

**Alpine Lakes Protection Society • The Wilderness Society
Aqua Permanente • Center for Environmental Law & Policy
Conservation Congress • Doug Scott Wilderness Consulting
East Kachess Homeowners Association • Endangered Species Coalition
Federation of Western Outdoor Clubs • Friends of the Bitterroot
Friends of Bumping Lake • Friends of the Clearwater • Friends of Enchantments
Friends of Lake Kachess • Friends of Wild Sky • Great Old Broads for Wilderness
Issaquah Alps Trails Club • Kachess Community Association
Kachess Ridge Maintenance Association • Kittitas Audubon Society
Middle Fork Recreation Coalition (MidFORC) • Methow Valley Citizens Council
North Cascades Conservation Council • North Central Washington Audubon Society
River Runners For Wilderness • Save Lake Kachess • Save Our Sky Blue Waters
Seattle Audubon Society • Sierra Club • Spokane Mountaineers
Spring Family Trust for Trails • Washington Wild
Wild Fish Conservancy • Wilderness Watch**

February 12, 2019

Tom Tebb
Director, Office of Columbia River
Washington Department of Ecology
1250 Alder Street
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Mike Kaputa
Director, Chelan County Natural Resources Department
411 Washington Street, Suite 201
Wenatchee, WA 98801

RE: **Defects in Final Programmatic Environmental Impact Statement (FPEIS)
for the Icicle Creek Water Resource Management Strategy**

Dear Directors Tebb and Kaputa:

This letter provides comments on outstanding gaps and deficiencies in the Final Programmatic Environmental Impact Statement (FPEIS) for the Icicle Creek Water Resource Management Strategy. The undersigned organizations provided comments in 2018 on the Draft Programmatic Environmental Impact Statement (DPEIS) and/or in 2016 during the scoping period. As you will see below, many of the concerns highlighted in our prior comments still remain.

The FPEIS fails to recognize that fundamental legal issues may not be resolved the way the FPEIS implicitly asserts they will be resolved – legal issues that will determine which projects can and cannot be built, including federal wilderness law and state water law. Failing to address these fundamental issues before any further public funding is spent on implementation is wasteful and irresponsible. Because the Icicle Work Group (IWG) relies on interrelated projects

to accomplish common goals, later invalidation of an individual project may require IWG to revise all of the other projects in IWG’s Preferred Alternative.

To avoid repetition, a copy of our July 30, 2018 letter (signed by 31 organizations) is attached and incorporated by reference. We reiterate our concern and respect for wilderness values, the Alpine Lakes Wilderness and its Enchantment Basin; the tribal treaty rights of the Yakama Nation and Colville Confederated Tribes; and valid, prior existing water rights in the Wenatchee River basin for agriculture. Our outstanding criticisms are detailed below.

1. The FPEIS Fails to Adequately Analyze Wilderness Impacts.

An EIS must address a proposal’s “relationship to existing land use plans.” WAC 197-11-444(b)(b)(i). Lands designated as wilderness under the Wilderness Act are subject to land use plans that are very restrictive in terms of allowed uses. An EIS must address the relationship between a proposal and those federally-established land use restrictions. Likewise, an EIS must consider impacts to “unique physical features,” “habitat,” “nonrenewable resources,” and “conservation.” WAC 197-11-444. All of these are components of the wilderness values sought to be protected by the Wilderness Act and the designation of wilderness areas under the act. An EIS must consider a proposal’s impacts on all of these and other environmental elements sought to be protected in designated wilderness areas.

Like the draft version, the FPEIS fails to meaningfully consider environmental impacts flowing from fundamental land use restrictions imposed and values sought to be protected by federal wilderness law. This omission violates SEPA and renders the FPEIS useless for subsequent environmental review of projects on or near designated wilderness lands. Indeed, a U.S. Forest Service official wrote: “The [Draft] PEIS is silent on Wilderness effects, so there’s no opportunity to tier from or use their analysis.” (October 31, 2018 email by Okanogan-Wenatchee National Forest Deputy Supervisor Erick Walker). The same is true of the Final PEIS, since it changed so little¹ from the draft version. The FPEIS Fact Sheet states “the PEIS will serve as the basis for future project-level environmental review that may be required and NEPA review that would be required for projects that receive federal funding or permitting.” This is wrong, because the FPEIS is fatally flawed in its failure to adequately analyze wilderness values and impacts.

