system. Sludge produced by the scrubbers is thus contaminated with trace amounts of fluorides and metals, as well as more significant quantities of PAHs. Soils at the Site have been contaminated with polycyclic aromatic hydrocarbons (PAHs) and metals, including arsenic, cadmium, chromium, mercury, and selenium

These contaminants pose a serious risk to the environment. Two aquifers underlie the CGA Site. Groundwater generally flows to the south towards the Columbia River. Groundwater at the CGA is contaminated in places with fluorides, chlorides, and sulfates. Wastewater discharged from the CGA carried sludge directly into the Columbia River through a permitted outfall. The remediation of this site, consistent with state and federal law, and in consultation with the Yakama Nation is necessary to ensure the protection of groundwater, the Columbia River, and the Yakama Nation's Usual and Accustomed area where tribal subsistence and commercial fishing is ongoing.

Preliminary License Condition 5. Protection of Native Fish.

Licensee shall install and maintain fish screens on the Project intake that meet or exceed NMFS and WDFW screening requirements and take any other measures developed in consultation with NMFS, U.S. Fish and Wildlife, and WDFW, and the Yakama Nation, CTUIR, Nez Perce, and Warm Springs, to prevent the entrainment, impingement, or injury of salmon, steelhead trout, bull trout, Pacific lamprey, and other resident native fish.

Explanation: 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.

Preliminary License Condition 6. Protection of Wildlife.

Licensee shall ensure that ongoing project operations do not result in negative impacts in bird, mammal, and invertebrate populations by developing a Wildlife Management Plan, in coordination with WDFW, FWS, and the Yakama Nation, CTUIR, Nez Perce, and Warm Springs. The WMP must include specific measures designed to avoid adverse impacts on birds, mammals, and invertebrates as a result of the project during project construction, operation, and maintenance activities.

Explanation: The record developed to date demonstrates that a significant number of species likely use the Project site. The Project, if developed as proposed, will have direct and indirect negative impacts on a number of these species. For example, the FWS and WDFW have repeatedly noted that by providing open water habitat, the Project's reservoirs may attract waterfowl and waterbirds which in turn will attract bald eagles. In addition, golden eagles are known to use the site. Also, bats may be attracted to the reservoir to forage on insects and drink the water. The increased presence of birds and bats in the area increases the likelihood of mortality events at the adjacent wind turbines. As a result of these and other similar impacts on a variety of species, from birds to butterflies, the applicant must, in consultation with FWS, WDFW, and ODFW, develop measures to eliminate the potential negative impacts, and to mitigate unavoidable impacts. These measures must specifically prevent the use of the Project components by birds and mammals (in a ways that themselves do not have negative impacts on the existing local populations), ensure those measures are effective, and mitigate for any loss of habitat and harm to individuals that does occur as a result of the project's construction or operation.

Preliminary License Condition 7. Adaptive Management Plan.

Licensee shall develop an adaptive management plan to ensure ongoing operations of the Project are not in conflict with comprehensive management plans prepared by other agencies under FPA section 10(a)(2). The adaptive management plan shall be prepared in consultation with relevant resource agencies and interested stakeholders, and include the following: measurable objectives for the project's performance based on objectives contained in the comprehensive plans, deadlines for meeting measurable objectives, specific procedures for reopener if the measurable objectives are not met on time; and procedures for affirmative coordination between the Licensee, resource agencies that administer the comprehensive plans, and interested stakeholders.

Explanation: Rye must prepare an adaptive management plan that coordinates post-licensing monitoring and adaptive management measures as necessary to ensure license conditions are meeting previously established measurable objectives and otherwise performing as forecasted over the term of the new license. Such a plan must include specific provisions for reopener in the event the project is not meeting measurable objectives as intended.

IV. Conclusion

The REA Notice is premature and inadequate at this time. Before moving the process further, the Commission must direct Rye to develop and release the information necessary for the Commission and the public to understand the potential environmental impacts of this project

fully. If, however, the Commission proceeds with the NEPA review, the Commission must conduct an EIS for this development because the Project will significantly affect the quality of the human environment. Commenters identify pertinent issues that the Commission must address in its environmental review including but not limited to the destruction of irreplaceable Tribal cultural and religious resources and archeological sites, the infringement of Tribal peoples' access to food and medicine gathered in the area, impeding access to culturally significant areas, and impacting water quality and wildlife. In addition, the Commission must explore the reasonable alternatives that will meet the stated purpose and need of this project. Finally, should the Commission reach the remarkable decision that this project is in the public interest, we request the Commission adopt the necessary license terms and conditions to protect the local Tribes, their members, other community members, as well as the waters, fish, and wildlife that will undoubtedly be impacted by this project.

Sincerely,

Simone Anter
Staff Attorney
Columbia Riverkeeper

Margie Van Cleve
Conservation Chair
WA Chapter of the Sierra Club

Rebecca Ponzio
Climate and Fossil Fuel Director
Washington Environmental Council

DECLARATION OF SERVICE

I, Simone Anter, declare that I today served the attached document by electronic mail, or by first-class mail if no e-mail address is provided, to each person on the official service list compiled by the Secretary in this proceeding.

Dated: May 23, 2022

By: /s/Simone Anter
Staff Attorney
Columbia Riverkeeper

Attachment A

**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

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November 9, 2020

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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.”

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- 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.

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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,



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Legal and Program Director
Columbia Riverkeeper



Simone Anter
Staff Attorney
Columbia Riverkeeper



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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).

Attachment B

The top of the page features a banner with a scenic background of snow-capped mountains and a lake. On the left, the company name 'Rocky Mountain Econometrics' is written in a white, serif font. To the right of the name, contact information is listed in three columns: phone numbers, a P.O. box address, and an email address with a website URL.

