

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

**Public Utility District No. 1)
of Douglas County, Washington)**

Project No. 2149

**APPLICATION FOR APPROVAL OF THE WELLS ANADROMOUS FISH
AGREEMENT AND HABITAT CONSERVATION PLAN AND ADOPTION AS
AN AMENDMENT OF LICENSE**

To: The Commission

Pursuant to 18 C.F.R. § 4.201 (2003) of the regulations of the Federal Energy Regulatory Commission (the “Commission”), Public Utility District No. 1 of Douglas County, Washington (“Douglas”), the licensee, and National Marine Fisheries Service (“NMFS”), United States Fish and Wildlife Service (“USFWS”), Washington Department of Fish and Wildlife (“WDFW”), Confederated Tribes of the Colville Reservation (“Colville”), and the Wells Project power purchasers (“Puget Sound Energy”, “PacifiCorp”, “Portland General Electric” and “Avista Corporation”) (referred to collectively as “Parties” and individually as “Party”) hereby jointly submit this *Application for Approval of the Wells Anadromous Fish Agreement and Habitat Conservation Plan* (the “HCP Agreement”) and *Adoption as an Amendment of License* for the Wells Hydroelectric Project, FERC Project No. 2149 (the “Project”).

*Application for Approval of the Wells
Anadromous Fish Agreement and Habitat
Conservation Plan and Adoption as an Amendment of License*

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The Parties jointly seek to incorporate the HCP¹ Agreement, included in this filing as Attachment A, as a special article to the Wells Hydroelectric Project License which will replace the obligations contained in the 1990 Wells Agreement² (“1990 Wells Agreement”).

Concurrently with the filing of this Application, Public Utility District No. 1 of Chelan County (“Chelan”) is filing a similar *Application for Approval of Anadromous Fish Agreement and Habitat Conservation Plan and Adoption as an Amendment of License* for the Rock Island Hydroelectric Project, FERC Project No. 943 (the “Rock Island HCP Application”) and an *Application for Approval of Anadromous Fish Agreement and Habitat Conservation Plan as an Offer of Settlement and Adoption as an Amendment of License* for the Rocky Reach Hydroelectric Project, FERC Project No. 2145 (the “Rocky Reach HCP Application”). The Rock Island HCP Application and the Rocky Reach HCP Application also seek Commission approval of project-specific habitat conservation plans for the anadromous fish resources of the Mid-Columbia region and incorporation of those plans into the respective licenses for the Rock Island and Rocky Reach projects³.

¹ A habitat conservation plan or HCP is a planning document under section 10(a)(2)(A) of the ESA [16 U.S.C. § 1539(a)(2)(A)] “that is a mandatory component of an incidental take permit application.” *Endangered Species Habitat Conservation Planning Handbook*, page 8-1, U.S. Fish and Wildlife Service and National Marine Fisheries Service (November 1996). An incidental take permit is “a permit that exempts a permittee from the take prohibition of section 9 of the ESA [16 U.S.C. § 1538] issued by the FWS or NMFS pursuant to section 10(a)(1)(B) of the ESA.” *Id.* at 8-4. The HCP Agreement represents a settlement agreement of issues related to salmon and steelhead among all Parties and a habitat conservation plan between Douglas and NMFS.

² *Pub. Util. Dist. No. 1 of Douglas County, Wash.*, Order Approving Settlement Agreement (filed 10/30/90), 54 FERC ¶ 61,056 (January 24, 1991).

³ The Rocky Reach and Rock Island projects are located on the Columbia River immediately downstream of the Wells Project. Several stocks of anadromous fish migrate through all three projects and will be affected by all three of the habitat conservation plans that have been filed for Commission approval.

The HCP Agreement is an innovative approach for settling fish issues at the Project. Not only does it implement a long-term, comprehensive management plan for anadromous fish species and their habitat as affected by the Project, but it (along with the agreements submitted concurrently for the Rock Island and Rocky Reach Hydroelectric Projects) is the first HCP for a Commission-licensed hydroelectric project. The Parties to the HCP Agreement urge the Commission to grant this Application and approve the HCP Agreement without modification, since failure to do so could result in immediate termination of the HCP Agreement and the loss of important fish protection measures.⁴

Due to the relationship between this Application, the Rock Island HCP Application and the Rocky Reach HCP Application, the Parties to the HCP Agreement respectfully request the Commission to consolidate review of this Application with its review of the Rock Island HCP and Rocky Reach HCP Applications, particularly in connection with the assessments required under the National Environmental Policy Act (“NEPA”) and the Endangered Species Act (“ESA”). However, the Parties urge the Commission to preserve the flexibility to approve each Application separately when the record is adequate to support such action.

Prior to submitting this Application to the Commission, Douglas submitted the HCP Agreement to NMFS for regulatory review. Douglas submitted the HCP Agreement to NMFS along with Douglas’ application for individual Incidental Take Permit (“ITP”) for the Wells Project.⁵ NMFS’ regulatory review of the HCP Agreement

⁴ HCP Agreement §§ 2.1 (Automatic Termination Events), 2.2.3 (Governmental Action) and 9.3.2.

⁵ Application for Individual Incidental Take Permit for the Wells Hydroelectric Project, FERC No. 2149 (filed July 31, 1998). See also, *Application for Individual Incidental Take Permit for the Rocky Reach Hydroelectric Project*, FERC No. 2145 (July 30, 1998); *Application for Individual Incidental Take Permit for the Rock Island Hydroelectric Project*, FERC No. 943 (July 30, 1998).

included the preparation of an Environmental Impact Statement (“EIS”), the preparation of a Biological Opinion (“BO”) for operation of the Wells Project under the terms of the HCP Agreement and the preparation of three separate BOs for operation of the Douglas’ hatchery facilities under the terms of the HCP Agreement. NMFS has issued the requested ITP for operation of the Wells Project, based upon the findings contained within the EIS and the Wells Project BO.

While the Parties are confident that the public interest will be served by amending Douglas’s license to incorporate the HCP Agreement, as a special license article that replaces the 1990 Wells Agreement, the relationship of this proceeding to the NMFS’ issuance of the ITP for the HCP Agreement raises certain procedural questions concerning the obligations of both agencies under NEPA and the ESA.

