

Hon. Aimee K. Jorjani  
Chairman

Rick Gonzalez, AIA  
Vice Chairman

John M. Fowler  
Executive Director



August 24, 2020

The Honorable Neil Chatterjee  
Chairman, Federal Energy Regulatory Commission  
888 First Street, NE  
Washington, DC 20426

*Ref: Hydro Battery Pearl Hill Pumped Storage Hydroelectric Project  
FERC Project No. 14795-002 - Washington  
Rufus Woods Lake Reservoir, Douglas County, Washington  
ACHP Project 014448*

Dear Chairman Chatterjee:

In accordance with Section 106 of the National Historic Preservation Act (54 U.S.C. § 306108) (NHPA) and its implementing regulations, “Protection of Historic Properties” (36 CFR Part 800), I am writing to convey to you the comments of the Advisory Council on Historic Preservation (ACHP) regarding the Hydro Battery Pearl Hill Pumped Storage Hydroelectric Project (FERC No. 14795-002) (Project). On July 8, 2020, the director of the Office of Energy Projects at the Federal Energy Regulatory Commission (FERC) terminated the Section 106 consultation, having determined that further consultation to reach an agreement was unlikely to be productive. In accordance with 36 CFR § 800.7, the ACHP is providing these comments, which must be considered before reaching a final decision on the undertaking.

### **The Project**

The purpose of the project is to provide hydroelectric generation to help meet Washington’s power requirements by using surplus renewable power to pump water from the lower-elevation reservoir to the upper reservoir during low-demand periods and generate power for up to six hours when more energy is needed. The Pearl Hill project is intended to support grid reliability in the region and support renewable generation in the North West Power Pool (NWPP) sub-region.

The undertaking is proposed to be constructed on 28.8 acres of state land managed by the Washington Department of Natural Resources (DNR) in Douglas County, Washington. The project site lies within the traditional territories of the Okanogan Tribe, one of 12 constituent tribes of the Confederated Tribes of the Colville Reservation (CTCR). The project site is located just across the Rufus Woods Lake Reservoir in the Columbia River from the CTCR Reservation.

The proposed pumped storage project would withdraw water from the Rufus Woods Lake to fill a planned upper reservoir. During periods of peak demand, water from the upper reservoir will be released downhill through a penstock to a 77-foot square power platform to be located on the shore of Rufus Woods Lake. The power platform will house five vertical pumps and one 5-MW turbine generator. The power platform will be anchored to the shore using pilings and concrete foundations with rock anchors. Generating flows would discharge through a 42-inch-diameter half pipe containing seven baffles that will transition to a full pipe that

ADVISORY COUNCIL ON HISTORIC PRESERVATION

401 F Street NW, Suite 308 • Washington, DC 20001-2637  
Phone: 202-517-0200 • Fax: 202-517-6381 • [achp@achp.gov](mailto:achp@achp.gov) • [www.achp.gov](http://www.achp.gov)

then discharges through a velocity diffuser at a depth of about 20 feet. Electricity generated will be carried along a new 2,500-foot-long, 24.9-kilovolt transmission line (part buried, part affixed to the penstock) to an existing non-project power line. The planned upper reservoir would be a lined corrugated steel tank, 300 feet in diameter and 20 feet tall. The penstock will travel 3,400 feet above ground and 2,700 feet below ground. A new gravel road, approximately 3,847 feet long and 12 feet wide, will be built to enable access from a nearby county road.

### **Historic Properties**

The CTCR proposed that six pre-contact archaeological sites identified in the Area of Potential Effects (APE) for the undertaking constitute the Pearl Hill Archaeological and Traditional Cultural Property District. The archaeological sites in the district include lithic material sites, rock cairn sites, and two rock feature complexes that provide evidence of large-scale landform modification of a nature previously unseen within CTCR traditional territories. The tribe has determined that the sites represent a significant spiritual use area for the pre-contact ancestors of the CTCR.

The CTCR acknowledge that rock features such as these were sometimes used as caches and hunting blinds, but based on the location, these features were not likely associated with those uses. They sometimes were burials, and can have spiritual uses including vision questing and seeking spiritual power and were also used as sacred spaces or prayer rooms during ceremonies and rituals. The CTCR has opined that the district and its component sites are eligible for inclusion on the National Register of Historic Places as archaeological sites and as properties of religious and cultural significance which are associated with the cultural practices and beliefs of the Okanogan Tribe, as well as all constituent tribes of the CTCR. The CTCR has clarified that these practices and beliefs are rooted in tribal history and essential to the maintenance of tribal cultural identity and continuity. FERC, the proponent, and the Washington State Historic Preservation Officer (SHPO) have agreed with the CTCR's assessment.

