Draft Report to the WA State Legislature on Water Power License Fee Structure Recommendations

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I. Executive Summary

Engrossed Substitute Senate Bill (SSB) 6052 directed the Washington Departments of Ecology (ECY) and Fish and Wildlife (DFW) to conduct a stakeholder process to develop recommendations for restructuring the fees under RCW 90.16.050 and report to the appropriate committees by December 1, 2015.

The state coordinated a thorough process, commencing in April 2015 and ending in November 2015, culminating in review and approval of this report. Stakeholder participants included:

- DFW and ECY staff;
- Fee-paying utilities (Independently-Owned Utilities, Public Utility Districts, Municipal Utilities, and independent generators);
- Environmental and recreation non-governmental organizations; and
- A process facilitator with Aaland Planning Services, Inc., contracted by the State.

While a number of high-value issues were discussed over the course of the process, the group focused its effort on:

1. Recommending the appropriate and most-supported fee structure, if any, for the legislature to consider as the current water power license fee approaches a legislative sunset date of June 30, 2017; and
2. Recommending approaches to provide critical improvements to the State agencies' transparency and accountability in its use of the funds generated by the fee as established

in state law, strengthening opportunities ensure efficient and effective engagement from the State on high-priority energy and conservation issues at hydropower facilities.

A significant majority of stakeholder participants ultimately recommend the legislature act to maintain the current fee structure under RCW 90.16.050, with a sunset date of June 30, 2027, with the specific intent to revisit the fee to consider whether to extend, modify, or end the fee. This recommendation is generally consistent with House Bill (HB) 1130, an existing bill introduced in January 2015 by Representatives Jake Fey (D-27) and Shelley Short (R-7) to extend the sunset date to June 30, 2027.

A significant majority of stakeholder participants recommend that, should the current water power license fee structure be extended through legislation, discrete day-to-day, annual, and biennial transparency and accountability measures be implemented. Stakeholders feel these measures will significantly improve upon the current approaches the State uses to coordinate in a transparent manner and clarify accountability for the expenditure of funds generated from the fee and in the State's hydropower programs more broadly. Stakeholders do not recommend addressing these transparency and accountability recommendations via legislation, but rather support their implementation via mutual agreement and formal inclusion in the "Recommendations" section of the 2013-2015 Water Power License Fee Legislative Report, as originally required by SSB 5811.

This report attempts to capture dissenting opinions to these recommendations.

II. Proviso Language

Engrossed Substitute Senate Bill 6052 directed the Washington Departments of Ecology and Fish and Wildlife to conduct a stakeholder process to develop recommendations for restructuring the fees under RCW 90.16.050 and report to the appropriate committees by December 1, 2015.

III. Background information

Chapter 286 of the laws of 2007 incorporated Substitute Senate Bill 5881, an act relating to water power license fees. The revised law, Revised Code of Washington (RCW) 90.16.050, increased fees for the use of Washington's waters to produce power. Until the law became effective on July 27, 2007, water power license fees had remained the same since 1929. This base fee, provided by RCW 90.16.090(1)(a), was and continues to be used to augment funding for the Department of Ecology/USGS cooperative stream gauging program in the state.

The 2007 revision added fees specifically for expenses associated with staff at the Department of Ecology and the Department of Fish and Wildlife working on federal energy regulatory commission (FERC) relicensing and license implementation activities. This additional funding allows the state agencies to be more responsive to the hydropower industry's environmental regulatory requirements under Section 401 of the Clean Water Act and FERC licensing. These requirements ensure that the project license includes necessary conditions to monitor and protect the quality of the state waters, habitat, and aquatic resources.

The added FERC fees enacted in 2007 expire June 30, 2017, with the law recognizing that the biennial progress reports submitted by the Department of Ecology will serve as a record for considering the extension of the fee structure.

On January 14, 2015, Representatives Fey and Short introduced HB 1130, with the support of ECY and DFW. HB 1130 does not propose to adjust the fee structure but rather proposes to extend the sunset date established in SSB 5811 for the additional water power license fee to June 30, 2027. At the bill's legislative hearing, Grant County PUD and Douglas County PUD expressed opposition to the bill in its current form, while Chelan County PUD expressed neutrality on HB 1130 with a desire to identify approaches to improve the level of transparency and accountability by the State in its use of the funds.

