

Alpine Lakes Protection Society, American Rivers, American Whitewater, Center for Environmental Law and Policy, Conservation Northwest, North Cascades Conservation Council, Sierra Club – Washington State Chapter, The Mountaineers, Washington Wild, Wild Steelhead Coalition and Wild Washington Rivers

April 27th, 2016

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

Electronic Filing

Re: Sunset Falls Fish Passage and Energy Project (P-14295), South Fork Skykomish River, Snohomish County, Washington. Comments on Draft License Application.

Dear Ms. Bose:

Enclosed for filing in the above referenced proceedings are comments submitted in response to the Draft License Application filed by Snohomish County Public Utility District No. 1 for the Sunset Falls Fish Passage and Energy Project. The Conservation Groups have reviewed the DLA and have participated in this proceeding.

Copies of this filing have been served on all parties of record to these proceedings. Thank you for the opportunity to provide comments on this project.

Sincerely,

Karl Forsgaard
Alpine Lakes Protection Society

Tom Hammond
North Cascades Conservation Council

Michael Garrity
American Rivers

Rebecca Wolfe
Sierra Club, Washington State Chapter

Thomas O'Keefe
American Whitewater

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Wild Steelhead Coalition

Andrea Matzke
Wild Washington Rivers

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Snohomish)	Project No. 14295-000
County Public Utility District No. 1)	Sunset Fish Passage
)	and Energy Project
)	
)	Comments of Conservation
)	Groups

ALPINE LAKES PROTECTION SOCIETY, AMERICAN RIVERS, AMERICAN WHITEWATER, CONSERVATION NORTHWEST, CENTER FOR ENVIRONMENTAL LAW & POLICY, NORTH CASCADES CONSERVATION COUNCIL, SIERRA CLUB – WASHINGTON STATE CHAPTER, THE MOUNTAINEERS, WASHINGTON WILD, WILD STEELHEAD COALITION AND WILD WASHINGTON RIVERS COMMENTS ON THE DRAFT LICENSE APPLICATION FOR THE SUNSET FISH PASSAGE AND ENERGY PROJECT, FERC PROJECT NUMBER 14295-000

(Submitted April 27, 2016)

I. Introduction

Alpine Lakes Protection Society, American Rivers, American Whitewater, Center for Environmental Law & Policy, Conservation Northwest, North Cascades Conservation Council, Sierra Club – Washington State Chapter, The Mountaineers, Washington Wild, Wild Steelhead Coalition, and Washington Wild Rivers (hereafter Conservation Groups) offer the following comments on the Draft License Application (DLA) for the proposed Sunset Fish Passage and Energy Project (Project), dated January 28th, 2016. Conservation Groups have reviewed the Snohomish County Public Utility District’s (District) DLA and have participated in numerous public meetings and site tours since 2009 when the District notified stakeholders they were considering a hydropower project at this site.

As described in the DLA,¹ the Project would consist of the following new facilities: (1) An intake with a 2,500 cubic feet per second (cfs) maximum diversion capacity for power generation and 30 cfs for the fish bypass pipe, trash rack and fish screens in a V-shaped arrangement, fish bypass pipe discharging downstream of the diversion; (2) An underground, horseshoe-shaped; 22-foot diameter tunnel for 800 feet (Headrace), then a 21.5-foot diameter tunnel for 1,400 feet (Power Tunnel); (3) Semi-underground powerhouse with twin 15-MW vertical Kaplan-type turbines generators with a total capacity of 30MW and average output of 13.6 MW; (4) an underwater tailrace approximately 100-feet wide tapered rock channel originating as 15 feet high by 30 feet wide; and (5) a 115 kV overhead line to be overbuilt mostly along the existing

¹ Sunset Fish Passage and Energy Project, Draft License Application for Major Unconstructed Project, P-14295, FERC eLibrary 20160128-5159.

District distribution line on U.S. Highway 2 continuing ~8.5 miles to existing Gold Bar substation. The overall project footprint would be less than 5 acres and the bypass reach would be 1.1 miles (approximately between river mile 51.5 and 52.6). The District proposes to reduce flows in the bypass reach to as low as 220-250 cfs.²

A. Interest of Conservation Groups

The Conservation Groups are national or regional environmental and recreational non-profit organizations with an interest in protecting and restoring rivers and streams and other natural resources located in the Pacific Northwest. Each organization has a direct interest in changes to flows, public river access, flow information, habitat, land management, watershed protection and other topics that will arise in the consideration of a hydropower project on the South Fork of the Skykomish River near Index, Snohomish County, Washington.

The Conservation Groups have been actively engaged in this proceeding since the applicant filed a preliminary permit for this site in September 2011, and as early as 2009 when Conservation Groups engaged with the District as it assessed potential hydropower projects in Whatcom, Skagit, Snohomish and King Counties in Washington State.

Alpine Lakes Protection Society (ALPS) works to protect lands, waters and forests, and to encourage environmentally sustainable recreational development in the Alpine Lakes region, a dramatic area of peaks, forests and over 600 lakes in the central Cascade Mountains directly east of Puget Sound.

American Rivers is a national, non-profit, 501(c)(3) conservation organization that protects wild rivers, restores damaged rivers, and conserves clean water for people and nature. Since 1973, American Rivers has protected and restored more than 150,000 miles of rivers through advocacy efforts, on-the-ground projects, and an annual America's Most Endangered Rivers® campaign. Headquartered in Washington, D.C., American Rivers has offices across the country – including in Tacoma and Bellingham in the Puget Sound area – and more than 200,000 members, supporters, and volunteers.

American Whitewater is a national non-profit 501(c)(3) river conservation organization founded in 1954 with over 5,400 members and 100 local-based affiliate clubs, representing whitewater enthusiasts across the nation. American Whitewater's mission is to conserve and restore America's whitewater resources and to enhance opportunities to enjoy them safely. As a conservation-oriented paddling organization, American Whitewater has a significant percentage of members residing in Washington State and thus an interest in the Skykomish River.

² DLA Vol. 1 pp. 53-54, 78; DLA Vol. 2, Exhibit E pp. 115-117; 118-119; 122-23; 130-31; 161; 168-170; 177; 178; 181-83; 185; 187; 250; 307; Figure E.3-19; Table E.3-10; Table E.3-11.

The Center for Environmental Law & Policy is a membership-based, non-profit corporation with a mission to protect and restore the quantity of water flowing in Washington's freshwater resources, i.e. its rivers and aquifers, to ensure protection of public values in those waters, including drinking water supply, fish and wildlife habitat, water quality, recreational use, and aesthetic enjoyment.

Conservation Northwest is a nonprofit organization that protects and connects old-growth forests and other wild areas from the Washington Coast to the BC Rockies. Conservation Northwest works to ensure that the region is wild enough to support wildlife; engages local communities on forest restoration, creating sustainable timber jobs and wilderness protection; and helps ensure safe passage for wildlife, including those moving north and south in the Cascades and across the Canadian border, and east and west between the Cascades and Selkirks of the Rockies.

North Cascades Conservation Council (NCCC) is a 501(c)(3) not-for-profit organization formed to protect and preserve the North Cascades' scenic, scientific, recreational, educational, and wilderness values. NCCC has a 50 year history of aggressively promoting National Parks and Wilderness, protecting old growth forests and pristine watersheds, conserving endangered wildlife, preventing off-road vehicle damage to public lands, and guiding Park and Wilderness management.

The Mountaineers was formed in 1906 to explore the wild areas and peaks surrounding the City of Seattle. The Mountaineers works to ensure that wilderness areas are preserved and protected through the actions of their Conservation, Recreation Resources and Stewardship divisions, and with a mission to enrich the community by helping people explore, conserve, learn about and enjoy the lands and waters of the Pacific Northwest.

Sierra Club – Washington State Chapter is a 501(c)(4) national conservation organization founded in 1892. The Washington State Chapter represents over 30,000 activists statewide who work to explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; to educate and enlist humanity to protect and restore the quality of the natural and human environment; and to use all lawful means to carry out these objectives.

