

**Legal Outline of the Requirements for the Northwest
Power and Conservation Council's
Fish and Wildlife Program**

*In Support of Recommendations
For the Council's Program Amendments*

April 4, 2008

Submitted by

BPA Customer Representatives

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Introduction

This paper sets forth a legal outline of the requirements for the Council’s Fish and Wildlife program (“Program”) and supports the attached recommendations submitted to the Council by representatives of BPA customers regarding the Council’s Program amendment process. It is also intended to assist the Council’s evaluation of the various recommendations it will receive in its amendment process in order to ensure that its Program has a proper scope, and that it comports with the mandates and limitations provided in the Northwest Power Act.

I. *Purpose of the Council’s Program*

The Northwest Power Act has multiple stated purposes, including the encouragement of conservation and efficient use of electric power, the development of renewable resources, and an assurance of an adequate, efficient, economical, and reliable regional power supply.¹ Additionally, a major purpose of the Act is to “protect, mitigate and enhance” fish and wildlife of the Columbia River basin.² The Act’s main method of achieving this latter purpose is through its mandate that the Council develop an appropriate program to protect, mitigate and enhance fish and wildlife.³

II. *Scope of the Council’s Program to Protect, Mitigate, and Enhance*

Although the Act references the words “protect, mitigate, and enhance” multiple times, it does not expressly define them. Several provisions of the Act, however, clarify and define the scope of the Council’s Program, as discussed below.

A. Limited to Hydrosystem Impacts

The Act directs the Council to establish a program comprised of “measures to protect, mitigate, and enhance fish and wildlife affected by the development, operation, and management of [hydroelectric] facilities.”⁴ The Act also requires that to the extent the Council seeks to expand its Program beyond measures that address the impacts of hydroelectric facilities, it must secure agreements for

¹ Northwest Power Act, §§ 2(1), 2(2).

² *Id.* § 2(6).

³ *Id.* § 4(h)(1)(A).

⁴ *Id.* § 4(h)(5).

funding and administering those measures from the entities responsible for the impacts that are addressed.⁵

B. Consists of Measures, Not Individual Projects

As set forth in the Northwest Power Act, the Council’s Program is to be composed of “measures,” not specific “projects”.⁶ The Act speaks to measures as efforts that will complement existing mitigation activities and achieve biological objectives.⁷ In contrast, the Act speaks to “projects” as being actions that are funded by BPA, through its budget that implements the program.⁸ Further, the Act distinguishes between measures and projects by setting forth a separate process for developing and reviewing *projects*—a process that relies on independent scientific review and evaluation⁹—as well as separate considerations that the Council must undertake for projects, as opposed to the considerations it must make with regard to *measures*.¹⁰

Including specific projects in the Council’s Program would be problematic for a number of reasons, including limiting the Council’s ability to flexibly apply its Program, and would necessitate at least an integration of independent scientific review and evaluation into the Council’s program to ensure that the required review was applied to projects.

C. Priority for On-Site Measures

Legislative history indicates that Congress intentionally chose not to define “protect, mitigate, and enhance,” and that it intended the words to have their commonly understood meaning.¹¹ “Protect” (to guard or shield from injury¹²) and

⁵ *Id.* § 4(h)(8)(C) (“To the extent the program provides for coordination of its measures with additional measures (including additional enhancement measures to deal with impacts caused by factors other than the development and operation of electric power facilities and programs), such additional measures are to be implemented in accordance with agreements among the appropriate parties providing for the administration and funding of such additional measures.”).

⁶ *See* Northwest Power Act, § 4(h)(5) (“The program shall consist of measures to protect, mitigate, and enhance fish and wildlife . . .”).

⁷ *Id.* § 4(h)(6).

⁸ *Id.* § 4(h)(10)(D)(i).

⁹ *Id.* § 4(h)(10)(D).

¹⁰ *Id.* § 4(h)(10)(D)(vi) (“In making its [project] recommendations to BPA, the Council shall consider the impact of ocean conditions on fish and wildlife populations and shall determine whether the projects employ cost-effective measures to achieve program objectives.”).

¹¹ H.R. Rep. No. 96-976, pt. II, 96th Cong., 2d Sess., at 38.

