

**Joint Response from the State of Oregon and the Bonneville Power Administration to
Public Comment on the Proposed Willamette Mitigation Settlement Agreement**
Oct. 21, 2010

Introduction

The proposed Willamette Mitigation Settlement Agreement (Agreement) between the State of Oregon and the Bonneville Power Administration (BPA) received 79 public comments. The majority of comment (58) supported the Agreement and purchase of Trappist Abbey. Other comments filed in support of the Agreement included questions or critique of specific details of the Agreement. A smaller number of comments did not support the Agreement.

The BPA and the State of Oregon (the Parties), acting through the Oregon Department of Fish and Wildlife (ODFW) developed a coordinated response based on theme or topic. Rather than respond to individual comments, the Parties addressed themes or topics in a single response and identified individual commenters under topic headings. A number of the commenters had questions about how the parties negotiated the Agreement, particularly, in terms of settlement objectives and the amount of funding that will be dedicated to implementing the Agreement.

Changes in the Agreement in Response to Comments

BPA and ODFW reviewed the comments and in response to many of them modified final Agreement language. While the changes in response to comments are too numerous to list individually, comments did result in the following key improvements from the draft Agreement:

- Bolstering the permanence of the Agreement to satisfy federal wildlife responsibilities in the Willamette Basin and clarifying limitations of the State of Oregon to seek additional funding for the same.
- Elaboration on tribal participation in the Agreement and express support and recognition of the tribes' interests in using lands under the Agreement for traditional cultural practices where such practices do not conflict with the mitigation purposes of a project.
- Streamlining the collaborative process for developing and applying the project selection criteria and removed language on three-year solicitations in order to keep the process more flexible and open.
- Updating funding guidelines to accommodate maximum flexibility and assurance that BPA's funding commitment is fully executed.
- Providing details for BPA's long-term funding to ODFW necessary to ensure protection of habitat secured under the Agreement.
- Affirming the value of "cost share" as an element of the project selection criteria, and support for marketing "ecosystem services" to leverage funding available pursuant to the Agreement.
- Clarifying the provisions for quantifying fish habitat benefits and implementation of habitat protection and restoration actions in the National Marine Fisheries Services' (NOAA Fisheries) Willamette biological opinion (BiOp).

- Adding a provision specifically allowing the sale of Ecosystem Services as directed by Oregon law, provided this does not negatively impact the primary conservation purpose of any acquisition.

Comments and Responses

1. How did the Parties arrive at the acreage and monetary value of the Agreement? Is it reasonable as full satisfaction of federal agency wildlife mitigation obligations?

Responds to: Davis/US EPA, Wigg, Rabinowitz/ Sustain Eugene Org., Towner/PNGC, Kennedy/Confederated Tribes of the Grand Ronde Community of Oregon, Flores/Northwest River Partners, Corwin/PPC, Saven/NRU, Bear/Shoshone Paiute Tribes, Small/Shoshone Bannock Tribes

The Northwest Power and Conservation Council's (Council) Program assessed wildlife mitigation responsibility for the federal hydropower projects in habitat units (HUs). These HUs were quantified based on a Habitat Evaluation Procedure (HEP) analysis pre- and post inundation acreage at the various projects in the Columbia Basin. In the case of the Willamette, those HUs were quantified in 1985 and totaled a 94,275 HU loss across various species.

BPA disputed the area assessed for the construction and inundation impacts in the Willamette system. BPA has also disputed the number of HUs deemed lost, claiming that the number of species used to develop the assessments overestimated the impact of the projects by a significant factor. Previous attempts to settle the Willamette mitigation obligation focused on reaching agreement over the impact to HUs and failed to resolve the dispute between BPA and the management entities.

The Council's 2009 Fish and Wildlife Program (Program) identifies as its primary wildlife strategy to "Complete the current mitigation program for construction and inundation losses and include wildlife mitigation for all operational losses as an integrated part of habitat protection and restoration." (Section D.6, page 20). The Program also set forth guidelines for negotiated wildlife mitigation agreements the Council anticipated would ultimately address the primary strategy: "Whenever possible, wildlife mitigation should take place through long-term agreements that have clear objectives, a plan for action over time, a committed level of funding that provides a substantial likelihood of achieving and sustaining the stated wildlife mitigation objectives, and provisions for effective implementation with periodic monitoring and evaluation." (Section D.6.a, page 21). The Council noted that measureable objectives could include mitigated acres related to HUs.

In structuring the proposed Agreement, Oregon and BPA decided to concentrate on mitigated acreage as the objective of the Agreement. Both sides had experienced the frustration of dealing with the habitat unit assessments of previous HEP analyses, both from the original loss assessments and evaluation of mitigated properties purchased prior to the initiation of these settlement discussions. Both sides saw promise in the new habitat assessment methodology known as the Combined Habitat Assessment Protocols (CHAP) and Oregon began negotiations by applying an existing CHAP analysis to calculate HUs per acre. It became apparent that both sides preferred the certainty that an acreage calculation provided.

