30 September 2002

The Honorable W.J. “Billy” Tauzin, Chairman
House Committee on Energy and Commerce
2125 Rayburn House Office Building
Washington, DC 20515-1919

The Honorable Jeff Bingaman, Chairman
Senate Committee on Energy and Natural Resources
364 Dirksen Senate Office Building
Washington, DC 20510-6150

Re: Alternative Conditions and Fishways Provisions Before Energy Conference Committee

Dear Representative Tauzin and Senator Bingaman:

Adoption of the Senate floor amendment Alternative Conditions and Fishways, Section 301, by the Energy Conference Committee would be a catastrophe for America’s rivers and fisheries.

With this subtly written amendment to the Federal Power Act, the hydropower industry will evade the responsibility it has had since the industry’s inception to provide fishways where its facilities block important fish runs, as well as, weaken its obligation to protect the federal lands that a dam impacts. The Senate amendment would end most of the fish passage improvements that nearly every state with hydropower facilities has obtained over the last decade as old dams have begun to be relicensed. In contrast, the House provision, which the House Energy and Commerce Committee unanimously accepted, adopts best practices and prevents any abuses that might occur. Please vote to adopt section 401 instead of Senate section 301.

The effects of the Senate provision are not apparent upon first reading and the Senate floor debate did not raise them. Yet, this amendment would change the fishway standard to emphasize hatcheries and off-site mitigation at a time when the Nation has learned that hatcheries are not a good substitution for access to the important spawning and rearing habitat of declining fish species. The amendment also stealthily attempts to ensure that the recommendations of a hydropower licensee will prevail over those of a federal agency secretary, states, tribes, and the effected public in administrative and judicial challenges.
House Section 401
Both the hydropower industry and the environmental community supported the positive changes House section 401 brings to the relicensing process and opposed all amendments to it in committee and on the floor. The provision preserves the responsibility and discretion of federal agencies to condition licenses as necessary to protect the resources they manage from the adverse impacts of a hydropower project and to prescribe fish passage above and below a dam if appropriate at that site.

Over the last hundred years federal agencies have both attempted to obtain too much with this authority and failed to exercise it at all, so the House provision allows all parties to a proceeding to propose alternatives to ensure that the best ideas and most reasonable approaches are brought forward and refined. The Secretary must accept an alternative so long as it provides as much protection and is either less costly to implement or will result in improved operation. As a result, the provision protects federal resources while ensuring that conditions and prescriptions are as inexpensive and efficient as possible. The provision is practical and based upon the experience the Nation gained when the licenses of over a hundred and fifty hydropower facilities expired in 1993.

Senate Section 301
The Senate section reduces the fish passage standard an alternative must meet by inserting the phrase “fish resources” and thereby diverting its emphasis to off-site mitigation and hatcheries instead of fishways. Under this provision a Secretary would have to accept alternatives proposed by a licensee, but not alternatives proposed by States and tribes, which have extensive expertise and responsibilities to protect water and fish resources. The provision also would allow a licensee to determine what level of resource protection the licensee believes is needed to protect federal lands that are impacted by the facility, rather than to meet the level of protection contained in the Secretary’s proposal. It also provides a licensee decision criteria and litigation tools to force its determination on a Secretary.

Further, Senate section 301 attempts to ensure that the views and determinations of a license applicant will prevail in suits and administrative proceedings by inappropriately requiring a condition or fish passage prescription to be evaluated using broad public purpose criteria instead of the site-specific impacts of a hydropower facility. Once a project has met the requirements of state and federal environmental and natural resource statutes, state public utility and siting commissions use similar criteria to determine whether a license is in the public interest. However, substitution of these criteria at this stage in the licensing of an energy facility is inappropriate.

More generally, Oregon opposes efforts to weaken state and federal mandatory conditioning authority, especially state certification authority under section 401 of the Clean Water Act. Our experience is that most delay in the process is due to incomplete license applications. The appearance of delay on the part of states, which cannot act affirmatively on incomplete information, stems from the Federal Energy Regulatory Commission’s decision to redefine the date at which a state’s review begins. While applicants often complain about delay, they suffer no penalty from the delay they often
introduce, because the Commission annually extends expired licenses until an applicant completes the process. States dislike extended delay, because projects continue to operate under licenses that do not meet the requirements of modern environmental law and knowledge. Relicensing does not jeopardize the hydropower industry. Hydropower facilities are among the most valuable assets in a utility's portfolio, selling for far more than their book value.

The relicensing experience of the last ten years demonstrates that the Commission's process can be shortened and achieve broad public support when participants collaborate and respect each other's needs and responsibilities. Oregon is committed to being a good partner in hydropower relicensing and believes that the desired streamlining and efficiency can be achieved without reducing protections for the natural resources impacted by hydropower facilities. I urge you to adopt section 401 of the House-passed version of HR 4 in place of section 301 of the Senate-passed version of the bill.

Sincerely,

John A. Kitzhaber, M.D.

cc: Members of the House and Senate Energy Conference Committee
September 30, 2002

Mr. Dave Sabo, Area Manager
Klamath Basin Area Office
U.S. Bureau of Reclamation
6600 Washburn Way
Klamath Falls, Oregon 97603

Dear Mr. Sabo:

Water Quality of Emergency Flow Releases
Iron Gate Reservoir to the Klamath River

The Department of Fish and Game (DFG) understands that flow releases were increased from 760 cfs to 1300 cfs at midnight on Friday, September 27, 2002, from Iron Gate Dam. This emergency release is in response to the major fish kill occurring in the lower Klamath River. It is not clear if flows from upper Klamath Lake and other associated reservoirs were also increased concurrently. DFG is extremely concerned that releases from Iron Gate Dam alone will rapidly deplete the epilimnion and lead to significant water quality degradation in the Klamath River. Depletion of the epilimnion without replenishment of flows from upstream will result in releases from the anoxic hypolimnion. Specifically, hypolimnion releases may lead to low dissolved oxygen, high biological oxygen demand, high pH and high ammonia concentrations which could result in further fish kills in the river. In addition, depletion of the epilimnion will result in the loss of suitable oxygenated habitat for fish in Iron Gate and could lead to a fish kill in the reservoir itself.

It is imperative that releases from Iron Gate Dam are coordinated with upstream releases from the Klamath Project as would occur under normal project operations. The DFG also believes that releases in accordance with past operating standards will result in the best opportunity to protect fishery resources given the existing circumstances.

Sincerely,

[Signature]
Donald B. Koch
Regional Manager

Conserving California’s Wildlife Since 1870
cc:  Mr. Kirk Rogers, Regional Director
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     Mr. Allen Foreman, Chairperson
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The Honorable LaVada Erickson, Chairperson
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The Honorable Bonnie Neely, Chairperson
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Mr. Dave Sabo  
September 26, 2002  
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