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Anthony Jones - Principal

CRITIQUE OF THE Goldendale Energy Storage Hydroelectric Project (FERC No. 14861) NOTIFICATION OF INTENT

Prepared for

American Rivers

December 3, 2019

Anthony Jones
ROCKY MOUNTAIN ECONOMETRICS
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I. EXECUTIVE SUMMARY

- On January of this year, 2019, FFP Project 101, LLC, notified FERC of its intent to file an application for an original license for the Goldendale Energy Storage Project No. 14861 (Goldendale), a closed-loop pump storage project, in Washington State close to the Columbia River near to the John Day Dam.¹
- In the Notice of Intent (NOI) Goldendale’s stated purpose for the project is that:
 - “Within the region, renewable energy development is growing, primarily through wind power generation. The Project would provide necessary ancillary services and energy storage to the Northwest region, and allow for more reliable management and integration of disparate renewable energy sources into the grid. The Project would provide additional ramping capacity (both up and down) as well as firming for wind energy regulation, coordination, and scheduling services, automatic generation control, and support of system integrity and security (reactive power, spinning, and operating reserves).”²
 -
- Rocky Mountain Econometrics (RME) finds that while the project may be technically able to serve in the stated capacity for a portion of each day, it will not be able to serve in that capacity for a large portion of each day when its upper reservoir has been partially or wholly used for power production and needs to be refilled. It is also extremely unlikely that Goldendale will be financially viable.
- While Goldendale’s description of project operations are preliminary in nature and not overly detailed, the parameters of pump storage project operations are well understood, Goldendale’s construction costs are sufficiently well defined, and the wholesale energy environment in which it will operate are clear. As a result RME is able to conclude that the Goldendale project is very unlikely to operate profitably given the state of current and future west coast and northwest energy pricing.
- As briefly as possible, Goldendale’s challenge is that to service its debt and cover the cost of M&O, as well as the cost of filling its supply reservoir as a prerequisite to generate power, Goldendale will have to charge almost double the going rate of peak hour open market (NP15) energy. Worse, since pump storage project sales hours are necessarily restricted to the portion of the day when the upper reservoir is not being filled, the opportunity to absorb overhead by operating more than about eight hours per day is precluded. Finally, while Goldendale’s costs of operation will likely increase with inflation over time, NW energy prices for the past two decades have been flat or declining as the market transforms to accommodate proportionally larger and larger amounts of solar power, a trend that is destined to continue.

¹ Goldendale Energy Storage Hydroelectric Project, (FERC No. 14861), Klickitat County, Washington, NOTIFICATION OF INTENT, Prepared for FFP Project 101, LLC.

² Ibid., pp. 2.

II. PROJECT DESCRIPTION

From Goldendale's NOI: Goldendale Energy Storage Project FFP Project 101, LLC, FERC Project No. 14861 Page 4 January 2019

The Project area has the suitable geography for a closed-loop pumped storage facility and is strategically located at the northern terminus of the Pacific AC and DC Interties operated by BPA, Los Angeles Department of Water & Power, and the California Independent System Operator (CA-ISO).

The interties allow for the bulk seasonal exchanges of power between British Columbia, Canada, the Northwest, and California and provide benefits of coordinated markets to the regions.

The Project is also located in close proximity to substantial existing, abundant, high quality, and untapped wind power generation that can be developed with relatively low environmental conflict and cost. The Project's location can also support the daily inter-regional exchanges of California massive mid-day solar oversupply and the significant power generation ramping needed by CA-ISO.³

The proposed Project is a closed-loop pumped storage hydropower facility located off-stream of the Columbia River at John Day Dam, located on the Washington (north) side of the Columbia River at River Mile 215.6. The Project will be located approximately 8 miles southeast of the City of Goldendale in Klickitat County, Washington.

The proposed Project will involve no river or stream impoundments, allowing for minimal potential environmental impact. Initial fill water and periodic make-up water will be purchased from Public Utility District No. 1 of Klickitat County, Washington (KPUD) using a KPUD-owned conveyance system and municipal water right.

The Project facilities include:

- _An upper reservoir consisting of a rockfill embankment dam approximately 170 feet high, 8,000 feet long, a surface area of about 59 acres, storage of 7,100 acre-feet (AF), at an elevation of 2,940 feet above mean sea level (AMSL);
- _A lower reservoir consisting of an embankment approximately 170 feet high, 7,400 feet long, a surface area of about 62 acres, storage of 7,100 AF, and an elevation of 580 feet AMSL.
- _An underground water conveyance tunnel and underground powerhouse; and
- _230-kilovolt (kV) transmission line(s).

The rated (average) gross head of the Project is 2,400 feet, and the rated total installed capacity is 1,200 megawatts (MW).

³ Ibid., pp. 4.

Project Characteristics

Approximate Installed Capacity	1,200 MW
Assumed Number of Units (Variable Speed)	3
Assumed Average Static Head	2,360 feet
Assumed Usable Storage Volume	7,100 AF
Approximate Energy Storage	14,745 MWh
Approximate Hours of Storage @ 1,200 MW	12 hours

Underground Powerhouse

Rated Head (Gross)	Approximately 2400 feet
Max Flow Generating Mode	8,280 cfs
Max Flow Pumping Mode	6,700 cfs
Generating Capacity	Up to 1,200 MW
Number of Units	3 x 400 MW units

III. MARKET PRICES

Understanding Goldendale requires understanding the west coast wholesale energy market with which it will interface.

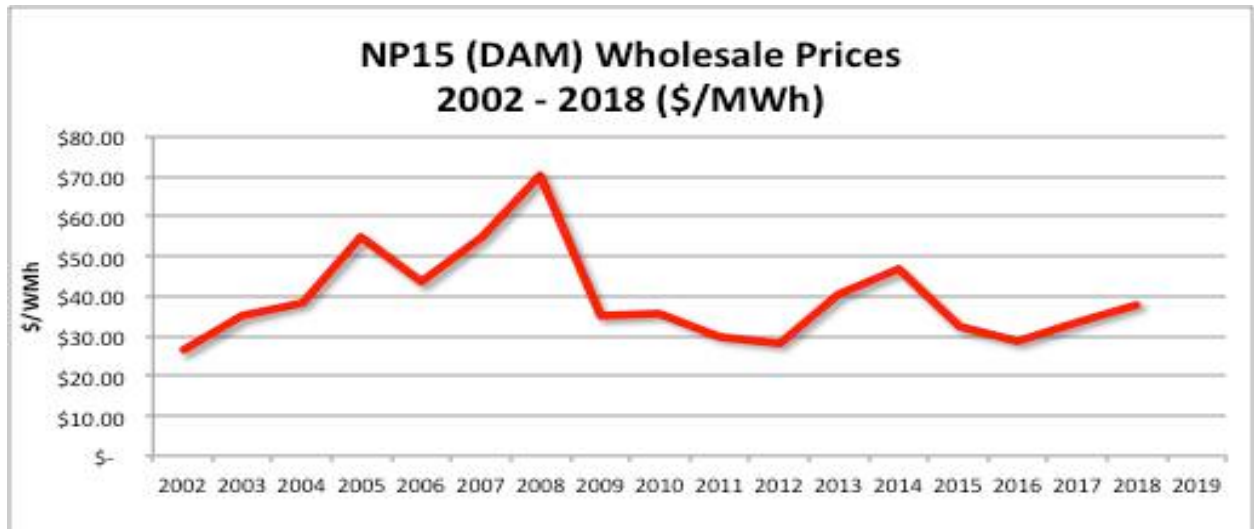
Unlike many, perhaps most, pump storage projects that are built in conjunction with a relatively fixed output, often thermal, generating station, Goldendale will be a free standing, independent operation buying and selling power on the western transmission grid, from and to the west coast wholesale energy markets.