The Parties agreed that the total acreage previously mitigated through acquisitions prior to or during FY2010 totaled 9,427 acres. The Parties also agreed that the inundated acreage equaled 17,791 acres. BPA maintained a position that the total mitigated area should reflect the acreage inundated by the eight dams subject to the Council Program, and based its responses to Willamette wildlife project recommendations on this level of obligation. The resulting acreage was “bound” and includes 17,791 inundated acres minus 9,427 acquired acres, or 8,364 unmitigated acres.

Oregon’s position was that program losses were for construction and inundation including above pool losses for construction that should also be mitigated by any settlement agreement. As noted, Oregon based its acreage assessment on a CHAP analysis performed on the Lonestar Ranch property that calculated the habitat units at 2.75 HUs per acre. Dividing 2.75 HUs/acre figure into the 94,275 HUs identified in the Council Program, Willamette losses totaled 34,282 acres to be mitigated.

ODFW also wanted to include operational losses in the acreage to be mitigated. The Parties considered the information about operational impacts to wildlife habitat that surfaced in the Willamette BiOp consultations and then used their knowledge of the Willamette dams to estimate potential impacts from their operations. Overall, the effects were considered unlikely to be substantial. Instead of taking years, and probably millions of dollars, to study something that initial assessment indicated would be unlikely to be definitive, the Parties settled on a reasonable but generous amount of acreage to address operational impacts. Noting that these operational losses were assessed only for wildlife, and not for fish losses, the Parties agreed that losses attributable to operations accounted for an additional 1,000 acres. Thus, the ODFW “bound” equaled 35,282 acres impacted minus the 9,427 acres already mitigated – for a total of 25,855 to be acquired.

Both sides eventually agreed to split the difference in their “bounds.” Thus, the total mitigation responsibility was $(17,191 + 35,282)/2$, for a total of 26,537 acres of hydrosystem responsibility for construction, inundation and operations. Subtracting the already mitigated acreage from the total resulted in 17,110 acres to be acquired. Prior to finalizing the Agreement, BPA acquired an additional 230 acres of land for a US Fish and Wildlife Service project. Both Parties agreed to add that acreage to the already acquired total, resulting in the Agreement total of 16,880 acres to be acquired.

In the structure of the Agreement, the acreage to be acquired is a minimum figure. BPA has agreed to fund the Agreement through FY2025. If the minimum acreage is acquired before the close of FY2025, ODFW and its partners in implementation may continue to acquire mitigation acreage. Thus, the State and its partners may exceed the total mitigation figure and, in fact, the State hopes to exceed that number. The incentive in the Agreement is to acquire acreage in a cost effective and efficient manner and to potentially exceed the minimum acreage total. Both sides would view that development positively. Acres acquired above the minimum would represent additional steps toward ecosystem restoration that remains a priority for both Parties.

Subsequent CHAP analyses of the Zena Ranch, the Trappist Abbey and the Wildish properties yielded an estimated 4.3 HUs/acre. Averaging to include the CHAP Lonestar Ranch analysis

yielded an estimate of 3.91 HUs/acre. Performing the same calculation on the 94,275 total HUs identified in the Council Program for the Willamette would yield a total construction and inundation debt of 24,111 acres. Adding in 1,000 acres for operation losses would yield a total acreage figure of 25,111. That number compares quite favorably with the settlement total acreage of 26,537 acres. Both Parties believe that the Agreement figure represents a fair allocation of the total wildlife debt in the Willamette and that the recent CHAP analyses supports the conclusion that the acreage in the Agreement will adequately address the HU losses adopted into the Council Program.

After settling on the overall acreage figure, BPA and ODFW addressed the funding stream that would support attaining the minimum acreage figure. With the addition of the four FY2010 properties noted in the Agreement to the total mitigation already accomplished in the Willamette subbasin, the average purchase cost per acre for prior acquisitions is \$6,115. Keeping in line with that historic trend, the Parties agreed to an overall settlement that would average \$6,132 per acre for habitat purchases, without inflation. Costs, however, might well increase over the life of the Agreement. The Parties factored a 2.5 percent inflation adjustment beginning in FY2015, with a per acre average over time of \$6,982. In addition to covering inflation risks, this adjustment helped spread out the costs of the Agreement to reduce its rate impact, and accommodated the time needed with new, large agreements to ramp up to full project implementation capacity.

