



PUBLIC UTILITY DISTRICT NO. 1 of CHELAN COUNTY

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December 8, 2017

Mr. Eric V. Rickerson
State Supervisor, Washington Fish and Wildlife Office
United States Fish and Wildlife Service
510 Desmond Dr. SE, Suite 102
Lacey, WA 98503

Re: 01EWF00-2018-CPA-003; Response to Comments on Tumwater Fishway Improvements Technical Memorandum for the Rocky Reach Hydroelectric Project, FERC Project No. 2145

Dear Mr. Rickerson:

I am writing in response to your November 21, 2017 letter providing the U.S. Fish and Wildlife Service's (Service) comments on the October 18, 2017 Tumwater Fishway Improvements Technical Memorandum (Technical Memorandum). Chelan PUD appreciates the opportunity to review the Service's comments, but must correct your letter's characterization of the legal and procedural context within which Chelan PUD offered the Technical Memorandum for evaluation by interested stakeholders, including the Service.

As you are aware, Chelan PUD has been engaged in a discussion with interested stakeholders regarding potential improvements to lamprey passage at Tumwater Dam for several years. Chelan PUD has been clear that it is participating in this discussion on a solely voluntary basis, and we prepared the Technical Memorandum in that context in order to inform the Service's and other stakeholders' consideration of potential passage improvements. Your letter questions the voluntary nature of such improvements and asserts that the Service has authority to unilaterally impose fishway prescriptions at Tumwater Dam pursuant to Section 18 of the Federal Power Act (FPA).

To be clear, Chelan PUD can only engage in a discussion of possible lamprey passage improvements at Tumwater Dam on a voluntary basis; the Dam is not part of any hydropower project license issued by the Federal Energy Regulatory Commission (FERC) and is not subject to Section 18 of the FPA. While Chelan PUD recognizes that the fish passage and trapping facility adjacent to the Dam are considered project works under the Rocky Reach Hydroelectric Project (Project) license for the limited purpose of collecting broodstock for its salmon and steelhead hatchery program, FERC expressly included only these facilities—and not Tumwater Dam itself—as part of the Project license.¹

¹ *Pub. Util. Dist. No. 1 of Chelan County*, 126 FERC ¶ 61,138, at PP 63-64 (2009) (*License Order*).

The Project's FERC-approved Exhibit G drawings, moreover, exclude the Dam from the Project,² and the Service has previously acknowledged that neither Tumwater Dam nor any impacts resulting from its existence are within the scope of the Project license.³

Chelan PUD has been and continues to be willing to engage in collaborative discussions regarding voluntary lamprey passage improvements at Tumwater Dam fishway with the Service and other stakeholders; however, we cannot do so while the Service concurrently pursues Section 18 prescriptive authority over Tumwater Dam, as such an action is inconsistent with the FPA and would violate both the intent and express provisions of the Rocky Reach Settlement Agreement. It is Chelan PUD's strong position that the Service, under the Settlement Agreement, reserved Section 18 authority to prescribe fishways *only* at Rocky Reach Dam, and not at any non-Project dam such as Tumwater.⁴ Any attempt by the Service to unilaterally expand Chelan PUD's obligations under the Project license in a manner that is materially inconsistent with the Settlement Agreement would be a clear violation of the Agreement⁵—and certainly highly inconsistent with the collaborative process that we have worked together to foster for nearly a decade and which has been successful in achieving 98.8% adult lamprey passage efficiency at Rocky Reach Dam.⁶

Chelan PUD is hopeful that both parties can agree to move forward with collaborative discussions. To that end, Chelan PUD will follow up directly with Steve Lewis to discuss the Service's comments on the Technical Memorandum. If this matter cannot be resolved on a voluntary and collaborative basis, however, Chelan PUD

² Dryden and Tumwater Dams Fish Ladders and Trapping Facilities Exhibit G Drawings, Project No. 2145-094 (filed July 17, 2009); *Pub. Util. Dist. No. 1 of Chelan County*, 129 FERC ¶ 62,133 (2009) (Order Approving Revised Exhibit G Drawings and Revising Annual Charges).

³ In its August 4, 2008 letter regarding meeting with Chelan PUD, the Service stated: "In a related matter, we discussed that Tumwater Dam is utilized by Chelan PUD as part of its hatchery supplementation program element of the proposed action. Accordingly, the Service informed Chelan PUD on July 24, 2008 that our upcoming biological opinion [on Project relicensing] will only cover activities at Tumwater Dam related to the upstream fishway broodstock trapping facilities at this structure. The aforementioned biological opinion will not cover other activities associated with the structure and existence of the dam." *See* Letter from Jessica Gonzales (USFWS) to Tracy Yount (Chelan PUD), dated Aug. 4, 2008 (USFWS Reference: 2008-F-0116); *see also*, Letter from Rich Torquemada (USFWS) to Kimberly Bose (FERC) transmitting *USFWS Biological Opinion on the Effects of the Rocky Reach Hydroelectric Project Relicensing on Bull Trout*, at p.1 ("No analysis was completed and no incidental take was issued in this biological opinion for: activities at Tumwater Dam *other than the function of the structure as an upstream fishway and associated broodstock capture at the facility*, ...) (emphasis in original).

⁴ License Order at P 71, Article 408, and App. B, § 11.1.2(b); Rocky Reach Settlement Agreement §§ 2.1, 11.1.2(b) (Feb. 3, 2006) (Settlement Agreement). *See* 16 U.S.C. § 811 (limiting prescriptive authority to "require the construction, maintenance, and operation by a licensee . . . [of] such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce" (emphasis added)); *Wis. Power & Light Co. v. FERC*, 363 F.3d 453, 462 (D.C. Cir. 2004) (noting that "the purpose of section 18 is to provide for 'safe and timely' fish passage as well as other 'fish and wildlife benefits both downstream and upstream of a project'" (quoting H.R. Conf. Rep. No. 99-934 at 23 (1986) (emphasis added)); *id.* (holding that the Secretary "must provide substantial evidence to show that fishery resources will be adversely affected by a particular project"); *e.g.*, *City of LeClaire, Iowa*, 66 FERC ¶ 61,270 at p. 61,665 (1994), *order denying reh'g*, 74 FERC ¶ 61,127 (1996) (holding that FPA Section 18 prescriptive authority does not apply to a facility that is not part of the licensed project).

⁵ Settlement Agreement §§ 11.1.2(b) & (c), 15.1, 15.1.5, 15.2, 17 & App. B Ch. 5.

⁶ *Monitoring Study to Quantify Dam Passage and Tributary Escapement of Adult Pacific Lamprey in the Rocky Reach Project Area and the Mid-Columbia River*, Blue Leaf Environmental (Oct. 4, 2017).

reserves its right to invoke the dispute resolution provisions of the Settlement Agreement⁷ and protect its interests in response to any subsequent attempt by the Service to unilaterally invoke Section 18 fishway authority pursuant to the Rocky Reach Project license.⁸

Please do not hesitate to contact me should you have questions regarding this letter.

Sincerely,



Alene Underwood
Manager, Fish and Wildlife

cc: K. Freund, USFWS, Portland, OR
J. Craig, USFWS, Leavenworth, WA
P. Verhey, WDFW, Ephrata, WA
B. Rose, Yakama Nation, Toppenish, WA
T. Skiles, CRITFC, Portland, OR
K. Bose, FERC, Washington, D.C.

⁷ Settlement Agreement § 17.

⁸ See 16 U.S.C. §§ 811, 823d; 43 C.F.R. Pt. 45.