The project as proposed and currently analyzed could violate the Wilderness Act, including federal agencies obligation to preserve wilderness character (16 USC 1133(b)) as well as the Act’s prohibition on structures and motorized uses (16 USC 1133(c)).

All federal agencies enforce the Wilderness Act. Congress has designated wilderness on lands managed by other federal agencies besides the U.S. Forest Service, such as the National Park Service, the U.S. Fish & Wildlife Service, and the Bureau of Land Management. All of these agencies have personnel who are familiar with the Wilderness Act and who know how to

¹ Other than the addition of a new Appendix A (copies of public comments on the Draft PEIS followed by cursory responses), the Final PEIS is almost entirely unchanged from the Draft version. The few Wilderness-related revisions included: “To address potential increased costs of work in the wilderness area, an additional 25-percent contingency has been added to all projects proposed in the wilderness area in the FPEIS.” App. A, response 12-32.

recognize impacts on Wilderness lands they manage, as well as impacts on nearby designated wilderness lands managed by a sister agency. Icicle projects put forth by any agency must acknowledge the gaps, omissions, and absence of analysis of Wilderness Act values and impacts in the FPEIS.

Our July 30, 2018 comment letter said that because of the deficiencies in the DPEIS (including the lack of Wilderness impacts analysis), Ecology and the County should withdraw, revise, and re-release the DPEIS once the deficiencies are addressed. The IWG co-leads declined to revise it to correct the deficiencies, explaining as follows in the FPEIS (Appendix A, response 12-1):

“Per WAC 197-11-405 a supplemental draft EIS is required if there are substantial changes to the proposal so that the proposal is likely to have significant adverse environmental impacts; or there is significant new information indicating, or on, a proposal's probable significant adverse environmental impacts. New information has not been found nor has the proposal changed in a way that new probable significant adverse environmental impacts are likely.” [emphasis added.]

The IWG co-leads' purported “response” is nonresponsive. The issue here is not whether to prepare a supplemental EIS. That issue would arise only if there were a prior EIS that was arguably in need of supplementation. Here, the issue is whether the draft EIS adequately addressed wilderness impacts. Thus, the issue is not whether wilderness impacts are “new information,” but whether they were incorrectly omitted from the draft EIS. The reality, of course, is that the proposal's impacts to wilderness plans and values have been known to federal agencies for a long time. As the Forest Service states, they are missing from the PEIS (e.g., OWNF statement that the PEIS is “silent” on wilderness impacts). The omission renders the EIS deficient and useless.

2. The FPEIS Fails to Adequately Analyze Water Rights of Icicle Peshastin Irrigation District (IPID) Which Are a Core Issue in the Preferred Alternative.

The FPEIS fails to account for IPID's relinquishment of some of its water rights. The proposal's impacts will vary depending on how this issue is resolved. This omission violates SEPA and renders the FPEIS useless for subsequent environmental review of projects involving relinquishment. The FPEIS fails to analyze how much of IPID's water rights remain (i.e., how much water is legally available) and fails to analyze the impact of building the dams to support that level of service. If the Eightmile Lake dam is rebuilt, it should remain at its current elevation, where it has been since at least 1990, because that elevation is the largest necessary to support whatever remains of IPID's relinquished water right.

Our July 30 comment letter said that because of the deficiencies in the DPEIS (including the lack of water rights relinquishment analysis), Ecology and the County should withdraw, revise, and re-release the DPEIS once the deficiencies are addressed. The IWG co-leads declined to revise it to correct the deficiencies, explaining as follows in the FPEIS (Appendix A, response 12-6):

“An extent and validity analysis, which is completed to determine if a water right or a portion of a water right has been relinquished by non-use or abandoned, is triggered by a

water right permitting action. There are several exemptions to relinquishment, which would be reviewed during an extent and validity analysis. At this point, there has been no water right permitting action that has triggered an extent and validity review. The process and timing of an extent and validity analysis is provided in Water Resources POL-1120.”