Washington Wild is a nonprofit 501(c)(3) conservation organization founded in 1979 working to preserve and restore wild lands and waters in Washington State through citizen empowerment, support for grassroots community groups, advocacy and public education.

The Wild Steelhead Coalition (WSC) is a nonprofit 501(c)(3) regional fish conservation organization. The organization was founded in 2000 by a group of conscientious steelhead anglers and advocates, in reaction to the closure of steelhead fishing on many Puget Sound rivers, including the Skykomish. For more 15 years, the WSC has worked to build partnerships, educate stakeholders, and change policy on behalf of the fish. As a Washington-centric

organization, we have a significant percentage of members with a strong interest to recover wild steelhead stocks in Puget Sound, especially in the fabled Skykomish River.

Wild Washington Rivers is a non-profit, 501(c)(3) conservation organization founded to protect the rivers of Washington State with high values in fish and wildlife resources and their habitats from hydropower development where inappropriate. Wild Washington Rivers was founded to research issues that could adversely affect Washington's rivers and subsequently to educate the public of our findings. Wild Washington Rivers focuses on one river at a time, with the South Fork Skykomish River, its tributaries and waters upstream and downstream being the waterways of current study.

II. Comments

Conservation Groups are opposed to the Project due to the impacts that would result from damming and dewatering one of the region's most treasured free-flowing rivers. In addition, as proposed, the Project plainly violates Washington state law protecting instream flows in this stretch of the river. The Conservation Groups recognize that hydropower can be an important source of energy and have supported projects to improve generation efficiency and new generation at sites that are appropriate for development.³ This Project will not improve efficiency and is not an appropriate site for new development. Rather, this proposed Project would bring new and unacceptable impacts to a river of high value to the region and state while providing a small amount of unneeded and only intermittent energy generation.⁴

The key to recognizing the promise of increased hydropower generation is choosing the right sites. The South Fork Skykomish River is simply an inappropriate river to consider for new hydropower generation. The proposed Project is contrary to local, state, and federal laws, policies, and comprehensive plans. The proposed Project site is on a reach of the river that has been recommended to Congress by the USDA Forest Service as a Wild and Scenic River, is identified as a Protected Area from hydropower development by the Northwest Power and Conservation Council, and recognized in state statute as a State Scenic Waterway. Additionally, the requirements of the Instream Flow Rule for the Skykomish River are inconsistent with the proposed diversion for this Project. These significant legal barriers are described in greater detail below.

³ The Hydropower Reform Coalition, of which many Conservation Groups are members, has spent the past two decades working with dam owners to improve the environmental performance of working dams. Over this time, the Coalition has supported more than 16,000 MW of hydropower at dams where owners have modernized their operations to benefit fisheries, watershed lands, water quality, and recreation.

⁴ The Northwest Power and Conservation Council Seventh Power Plan (Page 7-2) anticipates an annual average growth rate for electricity demand of 0.4 to 0.8 percent per year and states that "cost-effective efficiency improvements identified in this Seventh Power Plan are anticipated to meet most if not all of this projected growth under most future conditions." The Plan (page 13-33) also found there "was not significant new hydropower capacity available for development in the Pacific Northwest." Available at <http://www.nwcouncil.org/energy/powerplan/7/plan/>, last visited March 1, 2016.

A. Proposed Hydroelectric Project Represents a Large Development

While the “Sunset Falls Hydroelectric Project” was renamed in the Pre Application Document as the “Sunset Fish Passage and Energy Project,”⁵ it is still a proposal to substantially alter flows and largely dewater two iconic waterfalls on the South Fork Skykomish River in order to generate a modest amount of energy. It is a Hydroelectric Project, not a Fish Passage Project. In fact, the DLA specifically states that “the District does not propose to include the Trap-and-Haul Facility as a Project feature and does not anticipate that it would fall under FERC’s jurisdiction.”⁶

The District describes the Sunset Falls Project as a “small” and “low-impact” run-of-the-river project.⁷ These are highly subjective terms and do not accurately describe the proposed Project. The Project is estimated to cost up to \$225 million.⁸ With an ability to divert 2500 cfs from the river, the Project would seasonally remove 90% of flows from the South Fork Skykomish River,⁹ and have the ability to do so during every season except the high flow period of May and June.¹⁰

B. The District’s Economic Justification for the Project is Questionable

The District’s DLA portrays the proposed project as a valuable and economically competitive source of energy, arguing that it would be competitive with other renewable power alternatives, complement wind and solar generation, and provide reliable power of 119,383 MWh in a manner that fits the District’s load curve. By the District’s own estimate, the Project would only operate at full capacity for approximately 3 months of the year and would be offline for approximately 3 months during the summer.¹¹ However, these estimates are based on a minimum instream flow in the bypass reach of 250 cfs, which is in conflict with state law and the Instream Flow Rule for the Skykomish River (see Section F below for more information). It is likely that the amount of time the project is offline will increase in order to comply with existing state legal requirements regarding water quality and quantity.

C. There is Substantial Public Opposition to the Project

There have been several proposals in the past to develop Sunset Falls for hydropower. A cursory review of the FERC dockets for those projects (FERC Project Nos. P-4786, P-8574, P-8644, P-11195, and P-11216) clearly demonstrates a long history of strong public opposition to hydropower development at this site. Nothing has changed in this regard. The Project as currently proposed is opposed by a predominant number of local ratepayers, landowners,

⁵ Sunset Fish Passage and Energy Project, Pre-Application Document, March 21, 2013; FERC eLibrary 20130321-5054.

⁶ DLA at Page E-xvii.

⁷ *Id.* at Page B-8.

⁸ *Id.* at Page D-2.

⁹ *Id.* at Page B-31, Figure B.4-16.

¹⁰ *Id.*

¹¹ *Id.* at Page B-13

businesses, and conservation and recreation groups. It is also opposed by a number of state and local legislators, including representatives of the 32nd Legislative District where the project would be located, and the former mayors of the nearby communities of Index and Monroe. Three years ago, more than 200 stakeholders attended the scoping meeting and site tour, which was also attended by Commission staff.¹² All but one of those stakeholders spoke in opposition to the proposed project. Opposition to the Project remains strong today. Reporting on the recent study plan meeting, the local paper states, “Despite project revisions, opponents have remained steadfast in their belief the Skykomish River should be protected from hydroelectric development.”¹³ Hundreds of comments in opposition to the Project have been filed on the docket.

D. Inconsistency With Local, State, and Federal Comprehensive Plans

Section 10(a)(2)(A) of the Federal Power Act (FPA) specifically requires the Commission to consider “the extent to which [a] project is consistent with a comprehensive plan (where one exists) for improving, developing, or conserving a waterway or waterways affected by the project that is prepared by an agency established pursuant to Federal law that has the authority to prepare such a plan; or the State in which the facility is or will be located.”¹⁴ The Project proposed in the District’s DLA would be plainly inconsistent with a number of relevant comprehensive plans that have previously been filed with the Commission, and are described in further detail below.¹⁵ These plans speak to the community importance and value of this river in its free-flowing state.

The Commission has long recognized the importance of regional and coordinated planning, and has declined to issue licenses in cases where the negative impacts of a proposed project would run counter to these regional plans.¹⁶ Wild and Scenic suitability, inclusion in the National Rivers Inventory, Protected Area status, State Scenic Waterway designation, and the Skykomish Instream Flow Rule each constitute relevant in-place plans and strategies to enhance and protect the aquatic, aesthetic, habitat, recreational and conservation resources of the South Fork Skykomish River.

¹² Public Scoping Meeting transcript, Index, WA, May 12, 2013; FERC eLibrary 20130612-4004.

¹³ Skykomish River’s Electric Issue, Monroe Monitor, Chris Hendrickson, April 17th, 2016, <<http://www.monroemonitor.com/2016/04/17/skykomish-rivers-electric-issue>>

¹⁴ 16 U.S.C. § 803 (a)(2)(A); See also COMPREHENSIVE PLANS IN THE FEDERAL ENERGY REGULATORY COMMISSION’S LICENSING PROCESS <http://www.ferc.gov/industries/hydropower/gen-info/licensing/complan.pdf>, last visited July 15, 2013.