The NOI talks broadly about supporting other regional power producers but makes no mention of contracting with any of them. For the purposes of this analysis RME assumes Goldendale will be a freelance operation, attempting to buy low and sell high on the wholesale market, to the extent of their ability, at their discretion. In the absence of contractual requirements for energy used to fill their upper reservoir or sell their production, it is to market prices that we must look to understand the forces that will shape Goldendale's potential for success or failure.

Pre 2009, Prelude to a Crash

In the years leading up to 2009, west coast and northwest wholesale energy prices were escalating rapidly. From 2002 through 2008, NP15 prices climbed from about \$25/MWh to over \$70/MWh, a 180 percent increase in a scant six years. In 2008, FERC, BPA, and most NW utilities were predicting energy prices to continue escalating, at a somewhat slower rate, on upward toward \$80, \$90, and \$100/MWh within 10 years.

Chart 1



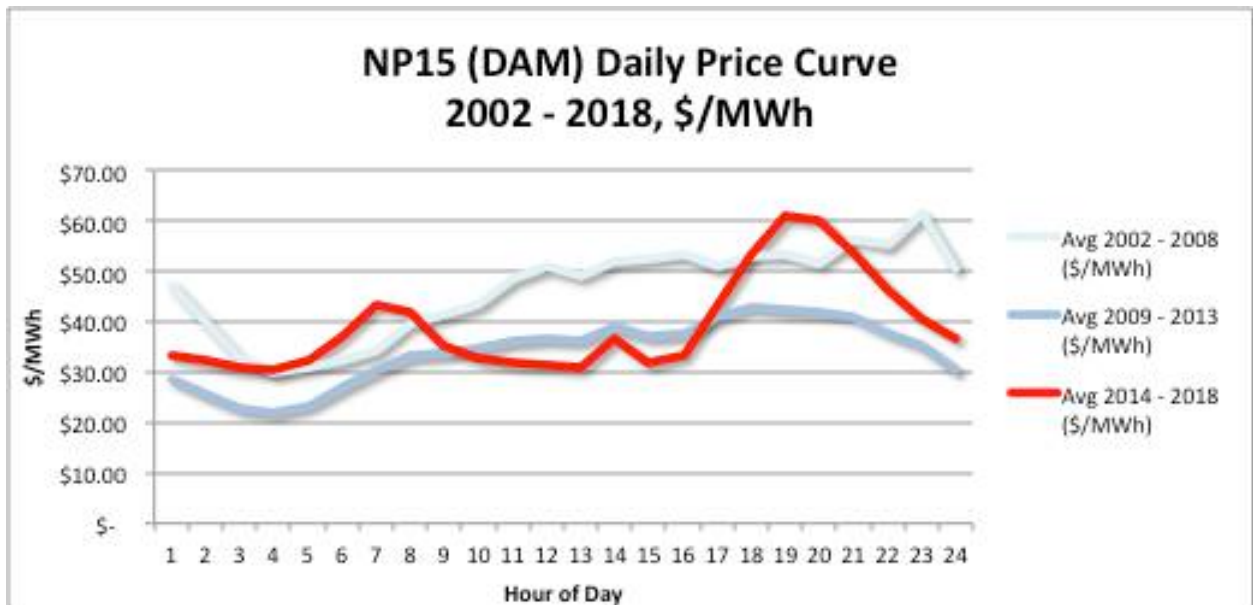
Source: CAISO⁴

⁴ <http://oasis.caiso.com/mrioasis/logon.do>

That line of thinking collapsed in 2009, the first year of the Great Recession. That year saw the collapse of gas prices (a major factor in the price of power produced by gas generating plants) and the point where solar capacity in California started gaining traction. In one year, from 2008 to 2009, NP15 prices dropped by 50 percent and have never recovered to any substantive degree for more than a year or two. Nine years after the 2009 price collapse 2018 prices averaged about \$38/MWh, roughly half of price levels ten years previous. And, the 2018 number would likely have been lower still if not for the effect of the Camp Fire in California that took several major PG&E generating plants offline for several months of the year, thus reducing supply and driving prices higher. Please refer to Chart 1, above.

Prices from 2009 to 2013 followed a daily price curve similar to but lower than the daily price curve prior to 2009. Daily prices continued to bottom out in the hours from midnight to about 6:00 AM and then began climbing to a peak in the late afternoon or early evening. Where pre 2009 prices bottomed out at about \$30/MWh, post 2008 prices bottomed out about \$10 lower at \$20/MWh. Where pre 2009 prices topped out as high as \$60/MWh in the late evening, post 2008 prices topped out about \$20 lower at about \$42/MWh as early as 6:00 PM.

Chart 2



Source: CAISO⁵

Prior to 2009 the range from minimum to maximum price for the day averaged a little more than \$30/MWh. From 2009 - 2014 the daily average price range from minimum to maximum was about \$8 less, at roughly \$22/MWh. Please see Chart 2, above.

⁵ <http://oasis.caiso.com/mrioasis/logon.do>

The lower overall prices and the narrowing of total price range after 2008 was probably due to a combination of factors including reduced demand due to the recession, lower gas prices used by thermal generating plants, and the beginnings of the solar power revolution associated with California investing in renewable energy.

High Spot Market Prices May Not Be Enough

If Goldendale would have made this proposal back in 2008, the year before market prices collapsed from the \$70/MWh range or higher, it would be more difficult to find fault with the proposal. Even the most respected forecaster has difficulty selling an audience on the likelihood of \$30 market prices when they looking at prices averaging as much as \$80/MWh for months at a time.