To facilitate the Commission’s review of the application, FERC, through separated staff⁶, has participated as a “cooperating agency⁷” in connection with the preparation of the Draft and Final Environmental Impact Statements⁸ (“DEIS” and “FEIS”) under NEPA as part of NMFS’ evaluation of the HCPs.⁹ These efforts should eliminate, or at least minimize, the Commission’s need to prepare a supplement to the FEIS for these applications.

⁶ Notice, Docket No P-2149-000, (issued September 8, 1999).

⁷ 40 C.F.R. § 1501.6 (2002).

⁸ *Anadromous Fish Agreement and Habitat Conservation Plans, Draft Environmental Impact Statement for the Wells, Rocky Reach, and Rock Island Hydroelectric Projects (December 29, 2000); Final Environmental Impact Statement for the Wells, Rocky Reach, and Rock Island Hydroelectric Projects (December 2002)*. The DEIS and FEIS are included in this Application as Attachment E.

⁹ See *supra*, Footnote 5.

Furthermore, to facilitate the Commission's consultation with NMFS and USFWS with respect to ESA listed and ESA candidate species,¹⁰ pursuant to Section 7 of the ESA, prior to taking action on the applications NMFS and USFWS have each issued a letter proposing expedited consultation¹¹. These letters are included in this Application filing as Attachment B. An expedited consultation is possible in this case as a result of NMFS' analysis of issues in connection with the issuance of the ITP for the Wells Project based upon the Wells HCP.¹² The ITP for the Wells Project ("Wells ITP") and the Record of Decision ("ROD") related to the issuance of this permit are included as Attachment C. The 2003 BO for the Wells Project ("Wells BO") is included in this filing as Attachment D, is used to support the ROD for the Wells ITP. The DEIS and FEIS related to the issuance of the Wells ITP is also included in this filing and can be found in Attachment E. In addition to issuing the Wells ITP for operation of the Wells Project, NMFS has also issued three incidental take permits for the operation of hatcheries, which provide compensation under the Wells HCP. ("Hatchery ITPs"). The Hatchery ITPs provide ESA coverage for the operation of Douglas' spring chinook, steelhead and non-

¹⁰ The listed species under the USFWS' jurisdiction are: pygmy rabbits (*Brachylagus idahoensis*), showy stickseed (*Hackelia venusta*), Wenatchee mountains checker-mallow (*Sidalcea oregana*), Columbia River bull trout (*Salvelinus confluentus*), bald eagles (*Haliaeetus leucocephalus*), Canadian lynx (*Lynx canadensis*), gray wolf (*Canis lupus*), grizzly bears (*Ursus arctos horribilis*), marbled murrelets (*Brachyramphus marmoratus marmoratus*), ute ladies'-tresses (*Spiranthes diluvialis*), and Northern spotted owl (*Strix occidentalis caurina*). Candidate species for ESA listing include: yellow-billed cuckoo (*Coccyzus americanus*), Western sage grouse (*Centrocercus urophasianus phaios*) and the Washington ground squirrel (*Spermophilus washingtoni*). The listed species under NOAA Fisheries jurisdiction are Upper Columbia River spring chinook salmon (*Oncorhynchus tshawytscha*) and Upper Columbia River steelhead (*O. mykiss*).

¹¹ 16 U.S.C. § 1536(a)(2) (Section 7 of the Endangered Species Act requires Federal agencies to ensure that any action they authorize, fund, or carry out is not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of their critical habitat.)

¹² Permit No. 1391 (Included in this Application as Attachment C). National Marine Fisheries Service. Permit for Incidental take of endangered/threatened species. Permit issued August 20, 2003.

listed anadromous fish hatchery facilities. The ESA authorized operation of Douglas' hatchery facilities is an important component of the HCP Agreement. The three Hatchery ITPs, together with their corresponding BOs and NEPA documents (i.e., Findings of No Significant Impacts ("FONSI") and/or Environmental Assessments ("EA")), are included in this Application and can be found in Attachment F.¹³

Finally, to expedite section 7 consultation for USFWS ESA listed species, Douglas has prepared a draft Biological Assessment ("BA") related to the occurrence of USFWS ESA listed and ESA candidate species in the project area and the effects of the proposed action on such species. The draft BA is included in this Application as Attachment G. As an applicant for amendment of license, Douglas hereby respectfully to be designated as FERC's non-federal representative for the informal phase of ESA consultation with the USFWS in connection with preparation of the foregoing draft BA.

In order to complete the work necessary to implement a fully effective HCP Agreement, the Parties respectfully request the Commission to issue the requested order.

I. REQUESTED FOR EXPEDITED REVIEW

The Parties respectfully request the Commission to process this Application on an expedited basis and issue the requested order as quickly as possible. As explained more fully below, the Parties and FERC staff have worked closely to enable an expedited review by the Commission.

¹³ One of the three hatchery ITPs, Permit No. 1196, was issued in 2002 but is awaiting amendment to add Douglas and Chelan PUDs as permittees and to incorporate monitoring and evaluation actions called for by the HCP Agreement. The amended Permit 1196 is expected to be issued by 2004 at which time Attachment F will be supplemented with the revised permit and its supporting documentation.

The juvenile salmon and steelhead migration begins in April each year. Study planning, material ordering, contractor selection, and other preparations for the migration are generally completed between November and December of the year preceding the migration.

Furthermore, planning for the 2004 juvenile migration is a challenge. The Parties must implement both the HCP Agreement along with the 1990 Wells Agreement until the Commission replaces the 1990 Wells Agreement with the HCP Agreement. Also, in order for the NMFS to issue incidental take permits for the HCP Agreement's hatchery program, NMFS is required to amend existing hatchery permits that were issued to the Washington State Department of Fish and Wildlife, the operator of Douglas' hatcheries. Those permits are not effective until and unless the Commission issues the requested relief. Lastly, FERC's consultation with NMFS on this Application under section 7 of the ESA can be expedited based upon the fact that NMFS has already reviewed the HCP Agreement. However, significant delay could trigger a need to supplement the record. Therefore, it would greatly assist the preparation for and implementation of the fish mitigation and studies activities for the 2004 juvenile migration, if the Commission were able to issue an order prior to April of 2004 or, in the alternative, as soon as practical thereafter.

II. EXPLANATORY STATEMENT

This statement is provided as a summary of the events leading to the creation of the HCP Agreements and the principal terms and conditions of the Agreement. This summary is not intended by the Parties as a definitive statement or interpretation of the

rights and duties of the parties, which are expressed exclusively in the HCP Agreement itself. This Application does not modify or interpret the HCP Agreement.