¹⁵ Such plans include, but are not necessarily limited to: Mt. Baker/Snoqualmie National Forest Land and Resources Management Plan (June 1990); National Park Service Nationwide Rivers Inventory (June 1982); NWPCC Protected Areas Amendment (Sept. 14, 1988); and NWPCC Sixth Northwest Conservation and Electric Power Plan (February 2010).

¹⁶ See City of Idaho Falls 80 FERC 61,342, Order Denying License, (1997) (Shelly Project No. 5090-005; Accession No. 19970925-3154); Intermountain Power Corp 58 FERC 62,227, Order Denying License Application (1992) (Oxbow Bend Hydroelectric Project No. 6329-001, Accession No. 19920324-0183); and City of Redding, 55 FERC 62,012 Order Denying License Application (1991) (Lake Redding Hydroelectric Project No. 2828-001, Accession No. 19910405-0338).

1. Wild and Scenic River Eligibility and Suitability

In 1990, the USDA Forest Service, as a part of its land management planning, evaluated many rivers and streams originating on National Forest Lands within the Mt. Baker-Snoqualmie National Forest to determine their eligibility and suitability for designation under the federal Wild and Scenic Rivers Act. The proposed Sunset Falls Hydroelectric Project would be located on a section of the Skykomish River that was found to be suitable and was recommended by the Forest Service for designation under the Wild and Scenic Rivers Act. Specifically, the Forest Service supported a congressional designation of the river from the confluence of the Foss and Tye Rivers to the town of Gold Bar. This reach includes Sunset Falls.¹⁷

The District's DLA references the Mt. Baker-Snoqualmie National Forest Land Resource Management Plan as a Comprehensive Plan, but it fails to highlight the fact that the USFS recommended that the segment of the river where the Project is proposed to be is designated as a Wild and Scenic River.¹⁸ While the District's DLA states that the USFS found the river to be "eligible" for Wild and Scenic designation, it fails to note that the agency subsequently found it to be "suitable," meaning that it was specifically recommended for designation.¹⁹ In addition, the DLA incorrectly characterizes this segment of the Skykomish as a "recreation category river." In fact, this segment was found suitable as a Wild and Scenic River with a recreational classification.²⁰

The Forest Service recommended that this section of the Skykomish River be designated as Wild and Scenic even though it lies outside of the forest boundary. While the Forest Service has no direct authority to manage rivers off the National Forest prior to designation, the agency did conduct a formal suitability analysis. This involved a public process through which they recognized the unique and valuable character of this segment by assigning the regionally and nationally significant Outstandingly Remarkable Values as scenic, recreation, fisheries, and wildlife.

2. Nationwide Rivers Inventory

The Skykomish River is also listed in the 1993 update of the Nationwide Rivers Inventory (NRI), which includes the 108-miles of the North Fork and South Fork as well as their major tributaries.²¹ The NRI is a comprehensive plan as defined under section 10(a)(2)(A) of the Federal Power Act. The website for the NRI explains:

¹⁷ United States Forest Service. Mt. Baker-Snoqualmie National Forest Land Resource Management Plan. June 1990. Wild and Scenic Rivers, Appendix E, pp. E-168 to E-223.

¹⁸ DLA Page E-329.

¹⁹ DLA at Page E-253.

²⁰ Wild and Scenic River classification is defined at 16 U.S. Code § 1273(b).

²¹ Nationwide Rivers Inventory. National Park Service <http://www.nps.gov/ncrc/programs/rtca/nri/states/wa2.html>, last visited April 25, 2016.

“The Nationwide Rivers Inventory (NRI) is a listing of more than 3,400 free-flowing river segments in the United States that are believed to possess one or more ‘outstandingly remarkable’ natural or cultural values judged to be of more than local or regional significance. Under a 1979 Presidential directive,²² and related Council on Environmental Quality procedures,²³ all federal agencies must seek to avoid or mitigate actions that would adversely affect one or more NRI segments.”²⁴

To be listed on the NRI, a river must be free-flowing and contain at least one outstandingly remarkable value (ORV) or a river related resource that is unique, rare, or exemplary on a regional or national scale.²⁵ The Skykomish River has four such exemplary river related resources: scenery, recreation, fisheries, and wildlife.²⁶ The inventory specifically highlights the “clear water with rapids, cascades and falls in upper reaches” that would be directly impacted by the Project.²⁷

3. Northwest Power and Conservation Council Protected Area

The proposed Project is located on a segment of the Skykomish River that is identified as a “Protected Area” from hydropower development for resident fish and wildlife by the Northwest Power and Conservation Council (Council) under their Fish and Wildlife Program.²⁸ The Council ensures “an affordable and reliable energy system while enhancing fish and wildlife in the Columbia River Basin.”²⁹ The Council’s Fish and Wildlife Program, which is a comprehensive plan as defined under section 10(a)(2)(A) of the Federal Power Act, is in place to “protect, mitigate and enhance fish and wildlife affected by hydropower dams in the Columbia River Basin.”³⁰ In order to meet this goal:

²² MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES. Presidential Directive of President Jimmy Carter. August 2, 1979. <http://www.nps.gov/ncrc/programs/rtca/nri/hist.html#pd>, last visited April 25, 2016. The Directive orders that: “Each federal agency shall, as part of its normal planning and environmental review process, take care to avoid or mitigate adverse effects on rivers identified in the Nationwide Inventory...Each federal agency with responsibility for administering public lands shall...to the extent of the agency's authority, promptly take such steps as are needed to protect and manage the river and the surrounding area in a fashion comparable to rivers already included in the Wild and Scenic Rivers System.”

²³ Procedures for Interagency Consultation to Avoid or Mitigate Adverse Effects on Rivers in the Nationwide Inventory. Council on Environmental Quality. <http://www.nps.gov/ncrc/programs/rtca/nri/hist.html#ceq>, last visited April 25, 2016.

²⁴ <http://www.nps.gov/ncrc/programs/rtca/nri/>, last visited April 25, 2016.

²⁵ *Id.*

²⁶ <http://www.nps.gov/ncrc/programs/rtca/nri/states/wa2.html>, last visited April 25, 2016.

²⁷ *Id.*

²⁸ See Protected Areas Mapper, available at: <http://www.streamnet.org/data/interactive-maps-and-gis-data/>, last visited April 25, 2016. Protected Areas were established as part of the Northwest Power Plan to meet the stipulations of Section 4(e)(2) of the Northwest Power Act; that is, to develop a Plan that considers the “protection, mitigation, and enhancement of fish and wildlife and related spawning grounds and habitat” during its development and implementation. Northwest Power Act § 4(e)(2)(C).

²⁹ <http://www.nwcouncil.org/about/mission/>; last visited April 25, 2016.

³⁰ Northwest Power and Conservation Council Columbia River Basin Fish and Wildlife Program 2014 Amendments. October 2014. Council Document 2014-12, Part 2(l), p. 10. (“NWPPCC Fish and Wildlife Program, 2014”)

“[t]he Council has adopted a set of standards for the Federal Energy Regulatory Commission, Bonneville and other federal agencies to apply to the development and licensing of new hydroelectric facilities in the Columbia River Basin. As part of this effort, the Council has designated certain river reaches in the basin as ‘protected areas.’ The Council found that new hydroelectric development in a designated protected area would have unacceptable risks of loss to fish and wildlife species of concern, their productive capacity, or their habitat.”³¹

While the Commission is not prohibited outright from licensing a project in a Protected Area,

“[t]he Council expects the Federal Energy Regulatory Commission, in the exercise of its licensing authority under the Federal Power Act, to take the Council’s hydroelectric development standards and protected areas designations into account to the fullest extent practicable...*The Commission should implement the Council’s decision in the Commission’s licensing and exemption proceedings unless the Commission’s legal responsibilities require otherwise.*”³²

