

-----Original Message-----

From: Joe Brogan [mailto:BrojJ@foster.com]
Posted At: Tuesday, November 15, 2005 12:26 PM
Posted To: Condit Dam
Conversation: Comments of Klickitat & Skamania Counties
Subject: Comments of Klickitat & Skamania Counties

Derek,

The attached files contain the comments of Klickitat and Skamania Counties concerning the Ecology Draft SEIS for the Condit Dam Removal Project. The SFXB66 file is a 5-page cover letter from this firm. The 11-15-05 file is Exhibit A- a technical report prepared by the Counties' consultants regarding the DSEIS. The SFXB60 file is Exhibit B referenced in the cover letter.

Please contact me if you have any questions concerning this filing or the Counties' specific comments. A hard copy was also sent via U.S. Mail this afternoon.

Sincerely,

FOSTER PEPPER & SHEFELMAN PLLC

Joseph A. Brogan
P. Stephen DiJulio

Special Deputy Prosecuting Attorneys for
Klickitat and Skamania Counties

Joseph A. Brogan
Foster Pepper & Shefelman PLLC
1111 Third Avenue, Suite 3400
Seattle, Washington 98101-3299
(206) 447-6407
Fax (206) 749-1935



E-Mail: BROJ@FOSTER.COM SFXB66.pdf 11-15-05 Condit DSEIS Review FINAL.pdf SFXB60.pdf

FOSTER PEPPER & SHEFELMAN PLLC
ATTORNEYS AT LAW



November 15, 2005

VIA E-MAIL & U.S. MAIL

Mr. Derek Sandison
SEPA Responsible Official
Washington State Department of Ecology
15 W Yakima Ave, Suite 200
Yakima, WA 98902-3452

Re: Comments of Klickitat and Skamania Counties on Condit Dam
Removal Draft SEPA Supplemental Environmental Impact Statement

Dear Mr. Sandison:

This firm represents Klickitat and Skamania Counties (the "Counties") who are parties to a Federal Energy and Regulatory Commission ("FERC") relicensing proceeding for the Condit Dam in the State of Washington (FERC Project No. 2342-011). The Counties, together with their consultants, AC Kindig & Company, Cedarock Consultants, Inc., and Associated Earth Sciences, Inc., have completed a comprehensive review of the Washington State Department of Ecology's ("Ecology's") Draft SEPA Supplemental Environmental Impact Statement ("DSEIS"). The conclusion of the Counties and its experts is that the DSEIS fails to address reasonable alternatives to the proposal as required by the RCW 43.21C.030(2)(c), the Washington State Environmental Policy Act ("SEPA"), fails to adequately disclose and analyze the true impacts of the proposal and potential mitigation as required by WAC 197-11-440, fails to provide reasonable assurance necessary for issuance of a CWA 401 Water Quality Certification, fails to provide adequate disclosure of impacts and mitigating measures for issuance of a CWA Section 402 permit, and fails to comply with Ecology guidelines and requirements for protection of State Water Quality Standards, including impacts to wetlands.

Exhibit A is a comprehensive technical report prepared by the Counties' consultants that outlines the fundamental flaws and uncertainties contained in the Ecology DSEIS. In addition to this consultant report, the Counties offer the following comments and background regarding Ecology's role in the Condit Dam Removal project.

Direct Phone
(206) 447-6407

Direct Facsimile
(206) 749-1935

E-Mail
broj@foster.com

1111 THIRD
AVENUE
Suite 3400
SEATTLE
Washington
98101-3299

Telephone
(206) 447-4400
Facsimile
(206) 447-9700
Website
WWW.FOSTER.COM

ANCHORAGE
Alaska

PORTLAND
Oregon

SEATTLE
Washington

SPOKANE
Washington

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A6-1

The environmental documentation including the FERC NEPA FSEIS (2002) environmental documentation has already addressed a reasonable range of alternatives.

A6-2

As expressed in following responses to detailed comments, the DSEIS and FSEIS and other environmental review documents do provide adequate disclosure and analysis.