A. Background

The history leading up to the HCP Agreement dates back to 1978, when NMFS, WDFW, the Confederated Tribes and Bands of the Yakama Indian Nation (“Yakama”) and other entities filed various petitions with the Commission seeking spill, improved flows, and other modifications of operations at the Project, as well as three other FERC licensed hydroelectric projects¹⁴ on the Columbia River in Washington State to protect downstream migrating juvenile fish. In response to these petitions, the Commission in March 1979 set for hearing, before an administrative law judge, a consolidated proceeding on juvenile fish protection at these projects.¹⁵ This consolidated proceeding, which is ongoing for two of the projects, has become known as the *Mid-Columbia Proceeding*. In 1979, under the direction of then Presiding Administrative Law Judge Allen Lande, the parties to the *Mid-Columbia Proceeding* negotiated a series of interim settlement agreements that provided for spill, hatchery compensation, and studies to improve fish protection.¹⁶ As licensee of the Wells Project, FERC Project No. 2149, one of the four FERC licensed projects involved in the *Mid-Columbia Proceeding*, Douglas

¹⁴ The other three projects are Chelan’s Rocky Reach Hydroelectric Project, FERC Project No. 2145, Rock Island Hydroelectric Project, FERC Project No. 943, and Grant County PUD’s Priest Rapids Hydroelectric Project, FERC Project No. 2114.

¹⁵ *Pub. Util. Dist. No. 2 of Grant County, Wash., et al.*, 6 FERC ¶ 61,210 (1979).

¹⁶ *Pub. Util. Dist. No. 2 of Grant County, Wash., et al.*, 8 FERC ¶ 63,064 (1979). The Commission approved these interim measures. *Pub. Util. Dist. No. 2 of Grant County, Wash., et al.*, 10 FERC ¶ 61,257 (1980).

was intimately involved in the *Mid-Columbia Proceeding* at the time these interim settlement measures were negotiated and filed.

On January 18, 1989, the Commission approved a long-term settlement agreement for the Rock Island Project, FERC Project No. 943¹⁷. During this same time period, Douglas was involved in the development of a highly effective juvenile bypass system and was actively negotiating a long-term settlement agreement for anadromous fish resources at the Wells Project. These negotiations resulted in the long-term 1990 Wells Settlement Agreement. Parties to the 1990 Wells Agreement filed an offer of settlement with the Commission, requesting that the Commission include the 1990 Wells Agreement in the FERC license for the Project. On January 24, 1991, the Commission: (1) approved the 1990 Wells Agreement; (2) incorporated the 1990 Wells Agreement as part of the license for Project No. 2149; and (3) terminated the *Mid-Columbia Proceeding* insofar as it pertained to the Wells Project¹⁸. Since 1991, Douglas has operated the Project pursuant to the license for the Project, including the incorporated 1990 Wells Agreement.

The *Mid-Columbia Proceeding* continued in regard to the two remaining FERC licensed projects, *i.e.*, Chelan's Rocky Reach Project, FERC Project No. 2145 and Grant County PUD's ("Grant") Priest Rapids Project, FERC Project No. 2114.

In August 1993, Douglas, Chelan, and Grant, (collectively, "Mid-Columbia PUDs") initiated discussions with NMFS, USFWS, and WDFW to develop a long-term, comprehensive program for managing fish and wildlife that inhabit the Mid-Columbia River Basin (the portion of the Columbia River from the tailrace of Chief Joseph Dam to

¹⁷ *Pub. Util. Dist. No. 1 of Chelan County, Wash.*, 46 FERC ¶ 61,033, at 61,212 (1989).

¹⁸ *See supra*, Footnote 2.

the confluence of the Yakima and Columbia Rivers). As these discussions proceeded and began to gain momentum, other parties, such as the Colville, the Yakama, the Confederated Tribes of the Umatilla Indian Reservation (“Umatilla”), American Rivers, and FERC staff, joined the negotiations.

These discussions first explored the possibility of developing an ecosystem-based plan for managing fish and wildlife resources inhabiting the Mid-Columbia River Basin, but because of the immense breadth of this type of plan the negotiating parties decided to focus on an agreement for aquatic species inhabiting the Mid-Columbia River Basin, including fish, plants and animals. After extensive review, the negotiating parties further concluded, given the likelihood that certain species of salmon and steelhead would be listed in the near future under the ESA and given the lack of information regarding other aquatic species, it was decided that the best basin-wide approach would be to develop an agreement for anadromous salmonids, specifically: spring, summer/fall chinook salmon (*O. tshawytscha*); sockeye salmon (*O. nerka*); coho salmon (*O. kisutch*); and steelhead (*O. mykiss*) (collectively, “Plan Species”).

On July 30, 1998, following five years of negotiations, Douglas submitted an unexecuted form of the HCP Agreement to the NMFS along with an Application for Individual Incidental Take Permit¹⁹. NMFS, as lead agency, and the FERC, as a cooperating agency, prepared a DEIS²⁰ on the unexecuted form of the HCP Agreement. Following a review of the public comments on the DEIS, the Parties developing the HCP Agreement engaged in further analysis, discussion and negotiations to clarify the terms of

¹⁹ See *supra*, Footnote 5.

²⁰ See *supra*, Footnote 8.

the HCP Agreement. Following these discussions, the Parties executed the HCP Agreement in April 2002, subject to regulatory review, and NMFS issued the FEIS in December 2002.

The efforts to achieve settlement were aided by the informal participation of certain members of FERC staff who were made available for this purpose by the Commission. Initially, Mr. John Schnagl assisted the Parties with the negotiations that led to the form of the HCP Agreement that was filed with NMFS in 1998. Subsequently, the Commission issued a Notice²¹ assigning Mr. Merrill Hathaway, Mr. Keith Brooks, Mr. Jim Hastreiter and Mr. Tim Welch to continue with this effort and providing for separation of functions pursuant to Rule 2202. As a result of this involvement, members of FERC staff participated in numerous meetings with the Parties that led to the revision and execution of the HCP Agreement submitted herein for approval. FERC staff acted as sounding boards for ideas, facilitated shuttle diplomacy, and offered concepts to resolve issues consistent with Commission policy.

As explained in more detail below, the HCP Agreement is a comprehensive and long-term management plan that imposes results-based protection and mitigation measures for specific anadromous fish species affected by the continued operation of the Project.