In the years since the Council first designated Protected Areas in 1988, the Commission has not approved a single new license within a Protected Area. For example, in the case of the proposed Shelly Hydroelectric Project on the Snake River in Idaho in 1997, the Commission denied a license application by the City of Idaho Falls, stating that Protected Areas “represent an attempt by the region to prevent the continued degradation of the remaining high quality fish and wildlife habitat, and the region’s unwillingness to risk further fish and wildlife losses...[The Shelly Project] would...have unavoidable, long-term adverse impacts on fish and wildlife resources, which the Council has determined to be important to the region.”³³

4. Washington State Scenic Waterway Designation

The DLA incorrectly states that the purpose of the State Scenic Waterway program “is to provide a mechanism for managing publicly-owned land on Washington’s rivers.”³⁴ The State Scenic Waterway program is not a program for managing public land on rivers generally. In fact, Washington’s State Scenic Waterway Program was established to preserve certain rivers in their natural condition when they possess outstanding natural, scenic, historic, ecological, and recreational values.³⁵ Rivers included in the system are free-flowing without diversions that hinder recreational use, have water of sufficient quality and quantity to be deemed worthy of

³¹ NWPCF Fish and Wildlife Program, 2014, Appendix F, Section (a), page 163. Available for download at: <http://www.nwcouncil.org/fw/program/2014-12/program/>, last visited April 25, 2016.

³² *Id.* at Part 3, Section IV(A)(5)(d), p. 53. Emphasis added.

³³ City of Idaho Falls 80 FERC 61,342, Order Denying License, (1997) (Shelly Project No. 5090-005; FERC eLibrary 19970925-3154).

³⁴ DLA at Page E-256.

³⁵ RCW 79A.55.005.

protection and other noteworthy qualities.³⁶ The South Fork Skykomish River is listed as a State Scenic Waterway under the Revised Code of Washington (RCW) 79A.55.080(1) from the junction of the North and South Forks to 20 miles up to the junction of the Tye and Foss Rivers. Washington State Scenic Waterways constitute a state plan that the Commission should consider. The DLA cites the 1983 Crippen studies and implies that co-locating the powerhouse with the trap-and-haul facility will make the Project consistent with the State Scenic Waterway Designation.³⁷ A more recent letter from 1991 from State Parks opposing the Project makes it clear that hydropower is inconsistent with the protection goals for a State Scenic Waterway.³⁸

E. Need for Power and Availability of Power with Less Impact

While the proposed Project could conceivably meet a small part of the Northwest's regional need for power, it would provide a relatively minimal amount of power at a high cost to the outstanding environmental, recreational, cultural and aesthetic values of the South Fork Skykomish River. Equally important, this power could be easily offset by other renewable generation or by energy efficiency and conservation efforts in a manner that would be substantially more cost effective than the proposed Project. The Northwest Power and Conservation Council's 7th Power Plan determined that energy efficiency proved to be the most cost-effective resource. Modeling done for the Plan shows that efficiency met all electricity load growth through 2030 for more than 90 percent of the future conditions. The Plan concludes that it will be the most significant way to meeting the region's electricity needs and is the largest source of new peaking capacity.³⁹ The power produced by the proposed Project is mere noise relative to the energy that can be captured through conservation and efficiency.

F. The Proposed Minimum Instream Flow Would Violate State Law

The District states that their proposal is to maintain "a minimum instream flow of 250 cubic feet per second (cfs) at the compliance gage (former U.S. Geological Survey [USGS] Station No. 12133000)." This proposed flow violates state law as it is inconsistent with the instream flow rule for the Skykomish River established in state statute. The Instream Flow Rule for the Skykomish River *requires* the following minimum flows for the stretch of the river that includes the bypass reach:⁴⁰

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³⁶ RCW 79A.55.050.

³⁷ DLA at Page E-254.

³⁸ Letter from Washington State Parks to Federal Energy Regulatory Commission, December 19th, 1991; FERC eLibrary 19920403-0005.

³⁹ Northwest Power and Conservation Council, 7th Power Plan, February 2016, Council Document 2016-02, p. 1-1. Available at: <http://www.nwcouncil.org/energy/powerplan/7/plan/>, last visited April 25, 2016.

⁴⁰ WAC 173-507-020.

Time Period	Minimum Flow
Nov-March:	900 cfs
April 1-15:	1100 cfs
April 15-July 15:	1250 cfs
July 15-July 30:	950 cfs
Aug. 1-Aug. 15:	650 cfs
Aug. 15-Sept.30:	450 cfs
Oct. 1-Oct. 15:	550 cfs
Oct. 15-Oct. 30:	700 cfs

When Ecology adopted these flows, the agency found that they are in the “public interest.”⁴¹ Therefore, any deviation from these flows would be contrary to the public interest.

The Washington Supreme Court has repeatedly confirmed that instream flows set by rule are water rights that may not be impaired by later issued water rights.⁴² In *Swinomish Indian Tribal Cmty v. WA Dept. of Ecology*, the court found that “a minimum flow or level cannot impair existing water rights and a later application for a water permit cannot be approved if the water right sought would impair the minimum flow or level.”⁴³ The instream flow rule that applies to this stretch of the river specifically requires the minimum flows will apply to later-issued consumptive water rights, including those that might be issued to the District for operation of the proposed Project.⁴⁴

Here, the instream flows adopted by rule have priority over later issued water rights (such as those needed to operate the Sunset Falls Hydroelectric Project), and thus the instream flows set by Ecology in the 401 Certification and in the water right must be conditioned on

⁴¹ RCW 90.22.010; authorizing Ecology to set instream flows by rule “whenever it appears to be in the public interest” to do so.

⁴² RCW 90.03.247; WAC 173-507-020(4); *Fox v. Skagit County*, ___ Wn. App. ___, No. 73315-0-1 (April 11, 2016) (slip. op.) at 7 (“Accordingly, these minimum flow levels are like any other water appropriation right – they cannot affect existing water rights, and they take priority over subsequently established rights.”); *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 81, 11 P.3d 726 (2000); *Swinomish Indian Tribal Comm’y v. Wash. State Dep’t of Ecology*, 178 Wn.2d 571, 584, 311 P.3d 6 (2013); *Hubbard v. WA Dept. of Ecology*, 86 Wn. App. 119, 125 (Wash. Ct.App. 1997) (“...the minimum instream flow established in 1976 for the Okanogan River, WAC 173-549-020(2), has priority over subsequent water rights appropriators”; and “...any permit for beneficial use of surface waters must be conditioned to protect the minimum levels established by code for each river basin.”).

⁴³ *Swinomish Indian Tribal Cmty v. WA Dept. of Ecology*, 178 Wn.2d 571, 593, 311 P.3d 6 (2013).

⁴⁴ WAC 173-507-020(4). The “legislative intent” of Washington’s instream flow program is described in *Swinomish*, where the Court recognized that “the Water Resources Act of 1971, discussed below, explicitly contemplates the value of instream resources for future populations: ‘Adequate water supplies are essential to meet the needs of the state’s growing population and economy. At the same time *instream resources and values must be preserved and protected so that future generations can continue to enjoy them.*’” 178 Wn.2d at 587 (citing RCW 90.54.010(1)(a)).

compliance with the flows in the instream flow rule.⁴⁵ RCW 90.03.247 specifies that “[w]henver an application for a permit to make beneficial use of public waters is approved relating to a stream or other water body for which minimum flows or levels have been adopted and are in effect at the time of approval, the permit *shall* be conditioned to protect the levels or flows.” This general rule reflects the legislature’s mandate that “[t]he quality of the natural environment *shall be protected* and, where possible, enhanced as follows: (a) Perennial rivers and streams of the state *shall be retained* with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.”⁴⁶

The only statutory exception to the application of the flows set by rule is as follows: “Withdrawals of water which would conflict therewith shall be authorized only in those situations where it is clear that overriding considerations of the public interest will be served.”⁴⁷ The Washington Supreme Court recently ruled that this exception cannot be used to deviate from the instream flows set by rule for permanent appropriations, such as what would be required by the District to operate the Project.⁴⁸ Therefore, Ecology cannot legitimately allow the District to deviate from the instream flows set by rule given this stretch of the river’s existing legal protections. The Washington Department of Ecology recently confirmed this legal interpretation. In a letter dated April 19th, 2016, Ecology “confirmed that the flows set in the rule are applicable for the project and that any deviations would require a formal rule change. Ecology does not have any plans for amending Chapter 173-507 WAC.”⁴⁹

Therefore, the extremely low flows that the District proposes for the bypass reach are contrary to existing statutory and regulatory law. If the District intends to pursue this Project, it must do so with the understanding that Project operations must be conditioned on compliance with the flows for the Skykomish River set forth in WAC 173-507.