But this is not 2008 and prices have not averaged greater than \$50/MWh on an annual basis in ten years. In fact, the price collapse was fully expected. The precipitousness of the decline might seem a little severe but the price correction was completely normal. High prices, while inconvenient, are the mechanism that triggers innovation and investment in the market. They lead to new construction that results in more capacity, greater supply, and ultimately lower prices.

The run-up to 2008 was not the first of its kind and is unlikely to be the last. Similarly, price corrections such as the one in 2009 are equally as normal as the preceding price spike. It is for that reason that RME cautions against any prophesy that market prices will return to pre 2009 levels for anything more than brief periods. As Chart 1 demonstrates, 2013-2014 looked like prices were once again heading towards pre 2009 \$60 and \$70 levels. But, again, price changes of that nature are the events that trigger new investment, more construction, and more supply that drives prices back down to \$30/MWh and lower.

One final point before leaving the subject of pre-2009 high market prices. As we will see, high prices are a necessary condition for Goldendale to cover their costs construction costs, but not a sufficient condition for to cover their operating costs.

High peak hour prices are little benefit to pump storage projects if it means similarly high off-peak hour prices. Projects of this nature also need situations that increase the spread between high and low daily prices. Years like 2008 when average prices were much higher than after 2009 present a situation in which the daily price spread is potentially higher, but not necessarily as high as needed.

Emergence Of The Duck Curve

Even more significant for this discussion is the transformation of the western energy market that started in about 2014. That year marked the emergence of the “Duck Curve”. The Duck Curve, named for the curve’s late in the day resemblance to the profile of a duck’s head, is the result of solar power becoming a major force in the California energy market.

Starting in 2014 prices from about 3:00 AM to about 8:00 AM returned to or even exceeded pre 2008 price levels, the difference being that by about 9:00 solar energy sources started producing in sufficient volume that prices, instead of continuing to increase, dropped back to pre-dawn levels of about \$30/MWh where they remained until about 5:00 PM when the late in the day peak begins. As with the morning peak, the late day peak is as high or higher than the pre 2009 peak but it is much shorter in duration. Again, please refer to Chart 2, above.

Dual Daily Supply Curves

Classical economic theory holds that as demand increases, it shifts the demand curve to the right and the equilibrium price increases. At first glance that result would seem to be violated in the western wholesale energy markets where midday prices are now typically lower than earlier in the day even though the amount of energy demanded is substantially higher. However, the west coast currently operates with, effectively, two supply curves, a nighttime curve and a daytime curve.

Early in the day, in the first few hours of peak demand before sun-up, energy load begins to ramp up and, with the nighttime supply curve in play, prices begin to rise in response. Later in the morning, with load ramping up even further, the supply curve begins to shift to the right as solar generation comes online. This process not only counters the earlier increase in prices but also typically over-compensates and drives prices lower than they were before the sun rises.

It is this price environment in which Goldendale proposes to operate. In an effort to recharge the upper reservoir during the 10 lowest cost hours of the day, Goldendale will have to pump for five hours from about midnight to 5:00 AM, for another four hours from about 10:00 AM to about 1:00 PM, and finally for one hour at 3:00 PM.

About half of Goldendale’s pumping will occur during the relatively low priced but high load middle of the day.

In an effort to sell power during the 8 highest hourly prices of the daily load and price cycle, Goldendale will need to run its generators for an hour during the morning price peak at about 7:00 AM, and for 7 hours from about 5:00 PM through 11:00 PM. Please see Chart 3 below.

One final takeaway for the post 2008 open market price history is that inflation has been outpacing NP15 prices and that the difference between peak prices and off peak prices, as

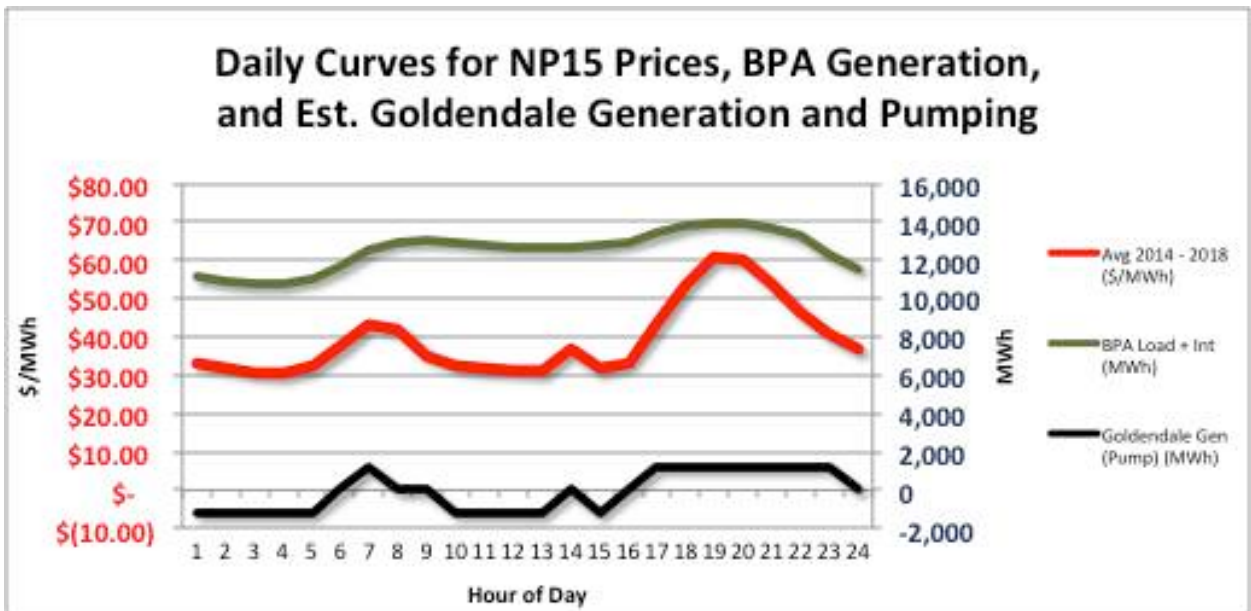
constrained by Goldendale’s profit maximizing operation curve, is a relatively stable \$16 - \$18/MWh.