Following compliance with the Commission's obligations under NEPA, ESA and the Federal Power Act ("FPA"), the Parties respectfully request that the Commission issue an order as soon as possible²²: (1) approving the HCP Agreement, and (2)

²¹ See *supra*, Footnote 6.

²² See *supra*, Part I "Request for Expedited Review".

amending the Project license to replace the 1990 Wells Agreement, including all articles that refer to or implement its provisions, with the HCP Agreement as a special article thereof.²³

B. Summary of HCP Agreement²⁴

This summary is provided to satisfy the requirements of the regulations, and is not intended by the Parties as a definitive statement of interpretation of the rights and duties of the Parties under the HCP Agreement, which are expressed exclusively in the HCP Agreement itself.

The HCP Agreement is intended to be a comprehensive and long-term management plan for Plan Species affected by the Project, which will replace the obligations contained within the 1990 Wells Agreement that is currently included in the license for the Project. The Parties believe that the Wells HCP Agreement (along with the agreements submitted concurrently for the Rock Island and Rocky Reach Hydroelectric projects) is the first HCP for a Commission licensed project. The objective of the HCP Agreement is to achieve “No Net Impact” for each “Plan Species,” *i.e.*, chinook salmon, sockeye salmon, coho salmon, and steelhead, affected by the Project, and to maintain the same for the duration of the HCP Agreement. No Net Impact will be accomplished through fish passage at the Project, hatchery programs, and fish habitat work along tributary rivers and streams.

²³ See *infra* Part II.B.

²⁴ Capitalized terms not defined in this Summary have the meaning as set forth in the HCP Agreement.

The Parties believe that these actions will contribute to the rebuilding of habitat production capacity and basic productivity and numerical abundance of Plan Species.

The following sections outline the salient provisions of the HCP Agreement.

1. Survival Standards

Section 3 of the HCP Agreement provides that No Net Impact will be achieved on a specified schedule and maintained for the duration of the HCP Agreement for each Plan Species affected by the Project. No Net Impact has two components: (1) a Combined Adult and Juvenile Project Survival Standard of at least 91%²⁵ and (2) up to 9% compensation for Unavoidable Project Mortality provided through hatchery and tributary programs, with up to 7% compensation provided through hatchery programs and up to 2% compensation provided through tributary programs.²⁶

Douglas will be responsible for achieving 91% Combined Adult and Juvenile Project Survival through Project improvement measures. Douglas will also be responsible for: (1) funding the 2% Tributary Conservation Plan;²⁷ (2) providing capacity and funding for the 7% Hatchery Compensation Plan;²⁸ and (3) making capacity and funding adjustments to the Hatchery Compensation Plan to reflect and compensate for future increases in run size of each Plan Species. If Douglas is unable to achieve 91% Combined Adult and Juvenile Project Survival (or, as discussed below, 93% Juvenile

²⁵ See definition for Combined Adult and Juvenile Project Survival in HCP Agreement (sub-Section 13.3, page 50).

²⁶ See HCP Agreement Section 3 Survival Standards and Allocation of Responsibility for No Net Impact and Section 4 Passage Survival Plan.

²⁷ See *infra* Part II.B.5.

²⁸ See *infra* Part II.B.6.

Project Survival or 95% Juvenile Dam Passage Survival²⁹), Douglas must consult with the Parties through a Coordinating Committee, established pursuant to the HCP Agreement,³⁰ to jointly seek a solution.

2. Passage Survival Plan

In accordance with Section 4 of the HCP Agreement, Douglas agrees to achieve and maintain a Combined Adult and Juvenile Project Survival standard of 91%, meaning that 91% of each Plan Species (juvenile and adult combined) survive Project effects when migrating through the Project's reservoir, forebay, dam and tailrace, including direct, indirect, and delayed mortality wherever it may occur and can be measured (as it relates to the Project) given the available mark-recapture technology. The HCP Agreement acknowledges that adult fish survival cannot be conclusively measured. Based upon regional information, the HCP Agreement further acknowledges that adult survival is estimated to be 98-100%. Until technology is available to accurately differentiate hydro-related mortality from natural adult losses, initial compliance with the Combined Adult and Juvenile Survival Standard will be based upon the measurement of juvenile fish survival.

Limitations associated with the best available technologies have required the development of three standards for assessing juvenile fish survival at the Project. In order of priority they are: 1) Measured Juvenile Project Survival³¹; 2) Measured Juvenile

²⁹ See *infra* Part II.B.1 and II.B.2.

³⁰ See *infra* Part II.B.4.

³¹ See definition for Juvenile Project Survival in HCP Agreement (sub-Section 13.14, page 51).

Dam Passage Survival³²; and 3) Calculated Juvenile Dam Passage Survival. The survival of each Plan Species will be determined by using one of three survival measures.

For some Plan Species such as sockeye and subyearling chinook, where measurement of Juvenile Project Survival and Juvenile Dam Passage Survival is not yet possible, the Juvenile Dam Passage Survival Standard will be calculated based on the best available information, as determined by the Coordinating Committee.

The HCP Agreement contains three phases of implementation. Under Phase I, Douglas will implement: (1) juvenile and adult operating plans and criteria to meet No Net Impact Survival Standards; and 2) a monitoring and evaluation program to determine compliance with the survival standards.

Following the completion of the three-year juvenile survival studies³³, the Coordinating Committee will determine whether the pertinent survival standard has been achieved for each Plan Species³⁴. If a standard has not been achieved for a particular Plan Species, Douglas will proceed to Phase II (Interim Tools) for that species, where Douglas will implement a very specific set of interim measures that will then require additional evaluation toward the achievement of the pertinent survival standard. If those measures implemented under Phase II (Interim Tools) fail to achieve the pertinent survival standards, such Additional Tools will be chosen using specified criteria, such as likelihood of success, timing and cost-effectiveness. Douglas will continue to implement

³² See definition for Juvenile Dam Passage Survival in HCP Agreement (sub-Section 13.13, Page 51).

³³ Douglas has already completed the Phase 1 survival studies. Three years of Juvenile Project Survival studies were conducted and the results are documented in the HCP Agreement, *Appendix B: Wells Project Survival Estimates*.