When the Parties considered required amounts for long-term operation and maintenance (O&M), they considered several factors. First, by seeking creative and alternative projects, some projects may be structured to not need O&M funding. Current projects, such as the Trappist Abbey, already fit this description, as the Trappist monks plan to dedicate a portion of the acquisition payment to stewardship of their land. Next, the Council's Independent Economic Advisory Board studied O&M costs basin-wide and noted that land trusts had an annual cost of \$14 per acre and ODFW had costs of \$24 per acre.¹ At \$25 per acre annually for 16,880 acres, the O&M cost for the Willamette wildlife projects would be \$420,000. If all 16,880 acres required O&M, the Parties estimate that to establish a trust large enough to fund this O&M responsibility with interest only payments would require between \$8 million and \$10 million from the Willamette Wildlife Fund.

Although recent acquisitions (including the Trappist Abbey and Wildish) have pushed beyond the \$6,982 per acre average, the Parties believe that knowing the amount of funding per year and having a target per-acre average will allow implementation to occur in a more cost effective manner. Other less expensive properties could serve to reduce per-acre overall costs so that a property or properties that exceed the per-acre average would still fit within the cost structure of the Agreement. Alternatively, projects that would potentially exceed the per-acre target could seek additional sources of funding or utilize other creative financing approaches to fall within the

¹ IEAB, Investigation of Wildlife O&M Costs (2007) <http://www.nwcouncil.org/library/ieab/ieab2007-4.pdf> See also, Brenda Lind, *The Conservation Easement Stewardship Guide* at 66 (1991) (Members of the Land Trust Alliance, a national organization of land trusts, recommended stewardship endowments for perpetual easements of \$1000 to \$7000 (in 1991 dollars) per easement, with monitoring costs running under \$200 annually). For the Lonestar easement that BPA recently secured, the Green Belt Land Trust obtained approximately \$70,000 for a one-time stewardship endowment from the seller to monitor the 199 acre, \$2.4 million dollar easement near Philomath, Oregon, in perpetuity.

Agreement's per-acre range. Both Oregon and BPA believe that they will achieve the minimum acreage guarantee for the cost per acre in the proposed Agreement.

Overall, the Agreement will provide a stable, predictable, and reasonable stream of funding that will be spent in an open and accountable way. This stability and accountability will benefit both the natural resources of the Willamette Basin and BPA's electric ratepayers.

2. Is the Agreement consistent with the Council's Fish and Wildlife Program? Why doesn't it include 2:1 mitigation as recognized in the Council Program?

Responds to: Kennedy/ CTGRCO, Bear/ SPT, Small/SBT

The Council's Program identifies as its primary wildlife strategy to: "Complete the current mitigation program for construction and inundation losses and include wildlife mitigation for all operational losses as an integrated part of habitat protection and restoration." (Section D.6, page 20) To address that strategy, the Council called upon the fish and wildlife managers to use the Council's loss assessments in Table C-4 of the Program as a starting point in negotiating long-term mitigation agreements.

The Council set forth some general guidance encouraging mitigation agreements: "Whenever possible, wildlife mitigation should take place through long-term agreements that have clear objectives, a plan for action over time, a committed level of funding that is expected to achieve and sustain the stated wildlife mitigation objectives, and provisions for effective implementation with periodic monitoring and evaluation." (Section D.6.a, page 21) The Council also included specific elements for the long term agreements, which include:

- Measureable objectives, including acres of habitat types and number of HUs by species to be acquired - The Agreement states that the Parties have defined the objectives in acres in an effort to avoid having to resolve specific technical issues associated with species – habitat stacking, proper crediting of past wildlife mitigation and crediting ratios.
- Consistency with the policies and objectives of the strategies in the Program, including Table C-1 - The Agreement remains consistent with the Program by addressing the primary wildlife strategy of completing the losses associated with construction, inundation and operation of the system. At the close of the period of the Agreement, BPA will have permanently completed mitigation requirements for construction, inundation and operation of the Willamette projects and addressed the losses assessed in the Council's Program. The focal habitats for the Agreement, developed through the Oregon Conservation Strategy, mirror those habitats identified in Table C-1 for the Lower Columbia Province.
- Commitment to open public process - The public process and project selection criteria to implement the Agreement are under development. There will be open solicitation to identify projects to implement the Agreement and an open, public prioritization process.
- Protection of riparian habitat benefitting both fish and wildlife - Historically, about half the projects in the Willamette Wildlife Mitigation Program have had a substantial riparian component that benefits anadromous and some resident fish in the subbasin. The John R. Palensky Conservation Area, Green Island, Big Island, Canby Landing, the Berggren Conservation Area and the Green Island Addition have all had a significant riparian

element that provides benefits to fish species. The ecosystem focus of the Wildlife Mitigation Program will continue through the Agreement. ODFW and BPA anticipate that “dual benefit” type projects will continue within the structure of this Agreement and have committed to at least 10 percent of the funding will go toward “dual benefits” projects.