A6-3

This is a legal argument to which no response is required because it is not directly relevant to SEPA. The CWA Section 401 certification decisions are separate from the SEPA decisions.

A6-4

This is a legal argument to which no response is required because it is not directly relevant to SEPA. Disclosure of impacts and mitigation measures are legally adequate.

A6-5

SEPA review requires evaluation and disclosure of environmental impacts, which is the purpose of the DSEIS. This is a legal argument to which no response is required because it is not directly relevant to SEPA.

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Background of Ecology Involvement In The Condit Dam Removal Project

The Counties previous filings with FERC (which are all hereby incorporated by reference into this DSEIS comment letter)¹ outline the adverse environmental impacts of this proposal and clearly illustrate that many years ago Ecology compromised and abdicated its role as an objective permitting agency and SEPA lead agency on this project. In September 1999, Ecology was persuaded by the applicant, PacifiCorp, to sign a settlement agreement (“Settlement Agreement” or “SA”) with PacifiCorp and other pro-dam removal entities that fully committed all signatories to a single dam removal alternative, the only proposal now analyzed in the Ecology SDEIS, the SA Dam Removal Alternative. The SA Dam Removal Alternative is a proposal to blast a hole in the base of Condit Dam that will, according to the applicant, release a torrent of sediment and debris that will wipe out all living biota in the Lower White Salmon River, a river which contains ESA-listed species and ESA-listed critical habitat.

Ecology made several contractual commitments in the SA that clearly violate SEPA. These include: 1) a commitment by Ecology to not commenting adversely to FERC or any other governmental agency on any aspect of the SA Dam Removal Alternative (see SA Section 2.4), 2) without even having commenced SEPA review, a commitment by the agency to a single dam removal (SEPA) alternative, the Settlement Agreement Dam Removal Alternative, and 3) an agreement with PacifiCorp on a cost cap on project costs and mitigation (see SA Section 4.1.1)

¹ See e.g., Counties' Comments on PacifiCorp's Amendment of Decommissioning Application and Request for Continued Abeyance of Decommissioning and Licensing Proceedings, Project No. 2342-011 (filed Mar. 21, 2005); Counties' Request that FERC Clarify the Record to Indicate that the U.S. Fish & Wildlife Service is Legally Obligated to Reinitiate Consultation, Project No. 2342-000 (filed Nov. 8, 2004); Counties' Request that the Commission Weigh the Concerns Associated with PacifiCorp's Pending Application for Amendment of License and Settlement Agreement, Project No. 2342-000 (filed Oct. 12, 2004); Counties' submission of a Copy of the Counties' March 7, 2003 letter to Ecology Opposing the Proposed Revisions to the State's Water Quality Standards; Counties' Comments concerning Settlement Agreement, Project No. 2342-011 (filed Mar. 31, 2003) Counties' Comments in Response to Nov. 8, 2002 Hydro Licensing Status Workshop, Project No. 2342-011 (filed Dec. 9, 2002); Counties' Memorandum Re the July 14, 2000 Meeting with Representatives of PacifiCorp, Project No. 2342-011 (filed Sept. 16, 2002); Counties' Response to Issues Raised in PacifiCorp's Comments on the Final Supplemental Final Environmental Impact Statement, Project No. 2342-011 (filed Sept. 13, 2002); Counties' Answer to PacifiCorp's Comments on Approach to Implementation of Settlement Agreement, Project No. 2342-011 (filed Aug. 9, 2002); Counties' Comments on Final Supplemental Environmental Impact Statement, Project No. 2342-000 (filed July 26, 2002); Counties' request to be placed on the official service list, Project No. 2342-000 (filed May 13, 2002); Counties' Answer to Motion to Abey, Project No. 2342-011 (filed May 3, 2002); Counties' Motion Requesting Rejection of PacifiCorp's Application For Amendment of License and For Approval of Offer of Settlement, Project No. 2342-011 (filed Apr. 9, 2002); Counties' Comments on the Draft Supplemental Final Environmental Impact Statement, Project No. 2342-000 (filed Mar. 25, 2002); Counties' Comments on the Draft Biological Assessment, Project No. 2342-011 (filed Feb. 28, 2002); Counties' Memorandum Re Comments on the Draft Biological Assessment, Project No. 2342-011 (filed Feb. 8, 2002); and Counties' Motion to Intervene and Comments, Project No. 2342-011 (filed Mar. 27, 2000).