“mitigate” (to cause to become less harsh¹³) therefore refer principally to measures that can be taken to *prevent* or *reduce* the harm caused to fish and wildlife in the Columbia River and its tributaries by the hydrosystem. Accordingly, one would expect that efforts to protect and mitigate fish and wildlife would occur primarily at the dams or in the adjacent reservoirs.

“Enhance,” on the other hand, refers to an “increase” or “improvements.”¹⁴ That term receives additional explanation in the Act, which clarifies that enhancement is appropriate only to the “extent such measures are designed to achieve improved protection and mitigation.”¹⁵ It also states that enhancement measures may be used only “in appropriate circumstances, as a means of achieving *offsite* protection and mitigation. . .”¹⁶ Enhancement, therefore, is a method of achieving protection and mitigation, and is reserved for when on-site measures are for some reason deemed insufficient.

The Act, then, establishes a distinct priority for mitigation at the dams and in the reservoirs before the Council looks to offsite mitigation measures. This priority is further confirmed in the Act’s purpose statement, which notes that anadromous fish are dependent on environmental conditions that are “*substantially obtainable from the management and operation* of Federal Columbia River Power System and other power generating facilities on the Columbia River and its tributaries.”¹⁷ It would be improper, therefore, for the Council to implement a Program that consisted mostly of offsite measures unrelated to the actual operation and management of the FCRPS projects.

D. Charges the Council with Coordinating and Integrating Fish and Wildlife Efforts

One of the major aims of the Northwest Power Act’s creation of the Council’s Program was to address mitigation and protection on a system-basis, instead of through a disjointed project-by-project approach. The Report of the Committee on Interior and Insular Affairs states,

The goal of the [Council’s] program is not to increase the obligations of water project owners and operators, *but rather to go beyond a project-by-project approach on a river system*

¹² See, e.g., Merriam-Webster’s Online Dictionary at <http://www.merriam-webster.com/>

¹³ See, e.g., *Id.*

¹⁴ See, e.g., *Id.*

¹⁵ Northwest Power Act, § 4(h)(5).

¹⁶ *Id.* § 4(h)(8)(A) (emphasis added).

¹⁷ *Id.* § 2(6) (emphasis added).

*whose multiplicity of projects and interdependent biological species makes a project-by-project approach unsatisfactory for all involved parties.*¹⁸

In essence, the Program is to implement a greater coordination in the region's existing fish and wildlife efforts and to ensure that the Council fulfills the role of "connecting the dots" to ensure that regional efforts complement, rather than undercut each other.

That the Program is to further a coordination role is evident in multiple parts of the Act. The Act states,

Because of the unique history, problems, and opportunities presented by the development and operation of hydroelectric facilities on the Columbia River and its tributaries, the program, to the greatest extent possible, shall be designed to deal with that river and its tributaries as a system.¹⁹

It also states that the measures that make up the Program must "complement the activities of federal and state fish and wildlife agencies and appropriate Indian tribes."²⁰ The Ninth Circuit has construed this to mean that Council should at least ensure that its Program complements efforts to meet ESA standards.²¹

Additionally, the Act's allowance for coordination with measures that do not deal with impacts caused by hydropower development, so long as those measures are paired with outside funding agreements, demonstrates the Council's role as integrating the various mitigation activities in the basin.²² Similarly, in commenting on this purpose of the Program, the Ad Hoc Committee of Fisheries/Power interests that worked on the development of the Act explained that one of its main advantages is the potential to achieve "benefits in terms of biological consistency and economies of scale achieved through a system-wide approach."²³

¹⁸ H.R. Rep. No. 96-976, pt. II, 96th Cong., 2d Sess., at 38 (emphasis added).

¹⁹ Northwest Power Act, § 4(h)(1)(A).

²⁰ *Id.* § 4(h)(6)(A). The Ninth Circuit has addressed this requirement in only one case, and construed it to mean that the measures should complement efforts to meet ESA standards. See *N.W. Resources Info. Ctr. v. N.W. Power Plan*, 35 F.3d 1371, 1390-91 (9th Cir. 1994).

²¹ See *N.W. Resources Info. Ctr.*, 35 F.3d at 1390-91.

²² Northwest Power Act, § 4(h)(8)(C).