- Incentives to ensure effective implementation with periodic monitoring and evaluation or a periodic audit - The Parties plan to annually report on progress toward the goals of the Agreement. The Parties have also committed to a three-year review of the implementation of “dual benefits” projects. Some funding in the expense portion of the ODFW operations and maintenance fund will also support monitoring and evaluation of species expected to benefit from the habitat acquisitions in the Willamette subbasin.
- Provisions for long-term maintenance – Long-term maintenance is covered through the Agreement by a provision of funds to ODFW to carry on the implementation of the program and to maintain ODFW-owned properties or properties funded through project 1992-06800 in their full extent through FY2025. BPA has also committed to negotiate addition operations and maintenance funds from FY2026 through FY2043. Properties already under separate contract agreements through BPA have not been addressed in this Agreement and will be subject to the Council’s project review and prioritization process. New properties purchased through capital funds will come into the upfront funding of O&M under the Agreement provisions, a new feature of the Agreement that effectively creates a stewardship trust fund for this purpose managed by ODFW. The Agreement also creates a Stewardship Account, to be funded with a portion of the capital allocated for acquisitions, which ODFW will manage and which will be used to create a grant program for long term maintenance of these acquisitions after the term of the Agreement ends.
- Sufficient funding to achieve the objectives - BPA has committed spending \$103 million in capital funding (not factoring in inflation adjustments) over the course of the Agreement. The agency has committed an additional \$26.226 million in expense funding for operations, maintenance and administration of the Agreement. The Parties believe that this substantial financial commitment over the life of the Agreement is sufficient to address the objectives.

Both ODFW and BPA believe the Agreement addresses these specific elements of the Council’s Program and the primary wildlife strategy of the Program. A mitigation ratio of 2:1 for wildlife is included in the Program, but is not a requirement for a wildlife settlement under the Program. The acres covered by the Agreement provide more than 1:1 mitigation for the acres actually flooded by the Willamette dams, and the potential for acquisition of additional acres is built into the Agreement as well.

3. Has the Council supported the Agreement?

Responds to: Kennedy/ CTGRCO, Bear/ SPT, Small/SBT

The Council received a briefing on the Agreement at its August 2010 meeting in Spokane. At the time, the Council was considering recommending funding request for the Trappist Abbey and Wildish properties. The Council was informed that BPA considered the completion of a

settlement agreement a precondition for purchase of both properties. The Council unanimously recommended funding the properties, with the condition of a completed settlement agreement.

Thus, the Council has implicitly endorsed the Agreement through the Council action in August supporting the need to conclude an Agreement for the purchase of the Trappist and Wildish properties. By signing the Agreement, ODFW and BPA will have fulfilled that condition. We anticipate that the Agreement will be incorporated into the Program through the next amendment process, as done for similar settlements.

4. Why is this Agreement just between BPA and Oregon? Why were the affected tribal governments not a party to the Agreement?

Responds to: Kennedy/ CTGRCO, Bear/ SPT, Small/SBT, Brunoe/Confederated Tribes of the Warm Springs Reservation of Oregon

In 2006, ODFW, tribes and others attempted unsuccessfully to settle the wildlife obligation for the entire state, not just the Willamette Basin. At the time, the partners to that 2006 effort attempted to divide the responsibility for what they considered the remaining wildlife obligation among the various partners and sized the obligation (in money and acreage) for each partner to the negotiation. The Willamette group included ODFW, Confederated Tribes of the Grand Ronde, Confederated Tribes of the Warm Springs Reservation of Oregon and the Confederated Tribes of the Siletz.

The 2010 proposed settlement departs from the 2006 effort by focusing solely on the Willamette Basin. ODFW and BPA have jointly settled on the total federal obligation for acreage to mitigate and for the amount of money BPA will pay over time to mitigate that acreage in the Willamette. Unlike the previous effort, the settlement does not assign responsibility for acquiring or protecting acreage to specific parties. Oregon and BPA have established a new, open process for selecting wildlife projects, so that that the acreage may be acquired by a variety of partners in the Willamette subbasin, including the three tribal governments, non-governmental organizations, and other governmental entities.

Time factors associated with the Wildish acquisition also played a role in the new approach. BPA and ODFW needed an agreement by October 30, otherwise the opportunity to secure the Wildish property would have been lost because the option to purchase would expire and the owners had informed the Nature Conservancy that they would not renew it. Negotiations between Oregon and BPA began July 23. By August 5, the agencies had met seven times and developed their principles of agreement.