³⁴ During the HCP negotiations, the Parties determined that the Juvenile Project Survival Standard had been achieved for steelhead and yearling chinook and that the Juvenile Dam Passage Survival Standard has likely been achieved for sockeye and subyearling chinook.

either Interim or Additional Tools until the survival standards being evaluated are achieved or until the Coordinating Committee determines the standards are impossible to achieve. The HCP requires Douglas to achieve No Net Impact by no later than 2013.

If the Coordinating Committee determines, either at the end of Phase I or anytime during Phase II, that a survival standard has been achieved, then the Parties will proceed to Phase III of the HCP Agreement, during which Douglas agrees to maintain the survival standard throughout the remaining term of the HCP Agreement. During Phase III, juvenile survival will also be evaluated, every ten years, as determined by the Coordinating Committee.

3. Reservoir Habitat and Water Quality

Section 5 of the HCP Agreement provides that when making land use or related permit decisions, Douglas will consider the cumulative impact of these decisions in order to satisfy the conservation objectives of the HCP Agreement, requirements of the Project's FERC license, and other applicable law. Douglas also agrees to notify and consider the comments from the Parties regarding any land-use permit application on Project lands.

4. Coordinating Committee

Section 6 of the HCP Agreement establishes a Coordinating Committee, consisting of one representative from each of the Parties and one non-voting observer acting on behalf of Douglas's power purchasers. The Coordinating Committee will oversee all aspects of the standards, methodologies, and implementation of the HCP Agreement by: (1) establishing protocols and methodologies for determining whether survival standards are being achieved for each Plan Species; (2) determining whether the

Parties are carrying out their responsibilities under the HCP Agreement; (3) determining whether No Net Impact is achieved; (4) determining the most appropriate survival standard to measure for each Plan Species; (5) approving studies prior to implementation; (6) reviewing study results and determining their applicability; (7) adjusting the Passage Survival Plan to address survival and Unavoidable Project Mortality; (8) resolving disputes; and (9) adjusting schedules and dates of performance. The predecessor to the proposed HCP Coordinating Committee, the Wells Coordinating Committee, has been very successful at resolving fish issues associated with the Wells Project without having to resort to alternative dispute resolution.

5. Tributary Conservation Plan

In Section 7 of the HCP Agreement, the Parties agree to implement a Tributary Conservation Plan (Tributary Plan). Under the Tributary Plan, Douglas will provide a Plan Species Account to fund projects for the protection and restoration of Plan Species habitat within the Columbia River watershed (from Chief Joseph tailrace to the Wells tailrace), and the Methow and Okanogan watersheds. The District's funding of the Plan Species Account will be considered full and complete compensation for an assumed 2% adult mortality³⁵ associated with the Project until actual adult survival rates can be accurately determined. Projects to be funded by the Plan Species Account will be selected by a Tributary Committee, consisting of representatives of the Parties, in accordance with criteria and priorities set forth in the HCP Agreement³⁶.

³⁵ See HCP Agreement, sub-Section 7.4, page 25 for background on the assumption of 2% project related adult mortality.

³⁶ See HCP Agreement sub-Sections 7.2 and 7.3, page 22 for criteria and priorities for selecting tributary projects. Also see HCP Agreement, Supporting Documents A and B.

Once the HCP Agreement has been approved by the FERC, Douglas has agreed to provide an initial contribution of \$1,982,000 in 1998 dollars to the Plan Species Account. This initial contribution will be in lieu of the first five years of annual payments to the Plan Species Account. Five years after the initial contribution to the Plan Species Account, Douglas will have the option of doing one of the following: 1) make annual payments of \$176,178 in 1998 dollars as long as the HCP Agreement is in effect; or 2) provide an up front payment of \$1,761,780 (representing 10 years of contributions) in 1998 dollars, but deducting cost associated with bond issuance and interest. Douglas will also provide annual financial reports of the Plan Species Account activity to the Tributary Committee. In addition, Douglas agrees to provide a tributary assessment program separate from the Plan Species Account. The tributary assessment program will be utilized to monitor and evaluate the relative performance of projects approved by the Tributary Committee and directly funded by the initial contribution to the Plan Species Account. The total cost of the tributary assessment program will not exceed \$200,000.

6. Hatchery Compensation Plan

Section 8 of the HCP Agreement establishes a Hatchery Compensation Plan, whereby Douglas agrees to provide funding and capacity to compensate for Unavoidable Project Mortality. Douglas will provide funding and capacity required to meet the 7% hatchery compensation level necessary to achieve No Net Impact. The Phase I production commitments for juvenile passage losses and initial inundation effects are satisfied by maintaining current production commitments as described in the 1990 Wells

Agreement. Upon the completion of Phase I³⁷, hatchery production commitments for passage losses will be adjusted based upon Juvenile Project Survival estimates.

The initial estimates of production capacity will be adjusted in 2013 and every 10 years thereafter to compensate for Unavoidable Project Mortality³⁸. Hatchery production commitments for passage losses will be adjusted periodically based upon the results of Juvenile Project Survival estimates³⁹. Douglas agrees to operate the hatchery facilities according to the terms of the Hatchery Compensation Plan developed by the Hatchery Committee and the required permits issued by NMFS pursuant to Section 10 of the ESA.

7. Assurances

In Section 9 of the HCP Agreement, the Parties provide certain assurances with respect to regulatory approvals, project licensing, limitation on reopening, and other matters. First, the Parties agree to discharge Douglas and the signatory power purchasers from claims and obligations, concerning the impact of the Project on Plan Species, except for the obligation to provide hatchery compensation for original construction inundation impacts, from the original construction to the date the FERC approves the HCP Agreement. The Parties further agree that provided that Douglas is in full compliance with its permit, the HCP Agreement, and FERC license provisions relating to Plan Species, the Parties will not institute any action under the ESA, the Federal Power Act

³⁷ Phase I survival studies conducted at the Wells Project have documented Juvenile Project Survival for yearling chinook and steelhead at 96.2%. Due to the inability to measure sockeye and subyearling chinook survival, hatchery compensation for these Plan Species will be maximized at 7%.

³⁸ See HCP Agreement sub-Section 8.4.5 Adjustment of Hatchery Compensation – Population Dynamics, page 31.

³⁹ See HCP Agreement sub-Section 8.4.4 Adjustment of Hatchery Compensation – Survival Studies, page 30.

