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FSFEIS also states that periodic sediment spikes over the course of two years after the initial blasting of the dam would be lethal to or displace all fish species in the White Salmon River and in the Columbia River near the mouth of the White Salmon River. Condit FSFEIS at 112. The record shows that PC itself has expressed concern that the phrase “major watershed restoration activity” may not describe their Condit proposal. PC knows its decision to remove Condit dam is a business decision first and foremost and not a PC sponsored watershed restoration activity.

Proposed Changes to the State Water Quality Standards are Inconsistent With State Law

Ecology’s proposed language in WAC 210A-410(3) is also inconsistent with minimal levels of water quality protection afforded by State statute. RCW 90.54.020(3) provides:

Notwithstanding that standards of quality established for the waters of the state would not be violated, wastes and other materials and substances shall not be allowed to enter such waters which will reduce the quality thereof, except in those situations in where it is clear that overriding considerations of the public interest will be served.

RCW 90.54.020(3)(b).

The proposed State Standards exempting watershed restoration projects and dam removal projects would allow a deterioration of water quality with no baseline level of minimum protection. Furthermore, the Counties doubt that Ecology can articulate defensible reasons why it is in the “overriding public interest” to allow the unmitigated release of over 2.4 million cubic yards of sediment into a river segment that contains listed species and is included in the Columbia River Gorge Scenic Area.

The statute also provides that regardless of the quality of the waters of the state, all wastes and other materials and substances proposed for entry into state waters shall be provided with all known, available, and reasonable methods of treatment (“AKART”) prior to entry. See RCW 90.54.020(3)(b). No meaningful AKART measures have been proposed by the applicant to mitigate the release of over 2.4 million cubic yards of sediment. Given Ecology’s stated commitment to the blow and go method of dam removal and commitment to the mitigation cost cap in the Settlement Agreement, it is highly unlikely that the agency will impose meaningful permit conditions to protect water quality.

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 permit

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This is a legal argument to which no response is required because it is not directly relevant to SEPA.

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Ecology believes that if AKART applies, based on the analysis, the proposed actions would meet it.

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This is a legal argument to which no response is required because it is not directly relevant to SEPA.

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application was ever submitted to Ecology and before the associated State Environmental Policy Act ("SEPA") process was even completed. Ecology is further compromising its integrity if it adopts vague standards that violate federal law and compromise the protection of water quality in Washington's rivers and streams. The Counties urge Ecology to withdraw the proposed rule provisions that create a double standard of water quality protection for environmental restoration projects. Ecology should also delete reference to dam removal as a de facto "watershed restoration activity" that "provides greater benefits to the health of aquatic systems in the long-term." Finally, Ecology should refrain from using other provisions of the State's Standards to sanction the release of 2.4 million cubic yards of sediment into the Lower White Salmon River.

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Very truly yours,

FOSTER PEPPER & SHEFELMAN PLLC



P. Stephen DiJulio

cc: Marcia Lagerloef, U.S. Environmental Protection Agency, Region X
 Timothy O'Neill, Klickitat County Prosecuting Attorney
 Peter Banks, Skamania County Prosecuting Attorney
 John Whittaker, Winston & Strawn
 Michael B. White, Director, Civil Works and Management, U.S. Army Corps of Engineers
 Robert Brown, U.S. Army Corps of Engineers, Seattle District

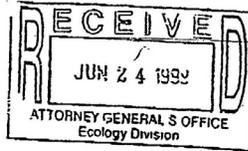
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June 23, 1999



To Brian

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Mr. Mark C. Jobson
Assistant Attorney General
State of Washington
Department of Ecology
P.O. Box 40117
Olympia, WA 98504-0117

Re: Department of Ecology Issues Relating to
Permitting for Condit Project Removal

Dear Mark:

As you know, I have been trying to find a letter from you dated last year, possibly around May, relating to Department of Ecology (Ecology) permitting issues that may be involved in removal of the Condit Hydroelectric Project. While I have been unable to find a letter, attached is a two page document which I believe you prepared in response to discussions I had with Tom Luster relating to permitting issues which may be involved in removal of the Condit Project.

The draft Condit Settlement Agreement includes a provision allowing withdrawal in the event permits necessary to Project removal cannot be obtained in a timely manner. Among the more important issues in that regard is Ecology's water quality standards rules which may affect both state permits and water quality certifications(s) for federal licenses and permits that may be necessary for Project removal. To ensure that the Ecology's water quality standards rules are adequate for these purposes, you proposed that Ecology adopt a rule allowing longer term water quality modifications for activities which have as their goal restoration of a stream or river, and I might add fishery resources, than may be authorized under Ecology's current rule for short term water quality modifications. As we also have discussed, other requirements, such as AKART and Ecology's antidegradation policy, also need to be considered in connection with permitting actions, as appropriate.