The Confederated Tribes of the Grand Ronde, Confederated Tribes of the Warm Springs Reservation of Oregon and the Confederated Tribes of the Siletz received information as soon as the agencies had it available. Outreach to the tribes began August 9 in a series of exchanges between technical staff and leadership at the agencies and tribes. By August 17, the agencies had enough of a draft agreement to be able to share an overview with the tribes and others. The tribes then received a working draft Agreement on August 25, more than two weeks before the agencies released a draft for public review. The agencies made every effort to inform the tribes of the proposed Agreement in a timely manner and to reflect tribal interests in it. Two of the

tribal governments, Warm Springs and Siletz, sent letters supporting the Agreement. Although the consultation was not what the Grand Ronde desired, it was indeed as timely as possible.

The Parties recognize the special role our tribal partners play in the Agreement. We continue to welcome the tribes' participation in the Agreement, the development of funding criteria, and attainment of the desired acreage goals through projects proposed and implemented. The Agreement in no way alters, expands, or limits the individual legal rights of the three tribes.

5. BPA should demonstrate that the economics of the proposal make sense. In particular, BPA and Oregon should demonstrate the unique value of the Wildish acquisition and the reasons for its high cost.

Responds to: NRU

The Agreement resolves a decades-old dispute about BPA's wildlife mitigation obligation in the Willamette. The State would agree that BPA has fully met its obligation, reducing some earlier estimates (which BPA contested) of the acres remaining where BPA would fund mitigation by as much as half. The Agreement provides Oregon and its partners a defined funding stream that allows them to purchase as much land as possible using the available funds through FY2025. Because the funding levels are defined, it provides predictability for BPA ratepayers.

Both Wildish and Trappist Abbey are unusually large and biologically significant properties. BPA funded Combined Habitat Assessment Protocol analyses of the Trappist Abbey and the Wildish properties. The Abbey scored at 3.2 HUs per acre. Wildish resulted in 5.1 HUs per acre CHAP score. These were two of the highest habitat unit scores attained in the Willamette subbasin.

The Wildish property (1,271 acres) includes more than six miles of river and adjacent floodplains; also extensive wetlands, upland oak woodlands, native prairie and hardwood-conifer forest. Conservation and restoration of habitats on this property will benefit more than 30 fish and wildlife species considered at-risk by conservation scientists, including Chinook salmon, steelhead, northern red-legged frog, vesper sparrow and western meadowlark, Oregon's state bird. The property includes six miles of federally designated Chinook critical habitat, and five miles of bull trout critical habitat. Restoration may also benefit the federally-listed Oregon chub. The property connects with another 3,500 acres of public lands that are managed for conservation, providing an opportunity for partners to work together over 4,700 acres of extremely diverse and complex habitats.

The U.S. Army Corps of Engineers' recent Willamette Floodplain Restoration Study identified 11 large-scale restoration projects near the confluence of the Coast and Middle Forks of the Willamette. Four of the top five projects are on the Wildish property.

The 1,310 acre Abbey property contains coniferous forest, oak woodlands, oak savanna and riparian forest habitats that provide habitat for species that have seen a 93 percent decline in oak woodland and a 99 percent decline in oak savanna. The Abbey is located in an area rapidly giving way to viticulture and upscale resort development and remains one of the largest blocks of intact habitat in the Yamhill area. Key species on the Trappist Abbey include the acorn

woodpecker, western gray squirrel, western bluebird, the endangered Fender's blue butterfly and Taylor's checkerspot butterfly. The Trappist monks have agreed to place a portion of the money they would receive into a fund for benefit of the conservation easement, resulting in no additional operations and maintenance costs to BPA and its ratepayers.

6. Why are there dual benefit projects for fish and how will this affect Willamette Biological Opinion funding? Is there still sufficient funding for the habitat projects under the Willamette BiOp?

Responds to: Williams/WR, Wolf and Hamilton/ Oregon Trout Unlimited and NW Sportfishing Industry Association, Bassett/Native Fish Society, Kennedy/CTGRCO, Bakke/Native Fish Society

The Parties specifically acknowledge that the Agreement is a wildlife agreement and further note that fish do not constitute wildlife under the structure of the Agreement. Thus, it is not surprising to note that the Agreement says nothing about fish passage or funding of fish-related projects. However, the settlement specifically endorses projects with dual benefits for wildlife and fish, particularly anadromous fish covered by the Willamette BiOp.

Historically, about half the wildlife projects funded in the Willamette subbasin through the Council Program have had a significant riparian component associated with them. Green Island, Big Island, Canby Landing, Little Willamette, the John Palensky Conservation area and other projects, though purchased for their wildlife values, also provide significant benefits for anadromous and resident fish species. The Agreement specifically acknowledges these "dual benefit" types of projects, projects that would benefit at least a listed fish species. The Wildish acquisition, for example, has fish benefits associated with six miles of major streams, and has been provided credit from under the Willamette BiOp. (This credit assumes acquisition and certain restoration funded by BPA under its current contract with The Nature Conservancy.) The Parties stipulate that a minimum of ten percent of the funding in the Agreement will go toward dual benefit projects. Over the course of the Agreement, ODFW and its partners would spend a minimum of over \$10 million for "dual benefits" under the Willamette BiOp.