A6-6

This is a legal argument to which no response is required because it is not directly relevant to SEPA. The Settlement Agreement does not constrain any Ecology environmental review or decision.

A6-7

This is a legal argument to which no response is required because it is not directly relevant to SEPA. The Settlement Agreement does not constrain any Ecology environmental review or decision.

A6-6

A6-7

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years before Ecology would even see a permit application, a mitigation proposal, or commence its own environmental review.

Ecology made a critical mistake when it signed the SA, a mistake which the record shows directed subsequent Ecology staff actions in support of the SA Dam Removal Alternative² and which will, in the Counties' opinion, dictate Ecology's upcoming decisions concerning the 401 and 402 permits now sought by the applicant.

Quite remarkably (or perhaps not), the SA Alternative is the current proposal that Ecology now supports in its brief discussion of project alternatives in Section 2.3 of the DSEIS. Ecology concludes in the SDEIS that "no further analysis of the alternatives other than the proposed action is required, as the other alternatives would have impacts greater than the proposed alternative." SDEIS at 2-3. This determination is clearly unsupported in the record. Perhaps most disturbing is the fact that Ecology's position is contrary to earlier conclusions reached by FERC itself, and the U.S. Army Corps of Engineers.

Comments of U.S. Army Corps of Engineers

"[T]he "settlement agreement dam removal alternative" seems to have serious, long-term adverse impacts. Should the dam be removed, we urge a more conservative approach that does not wipe out the existing fishery in the White Salmon River and deposit 2.42 million cubic yards of sediment and debris in the Columbia River."

– *Davis Moriuchi, Chief, Project Management Div., Portland District, Corps of Engineers, Memorandum for Commander North Pacific Division at 1-3, 2002.*

1996 FERC FEIS Conclusions

The unacceptable adverse environmental impacts of the "No Sediment Treatment" (SA Alternative) were well documented by FERC staff:

"The no sediment treatment option presents such significant adverse water quality and aquatic resource impacts that this alternative is not viable due to environmental concerns."

1996 FEIS at 4-85.

² See e.g., Exhibit B, Comments of Klickitat and Skamania Counties on Proposed Water Quality Standards – Condit Dam Hydroelectric Project, March 7, 2003.

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A6-8

The FERC quotes cited are from the 1996 FEIS. This document is superseded by FERC's 2002 FSEIS in which they conclude that "the benefits provided by dredging at least half the reservoir sediments under the 1996 FEIS dam removal alternative do not outweigh the economic and environmental costs of the removal method when compared to the Settlement Agreement dam removal alternatives; therefore we do not recommend the 1996 FEIS dam removal alternative. Instead, we recommend the method of removal proposed in the Settlement Agreement" (FERC FSEIS at page 186).

When the additional mitigation measures discussed in the 2005 SEPA DSEIS are considered, the Settlement Agreement alternative is neither "unsupported in the record" nor "contrary to" agency conclusions.

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“We reevaluated our analysis as presented in the DEIS and conclude that the environmental costs of a safely conducted dam removal operation are unacceptable if sediment is released to the downstream reaches of the White Salmon River. We conclude that the mass movement of sediment could effectively destroy the very resources we are attempting to enhance....”

1996 FEIS, App. I-42.

“Hydraulic bed-load analysis... indicates that fine sediments would be deposited at the mouth of the White Salmon River where they would remain for as long as twenty years.... Currently, the most valuable spawning grounds in the river are at the mouth. It is also possible that several native stocks utilize these grounds for spawning and rearing. Deposition of sediment fines in this section of the river would virtually destroy the spawning habitat and potentially extirpate the few remaining native stocks.”