IV. Stakeholder process, participants, and invited participants

ECY and DFW contracted with Neil Aaland of Aaland Planning Services, Inc. to serve as process facilitator. ECY, DFW, and the facilitator invited a large group of representatives to:

- 6 in-person meetings;
- Review and edit meeting notes;
- Review and edit meeting agendas;
- Provide needed feedback between meetings when agreed upon; and
- Review and edit draft documents and analysis

Invited participants[1] included representatives from fee-paying utilities (Independently-owned utilities, Public Utility Districts, municipal utilities, and independent generators) and environmental and recreation non-governmental organizations. Meetings were well attended.[2]

Following the initial meeting, the stakeholder group developed and approved a Work Plan[3], subsequently used to guide the creation of meeting agendas and project timeline.

V. Issues considered and discussed[4]

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[1] See Appendix A for full list of invited participants.
[2] See Appendix B for full list of meeting participants.
[3] See Appendix C for Final Work Plan.
[4] See Appendix D for final meeting minutes.

- Participants discussed different perspectives on the impetus for and intent behind establishing the water power license fee with SSB 5811 in 2007.
- Participants discussed different perspectives on the water power license fee being a ‘pooled service’ versus a ‘fee-for service’.
- Participants discussed different interpretations of the term “sunset” as it applies to the water power license fee. Douglas County PUD interpreted the term as to generally not allow for the consideration of extending the fee. Many participants referenced language in the law as written to interpret the term as stimulating an evaluation of extending or modifying the fee, or allowing the fee to terminate.
- Participants discussed perspectives on the historic, current, and future workload for the state in FERC hydropower processes and 401 Water Quality Certification development and implementation. Participants discussed the workload needs associated with different phases of the FERC licensing and 401 Water Quality Certification development and implementation. Some participants emphasized commitments to adaptive management in license articles, Settlement Agreements, and certification implementation that generally increases the workload of the State during this phase as compared to historic conditions. Most participants agreed that for many hydro projects, the State workload can decline at a certain point out from license and certification issuance.
- Participants discussed the challenges associated with paying the same fees despite declining need for State engagement, if a project has progressed beyond preliminary implementation and adaptive management challenges. Some participants supported exploring a fee structure that could more closely match a fee rate to the State workload need at that phase of the hydropower project.
- Participants discussed shifting to a “fee-for-service” approach. From their perspective, this would be fair because utilities would pay for the direct service they needed at the time. The work group discussed this at some length. The major concern was that some utilities have been paying in under the current system, and they believe it would not be fair if they would then have to pay at a greater level if their projects were coming in for review soon. The majority of participants around the table did not support this idea.
- Participants discussed the proportional role the fee plays in supporting the State’s timely and appropriate engagement, currently providing about half of the resources necessary for the State to meet its obligations and provide quality service with General Fund State and Federal funding sources combining for the remainder.
- Participants discussed the negative trend in General Fund State support for this work.
- Participants discussed the challenges to and value in the State maintaining staff with experience in and understanding of hydropower projects and FERC process.
- Participants discussed the needs and challenges associated with adding a Fiscal Growth Factor to the fee. Many stakeholders supported the addition of a Fiscal Growth Factor to ensure that the fees are able to support the appropriate amount of State agency participation, while other stakeholders expressed concerns for fiscal, political, and

- Participants discussed the applicable comparisons between the current structure of the water power license fees and an insurance policy, with some utility stakeholders suggesting that paying the fee assured the agencies would have experienced staff with an understanding of a project's issues available should an implementation challenge arise (i.e. drought, landside, dam safety incident) or for the commencement of relicensing. Some stakeholders did not completely support this comparison.
- Participants discussed the issue of fairness, specifically that some fee-payers have benefited more than others over the last 8 years with the 'pooled service' concept of the state fee, in that their projects have gotten a predominant amount of attention from the state. Over the next ten years, projects that have been paying the fee annually but have not received as much service are expected to require more of the state's attention. Some argue changing the fee structure now is unfair to these latter projects.
- Participants discussed how ECY and DFW track the amount of time agency staff spend on hydropower projects and on license and certification development and implementation. ECY and DFW have used different approaches. There is interest from work group participants in refining how the agencies track their time when reviewing projects.
- Participants discussed whether another source of authority for the fee – currently based on right to the use of state water – may be more appropriate.
- Participants discussed Participants discussed whether the recommended structure should strive to maintain the current level of funding and associated staffing support provided by the fee today. Most participants felt that current funding level was the right target rather than the current staffing level, which would require interim adjustments if fee rates to reflect Cost-of-Living Adjustments.