For the purpose of this analysis of Goldendale’s finances, RME will use the 2014 – 2018 minimum and maximum prices of \$32.0475 and \$50.2530 respectively. The reason for using these two numbers is that it provides a slightly greater range in prices than the full 2009 – 2018 record provides, a factor that gives the benefit of doubt to Goldendale in recognition that they may bring more sophisticated modeling to the operation than RME has at its disposal.

NP15 Prices

	Avg. Minimum Prices	Avg. Minimum Prices	Avg. Price Spread
2014 - 2018	\$32.0475	\$50.2530	\$18.2055
2009 - 2018	\$29.5999	\$45.9677	\$16.3679

Chart 3



IV. GOLDENDALE FINANCIALS

The Goldendale NOI estimates that the project will cost \$2.2 billion. The inclusion of Washington State sales tax and capitalized pre-completion interest will bring the startup cost of the project to about \$2.6 billion. Servicing the interest on \$2.6 billion will cost Goldendale about \$208 million per year.

The NOI indicates that M&O costs will come to about 8.5 million per year, bringing the total for debt service and M&O to about \$216 million per year, roughly \$62/MWh without accounting for pumping costs.

Goldendale - With Amortization

Capital Cost

PAD Cost Estimate	\$2,200,000,000	1
WSST @ 6.5%	\$143,000,000	2
Total Estimated Direct Cost	\$2,343,000,000	
Pre Cost Interest (60 Months)	\$246,310,804	3
Installed Cost	\$2,589,310,804	

Maintenance and Plant Cost

Cost	\$2,589,310,804	
Interest Rate	5.0%	5
Term (Yrs.)	20	6
Annual Interest Pmt.	\$207,772,998	

Wages	\$3,860,000	1
Other	\$4,620,000	
M&O	\$8,480,000	1
Total	\$216,252,998	

Based on Goldendale’s estimates in the NOI, the project will produce about 3.5 million MWh of energy. At an estimated peak-hours average price of \$50/MWh for the 8 highest NP15 daily prices, Goldendale will see revenues of about \$175 million per year.

Also from the NOI, Goldendale will use about 4.4 million MWh each year to power its pumps to fill the upper reservoir. At average market prices for the 10 lowest priced NP15 daily hours Goldendale will have to pay an average of about \$32/MWh and will spend about \$140 million in pumping costs each year.

The relatively narrow differential between peak and off peak market prices, combined with the 20 percent efficiency penalty associated with pumping, Goldendale will net about \$35 million per year at the cash flow level. However, M&O costs and debt service will lead to Goldendale losing about \$181 million per year, a loss of \$52/MWh of production.

Cash Flow From Operations⁶

Generation

Capacity	1,200	4
Hrs / Day	8	4
Days /Yr.	365	4
Annual Prod (MWh)	3,504,000	4

Generation \$/MWh	\$50	3
Revenue from Generation	175,200,000	

Pumping

Pumping Rate	1,200	4
Hrs / Day	10	4
Days /Yr.	365	4
Annual Pumping (MWh)	4,380,000	4

Pumping \$/MWh	\$32	3
Annual Pumping Cost	140,160,000	

Net Cash Flow from Operation \$35,040,000

Profit (Loss) **(\$181,212,998)**

Cost of Production (\$/MWh)	\$101.72
Profit (Loss) \$/MWh	(\$51.72)

⁶ Goldendale, PAD, pp 182; <http://www.salestaxstates.com/sales-tax-calculator-washington/>; RME; and Goldendale, PAD, pp 18.

To summarize, the minimum cost to cover debt service and O&M is about \$61/MWh. The minimum market price spread for Goldendale to cover its pumping costs is 20 percent above the price Goldendale pays to fill the upper reservoir. Combined, for Goldendale to operate profitably it needs to see market prices of \$61/MWh plus a price spread of about \$8/MWh on top of the \$32/MWh⁷ estimate for the lowest cost 10 hours of pumping. Thus, with the lowest 10 hours of a typical day averaging about \$32/MWh, efficiency losses will increase the value of water in the upper reservoir to about \$40/MWh. Adding the \$61.72/MWh necessary to cover debt service and O&M means Goldendale will need to see average prices for the 8 highest priced hours of the day of \$102/MWh or higher.

⁷ With efficiency losses of 20% \$32/MWh pumping costs equate to \$40/MWh at the generating level.

V. GENERAL DISCUSSION

Large Producer

Unlike many hydro type power producers that typically only run at full capacity during spring runoff or brief moments to match peaking demand, Goldendale can be expected to run at or near full capacity for most of its daily 8-hour operation as it attempts to maximize revenue.

When generating, Goldendale output will be one of the larger single-plant power sources in the northwest. It will be capable of out producing Bonneville Dam for the eight hours per day it generates. In terms of nameplate capacity it will be larger than McNary Dam. In terms of average production, when running, it will be on par with Chief Joseph dam and second only to Grand Coulee in the NW.

Larger Consumer

During the 10 hours per day that Goldendale will be pumping, it will be a major load center. When pumping, Goldendale will have the load equivalent of about 720,000 households, about the same as the all the residential households in Idaho!⁸

Net Consumer of Electricity

Goldendale estimates that the project is 20 percent less efficient in pumping mode than it is in generating mode. The result is that to produce 3.5 million MWh of electricity Goldendale will consume about 4.4 million MWh, an annual loss to the system of about 877,000 MWh.

General Operating Characteristics

Goldendale combines some of the features of a hydro project and some of the features of a thermal project and some features unique to pump storage projects.

Like any substantial hydroelectric generating plant, Goldendale's will be a major capital investment. Servicing the interest payment on its debt will be a major challenge. In the absence of high prices in the wholesale energy market, the alternative method for absorbing overhead is

⁸ Goldendale will consume 1,200 aMW in pumping mode. Idaho has about 720,000 residential electrical customers who consume an average of about 1,200 KWh per month. (720,000 Residents X 1.2 MWh/month = 864,000 MWh. 864,000 MWh / 30 Days / 24 Hours = 1,200 MWh)

to operate as many hours per year as possible. That, combined with minimal marginal operating costs, is the reason most hydro facilities operate as close to 24/7 as possible.

However, a 24/7 generating schedule will not be possible in Goldendale's case.