(“FPA”), the Fish and Wildlife Coordination Act (“FWCA”), the Pacific Northwest Electric Power Planning and Conservation Act⁴⁰, the Essential Fish Habitat provisions of the Magnuson-Stevens Fishery Conservation and Management Act, or to require additional protection or mitigation for Plan Species pursuant to Title 77 “Fish and Wildlife” of the Revised Code of Washington (RCW).

Second, the Parties agree to support Douglas’s long-term license applications with respect to Plan Species filed with the Commission during the term of the HCP Agreement, provided that Douglas has adhered to the conditions specified in the HCP Agreement. Subject to certain limitations, the HCP Agreement constitutes the Parties’ terms, conditions and recommendations for Plan Species under Sections 10(a), 10(j) and 18 of the FPA and the FWCA. The USFWS and NMFS specifically reserve their authority under section 18 of the FPA, which may be exercised in the event this HCP Agreement terminates.

Third, during the term of the HCP Agreement, the Parties will not seek to invoke or rely on any reopener clause in the Project’s license for the purpose of obtaining additional measures for Plan Species, except under limited circumstances detailed in the HCP Agreement.

Fourth, the Parties agree that during the term of the HCP Agreement, they will not advocate for or support additional or different fish protection measures or changes in Project structures or operations other than those set forth in the HCP Agreement. The HCP Agreement does not preclude spillway or tailrace modifications; spill; structural

⁴⁰ See Attachment H.

modifications to accommodate fish passage facility improvements; and reservoir elevation changes if all Parties, including the District, agree.

8. Endangered Species Act

Section 10 of the HCP Agreement sets forth the requirements for the issuance of permits for Permit Species under Section 10 of the ESA⁴¹. These permits will authorize the incidental take of Permit Species in connection with operation of the Project and its hatcheries. NMFS has issued Douglas all but one of the permits required by Section 10. Those permits are included in this filing as Attachment C and Attachment F. Hatchery Permit No. 1196, to which Douglas and Chelan PUDs must be added as permittees, is expected to be amended by 2004 at which time Attachment F will be supplemented accordingly.

9. Term of Agreement

The HCP Agreement will remain in effect for a period of 50 years and will become effective upon the completion of all regulatory reviews. The Commission's incorporation of the HCP Agreement (without change) into the Project license in place of the 1990 Wells Settlement Agreement is all that remains for the HCP Agreement to become fully effective.

10. Termination

The HCP Agreement will terminate automatically: (1) at the end of the 50-year term; (2) if the Commission issues a non-power license for the Project; (3) if the Commission orders removal of the Project; (4) if the Commission orders a drawdown of the Project; or (5) if Douglas withdraws from the HCP Agreement.

⁴¹ 16 U.S.C. § 1539.

The Parties to the HCP Agreement may elect to withdraw from the HCP Agreement when at least twenty-years has elapsed from March 1, 1998, subject to the following conditions: (1) No Net Impact has not been achieved or has been achieved but has not been maintained; or (2) the Project has achieved and maintained No Net Impact, but Plan Species are not rebuilding, and the Project is a significant factor in the failure to rebuild. In addition, the Parties may elect to withdraw from the HCP Agreement at any time upon the occurrence of any of the following situations: (1) non-compliance by Douglas (2) governmental action that is detrimental to the HCP Agreement, because it materially alters or is contrary to any of the terms of the HCP Agreement; (3) impossibility; (4) revocation of the permits issued by NMFS under Section 10 of the ESA; or (5) another Party to the HCP Agreement withdraws, provided proper notice is given. In addition, NMFS and USFWS may withdraw from the HCP Agreement to seek drawdown, non-power operations, or other actions if No Net Impact is not achieved by 2018.

III. PROPOSED PROCEDURE FOR COORDINATED REVIEW

The Parties recognize that before the Commission may grant the Application, it must satisfy its obligations under NEPA, ESA, and the FPA. NMFS has completed a FEIS and section 7(a)(2) biological opinion (i.e., the 2003 Wells BO) evaluating the effects of its ESA section 10(a)(1)(B) permit (i.e., the Wells ITP) issuance on ESA listed species⁴². The Parties respectfully suggest that the Commission and NMFS employ a coordinated process for meeting their respective obligations under NEPA and ESA, as

⁴² See *supra*, Footnote 12.

outlined below. The Parties believe that this approach will facilitate a proper review while minimizing the potential for undue delay, duplication of effort, inconsistent results and unnecessary use of financial resources.

A. Proposed Approval Process

To accommodate the unique aspects of this case, the Parties jointly request that the FERC adopt the following procedures for coordinated review and approval of this Application.

1. Compliance With NEPA

As explained above⁴³, the FERC has been a cooperating agency with NMFS concerning the scoping and preparation of a DEIS and FEIS⁴⁴ for the NMFS approval of the HCP Agreements for the Wells, Rocky Reach and Rock Island Projects. The Parties believe that these efforts should eliminate, or at least minimize, the Commission's need to prepare a supplement to the FEIS for this Application, the Rock Island HCP Application and the Rocky Reach HCP Application. The Parties believe that the Commission may fulfill its NEPA obligations by conducting an independent review and adopting NMFS' FEIS for the purposes of its action.⁴⁵

2. Consultation Under Section 7 of the ESA

As indicated earlier, prior to submitting this application to the Commission, NMFS reviewed the HCP Agreement in response to Douglas' application for ITP under

⁴³ See *supra*, Part III "Proposed Procedure for Coordinated Review".

⁴⁴ See *supra*, Footnote 8.

⁴⁵ 40 C.F.R. § 1506.3(c) (2002).

the ESA for the Wells Project. NMFS has issued the requested ITP and the ROD related to the issuance of the permit. (See Attachment C). In order to make its permitting decision, NMFS issued a BO and a FEIS. (See Attachments D and E)

To facilitate the Commission's consultation with NMFS and USFWS with respect to listed species, pursuant to section 7 of the ESA, prior to taking action on the applications, NMFS and USFWS have each issued a letter proposing expedited consultation. (See Attachment B). An expedited consultation is possible in this case as a result of NMFS' analysis of issues in connection with the issuance of the individual ITPs based upon the HCPs.⁴⁶ To expedite section 7 consultation for ESA listed species⁴⁷ under the jurisdiction of the USFWS, Douglas prepared a draft BA on USFWS listed species. (See Attachment G)

If the Commission proposes to adopt the HCP Agreement and license amendments, NMFS and USFWS anticipate that the Commission will initiate section 7 (a)(2) consultation. At FERC's direction, NMFS and USFWS will consider the above documents⁴⁸ as sufficient biological assessment related to the effects of the proposed action on listed species.