Other sources of money will provide the base funding for Willamette BiOp related work, outside the scope of this Agreement. BPA will continue to provide funding of between \$500,000 to \$800,000 per year under BiOp RPA 7.1.3. The Corps will seek Congressional appropriations for funding BiOp fish work under its various authorities. Other funding from State and NGO partners may be provided. "Dual benefits" projects will help augment those other sources of funding, but not replace them. Through Attachments 1 and 5, BPA, Oregon, and NOAA Fisheries have clarified the funding under the BiOp.

Attachment 5 describes BPA's ongoing expense funding to fulfill its obligations for RPA 7.1.3 in the Willamette BiOp. If "dual benefits" projects exceed 15 percent of the Agreement funding over time, BPA, NOAA Fisheries and ODFW will revisit the BPA funding commitment for Willamette BiOp implementation. Exceeding the 15 percent threshold guarantees a review of the commitment, to evaluate whether the funding could be reduced and if so by what amount. No funding reductions have been pre-determined.

7. Why is the agreement with NOAA Fisheries on fish benefits not being subjected to public review?

The Agreement with NOAA Fisheries over fish benefits is a public document and is appended to the agreement under Attachment 1. It is part of the ongoing implementation of a BiOp RPA, and is not a document that requires public review. The importance of BiOp credits for the Wildish property was discussed by BPA and ODFW as they briefed regional agencies, tribes, and conservation groups regarding the Agreement beginning in August 2010.

8. You do not specify the timeframe for discharging the Willamette dam wildlife obligation. Is this in perpetuity?

Responds to: Towner/PNGC, Saven/NRU, Flores/NRP, Corwin/PPC, Wolf and Hamilton/OTU,NWSIA

The Agreement is a permanent settlement of wildlife mitigation issues in dispute under the Northwest Power Act and applicable law. The Parties understand the concern and have addressed it by adding the word “permanently” in section IIIC, so that the Agreement now reads “Oregon agrees that after fulfilling its total wildlife mitigation obligations under this Agreement, BPA will have permanently satisfied the federal wildlife mitigation duties for the Willamette dams under applicable law.” In addition, future funding limitations and exceptions have also been described in greater detail.

9. The Agreement lacks a reference to the sale of ecosystem services in which Agreement funds are invested.

Responds to: Vickerman/Defenders of Wildlife

The Parties revised the final Agreement and its attachments to address this contingency. Please see Section IIF3 of the Agreement.

10. Why have a blanket 2.5 percent inflation adjustment?

Responds to: Towner/PNGC, Saven/NRU, Flores/NRP, Corwin/PPC

Costs might well increase over the life of the Agreement. Inflation rates have been low recently, but vary over time. The Parties included a 2.5 percent inflation adjustment beginning in FY2015 as a reasonable approach to factor in inflation. This is the same inflation adjustment rate included in the Columbia Basin Fish Accords.

11. Why is BPA proposing this Agreement with Oregon when Oregon has been litigating against the FCRPS?

Responds to: Towner/PNGC, Saven/NRU, Flores/NRP, Corwin/PPC

We understand this concern raised by numerous BPA customers. The intent of the Agreement is to foster a cooperative relationship as partners with Oregon and to permanently resolve wildlife mitigation commitments. Both BPA and Oregon are entering into this Agreement in good faith and will be working as partners in the Willamette Basin. Under the Good Faith Implementation provisions of Section IV.A., both Parties will mutually consult together before making decisions

implementing this Agreement and support it at all of their respective organizational levels. They will also make best efforts to coordinate on other issues relating to the natural resources of the Willamette Valley, resolving them “in a manner that preserves this Agreement and the spirit of collaboration as partners fostered by the Agreement.” We both hope that this Agreement might set the stage for expanded partnership in the future.

12. Are operations and maintenance funding for existing projects part of the ODFW funding or separate from this Agreement?

Previous operations, maintenance and restoration agreements for the Tualatin River National Wildlife Refuge, Amazon Basin/West Eugene Wetlands, and the Wildish property are not covered under the Agreement and will be negotiated separately. However, O&M currently being managed under the existing contract with ODFW, including the Palensky Wildlife Area, are included under the Agreement through the ODFW Operation and Maintenance Fund under section II.G.2. As noted previously, there is no O&M payment for the Trappist Abbey property. O&M for future acquisitions will all occur under the terms of the Agreement.

13. Make the Agreement as flexible as possible by eliminating the detail of the WWHMG and three-year solicitations.

Responds to: Kennedy/CTGRCO, Williams/WR, Five Land Trusts, Vickerman/DoW

The Parties agree and have deleted reference to the WWHMG and have removed language on three-year solicitations. Our intent is to keep the project solicitation, review and prioritization process open, flexible and non-bureaucratic. We encourage our partners work with us to design the process that will implement the Agreement.