The requirement to spend more time filling the upper reservoir than time generating energy, plus potentially waiting out shoulder hours when the price differential is insufficient to cover pumping losses, tends to limit Goldendale's capacity utilization rate to about 33 percent. If Goldendale could generate power 16 hours per day it could double its overhead absorption and cut its pre-pumping cost of production by half. However, again, that will not be possible.

Like a thermal project, the water in the upper reservoir has value in that it costs money to pump the water the 2360 vertical feet up from lower reservoir. Like a thermal project, Goldendale cannot generate electricity profitably unless it receives at least as much per MWh as the water in the upper reservoir cost to pump it up there, plus the 20 percent efficiency penalty.

If it cost \$40/MWh to fill the reservoir (\$32/MWh plus a 20 percent efficiency penalty for a total of about \$40 /MWh generating equivalent.), that tends to suggest that the cost minimizing operation level is when sales prices are \$40/MWh or higher. That logic works well enough until about 5:00 in the afternoon when the need to absorb overhead starts to conflict with the need to cover pumping costs. In other words, just because it cost \$40/MWh to fill the reservoir on one day does not mean the same water will be worth the same amount the next day. If, having paid \$40/MWh to fill the reservoir there is no guarantee peak prices the next day (or the day after that, ad infinitum) will not be even lower. In that event Goldendale would be smarter, toward the end of the day, to treat the pumping costs as sunk costs and produce as much power as possible during the late afternoon / evening peak price period in an effort to absorb overhead cost, to the extent possible.

In that manner, Goldendale would cover some of its overhead and recoup at least a portion of the day's pumping cost prior to beginning the next day of operation.

Clearly, no project of this type can profitably operate in that manner on a continuing basis, but it serves to illustrate the complex nature of Goldendale's business model as it attempts to minimize losses and maximize profits.

Finally, unlike the vast majority of both thermal and hydro projects, Goldendale will never be more than about 12 hours from running out of "fuel", exhausting the water in the upper reservoir, and having to stop generating electricity.

Emergency Generating Capability

Goldendale's data table claims that the plant's approximate hours of storage @ 1,200 MW is 12 hours. The implication seems to be that Goldendale will provide 12 hours of backup for a variety of ancillary services including emergency generation in the event some other project fails.

This claim fails for a variety of reasons. First, if 1,200 MW generation requires 8,280 cfs of water flow, the 7,100 acre foot reservoir will be exhausted in a little over 10 and hours, not 12. But that misses the second and broader point, the assumption that any event triggering the need for 12 hours, or 10.5 hours, of Goldendale production will occur when the upper reservoir is at full capacity.

Barring the unlikely event that Goldendale is paid to sit patiently, 24/7, with a full upper reservoir laying in wait for a moment when its services are needed, it seems far more likely that any emergency calling for Goldendale's services will happen when the project has already been generating for some period of time. Clearly, the length of time that Goldendale can provide backup is directly proportional to the amount of water remaining in the upper reservoir.

Assuming Goldendale operates a daily pumping and generating schedule consistent with maximizing revenue from the daily price swings, any emergency calling for Goldendale's production is most likely to occur when the upper reservoir is substantially depleted. If any emergency happens after Goldendale is more than 4 hours into its daily generating cycle, or fewer than 5 hours into its daily pumping cycle, the upper reservoir will be half empty. In that manner, if emergencies happen at random times of day, the expectation is that Goldendale's ability to respond to emergencies is only about 6 hours, not 12.

Finally, if some other power plant were to go offline and need backup while Goldendale is already in generating mode as part of its daily production schedule, it is not clear that there will be a benefit to the system if Goldendale ceases putting power onto the grid under its own name to begin putting power onto the grid in the name of some other power producer. This scenario results in a zero net increase in production.

Market Price Impacts

Classical economics suggests that, at the margin, Goldendale will drive off-peak prices up and peak prices down.

Traditionally, pump-storage projects have been built in conjunction with other specific generation projects in an attempt to extend the efficiency range of the main generating plant into other parts of the day, week, month, or year.

That description does not apply to Goldendale as presented in the NOI.

Goldendale, as currently proposed, is not linked to any individual power producer, or group of power producers. It will be a parasitic operation in that it will attempt to purchase power from other existing regional suppliers during the lower cost portions of the daily price curve in an effort to resell the energy later in the day when prices are relatively higher.

Regional power producers will hope the potential for higher off-peak prices they receive when Goldendale operates its pumps will be enough to offset the potentially lower peak prices they will see later in the day when Goldendale is producing power.

On the other side of the equation, Goldendale will hope its potential to drive up off-peak prices and the potential amount it will drive down peak-prices will not narrow the price spread to the point that they cannot operate profitably.

Finally, retail consumers will hope that the net reduction in supply and the resulting potential increase in energy costs will not adversely affect their retail rates.

Minimal Price Impact

Goldendale will be one of the regions larger power producers when generating and one of the regions larger load center when pumping. As mentioned in previous sections, that tends to suggest that Goldendale will depress market prices when generating and increase wholesale prices when pumping, at least at the margin. The amount of these effects is hard to predict but will probably be fairly small.

The reason the effect will likely be small is that, while Goldendale will be a major northwest load center when pumping and a large northwest power producer when generating it will not be a large producer or load center by California standards, and it is the California wholesale markets that are the price setters.

People in the northwest tend to forget that California utilities are sized to supply the peak needs of about 40 million people while northwest utilities are sized to serve the peak needs of about 13 million people.

Goldendale may be as much as five percent of northwest capacity when generating but it will be only about one percent of California capacity. Since Goldendale will be directly connected to the west coast wholesale markets by way of the west coast power grid Goldendale will be a price taker in most cases rather than a price setter.

Self-Defeating Market Price Impact

While any market price impact resulting from Goldendale's operation will likely be small, any effect will be self-defeating for Goldendale's needs.

For example, in its analysis of Goldendale's potential profitability RME estimated peak hour and off-peak hour prices would average \$50/ MWh and \$32/MWh respectively. If Goldendale's operation reduces peak hour prices by \$1 and raises off-peak hour prices by \$1, to \$49 and \$33/MWh respectively, the resulting \$2/MWh narrowing of the daily price spread will reduce Goldendale's annual net revenue by nearly \$8 million and increase its per MWh loss by over \$2/MWh to \$53.97/MWh.⁹

“Quick Response” May Not Mean Lower Rates.

Goldendale lists “quick response time” as one of the project's assets. It is not clear to RME that this is a net benefit to the region.

