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 Commonents 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 ancestrial 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 acquatic resources, and has the potential to exasperate existing soil and groundwater contaimination 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 Commonents 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 ancestrial condition – the cultural resource is forever decimated. The nature and character of the cultural resources within the APE will be significantly harmed or lost

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[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' integril 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 Columiba 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

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[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.]

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 distruction of Traditional Cultural Properties; loss of acquatic resources; harmful impacts to avian and wildlife populations; and, existing soil and groundwater contaimination 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

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[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 permenantly 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

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[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 integril 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 Columiba 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, breeched, 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).

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

EXHIBIT A

Letter From Yakama Tribal Council Chairman To FERC Secretary (Mar. 2020)

Exhibit Coversheet Only.

[Paginated separately.]

Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

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 1885 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 contributon 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 permenant 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

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

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

EXHIBIT B

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

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Exhibit Coversheet Only.

[Paginated separately.]

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;

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[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, Klickatat* [sic] *Washington*. Short Report 444. Archaeological and Historical Services, Eastern Washington University, submitted to Jones and Stokes Associates. Bellevue, Washington.

[3] Indigenous 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, Klickatat [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 plan 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: Alexandra B. Smith Date: 3/13/97

WASHINGTON STATE OFFICE OF ARCHAEOLOGY AND HISTORIC PRESERVATION

By: [illegible] 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/FERCOnline.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 it's 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 conducted, 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.

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 FLA[4], 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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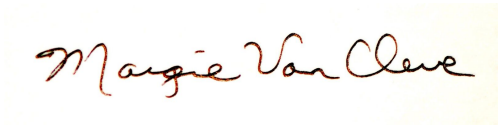

Margie Van Cleve
Sierra Club - Washington State Conservation Chair

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
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Union Gap, WA 98903-0009
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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

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[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

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, 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

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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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. Hooely 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 evaluation 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, nutrientes, and heavy metals in the project reservoirs and a schedule for annually reporting the monitoring results and anay 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.

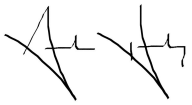
Commenters respectfully request that Ecology deny Rye's request for a CWA 401 certification. Rye filed a woefully incomplete application, leaving Ecology without grounds to certify the Project will comply with water quality standards. Based on available information, Ecology must deny the certification 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



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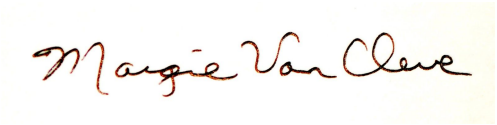
On behalf of Columbia Riverkeeper



Margie Van Cleve
Sierra Club - Washington State Conservation Chair

Wendy McDermott
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American Rivers

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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), *In* FERC Docket No. 1486.
2	The Confederated Tribes and Bands of the Yakama Nation, Comment to FERC, (Feb. 21, 2019), *In* FERC Docket No. 1486.
3	American Rivers, et al., Comment to FERC, (Mar. 12, 2020), *In* FERC Docket No. 1486. Filed on Mar. 12, 2020.
4	U.S. Fish & Wildlife Services, Comment to FERC, (Mar. 3, 2020), *In* FERC Docket No. 1486.
5	Wash. Dep't of Fish & Wildlife, Comment to FERC, (Mar. 10, 2020), *In* FERC Docket No. 1486.
6	Turlock Irrigation District, Comment to FERC, (Mar. 11, 2020), *In* FERC Docket No. 1486.
7	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
8	U.S. Fish & Wildlife, Updated list of threatened and endangered species that may occur in your proposed project location (Oct. 14, 2020), *In* 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), *In* FERC Docket No. 14861.
11	Zachary E. Hooely Underwood et al., *An Intermittent Stream Supports Extensive Spawning of Large‐River Native Fishes*, Transactions of the American Fisheries Society, 426 (2018)

12	Angela R. Riley*, Indian Remains, Human Rights: Reconsidering Entitlement Under the Native American Graves Protection and Repatriation Act,"* 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 Repatriation Reader: Who Owns American Indian Remains? 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), *In* FERC Docket No. 14861.
17	Sullivan, S. M. P., M. C. Rains, A. D. Rodewald, W. W. Buzbee, and A. D. Rosemond, *Distorting Science, Putting Water at Risk.* Science 369(6505):766–768 (2020).
18	Leslie M. Reid and Robert R. Ziemer, *Evaluating the Biological Significance of Intermittent Streams,* 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., *Swale Creek Water Temperature Study* (Sept. 2004).
22	Aspect Consulting, *Riparian Vegetation Assessment, Little Klickitat River and Swale Creek* (June 30, 2009).

Confederated Tribes and Bands
of the Yakama Nation

Established by the
Treaty of June 9, 1855

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 1885 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 contributon 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 permenant 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

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

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

EXHIBIT B

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

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Exhibit Coversheet Only.

[Paginated separately.]

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;

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[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, Klickatat* [sic] *Washington.* Short Report 444. Archaeological and Historical Services, Eastern Washington University, submitted to Jones and Stokes Associates. Bellevue, Washington.

[3] Indigenous 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, Klickatat [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 plan 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: Alexandra B. Smith Date: 3/13/97

WASHINGTON STATE OFFICE OF ARCHAEOLOGY AND HISTORIC PRESERVATION

By: [illegible] 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: _____