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Curt Smith, Will Settle and Bob Anderson became directly involved in the Condit Project removal negotiations after you provided me with your water quality standards rule change proposal. PacifiCorp believes it is important to advise Curt, Will and Bob that significant rulemaking actions by Ecology will be necessary to facilitate permitting for Project removal. To that end, I request that you confirm that you provided the attached document to me so that PacifiCorp can advise Curt, Will and Bob of your proposal.

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If you have any questions or comments, and if you can locate a transmittal letter further addressing these issues, please call me at my number above.

Sincerely,



Michael P. O'Connell

MOC:dja
Enclosures

CONDIT DAM REMOVAL PLAN

Department of Ecology Permits w/ relevant cites

1. Water Resources Contact: Jeff Marti, Ecology HQ

A. Abandonment, or transfer of existing Pacificorp rights.

Right to divert

Right to store

RCW 90.14.160 Abandonment If Pacificorp voluntarily gives up its right to store and divert, then the right reverts to the state and the water becomes available to other appropriators both upstream and down.

RCW 90.42.080 Trust Water Rights Program.

The state prefers to acquire Pacificorps' existing water rights by donation to the trust in order to preserve the priority date of the rights so that they may not be impaired by later filed applications for withdrawal.

B. Impacts on other existing rights. Survey and analyze.

I am aware of only two existing surface water rights in the project area which could conceivably be impacted by dam removal. These are: 1. Mt. Adams Orchards, which maintains a pump at or near the dam, and 2. An unknown diverter below the dam. I do not yet know what impact dam removal has on these diverters if any.

C. Impacts on instream flow

Since the project is "run of the river," dam removal should have no impact on instream flow below the dam. Flow will increase in the existing bypass reach.

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2. Water Quality Contact: Bob Barwin, Ecology CRO

A. NPDES Permit RCW 90.48.

The CWA and state Water Pollution Prevention Act require that Ecology regulate industrial and municipal point source discharges through NPDES permits. The program states that "no pollutants shall be discharged to any surface water of the state from a point source, except as authorized by an individual or general permit." WAC 173-220-020. The permit includes effluent limits and requires that the effluent not violate water quality standards of the receiving water.

Issues:

- 1) Point source
- 2) Pollutant
- 3) Discharge
- 4) Effluent
- 5) applicable standard
- 6) is the program superceded by Section 404 permit and 401 Certification.

B. Short-term water Quality Mod. WAC 173-201A-110 and -070.

The regulation says:

B. Adoption of Rule for Restoring Habitat by Removal of Structures (Dams)

Propose that Ecology draft and adopt a rule allowing longer-term water quality impacts when they are a consequence of restoring a stream or river to its natural condition. One statute already recognizes the need to short cut the permit process in order to benefit riparian

habitat, especially where salmon are concerned. RCW 89.08.460; "Watershed Restoration Projects." Can this removal be done as a "watershed restoration project?" See 89.08.460(2)c? Who would be the sponsoring agency?

D. 404 Permit, Corps of Engineers 33 U.S.C. 1344
For activities involving work in public waters or the discharge of dredge or fill material to public water, the Corps of Engineers has primary jurisdiction.

E. 401 Water Quality Certification 33 U.S.C. 1341
Ecology has one year from the date of application in which to certify that a proposed 404 action, or any other action requiring a federal permit or license, complies with state water quality standards.

F. Coastal Zone Consistency Determination 16 U.S.C. 1456 c
Ecology has 6 months in which to concur, or not concur with a certification submitted by an applicant for a federal permit or license. Ecology must decide whether the proposed action is consistent with the state's coastal zone program, which in this instance is the Shoreline Management Act.

3. Shorelands

- A. Shoreline Substantial Development Permit RCW 90.58.140
Note that these permits are only good for two years from date of issuance. Klickitat/Skamania Counties; which county has shoreline jurisdiction where the river forms the boundary between the two?
- B. Exemption; under Cowiche Canyon Conservancy v. Bosley 118 Wn2d 801 (1992), Is a Shoreline Substantial Development Permit required? Is the removal of the dam "construction or alteration of a structure" as defined in the case? Do the other short-term project developments, incidental to the removal, constitute development?

4. SEPA/NEPA RCW 43.21C.031 Contact: Tom Luster
If FERC and Pacificorp publish a supplemental EIS adopting the proposed removal plan as the preferred alternative, is any additional SEPA process required? Can SEPA ride on NEPA? But see RCW 89.08.460(1) which requires a state EIS.

5. Dam Safety RCW 90.03.350; 86.16.035 Ecology HQ
With respect to safety only, FERC licensees are no longer required to submit plans, proposals, specs, etc. to Ecology for approval. RCW 43.21A.068 (1995).

6. Air Quality RCW 70.94 Ecology Central Regional Office
Contact person will be: Sue Billings, CRO

7. Solid Waste Permit RCW 70.95 Ecology Central Regional Office
Contact person will be John Storman, Melissa Gildersleeve 06/17/98 5:51 PM

8. Noise Control RCW 70.107. Local government enforces regulations adopted by Ecology to prevent excessive noise. Exemption at WAC 173-60-050. Blasting.

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