The fact that a permitting action has not yet begun is not a valid reason for the FPEIS to ignore the consequences of relinquishment here. SEPA requires reasonable forecasting of the future, including forecasts of future government actions related to the proposal. *See, e.g., King County v. King County Boundary Review Board*, 122 Wn.2d 648, 860 P.2d (1993); *Alpine Lakes Protection Society v. Washington Dept of Natural Resources*, 102 Wn.App. 1, 15, 979 P.2d 929 (1999). *See also Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1246 n. 9 (9th Cir.1984) (“Reasonable forecasting and speculation is ... implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as ‘crystal ball inquiry,’ ” quoting *Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (D.C.Cir.1973)). Where two or more outcomes are reasonably foreseeable, the EIS must analyze each.

There is too much at stake here not to address the water rights issue before proceeding further. As a practical matter, all of the streamflow numbers in the FPEIS will change if it is determined that relinquishment occurred and the Eightmile dam will be repaired at its current elevation, not four feet higher. The FPEIS also added a two-page section on the “Regulatory Framework” of water rights (FPEIS section 3.6.1.1), but it similarly dodges the central question about whether relinquishment happened here and the differing environmental impacts associated with each outcome.

Environmental review is designed to address the wisdom of taking or not taking the action in question. Accordingly, complete and meaningful review must come before governmental inertia and incremental decision-making takes on its own momentum and drives the project forward. *See Boundary Review Bd.*, 122 Wn.2d at 664 (“Even a boundary change, like this one, may begin a process of government action which can ‘snowball’ and acquire virtually unstoppable administrative inertia.”). *See also* William H. Rodgers, *The Washington Environmental Policy Act*, 60 Wash. L. Rev. 33, 54 (1984)(postponing review risks “a dangerous incrementalism where the obligation to decide is postponed successively while project momentum builds.”).

That environmental review must come at the earliest time – when a range of options are still practically on the table – is also a hallmark requirement of SEPA’s federal counterpart, the National Environmental Policy Act (NEPA), 42 U.S. Code § 4321 *et seq.* *See Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768 (9th Cir. 2006)(“Federal regulations explicitly, and repeatedly, require that environmental review be timely”); *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000)(review “must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made”); *Conner v. Burford*, 848 F.2d. 1441, 1446 (9th Cir. 1988)(“The purpose of an EIS is to apprise decisionmakers of the disruptive environmental effects that may flow from their decisions at a time when they retain a maximum range of options.”); *Save the Yaak Committee v. Block*, 840 F.2d 714, 718 (9th Cir. 1988) (“Proper timing is one of NEPA’s central themes.”). Here,

“complete and meaningful” environmental review includes an analysis of whether IPID’s remaining water rights would require any increase in Eightmile Dam’s height above its present level.

As we have consistently stated, the structure of the Icicle Work Group provides the opportunity to do things differently, which is at the heart of finding new solutions to long-standing problems. Addressing the water rights validity question up front and prior to a future “water right permitting action” is an example of doing things differently, within the safety of the IWG collaboration, and would respect the purpose and spirit of SEPA review. Instead, the IWG co-leads (Ecology and Chelan County) claim to be doing things differently, but instead hide behind the ways things are traditionally done, punting a fundamentally critical question down the road, thereby threatening the viability of actually accomplishing the ambitious goals of IWG and wasting millions of taxpayer dollars in the process.

3. The FPEIS Fails to Adequately Plan for Climate Change Impacts in the Icicle Watershed.

IWG made a significant investment in working with the University of Washington’s Climate Impacts Group, but incorporates very little of its analysis and long-term projections into the Icicle FPEIS’s forecast for future drought conditions. As stated by Aspect Consulting at a December 20, 2018 meeting with Ecology, Chelan County and other stakeholders, the graphs presenting future conditions “could underpredict drought years and overpredict non-drought performance,” which begs the question whether the analysis will truly meet future drought conditions. FPEIS Figure 2-6 (p. 2-22) shows that stream flows are predicted to fall short of the Icicle FPEIS’s goal of 60 cfs in the fall based on historic drought conditions. If these potential drought conditions are underpredicted (which they are since they are based on historic data and not modified to consider future flow conditions), the Preferred Alternative meets only the bare minimum needs, and certainly will not set the Icicle basin on the path to success for fishery goals in 2050 and beyond.