NMFS anticipates that its ESA section 7(a)(2) analysis completed to support issuance of the Wells ITP would also apply to FERC action that is consistent with the ITP. NMFS expects to apply its analysis of the Wells ITP action to FERC's proposed action by letter issued shortly after FERC initiation of consultation. Upon FERC's

⁴⁶ See *supra* footnote 12.

⁴⁷ See *supra*, Footnote 10.

⁴⁸ Attachments A, C, D, E, F and G.

request to initiate formal consultation, related to the effect of the proposed action on USFWS listed species, the USFWS is prepared to expeditiously complete a biological opinion and incidental take statement under ESA section 7 (a)(2).

3. Commission Approval of HCP Agreement

The HCP Signatories believe that the process identified above to address NEPA and the ESA will place the Commission in a position to expeditiously complete its review of the Application under the FPA and issue an order as soon as possible: (1) approving the HCP Agreement, and (2) amend the project license to replace the 1990 Wells Agreement, including all articles that refer to or implement its provisions, with the HCP Agreement as a special article thereof.

IV. REPLACEMENT OF 1990 SETTLEMENT WITH THE HCP AGREEMENT IS IN THE PUBLIC INTEREST

The 1990 Wells Settlement Agreement provides that following March 1, 2004, any party to the 1990 Settlement Agreement may seek to modify the terms and conditions of the agreement.⁴⁹ Therefore, a proposal to replace the 1990 Wells Agreement with the Wells HCP is consistent with the 1990 Wells Agreement.

Since the adoption of the 1990 Wells Agreement the needs of the salmon and steelhead populations that are affected by the Project have changed. Upper Columbia River spring-run chinook and steelhead have been listed as “endangered” under the ESA⁵⁰. While Upper Columbia River summer/fall chinook and sockeye salmon were not listed, NMFS is closely monitoring their status⁵¹. Coho salmon are extinct in the Upper Columbia River, but efforts are underway to reintroduce this species. These events motivated the Parties to establish a higher level of protection for all anadromous species of salmon and steelhead affected by the Project. These new levels of protection are contained within the HCP Agreement, which is proposed as a replacement to the 1990 Wells Agreement.

The HCP Agreement addresses the survival improvement and hatchery rearing modifications needed to benefit the salmon and steelhead stocks affected

⁴⁹ See *supra*, Footnote 2.

⁵⁰ 64 Fed. Reg. 14,308 (March 24, 1999) (Upper Columbia ESU Chinook listed as endangered); 63 Fed. Reg. 13,347 (March 19, 1998) (Upper Columbia ESU steelhead listed as endangered).

⁵¹ 64 Fed. Reg. 14,308 (March 24, 1999) (Upper Columbia ESU summer/fall chinook); 64 Fed. Reg. 14,528 (March 25, 1999) (Okanogan River and Lake Wenatchee sockeye ESUs).

by the Project. The HCP Agreement establishes a level of protection of No Net Impact for salmon and steelhead affected by the Project; a level of protection that is greater than that provided by the 1990 Wells Agreement. The 1990 Wells Agreement protects juvenile salmon and steelhead with a bypass system, adult salmon and steelhead fish ladders, and increased numerical abundance of the species through hatchery supplementation. Bypass operations for juvenile fish passage is based upon arrival timing and the proportion of the migration available for collection and passage through the project.

The HCP Agreement protects salmon and steelhead in terms of the actual survival of the species, as opposed to defining specific actions that must be taken. The HCP Agreement defines specific survival standards to be achieved and a specific schedule for achieving those standards. Operation of the bypass system would be based upon biological results and numerical passage rates through the system. The HCP Agreement continues the use of fish ladders to protect adult salmon and steelhead but also establishes a survival standard for adults that must be achieved when technology becomes available to measure adult survival.

The HCP Agreement modifies the 1990 Settlement Agreement hatchery programs in a manner that satisfies the requirements of the ESA. The HCP Agreement hatchery program will continue unchanged through at least 2013. However, in 2013 the hatchery program may be modified by NMFS if necessary to comply with the ESA; a feature not found in the 1990 Wells Agreement. The HCP Agreement goes beyond project and hatchery improvements by also improving the survival of Plan Species through the enhancement of off-site

tributary habitat utilized by salmon and steelhead within the Mid-Columbia River Basin. Lastly, the HCP Agreement establishes a new collaborative decision making process.

The HCP Agreement provides a much higher level of protection for the salmon and steelhead affected by the Project than that provided in the 1990 Wells Agreement. Thereby, the Parties urge the Commission to find that replacement of the 1990 Wells Agreement with the terms of the HCP Agreement is in the public interest.

V. NON-CAPACITY AMENDMENT OF LICENSE

This Application satisfies the applicable requirements in the Commission's regulations for a non-capacity related amendment of the license.⁵² As the licensee, Douglas has engaged in extensive pre-filing consultations with the affected resource agencies and tribes concerning the proposed amendment to its license. As explained above, the proposed language of the license amendment is the HCP Agreement itself. The terms of the HCP Agreement were negotiated with NMFS, USFWS, WDFW and Colville⁵³, over a 9-year period, well in excess of the 60 days contemplated by 18 C.F.R. § 4.38(a). Accordingly, the Parties believe that the requirements applicable to the requested amendment have been met.

⁵² 18 C.F.R. § 4.200 (2001).

⁵³ The Yakama, Umatilla, Columbia River Intertribal Fish Commission, and American Rivers, also actively participated in the negotiation of the HCP Agreement.

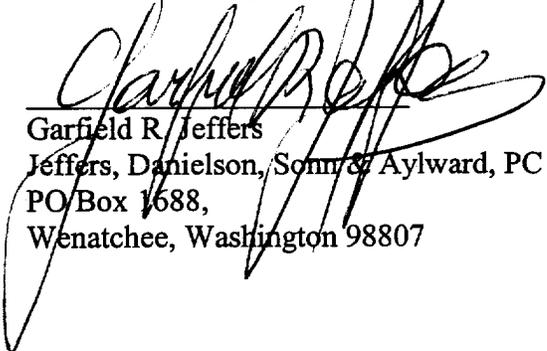
VI. REQUEST FOR COMMISSION ACTION

WHEREFORE, the Parties hereby respectfully request the Commission to find the HCP Agreement is reasonable and in the public interest, and accordingly, to approve the HCP Agreement without alteration by granting the Application and amending the license as requested herein.