### **Effects of the Project**

The CTCR believes that the construction and operation of the proposed undertaking will adversely affect the district and its constituent elements, directly and indirectly. The construction of the upper reservoir will destroy one of the lithic material sites that is a component of the district. Further, the undertaking will diminish the integrity of setting and feeling of the district by topographical modifications and other modifications of the surrounding landscape. The components of the project will be modern, industrial intrusions in the setting with visual and auditory impacts. The CTCR is also concerned that the new access road and associated trails will facilitate greater access to the project area and potential for damage to the components of the district.

Following additional study and consideration, the CTCR came to the conclusion that the project would be unacceptable in the proposed location, and no resolution of adverse effects would be sufficient.

### **The Section 106 Process**

The proponents of the Pearl Hill Project are required to apply to FERC for a license to construct, operate, and maintain the pumped storage hydroelectric project (P-14795) under Part I of the Federal Power Act, 16 U.S.C. §§ 791(a) through 825(r), as amended. They are also required to apply for permits from the Corps of Engineers Seattle District (Corps), which manages the Rufus Woods Lake Reservoir and has responsibilities for issuing permits to the licensee under Sections 10 and 14 of the Rivers and Harbors Act of 1899 and Section 404 of the Clean Water Act and Section 408 of 33 USC 408, as well as providing a real estate out grant. Review of the project and issuance of the required authorizations makes the project an undertaking subject to review under Section 106 by FERC and the Corps. The Corps designated FERC the lead federal

agency for the purposes of Section 106 according to 36 CFR § 800.2(a)(2). The other consulting parties in the Section 106 review included the Washington SHPO, DNR, and the CTCR. The ACHP entered the consultation formally in May 2020 but informally participated in meetings with FERC, SHPO, CTCR, and other consulting parties in 2019, and in 2020, prior to and after formally entering to facilitate the consultation process.

The Section 106 review was carried out according to FERC's standard protocols, relying on delegation of the initiation of Section 106 to the project proponent, Shell Energy North America (US), L.P. (SENA). Consultation regarding a number of archaeological sites initially identified was subsequently challenged by later discovery of additional archaeological sites with unique characteristics, which the CTCR has determined form the core of an archaeological district and cultural landscape of great religious and cultural significance. In light of the tribe's position that the project was unacceptable in the proposed location and there was no mitigation that could resolve adverse effects, the Washington SHPO indicated its reluctance to execute a Section 106 agreement to complete the Section 106 review.

Despite this, FERC developed and finalized a Programmatic Agreement (PA), which it circulated for signature by the consulting parties, which would require the development of a Historic Properties Management Plan (HPMP). The HPMP would include a set of measures intended to avoid, reduce, or mitigate any project-related adverse effects on National Register-eligible cultural resources within the project's APE, including site-specific data recovery plans and a detailed plan for studying the relationship of the Pearl Hill Traditional Cultural Properties District to the Rufus Woods Lake Archaeological District to determine its importance in the tribal history of the region and reporting on study results. The HPMP would also include a description of future construction and maintenance activities that would be subject to review by the Washington SHPO, Corps, and CTCR, a process for conducting that review and resolving adverse effects, and detailed construction monitoring procedures.

On July 8, 2020, FERC notified the ACHP and consulting parties it was terminating consultation, given that the SHPO continued to maintain that it would not sign the PA.

In accordance with the ACHP's regulations, comments were sought from consulting parties and the public regarding the project and its termination. Comments were received from the CTCR, the Washington SHPO, and DNR during the ACHP's review period. The Corps responded that it declined to provide comment. In its July 20, 2020, letter, the CTCR reiterated its previous communications that the adverse effects are not acceptable, that no mitigation is possible, and that the project should be relocated. The CTCR also believe that its concerns were ignored or minimized based on an inherent ethnocentric bias in the FERC review process. The Washington SHPO summarized its concerns on July 28, 2020, reaffirming its position that it would not sign the PA if the CTCR continues to object, dependent on coordination with the governor. The SHPO believes that requests for consideration of alternative locations were ignored. Finally, in a letter dated August 8, 2020, DNR affirmed that it supports the expansion of new energy projects to help Washington transition to a clean energy future. However, as manager for the state land where the project site is proposed, DNR does not intend to renew the lease and authorize development of the proposed project without concurrence regarding the resolution of adverse effects from the CTCR and the SHPO.