Furthermore, in the December 20, 2018 meeting referenced above, the IWG co-leads affirmed that the Icicle FPEIS focuses on addressing water needs only for the “short-term,” which the co-leads defined as a period of 20 years, which is simply not long enough given the proposed magnitude of public investment in this project. The January 27, 2019 *Seattle Times* article on the Icicle (“Crumbling dam foreshadows potential water-supply crisis”) quotes Dan Haller of Aspect Consulting stating that the plan indeed needs to account for and plan for climate change: “We’d hate to invest \$100 million in a suite of projects and then 20 or 50 years from now find they’re underperforming.” Ironically, the Preferred Alternative would do just that, as admitted during the December 20, 2018 meeting referenced above, and as indicated in data presented throughout the FPEIS. This means that at present the Preferred Alternative will not set the Icicle basin on the path to climate resiliency, as promoted by the IWG co-leads. At best, it helps agricultural interests and domestic users to have some level of reliability for the next 20 years, but does not go far enough for fish and wildlife and other out-of-stream interests and uses.

4. The FPEIS Punts Substantive Analyses to Future Project-Level Review, Which Threatens to Overlook Cumulative Impacts and Shifts the Burden of Planning and Review to Other Agencies.

The IWG co-leads consider the FPEIS a foundational document for project-level review and did not include additional substantive information in the FPEIS despite a robust response during the public comment period.

A failure to include updated information such as the IPID Comprehensive Water Management Plan or the City of Leavenworth’s Water System Plan, both completed in 2018, or any updated information on emergency dam and outlet repairs completed at Eightmile Lake in 2018 show either a deliberate exclusion of pertinent information or a lack of effort in the final stages of drafting the PEIS.

The FPEIS states that for projects for which adequate environmental review is contained in the FPEIS, “the permitting agency may decide to adopt the PEIS analysis and proceed to permitting . . . projects that may have new or additional significant adverse impacts not analyzed in the PEIS would require additional project-level review.” (FPEIS, p. 1-39-40) The requirement for additional environmental review at the project level does not excuse the obligation to analyze the issues as fully as reasonably possible at this time. To the extent impacts can be reasonably forecast now, the EIS must do so (see caselaw cited above).

5. The FPEIS Fails to Present an Adequate Water Conservation Plan and Commits Public Funding Toward Subsidizing Inefficient Use of Water.

In our July 30 comment letter, we provided extensive recommendations on ways to obtain new water supply while reducing demands on Icicle Creek by increasing conservation of water, such as by tightening up water delivery and consumption infrastructure in the Leavenworth area; demand management efforts; and recalculating future demand. However, most of our recommendations were ignored. A voluntary lawn buy-back proposal was added, but the FPEIS does not go far enough. More aggressive conservation efforts are needed.

Conclusion

The Icicle FPEIS implies that it is a comprehensive review of all of the environmental issues, but it is not. The FPEIS cannot be said to comply with the Guiding Principles of the Icicle Work Group, including compliance with federal laws such as the Wilderness Act, when analysis of those laws has been skipped over and punted to subsequent project-level review. The outstanding gaps and deficiencies in the Icicle FPEIS are egregious, and too significant for it to serve as the “foundation” for environmental review of any project in the Alpine Lakes Wilderness. Government agencies responsible for project-level review need to be aware of these defects, and refrain from basing their decisions on the Icicle FPEIS. Instead, lead agencies should make threshold determinations of whether projects are lawful in the first place, before proceeding with further review.

Sincerely,

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Karl Forsgaard, Past President
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Trish Rolfe, Executive Director
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Brock Evans, President
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Spring Family Trust for Trails

Judy Hallisey, President
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Melissa Bates, President
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Friends of Bumping Lake

Mike Town, President
Friends of Wild Sky

Mark Boyar, President
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Tom Martin, Council Member
River Runners For Wilderness

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Denise Boggs, Executive Director
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Lori Andresen, President
Save Our Sky Blue Waters

William Campbell, President
Friends of Lake Kachess

Terry Montoya, President
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Christine Johnson, President
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Attachment: July 30, 2018 comment letter of 31 organizations

cc: Governor Jay Inslee
Washington State Dept. of Ecology Director Maia Bellon
U.S. Senator Patty Murray
U.S. Senator Maria Cantwell
U.S. Representative Kim Schrier
Chelan County Commissioners Bob Bugert, Doug England and Kevin Overbay
Okanogan-Wenatchee National Forest Supervisor Mike Williams
Wenatchee River District Ranger Jeff Rivera
Icicle Work Group members