From Goldendale's perspective, its proposed ability to supply power in response to “emergency” changes in load and or reduce the supply of power as necessary to help balance system load, is a benefit to the system.

However, quick response time can just as easily be used to respond, pumping or generating, in efforts to grasp low cost pumping opportunities or switch to generating mode to take advantage of fleeting moments of high wholesale prices. Responding to emergencies may be a benefit to the system but chasing momentary price changes can increase chaos, uncertain, and risk, and be detrimental to the system.

For instance, Goldendale has the potential to switch from consuming 1,200 MW per hour in pumping mode to producing 1,200 MW per hour in generating mode, and vice versa, in an unspecified but presumably brief period of time, perhaps as quickly as a few minutes or even quicker. To other entities on the grid, power producers, energy aggregators, and consumers, this would be seen as a 2,400 MW swing in load volume, the equivalent of a substantial western city suddenly going off line, or Grand Coulee switching arbitrarily off and on, with little or no warning!

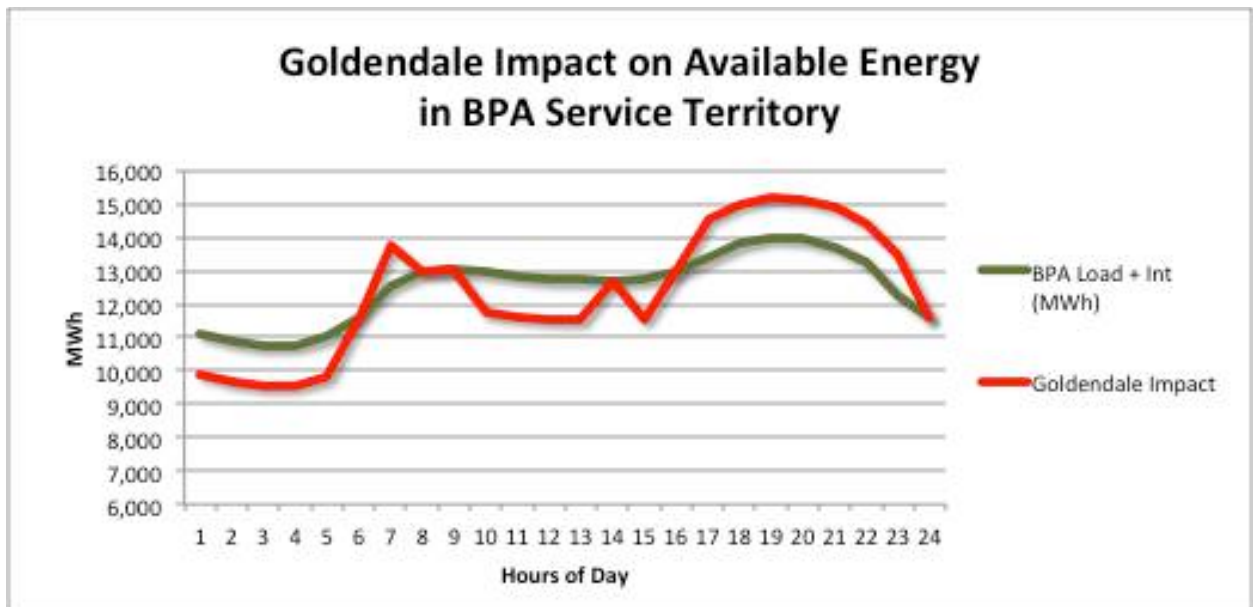
Given Goldendale's precarious financial situation, and in the absence of regulatory or contractual operational constraints, increased wholesale market chaos appears to be the most likely result of Goldendale's operation.

⁹ RME is highly skeptical of Goldendale's potential to operate profitably. However, by choosing options and assumptions that tilt the scale in Goldendale's direction, and not including price impacts such as this, RME generally gives the benefit of the doubt to Goldendale.

Chart 4 below provides a graphical example of this discussion. If Goldendale’s operation were grafted onto BPA’s load curve¹⁰ it would make BPA’s available power curve substantially less “smooth” and it would make the spread, the range of power, from low point to high point, available to consumers broader by about 2,400 aMW. The power currently available to contract customers exemplified by the green line, would instead follow the red line.

Would NW producers modify their production in recognition that Goldendale is operating in that fashion? The answer is undoubtedly yes, to at least some degree. However, it is important to remember that the curve shown by the green line is the result of BPA servicing load as well as chasing the same daily price curves in search of higher revenues as Goldendale will be chasing. In other words, yes, Goldendale’s operation will cause changes in the operations of other NW utilities, but it is not clear that the result will smoother or less chaotic. Absent any regulatory or contractual mandate, the opposite seems most likely.

Chart 4



As hinted at in the preceding paragraph, regulating the manner and the degree, the when and the how much if you will, to which Goldendale can enter the market could conceivably alleviate the potential for Goldendale to increase market uncertainty. That, of course, would reduce Goldendale’s ability to profit from swings in market demand and prices, and make their already precarious financial picture look even worse.

¹⁰ BPA is used here because their production numbers are roughly half of the NW, they are readily available and transparent. The inclusion of the remaining NW producers would tend to minimize this impact to some degree, but not eliminate it.

Contracting

As mentioned above, Goldendale is not directly linked to any one, or any group, of generating entities. As currently configured, it is a freelance operation.

To that end power producers in need of load shaping services may look to Goldendale for assistance. The question then becomes whether or not Goldendale can compete with other regional load shaping service providers. The evidence suggests not.

Again, Goldendale's breakeven production cost exceeds \$100/MWh.

Competing with Goldendale will be most of the other NW entities with excess capacity, particularly utilities with hydro power plants that have some potential to shift their time of day production schedules. This will include BPA that touts its load shaping ability for around \$40/MWh. Other hydro intensive utilities such as Idaho Power and Avista offer similar services for roughly similar prices.¹¹

For companies looking for load shaping services but hoping to avoid fixed contracts there is always the option of playing the same wholesale market as Goldendale. Here, the prices may be more volatile than would be seen with a fixed contract, but with average daily prices of around \$30/MWh it is hard to find justification for \$100 Goldendale power.

Finally, Goldendale will have to compete with new power producers that are increasingly entering the market with rates as low as \$20/MWh, including battery backup. This might seem especially galling to Goldendale since Goldendale will have trouble filling its upper reservoir for \$20/MWh, let alone generating power that inexpensively.