VII. SIGNATURES

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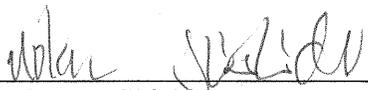
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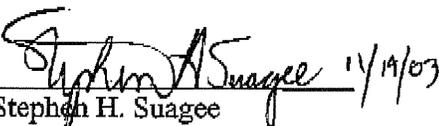
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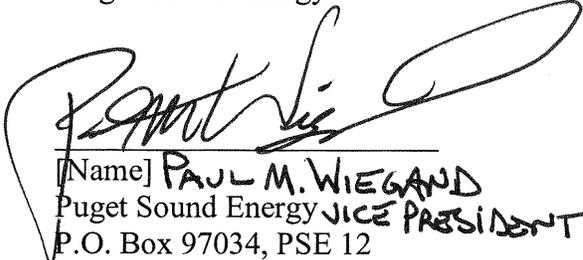
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DATED: August 4, 2003

VI. List of Attachments

Attachment A Anadromous Fish Agreement and Habitat Conservation Plan, Wells Hydroelectric Project, FERC No. 2149 (2002)

Supporting Document A

Aquatic Species and Habitat Assessment: Wenatchee, Entiat, Methow, and Okanogan Rivers (1998)

Supporting Document B

Biological Assessment and Management Plan (BAMP): Mid-Columbia Hatchery Programs (1998)

Supporting Document C

Briefing Paper Estimating Survival of Anadromous Fish through the Mid-Columbia PUD Hydropower Projects (2002)

Supporting Document D

Tributary Plan, Project Selection, Implementation, and Evaluation (1998)

Attachment B Letter from the National Marine Fisheries Service to the Federal Energy Regulatory Commission regarding Endangered Species Consultation related to Approval of the Anadromous Fish Agreement and Habitat Conservation Plan and Application for Amendment of License for the Wells, Rocky Reach, and Rock Island Hydroelectric Projects, FERC Nos. 2149, 2145, and 943 (November 10, 2003).

Letter from the U.S. Fish and Wildlife Service to the Federal Energy Regulatory Commission regarding Endangered Species Consultation related to Approval of the Anadromous Fish Agreement and Habitat Conservation Plan and Application for Amendment of License for the Wells, Rocky Reach, and Rock Island Hydroelectric Projects, FERC Nos. 2149, 2145, and 943 (November 06, 2003).

Attachment C

Permit No. 1391. Permit for Incidental Take of Endangered/Threatened Species – Wells Hydroelectric Project. Permit Issued to the Public Utility District No. 1 of Douglas County. August 20, 2003. <http://www.nwr.noaa.gov/1hydrop/hydroweb/hcp.htm>

Record of Decision for the proposed issuance of Permit No. 1391 authorizing Incidental Take of Endangered/Threatened Species. NOAA Fisheries, Northwest Region, Hydropower Division. August 12, 2003. <http://www.nwr.noaa.gov/1hydrop/hydroweb/hcp.htm>

Appendix A - Acronyms

Appendix B - Revised HCP Public Comments

Appendix C - NMFS Responses to Revised HCP Comments

Appendix D - National Marine Fisheries Service Section 10(a)(2)(B) Statements of Findings

Attachment D

Biological Opinion, Unlisted Species Analysis, and Magnuson-Stevens Fishery Conservation and Management Act Consultation for proposed issuance of a Section 10 Incidental Take permit to Public Utility District No. 1 of Douglas County for the Wells Hydroelectric Project (FERC No. 2149) Anadromous Fish Agreement and Habitat Conservation Plan. NOAA Fisheries, Northwest Region, Hydropower Division. August 12, 2003. <http://www.nwr.noaa.gov/1hydrop/hydroweb/hcp.htm>

Attachment E

Anadromous Fish Agreements and Habitat Conservation Plans, Draft Environmental Impact Statement for the Wells, Rock Island and Rocky Reach Hydroelectric Projects (December 29, 2000).

FEIS Volume I – Chapters 1-10

Anadromous Fish Agreement and Habitat Conservation Plans, Final Environmental Impact Statement for the Wells, Rock Island and Rocky Reach Hydroelectric Projects (December 2002). <http://www.nwr.noaa.gov/1hydrop/hydroweb/hcp.htm>

FEIS Volume II – Appendices

Appendix A - DEIS Public Meetings March 6, 2001

Appendix B - DEIS Public Comments

Appendix C - NMFS Responses to DEIS Public Comments

Appendix D - Chelan and Douglas County PUD Comments and NMFS Responses

Appendix E - Quantitative Analysis Report Summary

Appendix F - Economic Figures

Attachment F

Permit No. 1395. Permit for Incidental Take of Endangered/Threatened Species – Steelhead Hatchery Facilities. Permit issued jointly to WDFW, the Public Utility District No. 1 of Douglas County, and the Public Utility District No. 1 of Chelan County. October 2, 2003.

Supporting Documents

Biological Opinion for Permit No. 1395

Environmental Assessment (EA) & Finding of No Significant Impact (FONSI) for Permit No. 1395

Permit No. 1347. Permit for Incidental Take of Endangered/Threatened Species – Non-listed Anadromous Hatchery Facilities. Permit Issued to WDFW, the Public Utility District No. 1 of Chelan County, and the Public Utility District No. 1 of Douglas County. October 22, 2003.

Supporting Documents

Biological Opinion for Permit No. 1347

Environmental Assessment (EA) & Finding of No Significant Impact (FONSI) for Permit No. 1347

Permit No. 1196. Permit for Incidental Take of Endangered/Threatened Species – Spring Chinook Hatchery Facilities. Permit Issued to the Washington Department of Fish and Wildlife. August 16, 2002.

Supporting Documents

Biological Opinion for Permit No. 1196

Environmental Assessment (EA) & Finding of No Significant Impact (FONSI) for Permit No. 1196

Attachment G Draft Biological Assessment and Scope of Proposed Actions related to Implementation of the Wells Anadromous Fish Agreement and Habitat Conservation Plan. Prepared by the Public Utility District No. 1 of Douglas County. October 2, 2003.

Attachment H Letter of support from Northwest Power Council.