14. Provide maximum funding flexibility, particularly in the first three years. What about projects that are currently under development for 2011-2013?

Responds to: Five Land Trusts, Moll/MRT, Wigg

The Parties understand the concern about uncertainty for FY2011-2013. Projects that are currently under discussion or evaluation by BPA for FY2011 and beyond will now all be included under the funding provisions of the Agreement. The current economic condition in the Willamette has allowed significant conservation opportunities on the market. We have attempted to build in funding flexibility to move money forward to address conservation opportunities that might arise in the FY2011-2013 period. The lower amounts available for acquisitions in those three years are directly related to the significant investment that BPA has made in the Willamette for the purchase of the Wildish and Trappist properties.

Oregon and BPA both wish to ensure that acquisitions in FY2011-2013 take place within existing budget and rate expectations, in order to address the reasonable concerns of BPA’s customers and ratepayers. Within these constraints on budget flexibility and the terms of the Agreement, we will jointly seek flexibility as needed for high priority acquisitions.

The Parties structured the Agreement in a way that is flexible and benefits from recent experience gained through the Columbia River Basin Fish Accords to allow stable and effective implementation of those agreements. This experience includes:

- the development of the accounting tools—such as pre-scheduling and rescheduling—necessary to transparently manage the funding agreements;
- structuring simple yet flexible principles that allow the rescheduling of the funding streams and encouraging the money to be spent at a reasonably steady pace to ensure that the expected benefits continue to be delivered over the life of the Agreement;
- all the money is intended to be paid out—there is no three-year cliff or point at which unexpended funds from past years are no longer available for spending; and
- rescheduling up to 120 percent of the annual budget automatically, without additional process or negotiation; the Agreement also allows rescheduling above that amount with adequate notice and when BPA has sufficient flexibility available in its overall fish and wildlife program budget.

15. Will projects have to qualify for the capital threshold to get capital funding?

Responds to: Five Land Trusts

The Parties intend to have projects acquiring habitat for wildlife mitigation receive capital funding even if the value of the project does not exceed the \$1 million capital threshold. We have included a footnote in the final Agreement explaining that intent. However, some elements of projects or, in a special circumstance, an entire project might not qualify for capital funding. BPA retains the right to maintain the flexibility to expense project elements or projects that would not qualify for capital funding treatment.

16. Why is the Agreement timing so rapid? Can we expand the public process for more interested party input? Why are the two acquisitions being tied to a long-term Agreement?

Responds to: Williams/WR, Kennedy/CTGRCO, Bassett/NFS, Wolf and Hamilton/OTU, NWSFIA

The option to purchase the Wildish property expires Oct. 30 and the owners have informed The Nature Conservancy that they would not renew it. ODFW considers the purchase of the Wildish and Trappist Abbey properties a condition precedent to having a settlement agreement. BPA viewed the Agreement as a condition precedent to purchasing both properties. Given the centrality of the Wildish property to an overall settlement, the comment period had to close in time for BPA and the State to consider comments and make a decision on the Agreement before Oct. 30.

Even under the time constraints, we did provide the standard 30 day comment period. In fact, our original goal was to close by the end of September, but we were able to extend the closing by approximately 30 days to give parties a full 30 days to comment.

17. Why is there an easement for transmission lines included as covering all properties under the Agreement? Can't this be on a case-by-case basis?

Responds to: Five Land Trusts

BPA has internal guidance generally directing that when it funds the fee acquisition of a

mitigation property, it should also receive the future right to acquire a transmission easement on such property at no additional cost. Similarly, BPA guidance anticipates that BPA will receive the right to a future transmission easement on properties where it funds a conservation easement. BPA adopted this guidance because if it needs an easement over a mitigation property it funded, it has already paid once for the property.

If BPA needed to locate a transmission facility on a mitigation property it has funded, BPA would work with ODFW and the underlying land owner to site the future facility in a manner least intrusive to the conservation values being protected. Next, BPA would work to mitigate the adverse affects of the new facility. Lastly, BPA would replace the affected acreage with additional wildlife mitigation acreage.

BPA has never exercised its right to secure an easement on a mitigation property. BPA believes, however, that mitigation and transmission can coexist when property planned and implemented, as witnessed by the facilities that existed on several parcels near the Tualatin River when BPA funded the U.S. Fish and Wildlife Service to purchase them for the Tualatin National Wildlife Refuge.

