



Via Electronic Mail

April 1, 2016

Jennifer Holderman
 Email: jeho461@ecy.wa.gov
 Monika Kannadaguli
 Email: mkan461@ecy.wa.gov
 Jim Pacheco
 Email: jpac461@ecy.wa.gov
 WA Department of Ecology

Re: Sunset Falls Hydroelectric Project & Instream Flows

Dear Ms. Holderman, Ms. Kannadaguli and Mr. Pacheco:

We are writing to express our strong opposition to Snohomish County PUD’s “off the record” request to amend the Instream Flow Rule for the Skykomish River to facilitate development of the Sunset Falls Hydroelectric Project, also called the Sunset Fish Passage and Energy Project. In addition, we are writing to express our disappointment that NGOs were excluded from the “flow negotiation” meeting that Ecology held with the PUD on March 16, 2016. At our meeting with you last year it was our understanding that the negotiation of flows in the bypass reach would not be behind closed doors, but that appears to be the case. The proposed project clearly violates Washington state law as it seeks to reduce flows in the bypass

reach of the project in violation of WAC 173-507-020. Because of that legal obstacle, we have learned that the PUD has now asked Ecology to amend the instream flow rule. Such an opportunistic amendment would be improper and is opposed by the undersigned.

On January 28, 2016, the PUD filed the Draft License Application (DLA) with the Federal Energy Regulatory Commission (FERC). In the application, the PUD makes it very clear that it seeks to reduce flows in the bypass reach to as low as 220-250 cfs. *See, e.g.*, 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. These flows violate state law, which *requires* the following flows for the stretch of the river that includes the bypass reach:

Nov 1 – Mar 31	900 cfs
April 1 – 14	1100 cfs
April 15 – July 14	1250 cfs
July 15 – July 31	950 cfs
Aug 1 – Aug 14	650 cfs
Aug 15 – Sept 30	450 cfs
Oct 1 – Oct 14	550 cfs
Oct 15 – Oct 31	700 cfs

WAC 173-507-020. As noted in our previous letter (Attachment 1), the instream flow set by rule is a water right that may not be impaired by later issued water rights.¹ RCW 90.03.247; WAC 173-507-020(4); *Swinomish Indian Tribal Cmty v. WA Dept. of Ecology*, 178 Wn.2d 571, 593, 311 P.3d 6 (2013) (“[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.”). The instream flow rule that applies to this stretch of the river specifically requires that minimum flows will apply to later-issued consumptive water rights, including those issued to the PUD for operation of the Sunset Falls Hydroelectric Project.² WAC 173-507-020(4).

When we last met with you regarding this project, there appeared to be some confusion as to the location of the control station to determine compliance with the flows set by the rule. The existing rule and the DLA clearly identify the relevant control station, and it lies within the bypass reach.

¹ *See Hubbard*, 86 Wash. App. at 125 (“the minimum instream flow established in 1976 for the Okanogan River, WAC 173-549-020(2), has priority over subsequent water rights appropriators”); *Id.* (“[A]ny permit for beneficial use of surface waters must be conditioned to protect the minimum levels established by code for each river basin.”).

² 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)).

Figure 1. Map of Project from DLA, with Location of Compliance Gauge Overlaid on Top.