²³ Ad Hoc Pacific Northwest Power/Fisheries Committee, *Section-by-Section Analysis of Fisheries Provisions of the Northwest Regional Power Bill (S.885) if Amended in Accordance with the Ad Hoc Committee Proposals*, at 6 (Aug. 22, 1980).

The Council's Program, therefore, should contain a strong focus on measures that lead to increased coordination among the various entities in the region that manage fish and wildlife in the basin.

E. Does Not Require Restoration of Past Losses

As explained above, the Council's Program is to guard against and lessen any injury to fish and wildlife from the hydroelectric facilities in the basin. And, where appropriate, the Program can look to offsite "enhancement" measures to protect and mitigate the impacts of the basin's hydroelectric projects when those results cannot be achieved on-site. The Northwest Power Act's creation of a program to protect, mitigate, and enhance fish and wildlife is not, however, a mandate or authorization to develop a plan to restore past losses that have occurred due to Congress's authorization, or the construction of the federal hydrosystem.

None of the words "protect," "mitigate," or "enhance" means to restore. Furthermore, no provision of the Northwest Power Act provides a mandate that the Program be aimed at reversing the clock with regard to construction of the projects.

Other federal legislation is revealing of the fact that a program to protect, mitigate, and enhance fish and wildlife is not a program to fully restore past losses. The terms "protect, mitigate, and enhance" show up in several state and federal statutes, including the Federal Power Act. As with the Council, the Federal Power Act charges FERC with ensuring the "protection, mitigation, and enhancement" of fish and wildlife through conditioning hydropower licenses on actions designed to achieve that result.²⁴ Courts have interpreted that mandate to mean something less than full restoration.

In *American Rivers v. FERC*,²⁵ FERC used existing environmental conditions at a regional hydroelectric project as a "baseline" against which to evaluate alternatives to a public utility's relicensing proposal.²⁶ Environmental groups sued, arguing that the Federal Power Act's mandate to protect, mitigate, and enhance fish and wildlife required FERC to evaluate the relicensing proposal against a baseline embodying a reconstruction of what the river would be like if

²⁴ See 16 U.S.C. §§ 797(e), 803(a)(1), 808 (referring to FERC responsibility to ensure protect, mitigation, and enhancement of fish and wildlife).

²⁵ 201 F.3d 1186 (9th Cir. 2000).

²⁶ *American Rivers*, 201 F.3d at 1195.

the project had not been constructed.²⁷ The Court rejected that argument, explaining that it “defies common sense and notions of pragmatism to require the Commission or license applicants to . . . recreate a 50-year-old environmental base upon which to make present day development decisions.”²⁸

The Court further explained that it was “more than reasonable” for FERC to determine appropriate enhancement measures “in the context of today’s environment and not in the context of the world as it existed 50 years ago.”²⁹ The Court then noted,

[N]othing in the FPA suggests that the only acceptable future for the [river basin] is a recreation of its past. . . . The [Federal Power Act] does not mandate that all past damage to fish and wildlife caused by a project . . . be ‘mitigated’ in a relicensing proceeding.³⁰

Thus, the Ninth Circuit has found that language that is, for all practical purposes, identical to that in the Northwest Power Act does not require a restoration of the past in order to satisfy the obligation to protect, mitigate, and enhance for fish and wildlife.

Additionally, when FERC went through rule-making to determine how it would determine which measures to “protect, mitigate, and enhance” it would require of hydropower projects, it found that the duty to “protect, mitigate, and enhance” did not authorize it to require restitution for all past damages. FERC explained,

Some tribes suggest that, because original construction of dams caused impacts to tribal resources for which there was no compensation under an original license or other pre-license construction authorization, the licensing process should provide a means to identify and mitigate for those past impacts. *The Commission has no authority under the FPA to require restitution or to assess damages. Moreover, the FPA*

²⁷ *Id.*

²⁸ *Id.* at 1197.

²⁹ *Id.*

³⁰ *Id.* at 1198. The Court made this decision even though the “same procedures and substance applicable to original licenses . . . apply fully in relicensing.” *American Rivers*, 201 F.3d at 1198 n.18 (quoting H.R. Rep. No. 99-507, at 33-34, 1986 U.S.C.C.A.N. at 2520-21).