G. Impacts on Fishery Resources

The Project site is within critical habitat for Puget Sound Chinook Salmon,⁵⁰ and was designated on March 25th, 2016 as critical habitat for Puget Sound Steelhead.⁵¹ In addition, the Project site is within critical habitat for bull trout.⁵² The U.S. Fish and Wildlife Service stated, “the Snohomish–Skykomish River Critical Habitat Subunit is essential to bull trout conservation

⁴⁵ See *Hubbard*, 86 Wn.App. at 125. “Additionally, any permit for beneficial use of surface waters must be conditioned to protect the minimum levels established by code for each river basin.”

⁴⁶ RCW 90.54.020(3)(a), (emphasis added).

⁴⁷ RCW 90.54.020(3)(a). The Washington Supreme Court has stressed that this “OCPI” exception is to be narrowly construed, and that economic benefits alone do not provide sufficient reason to invoke the exception. See *Swinomish Indian Tribal Community v. Ecology*, 178 Wn.2d at 600.

⁴⁸ *Foster v. Wash. Dep’t of Ecology*, ___ Wn.2d ___, 2015 WL 5916933 (Oct. 8, 2015) at ¶ 15. “We hold that the OCPI exception does not allow for the permanent impairment of minimum flows.”

⁴⁹ Letter of Rusty Post, Washington Department of Ecology to Andrea Rodgers, Western Environmental Law Center, April 19th, 2016. FERC eLibrary 20160421-5015.

⁵⁰ 50 CFR 226.212 (i)(6)(ii).

⁵¹ 81 FR 9251.

⁵² 50 CFR 17.95 (e); bull trout (9).

because it represents the second stronghold for the amphidromous life history form within the Coastal Recovery Unit. It also represents part of the core distribution of amphidromous bull trout in Puget Sound.”⁵³

Harmful effects or risks of the Project include the following:

- Increased predation in the 1.1 mile reach of the Skykomish River bypassed by the Project;
- Warmer water temperatures in the reach of the Skykomish River bypassed by the Project;
- Entrapment of juvenile fish and higher injury rates due to entrapment on diversion screen;
- Increased injury as fish go over the Canyon Falls and Sunset Falls at lower levels. While the DLA modeling does not forecast this, the models have not adequately incorporated the affects of aeration at higher flows and rely on over-simplistic assumptions about the downstream route and the effects of high volumes of aerated water vs. lower volumes of less aerated water on juvenile fish survival and that of adult steelhead kelts and bull trout. Conservation Groups share additional concerns about the modeling conducted for the DLA with the Tulalip Tribes, and incorporate their comments by reference.

Overall, these affects will create greater risk for already imperiled fish runs. As apparent mitigation for these impacts, the District is “proposing to implement one-time upgrades to the Washington Department of Fish and Wildlife (WDFW) Trap-and-Haul Facility located adjacent to the proposed powerhouse to improve safe and efficient handling of anadromous fish, including listed species.”⁵⁴ The District contends that these “improvements to the WDFW Trap-and-Haul Facility would compensate for reductions in Chinook salmon and steelhead spawning habitat.”⁵⁵

However, “the District does not propose to include the Trap-and-Haul Facility as a Project feature and does not anticipate that it would fall under FERC’s jurisdiction.”⁵⁶ Despite this, the upgrades to the Trap-and-Haul Facility are included in the Project Construction Schedule.⁵⁷ Therefore, any improvements to fish runs due to unspecified improvements to the WDFW Trap-and-Haul Facility are speculative at best and are insufficient to justify the Project’s likely impacts on imperiled fish resources in the area.

While the District has titled the DLA as the Sunset Fish Passage and Energy Project and states

⁵³ At Page 153, Bull Trout Final Critical Habitat Justification: Rationale for Why Habitat is Essential and Documentation of Occupancy, U.S. Fish & Wildlife Service Idaho Fish and Wildlife Office, Boise, Idaho Pacific Region, Portland, Oregon, September 2010.

⁵⁴ DLA at Page E-xvii.

⁵⁵ DLA at Page E-xix.

⁵⁶ DLA at Page E-xvii.

⁵⁷ DLA at Page C-1.

that the District is “proposing a project related to both [hydropower and fish passage],”⁵⁸ the contradictory statements on whether the Trap-and-Haul Facility is part of the Project or not need clarification. We are unclear if the Trap-and-Haul Facility is a formal Protection, Mitigation, and Enhancement (PME) measure for the Project or an off-license activity the District would pursue independent of Commission oversight. If the Trap-and-Haul Facility upgrade does represent a mitigation measure for the Project, to be considered by the Commission in balancing developmental and non-developmental values, then it must be evaluated as a potential license condition subject to Commission jurisdiction. If it is an off-license activity not subject to Commission jurisdiction, it should not be included as “compensation” for negative impacts on fishery resources of the Project.

Improvements to the Trap and Haul Facility at Sunset Falls can and should be made regardless of whether a hydropower project is built. For this reason, the “inclusion” of the Trap-and-Haul Facility improvements in the District’s proposal – regardless of how it is characterized – is not compelling from a fisheries conservation perspective, especially when there is little, if any information, regarding how the improvements will benefit salmon runs.

H. Recreation

The sole measure that the Applicant proposes to mitigate impacts to recreation is “to provide a kiosk with interpretation and educational signage about hydroelectric power, the Project, the Trap-and-Haul Facility, surrounding environmental resources, and other topics of interest.”⁵⁹ We view this mitigation as woefully insufficient for a Project of this scope and scale.

The DLA does not reference the fact that whitewater paddlers accessed the Skykomish River at Sunset Falls for over 50 years prior to 2000, when the Washington State Department of Fish and Wildlife closed it.⁶⁰ The DLA states, “WDFW is not willing to consider public access at the [Trap-and-Haul] facility for liability, safety, and vandalism reasons.”⁶¹

All of the barriers to public access outlined in the DLA can be overcome.⁶² The one-lane private road will need to be upgraded if the Project is constructed. The District has acquired additional land beyond that identified in Figure E.7-4 and the amount of private land surrounding the Project Area continues to be reduced. Current limitations of the easement for access to the river will certainly be modified (more likely, all lands will be acquired by the District) if the Project proceeds to construction. In light of these factors, a walk-in trail could be developed to avoid conflict between recreational vehicle use and WDFW truck use. Other measures could also accomplish this goal, including implementing security upgrades and utilizing fencing or

⁵⁸ DLA at Page A-1.

⁵⁹ DLA at Page E-xxi.

⁶⁰ Washington Kayak Club Papers 1950-1982, University of Washington Archives; Wolf G. Bauer Papers 1952-1974, University of Washington Archives, Manuscript Collection No. 1669; Furrer, Werner, 1979, *Water Trails of Washington*, Signpost Books.

⁶¹ DLA at Page E-253.

⁶² DLA at Page E-262.

vegetation as part of the upgrade to the Trap-and-Haul Facility.

While ownership, permitting, and safety would all need to be addressed, this Project as a whole has many hurdles to clear prior to construction. Provisions for recreational access are no more difficult than any of the other issues the District must address as part of this Project. The analysis of recreational access inappropriately evaluates the limitations of the current situation and does not consider how access might be accommodated and improved if the Project is constructed.