## **Findings**

The ACHP has made the following findings:

- The CTCR have provided thorough and detailed information that clarifies the nature and significance of the Pearl Hill District and the effects of the undertaking on it.

The Section 106 regulations require federal agencies to acknowledge that federally recognized tribes and

Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them. The CTCR, in its Technical Memorandum, clearly outlined the property's significance to the tribe, as well as the high degree of integrity it retains. As a result, FERC, SENA, the Washington SHPO, and other consulting parties were able to consider how the undertaking would diminish various aspects of the property's integrity in assessing the undertaking's effect.

- The cultural value of the identified historic property, and its importance as a property of religious and cultural significance to the CTCR, was not fully appreciated by FERC.

The CTCR has clearly articulated that core sites in the Pearl Hill District are unique and of exceptional religious and cultural significance for its members. The CTCR believes that its concerns have been ignored or minimized based on an inherent ethnocentric bias in the FERC review process. The CTCR has tried to communicate that the historic properties identified are not simply another collection of archaeological sites such that the adverse effect of constructing and operating this facility can be reasonably resolved through data recovery, paint colors on project components, and funding to the tribe to assist with monitoring and academic evaluations of the District. The CTCR has clearly detailed the unique nature of this significant property and its location in an area with a high degree of integrity, particularly in regard to setting. While FERC's communications with the CTCR are demonstrated in the administrative record, FERC's reliance on the project proponent and proponent's consultants to coordinate with tribes in carrying out research to inform the license application and the steps in the Section 106 review subsequent to the submission of the application may insulate FERC staff from the full import of the tribe's communications about significant properties.

- The FERC process hinders the consideration of a range of alternatives in Section 106 reviews.

Section 800.1(c) of the Section 106 regulations requires that federal agencies ensure that the Section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking. That is a requirement more easily adhered to by federal agencies that are planning undertakings that they will fund on land they manage. However, concern for the logic that informs that requirement is important for federal agencies that provide assistance or authorizations as well. Because FERC is not a siting agency, it asserts that it only considers the proposed action, no action, and alternatives that are within the general footprint of the proposed project in making its licensing decisions and that any major relocation of the project outside of this area would require withdrawal or denial of the current application and submission of a new application. This places a heavy reliance on a proponent's coordination with tribes to identify and avoid properties of significance very early in the planning process, even before a project site has been selected, to avoid submitting an application that locks in a location where significant historic properties have been or may be identified. This also makes it unlikely that a significant historic property identified after an application is submitted can be effectively avoided, thus limiting the federal agency to a resolution of adverse effects that may not address the significance of the property to the tribes. In this case, the CTCR has asserted the proposed undertaking will have unacceptable adverse effects on historic properties of extreme significance for the tribes, and, as such, no resolution of adverse effects is possible.

- Despite the potential for the proponent to be unable to obtain local and state authorizations, FERC intends to complete its review and make its decision regarding the license application.

FERC staff have made clear that DNR's decision to withhold a lease renewal would not have any bearing on the Commission's licensing decision, because any license issued would give the licensee five years to obtain the necessary permits and rights needed to construct and operate the project. SENA also said the DNR decision to not issue an occupancy permit to SENA at this time due to CRCT objections to the project would not deter the company from pursuing the project.

## Recommendations

The ACHP offers the following recommendations for your consideration:

- FERC should deny approval of a license for this project in this location.

As the project will only provide a limited contribution to support of the grid during times of peak demand, but will cause irreparable harm to a significant tribal historic property, it does not appear that the project's need is greater than the effects to historic properties. The CTCR have repeatedly stated throughout the process that this is a property of great cultural and religious significance that will be irreparably damaged by the project. In the CTCR's opinion, the effects cannot be mitigated. Accordingly, FERC should give careful consideration to denying approval for the project as currently proposed.