*does not mandate that all past environmental damage caused by a project be "mitigated" in a relicensing proceeding.*³¹

In sum, the Council's directive to create a program to "protect, mitigate, and enhance" fish and wildlife affected by hydroelectric development in the Columbia River basin does not compel, or authorize the Council to create a program aimed at restoring past losses due to those projects or their operation.

III. Council's Duty to Screen the Recommended Measures for its Program

Under the Northwest Power Act, in creating its Program the Council is required to request from federal and state fishery managers and the Tribes recommendations for measures that can be included in the Program. The Council is also to consider recommendations by the region's electric power producing agencies, customers, and the public.³² Where the Council receives recommendations that "are inconsistent with each other," it is to resolve those inconsistencies while "giving due weight" to the regional federal and state fish and wildlife agencies, and appropriate Tribes.³³

Despite the weight the Council is to give to the Tribes' and fish managers' recommendations, however, the Council would be in error if it regarded its role as simply collecting the recommendations of fish managers and Tribes and bundling them into a program. To the contrary, the Council has an obligation to screen the recommendations it receives, whether from the fish managers, Tribes, or customers, to ensure that it produces a program that comports with the Act, and that meets the act's purpose of providing a cohesive and complementary approach to regional fish and wildlife management.³⁴

It is also important to note that while the Northwest Power Act requires "due weight" to be given to federal and state fish managers' and tribes' recommendations for measures, where the recommendations conflict, it does not require deference to these entities' recommendations for specific projects to address those measures. Once a measure is adopted, and the Council seeks projects to address that measure, the Council's role is spelled out in section

³¹ *Hydroelectric Licensing Under the Federal Power Act*, 102 FERC ¶ 61,185 at par. 122 (Feb. 20, 2003) (emphasis added).

³² Northwest Power Act, § 4(h)(3).

³³ *Id.* § 4(h)(7).

³⁴ *See* Northwest Power Act, § 4(h)(7) ("The Council *shall determine* whether each recommendation received is consistent with the purposes of this [Act].") (emphasis added).

4(h)(10)(D), which directs that it rely on an Independent Scientific Review Panel's and Peer Review Groups' review of projects.

Despite the consideration the Council must give in certain instances to state and federal fish managers and appropriate tribes, there are multiple reasons for which the Council should, or must reject recommendations that it receives. In doing so, the Council is to articulate its reasoning in writing.³⁵ Some of these reasons are described below.

A. Recommendations Lacking Detailed Supporting Information and Data

The Northwest Power Act requires that recommendations be “accompanied by detailed information and data in support of the recommendations.”³⁶ The Council's duty to defer to recommendations is therefore conditioned upon the provision of detailed supporting information and data. To the extent detailed supporting information and data is not provided, the Council should not rely on those recommended measures.

B. Recommendations that are Inconsistent with the Act's Substantive Criteria

The Council must not adopt recommendations that are inconsistent with the Northwest Power Act's substantive criteria.³⁷ These include findings that the recommendation is not consistent with section 4(h)(5) or 4(h)(6) of the Act, or that the recommendation is “less effective than the adopted recommendations for the protection, mitigation, and enhancement of fish and wildlife.”³⁸

1) *Do Not Assure an Adequate, Efficient, Economical, and Reliable Power Supply*

Section 4(h)(5) of the Northwest Power Act requires that the Council's Program consist of “measures to protect, mitigate, and enhance fish and wildlife . . . while assuring the Pacific Northwest an adequate, efficient, economical, and reliable power supply.”³⁹ To the extent a recommended measure would significantly increase the funding levels of the Council's Program, compromise

³⁵ *Id.*

³⁶ *Id.* § 4(h)(3).

³⁷ *See Id.* § 4(h)(7) (“The Council shall determine whether each recommendation received is consistent with the purposes of this chapter.”).