1996 FEIS, App. I-85.

“The effects of mass sediment transport on the downstream reaches of the White Salmon River would be severe. The volume of sediment would be twice as large in the no sediment treatment option as compared to the dry excavation option, resulting in greater sediment loads and longer residence time of lake sediments in the lower river. The applicant estimates, and we concur, that it would take 10-20 years for lake sediments to be transported through the lower reaches of the river to the Bonneville Pool (PacifiCorp, 1993f). The environmental impacts to the in lieu fishing site in this area would be unacceptable as the habitat would be covered by the silty clays and fine sands for a minimum of ten years and likely longer, causing a long-term degradation of this valuable habitat.”

1996 FEIS at 4-81.

The Counties’ consultants have outlined in greater detail (See Exhibit A, Section 7.0) how the existing environmental record contains an inadequate analysis of alternatives to the proposal. As a result, the DSEIS is flawed for relying on an inadequate assessment of reasonable alternatives and failing to conduct a thorough review of reasonable alternatives and mitigation as required by SEPA.

A6-9

Ecology disagrees with these allegations. Specific comments are addressed below.

A6-8
Continued

A6-9

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In conclusion, Ecology is faced with an obvious dilemma. It felt compelled to sign the Settlement Agreement in which it committed to PC's preferred "blow and go" method of dam removal. Ecology also negotiated and committed to specific mitigation cost caps before a single permit application was ever submitted to Ecology and before the associated SEPA process had even commenced. Ecology is further compromising its integrity if it proceeds to issue project permits that, although consistent with commitments made to PacifiCorp and the settlement parties, are not defensible under applicable State and federal laws.

A6-9
Continued

Sincerely,



Joseph A. Brogan
P. Stephen DiJulio

Attachments

- cc: Timothy O'Neill, Klickitat County Prosecuting Attorney
- Peter Banks, Skamania County Prosecuting Attorney
- John Whittaker, Winston & Strawn
- Kathryn Harris, U.S. Army Corps of Engineers
- Lawrence C. Evans, Chief, Regulatory Branch, Portland District U.S. Army Corps of Engineers
- Marcia Lagerloef, U.S. Environmental Protection Agency, Region X

Associated Earth Sciences, Inc.



Celebrating 25 Years of Service

911 Fifth Avenue, Suite 100
Kirkland, Washington 98033
425 827-7701 fax 425 827-5424

CEDAROCK CONSULTANTS, INC.

Environmental Consulting
19609 244th Avenue NE
Woodinville, Washington 98077
425 788-0961 fax 425 788-5562

A.C. Kindig & Co.

ENVIRONMENTAL CONSULTING
12501 Bellevue-Redmond Road, Suite 110
Bellevue, Washington 98005
425 638 0358 fax 425 455 8365

November 15, 2005
Project No. 159

Mr. Tim O'Neill, Klickitat County Prosecuting Attorney
Mr. Peter Banks, Skamania County Prosecuting Attorney
c/o Mr. Stephen DiJulio
Foster Pepper & Shefelman
1111 Third Ave., Suite 3400
Seattle, WA. 98101-3299

RE: Condit Dam Removal Draft Supplemental EIS (Draft SEIS)
Review of Condit Dam Removal Draft Supplemental EIS
Washington Department of Ecology, Publication # 05-06-022
September 30, 2005
Corps of Engineers Action ID 200400523; FERC No. 2342

Dear Mr. O'Neill and Mr. Banks,

This letter contains our technical review of the September 30, 2005 Draft SEIS issued by the Washington Department of Ecology (Ecology), as requested by your legal counsel, Foster Pepper and Shefelman PLLC. It is our opinion the Draft SEIS fails to provide reasonable assurance that all impacts are disclosed, or that appropriate mitigating measures are provided, or that Ecology guidelines and requirements for protection of state water quality standards, including those regulating wetlands, are met. The reasons for this conclusion are explained in the analysis below.

A6-10

Opinion acknowledged. See responses to further comments.

A6-10