VI. General Agreements

The following issues were generally agreed to by the stakeholder group:

- "Sunset" as used in association with this water power license fee meant and means "revisiting the fee to consider whether to extend, modify, or end the fee".
- If the fee be extended or modified, the group feels a legislative "off-ramp opportunity" should be created and that opportunity should occur ten years after enactment. The option to end the fee must be accompanied be a re-evaluation of whether to extend or modify.
- The current total dollar amount generated by the FERC fee–$518,000– is the amount most stakeholders agree needs to be maintained. Grant PUD and Douglas PUD dissented by advocating that the amount of funds collected at each project at any given time should be matched to a projected work load than is quantified – the "fee-for-service" model.
- Workgroup members were not in support of moving the authority for fees out of water resources fees.

- Most workgroup members (small minority) do not support shifting to a direct fee-for-service approach in lieu of a fee. Rationale included:
    - Fairness - some utilities have been paying-in under the current system in advance of project relicensing, and object to not receiving the benefits of those payments while also having to pay at a greater level towards a fee-for-service contract during relicensing;
    - Concerns about cost increases with paying for the entirety of the State's hydro program, paying prevailing wage, paying increased overhead needed to managed dozens of contracts;
    - Concerns of a real or perceived conflict of interest, where the State cannot adequately represent the taxpayer and the resource in policy decisions due to source of funding for that staffer.

VII. Recommendations on Transparency and Accountability

RCW 90.16.050 supports the expenses of ECY and DFW staff working on FERC relicensing and license implementation activities, allowing the agencies to be more responsive to the industries regulatory requirements and to the resource protection interests of the residents of WA State.

Currently, the biennial legislative report required under this law is State's most significant effort to provide transparency on the funds collected, their use providing responsive, informed, and appropriate engagement at projects across the state, and their contribution to the State's broader FERC program funding needs. The biennial report received strong positive feedback from many of the stakeholders. The report also provides some opportunity for agency and stakeholder accountability by soliciting comments from stakeholders and responding to those comments with recommendations.

ECY and DFW have been coordinating an annual meeting of stakeholders associated with this fee as an additional transparency and accountability tool, and many of the individual projects across the state have mechanisms to support open communication.

In addition to existing mechanisms, participants felt ECY, DFW, and stakeholders can better demonstrate transparency in how collected fees are expended and provide better accountability for meeting agreed upon acceptable performance expectations.

Participants agreed upon these discrete recommendations, implementation of which would be contingent upon a legislative extension of a FERC fee:

<u>Day-to-day accountability:</u>

- ECY and DFW will identify a single-agency manager point-of-contact for hydropower should issues or conflict arise. This point of contact will be identified at annual meetings and in the biennial report.
- ECY will update and share an Inter-Program Agreement between its Water Quality and Water Resources programs, that clarifies roles and responsibilities for addressing conflict, includes an updated organizational chart, and will include a single point-of-contact on FERC issues.
- ECY and DFW will identify one staff person per hydropower project as agency lead with the ability to identify and resolve any policy conflicts within their agency, and either make decisions or facilitate timely decision-making within the agency. This point of contact will be identified at annual meetings and in the biennial report.
- All stakeholders commit to continual process improvement by soliciting frequent one-on-one check-ins to achieve appropriate level of performance.

<u>Annual Accountability:</u>

- ECY and DFW will continue to host an annual collective meeting of FERC fee stakeholders.
    - Stakeholders commit to preparing for and participating in the annual meeting to the degree possible.
    - ECY and DFW design the meeting agenda to be consistent with key transparency and accountability objectives.
    - ECY and DFW will provided updated Program and Project points-of-contact at the annual meeting, as well as providing updated organizational charts.
    - ECY and DFW will provide updates on hydro program succession planning at the meeting, in an effort to keep institution knowledge on process and projects in-house.
    - ECY and DFW will provide available information on more detailed budget code tracking.
    - All stakeholders will select priority issues for discussion based on the results of annual surveys and annual one-on-one meetings that may have broader applicability.
- Following distribution of annual surveys to stakeholders, and prior to the collective meeting, upon request from the license holder or agency, license holders, project contacts and their supervisor, and agency FERC contact will conduct an annual one-on-one meeting to discuss what is working, what is not, identify any specific items which need improvement, and prepare for the year ahead.

