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March 4, 2005

Ms. Linda Goodman
Regional Forester
U.S. Department of Agriculture
Forest Service Pacific Northwest Region
333 SW First Avenue
Portland, OR 97204

Re: Box Canyon Hydroelectric Project-FERC Docket No. P-2042-013
Request for U.S. Forest Service to Prepare a NEPA Document and Issue a Record of Decision regarding Conditions and Recommendations Filed Pursuant to Sections 4(e) and 10 of the Federal Power Act on January 12, 2005

Dear Ms. Goodman:

This letter is being submitted on behalf of the Public Utility District No. 1 of Pend Oreille County, Washington ("District"), Licensee for the Box Canyon Project (FERC No. 2042-013). On January 12, 2005, the Forest Service ("FS") filed its final conditions under section 4(e) of the Federal Power Act ("FPA")[1] with the Federal Energy Regulatory Commission ("FERC") for the Box Canyon Project. In the past, pursuant to its prior practice and policies, FS provided an opportunity to file an administrative appeal of final 4(e) conditions pursuant to 36 C.F.R. Part 215, which applies to FS decisions documented in a Record of Decision ("ROD") following preparation of an environmental analysis as required by the National Environmental Policy Act ("NEPA").

However, in a memorandum dated May 12, 2003, the FS announced a change in its policy regarding its role in the hydropower licensing process. Under the new policy the FS purportedly "relies" on FERC's NEPA analysis, instead of its own, to support its section 4(e) conditions. As a result, the FS no longer issues a separate "NEPA decision document" to support its conditions,

[1] 16 U.S.C. § 797(e).

and as a consequence of this change in policy, these conditions are no longer subject to appeal under Part 215 of the FS's regulations.

FS has attempted to justify its new policy that it no longer needs to issue an appealable NEPA decision document on two grounds: (1) the NEPA "action" is actually FERC's and not the FS's; and (2) instead of issuing its own NEPA document as it had traditionally done, FS will instead rely on the document prepared by FERC. As will be outlined below, neither justification is warranted.

FS's first justification fails due to the mandatory nature of 4(e) conditions; FS remains the action agency for purposes of NEPA, not FERC. FS's second argument fails because FS has not properly relied on or "adopted" FERC's NEPA document. FS is attempting to selectively rely upon FERC's Final Environmental Impact Statement ("FEIS") on an issue-by-issue basis as a supporting NEPA document for some purposes, while at the same time rejecting it and declaring it inadequate wherever it is inconsistent with FS's 4(e) conditions. FS cannot have it both ways.

The purpose of this letter is to demonstrate that FS's new policy is inconsistent with the requirements of NEPA and to suggest two options FS could undertake to bring itself back in compliance with the requirements of NEPA. The first option would require FS to retract all of its criticism of the FERC FEIS and properly "adopt" it and its recommendations and withdraw the 4(e) conditions that the FERC FEIS does not endorse. Alternatively, should FS wish to stand by its criticism of the FERC FEIS, it must return to its prior policy of issuing its own EIS that provides the necessary support for its 4(e) conditions. Following this, FS must prepare a Record of Decision that will reopen access to the administrative appeal process that FS has improperly foreclosed through its arbitrary and capricious 2003 policy change.

I. Background

A. NEPA Requirements and FS's Practices

NEPA is the foundational national environmental statute applicable to nearly all actions taken or approved by federal agencies. NEPA requires that before a federal agency takes a major action, it must disclose the environmental impact of the action and evaluate alternatives that would have fewer environmental costs. With the limited exception of the President, the Congress and the courts, NEPA's requirements apply to ***all*** agencies of the federal government. Specifically, NEPA Section 102(2) requires federal agencies to include an environmental document in "every recommendation or report on…major Federal actions significantly affecting the quality of the human environment."[2]

Under the Counsel on Environment Quality ("CEQ") regulations that implement NEPA,[3] an agency must first prepare an environmental assessment ("EA") if an agency's regulations do not

[2] 42 U.S.C. § 4332 (2)(c).
[3] 40 C.F.R. Part 1500.

require the preparation of a full environmental impact statement ("EIS").[4] If the EA establishes that the agency action may have a significant effect on the environment, an EIS must be prepared.[5] Otherwise, the agency must issue a "finding of no significant impact" ("FONSI") accompanied by a "convincing statement of reasons" to explain why a project's impacts are insignificant.[6] Since the issuance of a new license for a hydroelectric project is generally considered to involve the potential of significant environmental impacts, an EIS or EA is typically required.[7] After an agency issues a final EIS, it then issues a "record of decision" ("ROD") that notifies the public of its decision and triggers the administrative appeals process.

B. FS's Prior Practice and Policy Were Consistent with the Requirements of NEPA

Prior to 2003, FS's policies and practices were consistent with the NEPA requirements outlined above. In FS's own Hydroelectric Handbook, § 32.53b "Documentation for the 4(e) Report," FS stated:

> When an Environmental Impact Statement is Necessary.
> If the proposed project may have a significant impact on the quality of the human environment as it relates to National Forest System lands, it is necessary to prepare an environmental impact statement (EIS) before responding with a 4(e) report containing conditions or making a recommendation concerning the project's compatibility with National Forest purposes. In that case inform FERC, in the initial 4(e) report, that there are significant impacts and request designation as a cooperating agency. Prepare the 4(e) report containing conditions after issuance of the final EIS and record of decision (sec. 52.11 and sec. 54.43).

In § 32.6(2)(b) "Decision Documents," the FS Hydroelectric Handbook, FS stated:

> Restate the decision in the 4(e) report cover letter (sec. 52.21). If an environmental impact statement was necessary, issue a separate record of decision according to the procedures in FSH 1909.15 section 47 (sec. 32.53b). If an environmental assessment was prepared, issue a decision notice and finding of no significant impact (sec. 32.7).

Furthermore, under its prior regulations, FS listed the types of agency decisions that were subject to appeal and included the following:

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[4] *National Parks & Conservation Ass'n v. Babbit*, 241 F.3d 722, 730 (9th Cir. 2001) (citing 40 C.F.R. 1501.4).
[5] *Id.*
[6] *Id.*
[7] *Confederated Tribes and Bands of Yakima Indian Nation v. F.E.R.C.*, 746 F.2d 466 (9th Cir. 1984).

(a) Project and activity decisions documented in a Record of Decision [ROD] or Decision Notice [DN], including those which, as a part of the project approval decision, contain a nonsignificant amendment to a National Forest Land and Resource Management Plan (36 CFR 219.10).[8]

As indicated above, decisions subject to appeal had to have a ROD or DN, which meant that the decision had to be supported by either an environmental impact statement or an environmental assessment and declaration of no significant impact prepared by the FS. Thus, under its traditional practice in a hydroelectric relicensing, FS would issue an ROD pursuant to NEPA that would give interested parties access to an administrative appeal of its final 4(e) conditions.