18. How can easements be considered full protection instead of fee title acquisition?

Responds to: Bear/SPT

At the requests of fish and wildlife resource management agencies and tribes, as well as land trusts, the Council has recommended that BPA fund conservation easements because they serve as a valuable tool in protecting habitat. Generally, they offer the same type of protection for the conserved habitat as a fee title acquisition, but at reduced cost since the entire property interest is not purchased. Generally, O&M funding needs are not as great for a conservation easement, thus lessening the long-term funding commitment for maintenance of the habitat values.

ODFW and its partners have made use of conservation easements in the Willamette subbasin for many years. Though ODFW and its partners have also acquired properties in fee, they continue to utilize all possible tools that will provide a permanent protection of the habitat values of properties acquired. Fee title is not the only way, and sometimes not the most cost effective way, to protect those values.

19. Why is there language about estuary mitigation included as an aspect of the Agreement?

Responds to: Williams/WR, Kennedy/CTGRCO

We are not sure of the nature of this concern. The language in the Agreement states: “*BPA is not claiming wildlife mitigation credit under this Agreement for estuary projects even if they evidence substantial wildlife habitat values. In the event a legal challenge is made concerning the adequacy, extent, or location of Willamette wildlife mitigation, BPA may in its discretion, and with ODFW’s support, count habitat projects on the Oregon side of the estuary as mitigation that also benefits wildlife affected by the Willamette dams, unless the Parties have agreed to credit estuary projects against Bonneville Dam wildlife impacts*” (emphasis ours).

BPA funds, and has funded, projects in the estuary under both fish and wildlife mitigation contracts. The agreements for the estuary wildlife projects left open what dam BPA would credit those projects against. The Willamette dams were—and are—a reasonable choice because the 1993 Oregon Trust Agreement Planning Project included “all areas located along the Lower Columbia River, below Bonneville Dam....”² The hundreds of acres of wildlife habitat protected and enhanced in estuary warrant crediting, but have not yet been credited anywhere. The Agreement ensures that those acres could count toward overall Willamette mitigation goals if needed and the Parties mutually agree to that accounting.

20. Why have did the Parties include footnote 4 on page 6 about ODFW having a “right of first refusal” on any potential transfer of the Wildish property?

Responds to: Van Vactor/Lane County

The Parties appreciate and understand the concern expressed by Lane County. We have altered the footnote to read that the State of Oregon has the right to approve the grantee’s successor or transferee should the grantee decide to dispose of the Wildish property rather than provide a right of first refusal as an owner of the property.

21. Why the lack of use of products coming out of the Wildlife Crediting Forum as a basis for the Agreement?

Responds to: Kennedy/CTGRCO, Small/SBT, Bear/SPT

Early in the forum process the participants agreed not to address Willamette mitigation. Issues in the Willamette are complex and unique, and entities that were deeply involved in Willamette mitigation—including NGOs and ODFW—were not active in the forum. Further, the forum participants are largely technical staff, not policy decision makers. As the forum has progressed, the participants have agreed that while settlements based on forum products and principles may be desirable, actual negotiations would have to take place elsewhere. The forum has stated that agreements should reflect the issues and interests of the particular areas to which they apply and cannot be uniform in nature. The Parties believe that the forum serves a valuable purpose of mitigation within the Program, but that the Willamette has unique issues and solutions that exist largely outside the forum context.

22. Will capital funding potentially disappear if not spent over a specific time period?

Responds to: Kennedy/CTGRCO, Five Land Trusts

No, capital funds will not disappear if not spend over a specific time period, instead the Agreement now has a Willamette Wildlife Fund for new projects. BPA will endeavor to maximize the use of capitalization for expenditures from this fund, but it cannot predetermine to what extent the projects proposed for funding will meet agency capitalization criteria.

In addition, BPA’s experience is that its capital habitat projects tend not to under spend. The provisions in question limit the time capital funds from one fiscal year can remain unspent and

²ODFW, USFWS, Umatilla Tribes, Warm Springs Tribes, Burns Paiute Tribe, Oregon Natural Heritage Program, Oregon Trust Agreement Planning Project: Potential Mitigations to the Impacts on Oregon Wildlife Resources Associated with Relevant Mainstem Columbia River and Willamette River Hydroelectric Projects p. 3 (Oct. 1993).

be available in future years. Holding capital funds indefinitely would create several problems. It would tie up available capital and inhibit BPA's ability to ensure funding for other vital projects over time, result in inaccurate budgeted amounts used for rate setting and result in over collection in one rate period and under collection in another and create the potential for a unmanageably large influx of capital in one fiscal year instead of spreading the budgetary and rate effects over several years. BPA has limited borrowing authority for capital dollars, and must manage those funds across the agency to meet all statutory purposes.

We have adjusted this section of the Agreement to address the concern about creating a "bow wave" of capital spending, but to not imply that unspent funds over a several year period will disappear during the course of the Agreement. We have added a section (G. 10) to clarify the intent to fully expend all of the funds in this Agreement for the purpose of wildlife mitigation.