³⁸ *Id.*

³⁹ *Id.* § 4(h)(5) (emphasis added).

reliability, or otherwise degrade the hydroelectric power system, the Council must reject that recommendation.⁴⁰

2) *Do Not Meet Various Other Criteria*

Section 4(h)(6) of the Northwest Power Act sets forth a variety of other substantive criteria for the contents of the Council's Program. These criteria include that the measure must:

- **“complement the existing and future activities”** of regional fish managers;
- **“be based on, and supported by, the best available scientific knowledge”**;
- **utilize the alternative with the “minimum economic cost,”** where “equally effective alternative means of achieving the same sound biological objective exist”;
- **“be consistent with the legal rights of appropriate Indian tribes in the region,”** and
- **“provide for improved survival of [anadromous] fish at hydroelectric facilities,”** in the case of measures directed at such fish.

To the extent any recommendation does not comport with the above criteria, the Council must reject it.

⁴⁰ Legislative history indicates that Congress expected that power losses could be minimized. The Committee on Interstate and Foreign Commerce explained,

The objective is to give flexibility to all concerned to devise effective and imaginative measures that are also reasonable and will not result in unreasonable power shortages or loss of power revenues. Some power losses, with resultant loss in revenues, may be inevitable at times if these fish and wildlife objectives are to be achieved. *Such losses, however, should not be a burden on the consumers of the region.* The objective, however, should be to avoid, or at least minimize, losses, while meeting fish and wildlife needs. The Committee does not intend that these provisions be used to subvert [*sic*] the power objectives of this bill.

H. Report 96-976, Pt. I (Commerce) at 57 (emphasis added).

C. Recommendations that are “Less Effective than the Adopted Recommendations”

The Council is to reject recommendations for its Program if it determines that the recommendation is less effective than the one it proposes to adopt.⁴¹ With each recommendation, therefore, the Council should determine if a “more effective” recommendation exists, and if so, it should adopt the more effective approach.

D. Recommendations that are Not Related to Hydroelectric Impacts, or Constitute “In Lieu” Funding by BPA

As described above, the Act limits the Program’s scope to addressing impacts caused by hydroelectric projects in the Columbia River and its tributaries. To the extent any recommendation does not address the impacts of hydroelectric projects in the basin, therefore, the Council must reject that recommendation. The one exception to this could be where the Council determines that including a certain measure could add value through coordinating regional efforts.⁴² To the extent, however, any such measure deals with impacts caused by factors other than the development and operation of electric power facilities and programs, those measures would have to be coupled with agreements among the appropriate parties providing for the administration and funding of such measures.⁴³

Additionally, the Act clearly states that “[c]onsumers of electric power shall bear the cost of measures designed to deal with adverse impacts caused by the development and operation of electric power facilities and programs only.”⁴⁴ To the extent recommended measures do not address hydroelectric impacts, therefore, they could not be funded by BPA, and would therefore not meet the Act’s definition of “measures which can be expected to be implemented by the Administrator.”⁴⁵ The Council could reject such measures on this basis, in addition to the obvious reasons that the scope of the Act is limited to addressing hydroelectric impacts.

Finally, the Northwest Power Act states that BPA expenditures under the Council’s Program “shall be in addition to, not in lieu of, other expenditures authorized or required from other entities under other agreements or provisions of

⁴¹ Northwest Power Act, § 4(h)(7)(C).

⁴² *Id.* § 4(h)(8)(C).

⁴³ *Id.*

⁴⁴ *Id.* § 4(h)(8)(B).

⁴⁵ *Id.* § 4(h)(2)(A).

law.”⁴⁶ This means that where a recommended measure addresses impacts, for which other entities are authorized or required to fund mitigation, BPA cannot expend funds to implement it. In instances where the Council finds that a measure addresses non-FCRPS obligations, the Council could reject those measures since they also would not be “measures which can be expected to be implemented by the Administrator.”⁴⁷

IV. Conclusion

As described above, the Northwest Power Act’s directive that the Council create a program to “protect, mitigate, and enhance” fish and wildlife in the Columbia River and its tributaries is intended to produce an integrated Program that consists of measures that will guide projects that lessen the impacts on fish and wildlife of the hydrosystem in the basin. Although the Council must give due weight to the federal and state fish managers’ and tribes’ recommendations where multiple recommendations conflict, the Council has an important responsibility to ensure that its Program ultimately reflects a proper scope and content as described by the Act.

⁴⁶ *Id.* § 4(h)(10)(A).

⁴⁷ *Id.* § 4(h)(2)(A).