I. Water Quality & Quantity Issues

Washington state water quality standards consist of three independent parts: (1) designated uses of each water body; (2) water quality criteria for the waters based upon the designated use,⁶³ and (3) an anti-degradation policy.⁶⁴ The anti-degradation policy requires “that state [water quality] standards be sufficient to maintain existing beneficial uses of navigable waters, preventing their further degradation.”⁶⁵ At a minimum, a state’s anti-degradation policy must ensure that “[e]xisting instream water uses and the level of water quality necessary to protect the existing uses shall be maintained and protected.”⁶⁶ Pursuant to these three independent sources of authority under the CWA, Ecology adopted water quality standards applicable to all waters of the state, as discussed below, including the Skykomish River.⁶⁷

Because the District seeks to obtain a FERC license, it must also obtain certification from Ecology that it has reasonable assurance that the proposed project will comply with state water quality standards, commonly called a 401 Certification.⁶⁸ If Ecology cannot find that it has reasonable assurance the Project will comply with state water quality standards, it must deny the request for the 401 Certification.⁶⁹

The law is clear in Washington that Ecology has the legal authority and responsibility to protect and mandate minimum instream flows to protect designated uses (such as aesthetics, recreation, and fishery resources) as part of the 401 Certification process.⁷⁰ Because the proposed project seeks to substantially dewater a section of the Skykomish River that is a state scenic river, a Protected Area, and eligible for designation as a Wild and Scenic River, and subject to instream

⁶³ 33 U.S.C. § 1313(c)(2)(A).

⁶⁴ 33 U.S.C. § 1313(4)(B).

⁶⁵ *PUD No. 1 of Jefferson County v. WA Dep’t of Ecology*, 511 U.S. 700, 705 (1994).

⁶⁶ 40 C.F.R. § 131.12.

⁶⁷ WAC 173-201A; WAC 173-201A-602(1).

⁶⁸ 33 U.S.C. § 1341.

⁶⁹ “[I]n granting certification pursuant to § 401(d), Ecology must ‘set forth any . . . limitations . . . necessary to assure that [the applicant] will comply with any . . . limitations under [§ 303] . . . and with any other appropriate requirement of State law.’” *Ctr. for Env’tl. Law & Policy, et al. v. Ecology, PUD No. 1 of Okanogan County*, PCHB No. 12-082 (Findings of Fact, Conclusions of Law and Final Order (As Amended Upon Reconsideration)) (Aug. 30, 2013) at 22.

⁷⁰ *PUD No. 1 of Jefferson County v. Ecology*, 511 U.S. 700, 715 (1994) (*Elkhorn*); *Ecology v. PUD No. 1 of Jefferson County*, 121 Wn.2d 179, 189-192, 849 P.2d 646 (1993), *aff’d on other grounds by Elkhorn*, 511 U.S. at 713-716.

flows set by rule, Ecology must condition any 401 Certification on compliance with the instream flows set by rule. Because the streamflow level proposed by the PUD for the bypass reach would violate the instream flow rule, Ecology could not provide a 401 Certification for this project as proposed.

Similarly, Ecology has a statutory *duty to reject* a water right application if any of the criteria set forth in the four-part test⁷¹ cannot be answered in the affirmative.⁷² Here, the Project could only be issued a water right if that right was conditioned on compliance with the instream flows set by rule.

J. Climate Change

One issue that should be considered when deciding whether to move forward with this Project is climate change. Our climate is changing and one of the most significant impacts in the Pacific Northwest is the reduction of instream flows. What this means is that there is likely no predictable stream flow now or in the future to operate this project. According to Ecology:

*Climate Change will increase the variability – widening the range – of future supply and demand of water. As climate change shifts the timing and volume of streamflow and reduces snowpack, lower flows during the summer will make it more difficult to maintain an adequate supply of water for communities, agriculture, and fish and wildlife. Lower summer flows and higher stream temperatures will continue to degrade our water quality and place stress on salmon.*⁷³

The science is clear that “[t]he glacier retreat and loss of glacier runoff has been quite pronounced in the Skykomish River Basin, North Cascades, Washington from 1950-2014.”⁷⁴ Specifically, “[a]n analysis comparing USGS streamflow records for the Skykomish River at Gold Bar for the 1950-1985 to the 1985-2009 period indicates that during the recent period the Skykomish River summer streamflow (July-September) has declined 25% in the watershed, spring runoff (April-June) has declined 6%, while winter runoff (November-March) has

⁷¹ It is black letter law that, when processing a water right application, Ecology must make four affirmative findings *before* it may authorize a right to use water. Ecology must find that (1) water is (physically) available; (2) the use is beneficial; (3) senior water rights will not be impaired;⁷¹ and (4) the new use will not be detrimental to the public welfare.⁷¹ RCW 90.03.290; *Lummi Nation v. State of Washington*, 170 Wn.2d 247, 252-53, 241 P.3d 1220 (2011)

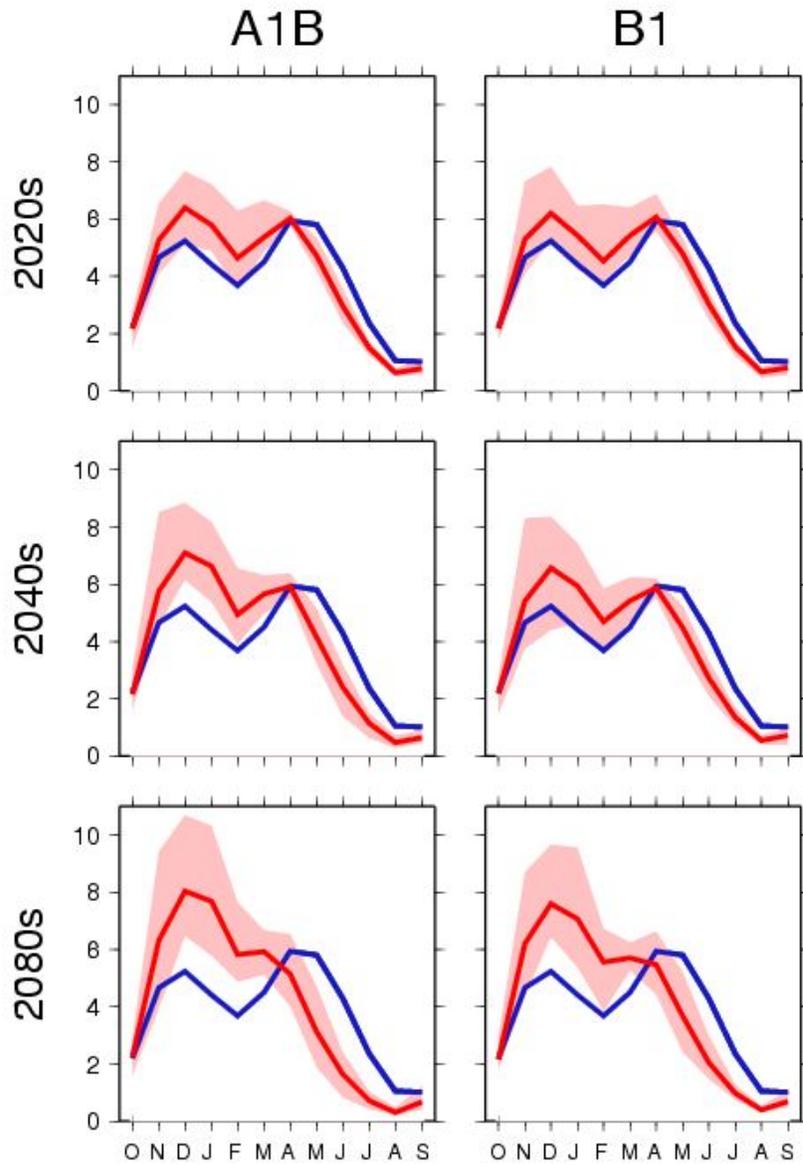
⁷² RCW 90.03.290(3); *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 95, 11 P.3d 726 (2011) (emphasis added). “[W]here a proposed withdrawal would reduce the flow in surface waters closed to further appropriations, *denial is required* because water is unavailable and withdrawal would be detrimental to the public welfare.”