Sunset Fish Passage and Energy Project, No. 14295

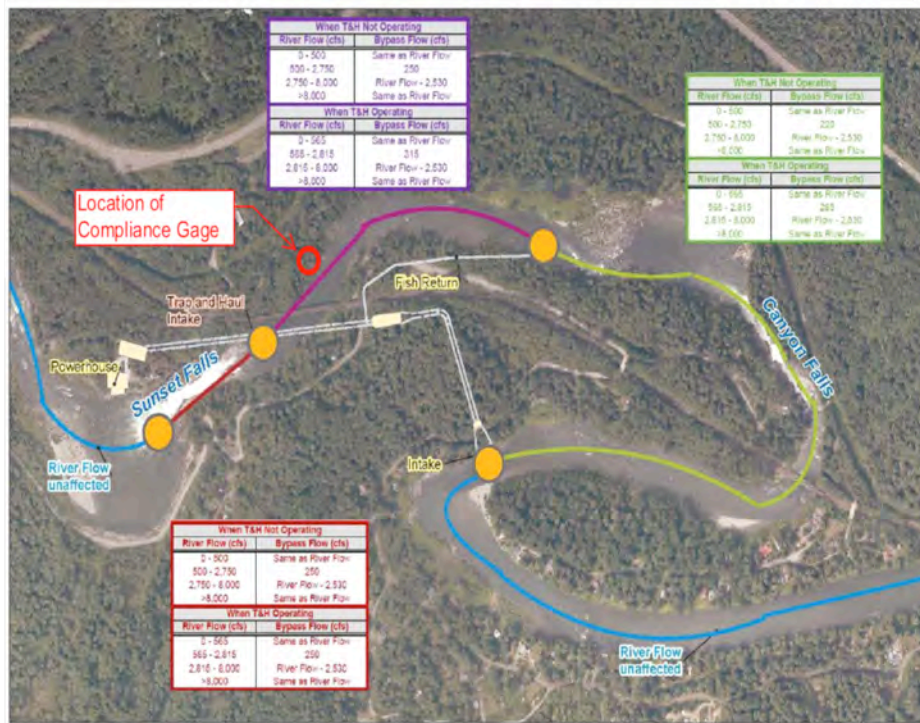


Figure E.3-19. Examples of operational flows to the powerhouse, diversions to the Trap-and-Haul Fishway, and instream flows in the bypass reach, at the compliance gauge, and over Sunset Falls, within a range of operating conditions.

As the waters of the state belong to the public, we hope and expect that Ecology, as the trustee of the waters of this state on behalf of all citizens, will protect and uphold its instream flow rules. Because the law is so clear on this issue, we ask that Ecology stand firm in ensuring that the PUD comply with the mandates of the instream flow rule, like all other entities must do. In addition, we respectfully ask that NGOs who have expressed an interest in this project be alerted to any and all meetings regarding the “negotiation” of flows for the bypass reach. This is a requirement of Washington’s Open Public Meetings Act: “All meetings of the governing body of a public agency shall be open and public and all persons shall be permitted to attend any meeting of the governing body of a public agency, except as otherwise provided in this chapter.” RCW 42.30.030. Setting aside the fact that flows are not subject to negotiation here given the instream flow rule, that the PUD’s request to change the instream flow rule was made off the

record causes us great concern and we hope it does for your agency as well. Thank you for your time and attention to this matter and we look forward to your response.

Sincerely,

s/ Andrea K. Rodgers

Andrea K. Rodgers
Attorney
Western Environmental Law Center

On Behalf Of:

Thomas O'Keefe, PhD
PNW Stewardship Director
American Whitewater

Megan Hooker
PNW Coordinator
Hydropower Reform
Coalition

Michael Garrity
Director, Rivers of Puget
Sound and Columbia Basin
American Rivers

Joshua Osborne-Klein
Conservation Chair
Sierra Club
WA State Chapter

Tom Uniack
Executive Director
Washington Wild

Allen Gibbs
Conservation Chair
Pilchuck Audubon
Society

Tom Hammond
President, North Cascades
Conservation Council
Conservation

Dave Werntz
Science & Conservation
Director
Conservation Northwest

Katherine Hollis
Conservation &
Advocacy Director
The Mountaineers

Andrea Matzke
Wild Washington Rivers

Karl Forsgaard, President
Alpine Lakes Protection
Society

Tom Derry
Director
Native Fish Society

Jonathan Stumpf
Board Chair
Wild Steelhead Coalition

Inessa Pearce, President
SVENA (Skykomish Valley
Environmental & Economic
Alliance)

Pete Rainey, M.D., PhD
Local Property Owner

Lora Cox
Local Property Owner

Art Petersen
Local Property Owner

Clyde Petersen
Local Property Owner

Mary Land
Local Property Owner

Lafe and Barb Altier
Local Property Owners

Stan & Becky Simonson

David Allais

David & Terry Wick

Local Property Owners

Local Property Owner

Local Property Owners

Harvey, Patty & Brook Harbaugh
Local Property Owners

Tracy Hoverson
Local Property Owner

Patty Hughes
Local Property Owner

Elizabeth Wangerin
Concerned Citizen

Conrad Lilleness
Concerned Citizen

Raylene Canby
Concerned Citizen

Valerie Spadt
Concerned Citizen

Martin Estrada
Concerned Citizen

Gwen Wessels
Concerned Citizen

Cc: Federal Energy Regulatory Commission; Snohomish County PUD