<u>Transparency in Biennial Report:</u>

- ECY and DFW will continue to solicit stakeholder comments on the biennium progress report and any recommendations stakeholders would like included

- Quantitative Tracking
    - ECY and DFW commit to refining current hydro tracking codes to consistently track the type of work being done (relicensing, implementation of select buckets of discrete tasks, rulemaking, training and education, etc.)
    - ECY and DFW will include information on how the FTE hours were distributed.
- Staff work tasks will be broken out between ECY and DFW.
- Legislative report 'Comments' will include a short list from the agencies of priority issues that arise between a licensee and the agencies, how they were dealt with, and what the final outcome was and/or if discussions are ongoing to resolve the issues.

<u>Transparency via Annual Survey</u>

- ECY and DFW will work with stakeholders to develop a mutually-agreeable annual survey that will be distributed in early fall.
    - Completing the annual survey is strictly optional
    - Survey results will not be used in required employee performance evaluation
    - Summary of survey results presented in biennial report and high priority issues identified for discussion at annual collective meeting.
    - Survey results may indicate a need for a one-on-one meeting.
    - ECY and DFW will have the opportunity to comment on surveys in the comments section to facilitate a two-way-street of evaluation.
- Possible Survey Evaluation Criteria
    - Staff Communication
        - Staff and Agency responsiveness
        - Staff and Agency timeliness
            - in reviews and responses
            - in decision making
        - Professionalism in communication
    - Staff Participation and Staff Understanding of Roles and Responsibilities
        - Have agencies identified designated staff for a project?
        - Is the point of con
        - Has the same staff consistently engaged?
        - Does the lead staff have ready access to decision makers at critical points
    - Are staff prepared for meetings?
        - Have WDFW and Ecology appropriately and consistently collaborated prior to and at decision-making meetings?
        - how well agency staff coordinates positions within their agency and come prepared to hydropower meetings
        - how well staff came prepared to move discussions forward.
    - Staff Expertise

        - how well staff understands laws and statutes (knowledge of state regulations, project license and 401 conditions, etc.)
        - how consistently staff interprets laws and statutes from one project to another
        - staff assigned to projects have the necessary training and experience
    - Is the agency supporting staff?
    - Is agency management engaging effectively (as needed)?
    - Comments section

VIII. Preferred fee structure alternative[5]

A significant majority of stakeholder participants ultimately recommend the legislature act to maintain the current fee structure under RCW 90.16.050, with a sunset date of June 30, 2027, with the specific intent to revisit the fee to consider whether to extend, modify, or end the fee. This recommendation is generally consistent with House Bill (HB) 1130, an existing bill introduced in January 2015 by Representatives Jake Fey (D-27) and Shelley Short (R-7) to extend the sunset date to June 30, 2027.

- Insert summary of statements of support and statements of concern with footnotes including transcribed positions.

IX. Other alternatives considered

Several other alternative fee structures were considered by the group but did not generate the level of overall support as maintaining the current fee structure for an additional ten years.

- Additive phase-based fee approach[6]
    - Overview
    - Analysis
    - Summary of Support

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[5] NOTE: In this section and the next, I've copy/pasted from the summary of comments previously received. WDFW sees value in providing this detail for perpetuity (if we come back in 2027) but can be convinced that a summary is more appropriate without attribution. If we keep it as is, it is only appropriate that the relevant party be allowed to review, vet, and edit their previous statements, as we are aware that previous comments were not offered with knowledge that they may be incorporated directly into the report.