⁷³ Ecology, Preparing for a Changing Climate: Washington State’s Integrated Climate Response Strategy (April 2012) at 101-102; *id.* at 103 (stating that climate change will lead to “increases in winter precipitation, posing additional challenges for managing reservoirs for flood control, fish, and hydropower.”).

⁷⁴ Pelto, M.S. (2011), Skykomish River, Washington: Impact of Ongoing Glacier Retreat on Streamflow. *Hydrol. Process.*, 25: 3356-3363. doi. 10.1002/hyp.8218.

increased 10%.”⁷⁵ Modeling of likely climate change scenarios predicts that this shift in streamflow timing will accelerate, and summer streamflows will be even lower than they currently are. The figure below superimposes predicted streamflow in the Skykomish near Gold Bar for the decades of the 2020s, 2040s, and 2080s under two climate change scenarios (red lines) against the current average conditions (blue lines).⁷⁶

combined flow (in):



⁷⁵ Mauri Pelto, Skykomish River, Washington Reduced Minimum River Flow and Glacier Retreat, *available at* <http://blogs.agu.org/fromglaciersperspective/2015/05/19/skykomish-river-washington-reduced-minimum-river-flow-and-glacier-retreat/> (last visited Sept. 16, 2015).

⁷⁶ See Washington Climate Impacts Group, Pacific Northwest Hydroclimate Scenarios Project, <http://warm.atmos.washington.edu/2860/products/sites/?site=6015> (last visited April 26, 2016).

This is particularly relevant for a Project that proposes to dewater a portion of the Skykomish River; “This combination makes it likely, that the Skykomish River will have an extended period of low flow this summer and into the fall. If the summer is drier than average, flows will likely reach a new minimum.”⁷⁷ This is what occurred in the summer of 2015 and has the potential to influence the viability of this proposed Project.

K. Aesthetics

Aesthetic values associated with water are protected in several provisions of Washington law. For example, “[u]ses of water for domestic, stock watering, industrial, commercial, agricultural, irrigation, hydroelectric power production, mining, fish and wildlife maintenance and enhancement, recreational, and thermal power production purposes, and preservation of environmental and aesthetic values, and all other uses compatible with the enjoyment of the public waters of the state, are declared to be beneficial.”⁷⁸ In addition, “[p]erennial rivers and streams of the state shall be retained with base flows necessary to provide for preservation of wildlife, fish, scenic, aesthetic and other environmental values, and navigational values.”⁷⁹ Further, “[t]he Department of Ecology may establish minimum water flows or levels for streams, lakes or other public waters for the purposes of protecting fish, game, birds or other wildlife resources, or recreational or aesthetic values of said public waters whenever it appears to be in the public interest to establish the same.”⁸⁰ As the state agency delegated authority to protect and manage the waters of the state, Ecology will analyze the Project to determine whether it will harm aesthetic values, and if it does, has the responsibility to deny permits (e.g. a water right and 401 certification) for the Project given the detriment to aesthetic values.

The Project proposes to substantially reduce the amount of water that is currently freely-flowing over two aesthetic features within the proposed bypass reach—Canyon Falls and Sunset Falls. The tremendous aesthetic value associated with this stretch of the river is one reason why the river is a State Scenic River and eligible to be designated as a federal Wild and Scenic River. The District conducted an aesthetic flow study as part of its pre-licensing requirements, but the final study is flawed in several respects. The National Park Service has provided detailed technical comments highlighting the inadequacies of the aesthetic flow study. Conservation Groups incorporate those comments by reference herein as they raise valid issues regarding the data on aesthetics that was collected and analyzed by the District.

L. An Environmental Impact Statement Should Be Prepared

⁷⁷ *Id.*

⁷⁸ RCW 90.54.020(1).

⁷⁹ RCW 90.54.020(3)(a).

⁸⁰ RCW 90.22.010.

Given the significant issues outlined above and inconsistency with comprehensive plans, this proposed Project represents a major federal action for which preparation of an Environmental Impact Statement is required under NEPA. The proposed Project does not fall under the conditions outlined at 18 CFR 380.5 for which an Environmental Assessment is appropriate.

M. Specific Comments on the Draft License Application

Page ii

The table in section (a)(5) of the Initial Statement outlines requirements under Washington law that would affect the project. In response to the requirements of the Pacific Northwest Electric Power and Planning Conservation Act, the DLA states, “the Project is not located within the Columbia Basin and would not affect Columbia Basin fisheries.” This statement is misleading because the Northwest Power and Conservation Council’s Fish and Wildlife Program extends beyond the Columbia Basin, and the Project is proposed to be located on a reach of river designated as a “protected area” from hydropower development. As a result, the Project is subject to the requirements of this law and the Council’s Fish and Wildlife Program.

Page iii

The discussion of the Pacific Northwest Electric Power Planning and Conservation Act of 1980 and the Columbia River Basin Fish and Wildlife Program is misleading. Specifically, the District states, that “the Project is not located within the Columbia River basin and would not affect Columbia River fisheries.” While the Project would be located within Puget Sound, it is within a Protected Area from hydropower development as defined by the Columbia River Basin Fish and Wildlife Program. The basis for the statement that “the Project would be consistent with the Council’s recommended standards for development of new hydropower facilities” is unclear. A citation for these standards should be provided. The District further states that “the Project would be consistent with the Council’s goals for protected areas.” No description of the goals or description of how the Project would be consistent with them is provided.

Section A.1. Page A-1

The statement that “the Sunset Fish Passage and Energy Project (Project) was reviewed and deemed a renewable resource that meets the various needs of the District” is incorrect. New hydropower development, such as the proposed Sunset Falls Project, does not qualify for the renewable energy portfolio as established by Washington State’s Energy Independence Act.⁸¹ As a result, this Project would not contribute to meeting the District’s renewable portfolio obligations.

Figure A.2-1 and A.2-2, Page A-3 and A-4

⁸¹ Revised Code of Washington 19.285.030.

The landslide depicted in the aerial image and subsequent figure has continued to expand in spatial extent. Aerial imagery and maps depicting the slide should include a date.

Section A.2.2

It appears a unit of discharge is being used to express current velocity.

Section B.1, Page B-1

The introductory paragraph states, “Most feasible major hydropower sites have been developed.” We agree with this statement and consider the proposed Project to be a major one. Projects at this site have been considered many times in the past dating back over a century. The reason the site has not been developed is it has been rejected many times in the past as a site that is not feasible for development.

The paragraph further continues with the statement that appears to characterize the Project as “small hydropower” with “predictable output.” This is not a small project—the title of the DLA refers to it as a “Major Unconstructed Project”—and with no storage capacity the output is not predictable. In fact, the District makes this point elsewhere in the DLA at Page A-24 stating, “as a run-of-the-river project using a natural pool at the intake, the Project will have no year-round dependable capacity from storage.”

The Project site does not meet the criteria set out by the District as the basis for site selection and it is unclear how it could be characterized as “one of the highest ranked by the District’s criteria.” In fact, it is inconsistent with at least five of the criteria set as follows:

- *At or above an anadromous barrier or minimal anadromy issues:* The Project site has major issues with anadromous fish that are well known. In response to a past effort by the District to develop a project at this site in the 1980’s the National Oceanic and Atmospheric Administration (NOAA) characterized the project as questionable based on “potential of the project to impact anadromous salmonids.” In a subsequent filing with the Commission in 1984, NOAA stated that “the Project may not be feasible or acceptable because of the conflicts the project poses with anadromous fishery resources.” NOAA goes on to note that a “serious concern is that the present safe downstream passage of juvenile anadromous salmonids through the proposed bypassed reach of the project area, which includes the falls, may be jeopardized by the instream flow reductions caused by water diversion by power.” In a proposal for hydropower development at the site in 1991 by Tacoma Public Utilities, NOAA again raised concerns with impacts to anadromous fish in their Motion to Intervene and Petition to Deny Preliminary Permit. These concerns with the Project site that were identified over 30 years ago remain today and it is difficult to understand how “serious concerns” could later be characterized as “minimal anadromy issues.” The District was well aware of these concerns because Mr. Steve Klein, who was the District CEO and General Manager

at the time the Preliminary Permit for the current Project was filed, was signatory to the Preliminary Permit application for the Tacoma Public Utilities proposal at this site.