¹¹ And, those prices may be a bit high. CAISO staff concludes load shaping in California only adds about \$0.85/MWh to market prices. For this analysis that means Goldendale, with its \$100+ / MWh cost structure trying to compete with \$33/MWh market prices.

VI. APPENDIX – ALTERNATIVE DEBT STRUCTURES

Goldendale Without Amortization

In recognition that it is fairly common for utilities to not amortize debt on major projects, RME looked at the affect of Goldendale limiting its debt service to paying only the interest on the \$2.6 billion startup cost. This has the benefit of reducing the debt service charge by \$75 million from \$219 million to about \$144 million per year. Carrying the \$75 million annual cost reduction through to the bottom line reduces Goldendale's losses from \$192 million to \$117 million per year, a loss of \$33/MWh of production.

Goldendale With Bankruptcy

In the forgoing analysis RME used assumptions generally favorable to Goldendale. For example, for the market price spread, RME used the 2014 – 2018 spread of \$18/MWh. The 2009 – 2018 spread is perhaps more relevant, but with a spread of only \$16/MWh would have made the project look still worse. The same is true for interest rates. RME chose to use the lowest prime rate on record at the time of writing. Prime plus one or two is perhaps more accurate, especially given the speculative nature of this project, but that too would have made the project look even worse.¹²

Given that in this analysis RME made assumptions generally favorable to Goldendale and the financial results are still abysmal, RME is left to speculate on what it is that the project's sponsors see that RME does not.

Looking at the reports produced to date, and the resources at Goldendale's disposal, RME must assume the sponsors are intelligent, successful people. They must see all the same market forces and interest charges that RME sees. At the same time, the project as currently proposed appears from all angles to be destined to fail, in short order. RME is hesitant to make the following statement but feels it may be true and must be addressed: It is possible that the Goldendale Pump Storage Project is being proposed with full knowledge that it will fail. Further, bankruptcy may be an unstated but integral part of the Goldendale business plan as a means of shedding sufficient debt to survive in the current wholesale power market.

If we look at bankruptcy as an unstated but intended method of shedding the bulk of the construction cost, the project begins to make financial sense. If, in the course of a bankruptcy proceeding, the tunnels and reservoirs are declared sunk costs, and total debt is reduced to a hypothetical \$75 million by salvaging the turbines and generators (\$25 million apiece for three used turbines and control structures) annual debt service drops to a very reasonable \$4.9 million.

¹² At the time of this writing, November 28, 2019, the prime rate is 4.75% and RME in this analysis is using a rate of Prime plus 0.25%.

Adding M&O only brings the total up to about \$13.4 million. Using the same cash flow stream as in the previous examples, but with the restructured debt, Goldendale might see an annual profit of about \$6.18/MWh, \$21.7 million per year. Its cost of production would be about \$44/MWh, comfortably lower than the average peak wholesale prices of \$50/MWh.¹³

Goldendale - Without Amortization

Capital Cost

NOI Cost Estimate	\$2,200,000,000
WSST @ 6.5%	\$143,000,000
Total Estimated Direct Cost	\$2,343,000,000

Pre Const Interest (60 Months)	\$246,310,804
Installed Cost	\$2,589,310,804

Maintenance and Plant Cost

Cost	\$2,589,310,804
Interest Rate	5.0%
Term (Yrs.)	1000
Annual Interest Pmt.	\$129,465,540

Wages	\$3,860,000
Other	\$4,620,000
M&O	\$8,480,000
Total	\$137,945,540

Goldendale - With Bankruptcy

Capital Cost

NOI Cost Estimate	\$75,000,000
WSST @ 6.5%	\$4,875,000
Total Estimated Direct Cost	\$79,875,000

Pre Const Interest (60 Months)	\$8,396,959
Installed Cost	\$88,271,959

Maintenance and Plant Cost

Cost	\$88,271,959
Interest Rate	5.0%
Term (Yrs.)	1000
Annual Interest Pmt.	\$4,413,598

Wages	\$3,860,000
Other	\$4,620,000
M&O	\$8,480,000
Total	\$12,893,598

¹³ One simple way to eliminate the possibility of bankruptcy as an unstated but integral part of Goldendale's business plan is to include a clause in any regulatory approval of the project requiring Goldendale to set aside funding to remove the turbines and destroy the tunnel in the event the project fails.

Cash Flow From Operations**Generation**

Capacity	1,200
Hrs. / Day	8
Days /Yr.	365
Annual Prod (MWh)	3,504,000

Generation \$/MWh	\$50
Revenue from Generation	175,200,000

Pumping

Pumping Rate	1,200
Hrs. / Day	10
Days /Yr.	365
Annual Pumping (MWh)	4,380,000

Pumping \$/MWh	\$32
Annual Pumping Cost	140,160,000

Net Cash Flow from Operation \$35,040,000

Profit (Loss) **(\$102,905,540)**

Cost of Production (\$/MWh)	\$79.37
Profit (Loss) \$/MWh	(\$29.37)

Cash Flow From Operations**Generation**

Capacity	1,200
Hrs. / Day	8
Days /Yr.	365
Annual Prod (MWh)	3,504,000

Generation \$/MWh	\$50
Revenue from Generation	175,200,000

Pumping

Pumping Rate	1,200
Hrs. / Day	10
Days /Yr.	365
Annual Pumping (MWh)	4,380,000

Pumping \$/Who	\$32
Annual Pumping Cost	140,160,000

Net Cash Flow from Operation \$35,040,000

Profit (Loss) **\$22,146,402**

Cost of Production (\$/MWh)	\$43.68
Profit (Loss) \$/MWh	\$6.32

EXHIBIT B

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 Coversheet Only.

[Paginated separately.]

EXHIBIT C

Exhibit C – Communication From The Yakama Nation’s Consultation Dispute With The Federal Energy Regulatory Commission

Exhibit Coversheet Only.

Includes:

1. Letter from the Yakama Nation Tribal Council Chairman to the Advisory Council on Historic Preservation regarding FERC concerns (Feb. 16, 2022).
2. Letter from Robert Whitlam, State Archaeologist, to Erik Steimle. (Dec. 15, 2021)
3. Letter From Robert Whitlam, State Archaeologist, To Mike Trust And Erik Steimle. (Jan. 5, 2022)

[Paginated separately.]