- If FERC decides to approve the license application, it should require that the proponent comply with the terms of the unexecuted PA, including the mitigation proposed by SENA as referenced in the Final Environmental Assessment and further steps developed in meaningful consultation between FERC and the CTCR.

As stated above, the CTCR sees the adverse effects to the Pearl Hill District and its components as both unavoidable and unacceptable. However, if FERC decides to approve the license application, it should take all steps it can to mitigate the harm to those resources. At a minimum, FERC should make compliance with the provisions included in the proposed PA and any steps to resolve adverse effects proposed by SENA a condition of the approval. To the extent that the CTCR are willing to continue consultation, FERC and its proponent should continue to provide opportunities for further discussion.

- FERC should review the way it considers the importance of properties of religious and cultural significance to tribes and how it engages in consultation with tribes when carrying out its public interest review for licensing projects.

FERC should consider to what extent adverse effects to unique and irreplaceable properties of religious and cultural significance to tribes are realistically included in and influence its decision-making process. In addressing this, FERC should examine its policies on how it meets its government-to-government responsibilities, and consider increasing the participation of its staff in consultation with tribes as early as possible to enhance their understanding about the significance of properties, the ways they may be affected by an undertaking, and the potential for achieving consensus on resolving adverse effects. FERC should also consider and address how its ex parte requirements may hinder its ability to fully engage in consultation with tribes.

- Where possible, FERC should take steps to improve the consideration of alternatives in its review of license applications, particularly when properties of significance to tribes may be affected.

The FERC review process severely limits the consideration of alternatives that could avoid adverse effects. FERC should take steps to ensure the guidance it provides to project proponents and tribes reinforces the need for coordination at the earliest steps in the planning process to improve the chances that properties of significance for tribes will be considered in project siting before a location gets locked in by the license application. If FERC cannot envision a way to modify its review to include consideration of multiple locations in the early planning stages or pre-application process, then FERC should be more willing to consider the option of denying a license application based on adverse effects to historic properties of high significance to Indian tribes or other stakeholders. We wish to note that the ACHP has an online, on-demand course regarding Early Coordination with Indian Tribes for Infrastructure Projects available at no cost to users, which could be shared with proponents seeking guidance on FERC's licensing process.

- FERC should clarify the coordination of its review and license issuance with state and local level reviews.

FERC asserts that it does not have to wait for, or consider, the status of state and local level authorizations for projects in its review regarding issuance of a license other than including a condition on such licenses specifying a time limit on a proponent receiving such state and local authorizations. FERC should provide clarification regarding the basis for this position, whether in statute, regulations, or policy. Given that state and local level authorizations may influence the participation of a SHPO or other state agencies in the finalization of the Section 106 review and may ultimately affect the ability of the proponent to comply with conditions of FERC's license, FERC should make information available to Section 106 participants on how it factors such authorizations into its Section 106 reviews.

### **Conclusion**

Section 800.7(c)(4) of the Section 106 regulations requires you, as the head of the agency, to take these comments into account in reaching a final decision on the undertaking. As required by Section 110(l) of the NHPA (54 U.S.C. § 306114), you may not delegate this responsibility. A summary of your decision regarding the undertaking that contains the rationale for the decision and evidence of consideration of the ACHP's comments must be provided to the ACHP prior to the approval of the undertaking and shared with the Section 106 consulting parties and the public.

You and I have an obligation as federal agency leaders to advance the official policies of the U.S. government set forth in the NHPA, directing that the federal government exercise leadership in the preservation of the nation's irreplaceable cultural heritage. Those policies include the following:

- 1) use of measures, including financial and technical assistance, to foster conditions under which our modern society and our historic properties can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations;
- 2) providing leadership in the preservation of the historic property of the United States and of the international community of nations and in the administration of the national preservation program;
- 3) contributing to the preservation of non-federally owned historic property and giving maximum encouragement to organizations and individuals undertaking preservation by private means, ... (54 USC 300101).

More broadly, as federal agency leaders, we have a trust responsibility to tribes as set forth in the Constitution of the United States, treaties, statutes, and court decisions.

In that spirit, I hope you will see these recommendations as a wise path forward. I can assure you that the ACHP would welcome the opportunity to work with FERC and the stakeholders to achieve the accommodation of our nation's historic properties as FERC carries out its essential mission.

I look forward to your response.

Sincerely,



Aimee K. Jorjani  
Chairman