- *Outside Federal Wild and Scenic River designation:* While the Project does not include a currently designated Wild and Scenic River, the Skykomish is the only designated State Scenic Waterway in Western Washington⁸² and has been recommended to Congress for designation as a Wild and Scenic River.⁸³
- *Results of prior environmental impact statements indicate no major environmental issues:* To our knowledge, a full Environmental Impact Statement as defined under the National Environmental Policy Act (NEPA) has not been completed for a project at this site.⁸⁴ However, several studies and site evaluations have been conducted and determined that there are so many major environmental issues, along with poor economics and feasibility of the site, that a full project analysis under NEPA has not been warranted.⁸⁵
- *No known geological or unstable areas that would preclude construction:* A major landslide immediately adjacent to the Project began in December 2013 and continues to grow. This geologic issue is well known and has been widely reported in the local media as a “massive landslide.”⁸⁶
- *No known issue that would preclude moving project to evaluation stage:* This Project has several known issues that are well documented.⁸⁷ Hydropower development at this site has been actively opposed for over 30 years,⁸⁸ and public objection remains strong.⁸⁹ In addition, the Project, as proposed, currently violates state law that has already set minimum instream flows for this stretch of the river.

The characterization of informal discussions with stakeholders prior to the District selecting this Project as “one of the highest ranked by the District’s criteria,” fails to reference the significant concerns many of our organizations raised with this Project prior to filing for a Preliminary Permit. In written comments to the District submitted by American Rivers, American Whitewater, Conservation Northwest, Hydropower Reform Coalition, North Cascades Conservation Council, and Sierra Club, we stated that “dewatering this scenic and popular falls

⁸² Washington Revised Code 79A.55.005.

⁸³ United States Forest Service. Mt. Baker-Snoqualmie National Forest Land Resource Management Plan. June 1990. Wild and Scenic Rivers, Appendix E, pp. E-168 to E-223.

⁸⁴ 40 CFR Part 1502.

⁸⁵ See FERC dockets P-4786, P-8644, P-11195, P-11216, EL85-19-101.

⁸⁶ Massive landslide closes roads, knocks out power near Index, December 18, 2013, Mark Miller, <<http://komonews.com/news/local/massive-landslide-closes-roads-knocks-out-power-near-index>>; Rainy weather wreaking havoc at Index landslide, March 4, 2014, Steve Kiggins, <<http://q13fox.com/2014/03/04/rainy-weather-wreaking-havoc-on-mt-index-landslide/>>

⁸⁷ See FERC dockets P-4786, P-8644, P-11195, P-11216, EL85-19-101.

⁸⁸ See for example letter of Mt. Index Riversites, February 12th, 1985; FERC eLibrary 19850304-0025.

⁸⁹ See for example Public Scoping Meeting transcript, Index, WA, May 12, 2013; FERC eLibrary 20130612-4004.

just above the confluence of the South and North Forks of the Skykomish River would be a tragedy. The impacts of power lines, roads, and a powerhouse, and other construction and generation development would be especially hard-felt in this area.”⁹⁰ Additionally, American Whitewater and American Rivers sent a letter to the District on May 27, 2014 expressing concern with the District’s decision that public notice of all meetings was not necessary and questioning the District’s decision to exclude NGOs from participating or learning about technical working group meetings.⁹¹ In short, the additional review conducted by the District did not include the feedback we provided on this site.

Section B.3.2.1, Page B-8

The proposed minimum instream flow of 250 cfs violates state law due to inconsistency with the Instream Flow Rule for the Skykomish River as described above.

Section B.3.2.2, Page B-9

The operating scenario described violates state law due to inconsistency with the Instream Flow Rule for the Skykomish River as described above.

Figure B.3-1, Page B-10; and Figure E.3-19, Page E-90

These figures do not identify the compliance point for the Instream Flow Rule, which is relevant to the operating scenario. (See figure inserted below, with compliance point added.) The existing rule and the DLA clearly identify the relevant control station, and it lies within the bypass reach, which is why the Project can only be operated if it is consistent with the flows set by rule.

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⁹⁰ Letter of American Rivers, American Whitewater, Conservation Northwest, Hydropower Reform Coalition, North Cascades Conservation Council, and Sierra Club to Snohomish County Public Utility District No. 1. November 9, 2009; Appendix A, Comments on the Pre-Application Document, FERC eLibrary 20130719-5128.

⁹¹ Letter from American Whitewater & American Rivers to Steve Klein, PUD (May 27, 2014).

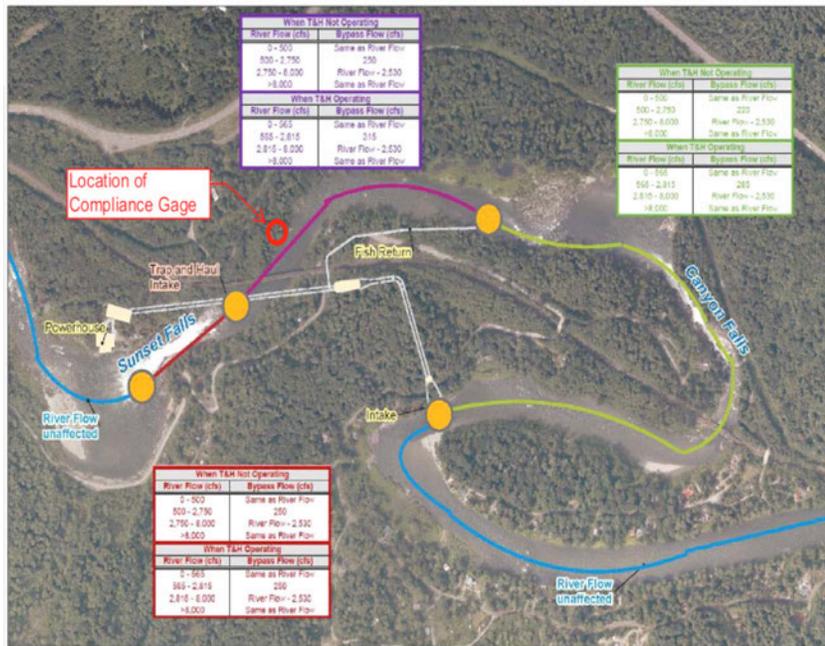


Figure E.3-19. Examples of operational flows to the powerhouse, diversions to the Trap-and-Haul Fishway, and instream flows in the bypass reach, at the compliance gage, and over Sunset Falls, within a range of operating conditions.

IV. Conclusion

The Conservation Groups strongly object to the development of the Sunset Falls Hydroelectric Project. As outlined above in our comments on the DLA, this Project would have significant and widespread impacts on the recreational, aesthetic, habitat and ecological values of the South Fork Skykomish River and the surrounding area. The Project would conflict with directives, policies and laws governing the management of this river, which has been found suitable and recommended for designation under the Wild and Scenic Rivers Act, designated as a Protected Area by the Northwest Power and Conservation Council, and established as a State Scenic Waterway.

Respectfully submitted,

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Alpine Lakes Protection Society

Michael Garrity
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Tom Hammond
North Cascades Conservation Council

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Sierra Club, Washington State Chapter

Katherine Hollis
The Mountaineers

Tom Uniack
Washington Wild

Rich Simms
Wild Steelhead Coalition

Andrea Matzke
Wild Washington Rivers

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Snohomish County
Public Utility District No. 1

Docket No. P – 14295-000

Sunset Fish Passage and Energy Project

CERTIFICATE OF SERVICE

Pursuant to Rule 2010 of the Commission’s Rules of Practice and Procedure, I hereby certify that I have this day caused the foregoing Conservation Group **Comments on the Draft License Application for the Sunset Falls Fish Passage and Energy Project (P-14295)**, to be served upon each person designated on the official service list compiled by the Secretary in this proceeding.

Dated this 27th day of April 2016.



Megan Hooker
American Whitewater