[6] "Grant PUD supports moving forward with restructuring the current fee to represent some form of a phase-based approach, similar to the proposal that I put forth at the June meeting using multipliers discussed at the July meeting, a modified version of my proposal, or other proposals for restructuring the fee." Document

- Summary of Concern[7]
- Summary rationale for not being the preferred alternative

- Revised tiered fee rates
  - One idea was taking the amount of funding currently being received, and then tried to reduce the highest rate based on horsepower. There was little support for this approach from the work group.
  - Analysis
  - Summary of Support
  - Summary of Concern
  - Summary rationale for not being the preferred alternative

Proposals discussed but not analyzed (NOTE: Build-out more)

- Consider a phased approach with only two phases would be considered. One phase includes relicensing and the first 10 years of implementation; the second phase would address years 10+ of a license.
- Another idea was an approach used by the state of Oregon. In Oregon all permittees pay a flat fee. If the agency doesn't have enough funding then they negotiate with the state for additional work. There was no support for this option.
- Letting the fee sunset without replacement.
- Shifting to a "fee for service" approach. Some felt this would be fair because utilities would pay for the direct service they needed at the time. Concerns included:
  - Fairness - some utilities have been paying-in under the current system in advance of project relicensing, and object to not receiving the benefits of those payments while also having to pay at a greater level towards a fee-for-service contract during relicensing;
  - Concerns about cost increases with paying for the entirety of the State's hydro program, paying prevailing wage, paying increased overhead needed to managed dozens of contracts;
  - Concerns of a real or perceived conflict of interest, where the State cannot adequately represent the taxpayer and the resource in policy decisions due to source of funding for that staffer.

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[7] Chelan PUD does not recommend the attempt to build a tiered approach based on where a project is in its License, since it would be difficult to know for certain how much time may be needed by Ecology or WDFW in any phase of a FERC License, or foresee future emergencies requiring immediate and time consuming attention by state agency staff. Additionally, adaptive management and 10-year check-ins found in many Licenses today can require as much time and effort as a relicensing process. Attempting to calculate where a Licensee is over a 10-year period in relationship to their needs for Ecology and WDFW staff time would certainly be challenging and likely incorrect.

Finally, participants discussed the potential for and value of ECY and DFW creating coding that could identify precisely the amount of annual hours and FTE the agency staff spend on an individual project, an individual fee payer, or on a detailed list of specific tasks. While the agencies agree that a certain level of additional granularity would be valuable for future discussions about how much time the State staff spent on certain 'buckets' of FERC activities in an effort identify tiered fee options, there are challenges and concerns that prevent implementation at such a detailed scale.

- First and foremost, it is not clear to the State what the need is to identify staff time spent per project when the group embraces a 'pooled service' strategy rather than a 'fee-for-service' approach. Under the 'pooled service' approach, time spent by agencies may be under or over the amount of fee paid, based on the current need. The agencies will be tracking time spent on certain types of tasks and also identifying in the biennial report the detailed task list per project, so this additional level of transparency appears to only have value if a fee-payer views this fee as a fee-for-service. The agencies feel that since the fee only pays for half of the FERC program that it is not a fee-for-service, and many participants also expressed concerns about such an approach.
- There are administrative hurdles to tracking detailed work per project. The number of projects and task types in the state would result in a potentially unwieldy list of codes. Additionally, DFW staff in Regional offices and across a large variety of issue programs often provide technical assistance to FERC process without discrete funding for hydropower work. DFW estimates the total amount of this work at close to 2 FTE per year across the state. It is not feasible for DFW to create formal budget tracking codes for this work funded by non-hydro funding sources that is consistent with the tracking desired here.
- ECY and DFW do not support developing a "shadow database" to track time spent on discrete tasks per project outside of the formal budget coding process. Agency experience shows that redundant tracking outside of the budget process is not embraced consistently by staff and will likely lead to inaccurate information.

X. Conclusion and Recommendations

- Group recommends legislation to extend the sunset to 2027
- Stakeholder agreement on transparency and accountability contingent upon extension of fee
  - T&A implemented via stakeholders submitting the proposal in 'comments' in biennial report and agencies agreeing to implement the proposal in 'recommendations' section, commencing only when legislation to extend the fee is signed by the Governor.
- 10 year re-evaluation process suggestions
  - This process was effective and should be the approach used to re-evaluate the fee in advance of a sunset in 2027

XI. Appendices

a. Invite List

b. Meeting Participant List
c. Work Plan
d. Minutes