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Mr. Brian Lipscomb, Executive Director  
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RE: Comments Regarding BPA Customer Representatives/Public Power Council Recommendations for the Northwest Power and Conservation Council's *Columbia Basin Fish and Wildlife Program*.

Dear Brian:

Several organizations representing BPA customers have submitted recommendations to the Council for amendments to the Fish and Wildlife Program.<sup>1</sup> The recommendations were accompanied by a document dated April 4, 2008, entitled "Legal Outline of the Requirements for the Northwest Power and Conservation Council's Fish and Wildlife Program." As directed by the CBFWA Members' Advisory Group, this letter provides my analysis following the review of BPA Customer Representatives' "Legal Outline."

According to the "Legal Outline," the Northwest Power Act establishes a minimal role for fish and wildlife managers in development of the Columbia Basin Fish and Wildlife Program. The outline suggests that managers are entitled to deference only when there is a conflict between recommendations. The outline argues the Council should disregard the fish and wildlife managers' recommendations unless accompanied by detailed information, and should disregard the managers' project-specific recommendations altogether.

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<sup>1</sup> These include the Pacific Northwest Generating Council (PNGC), the Pacific Northwest Utilities Conference Committee (PNUCC), the Public Power Council (PPC) and River Partners.

The outline also presents a narrow view of the proper scope of the Council's Program. The outline argues that the scope of the Program should be limited to addressing hydrosystem impacts, and should not include measures that address impacts for which other entities are authorized or required to fund mitigation. Furthermore, the outline suggests that the Program should include only programmatic measures and not individual projects. Finally, the outline claims that the Northwest Power only authorizes the Council to protect against and mitigate for present and future impacts, and only in limited circumstances to include offsite enhancement measures. According to the outline, this statutory mandate does not include authorization to mitigate for losses caused by construction or historic operations of hydroelectric facilities. Instead, existing environmental conditions should be used as a "baseline" against which to measure compensable impacts.

### I. Deference

The BPA Customers' "legal outline" asserts that the managers are only entitled to deference if there is a conflict in proposed program measures. The outline's assertion is inconsistent with the Act and the Ninth Circuit's interpretation of the Act.

The Northwest Power Act entrusts the Northwest Power Planning Council with the responsibility to develop a program to protect, mitigate and enhance fish and wildlife resources affected by the development of hydroelectric facilities in the Basin. Specifically, Section 4(h)(1) of the Northwest Power Act requires the Northwest Power Planning Council to develop and adopt "a program to protect, mitigate and enhance fish and wildlife, including related spawning grounds and habitat, on the Columbia River and its tributaries."<sup>2</sup> Section 4(h)(2) requires the Council to request recommendations from Federal agencies and the region's State fish and wildlife agencies and appropriate Indian tribes for --

(A) measures ... to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by the development and operation of any hydroelectric project on the Columbia River and its tributaries;

(B) establishing objectives for the development and operation of such projects on the Columbia River and its tributaries ... to protect, mitigate, and enhance fish and wildlife; and

(C) management coordination and research and development

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<sup>2</sup> Northwest Power Act, Section 4(h)(2), 16 U.S.C. § 839b(h)(2).

(including funding) ....<sup>3</sup>

The Northwest Power Planning Council is required to develop its Fish and Wildlife Program on the basis of recommendations received from the fish and wildlife agencies, appropriate Indian tribes, the region's water management and power producing agencies and their customers and the public generally.<sup>4</sup> The Council is required to include in the Program measures that –

(A) complement the existing and future activities of the Federal and the region's State fish and wildlife agencies and appropriate Indian tribes;

(B) be based on, and supported by, the best available scientific knowledge;

(C) utilize, where equally effective alternative means of achieving the same sound biological objective exist, the alternative with the minimum economic cost;

(D) be consistent with the legal rights of appropriate Indian tribes in the region; and

(E) in the case of anadromous fish--

(i) provide for improved survival of such fish at hydroelectric facilities located on the Columbia River system; and

(ii) provide flows of sufficient quality and quantity between such facilities to improve production, migration, and survival of such fish as necessary to meet sound biological objectives.<sup>5</sup>

The Northwest Power Act requires the Council to resolve inconsistencies between program recommendations by “giving due weight to the recommendations, expertise, and legal rights and responsibilities of the Federal and the region's State fish and wildlife agencies and appropriate Indian tribes.”<sup>6</sup> The Council may reject a recommendation of a fish and wildlife agency or tribe only if the recommendation is inconsistent with the statutory requirements, or is

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<sup>3</sup> Northwest Power Act, Section 4(h)(2)(A)-(C), 16 U.S.C. § 839b(h)(2)(A)-(C).

<sup>4</sup> Northwest Power Act, Section 4(h)(5), 16 U.S.C. § 839b(h)(5).

<sup>5</sup> Northwest Power Act, Section 4(h)(6), 16 U.S.C. § 839b(h)(6).

<sup>6</sup> Northwest Power Act, Section 4(h)(7), 16 U.S.C. § 839b(h)(7).

“less effective than the adopted recommendations for the protection, mitigation, and enhancement of fish and wildlife.”<sup>7</sup>

The federal courts have recognized the deference owed to fish and wildlife managers under the Northwest Power Act. In 1992, in response to listing petitions under the Endangered Species Act, the Council embarked on a comprehensive overhaul of the 1987 Program, which culminated in the Council’s adoption of *Strategy for Salmon*.<sup>8</sup> The Council received numerous proposals for amendments to the Program in connection with the *Strategy for Salmon*. Without explanation, the Council disregarded many of the recommendations of the agencies and tribes for *Strategy for Salmon*.<sup>9</sup> The Yakama Indian Nation and several environmental organizations challenged the Council’s decision to reject fish and wildlife managers’ recommendations.

In 1994, in Northwest Resource Information Center (NRIC) v. Northwest Power Planning Council,<sup>10</sup> the Ninth Circuit affirmed the Yakama Nation’s legal challenges to the 1992 *Strategy for Salmon*.<sup>11</sup> The NRIC court ruled that section 4(h)(7) of the Act requires the Council to explain - in writing, in the Program - a statutory basis for its rejection of [agency or tribal recommendations].<sup>12</sup> Furthermore, the court ruled there are only three permissible statutory bases in section 4(h)(7) for the Council to reject a recommendation of the fishery managers. First, the Council may reject a recommendation if it is inconsistent with the purposes of the Act. Second, the Council may reject a recommendation of the fishery managers if it is “inconsistent with standards established for the [Columbia Basin Fish and Wildlife] Program.” Third, the Council may reject a

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<sup>7</sup> Id.

<sup>8</sup> Northwest Power Planning Council, STRATEGY FOR SALMON (1992), *available online at*: <http://www.nwppc.org/library/1992/Default.htm>.

<sup>9</sup> The Council argued that its reasons for rejecting the fishery manager’s recommendations for the 1992 amendments were embodied in various documents that comprise the administrative record for adoption of the Program. The Ninth Circuit rejected this argument, noting that “the Program itself fails to explain any basis, much less a statutory basis, for the Council’s decisions rejecting recommendations of the fishery managers . . . .” Id.

<sup>10</sup> Northwest Resource Information Center v. Northwest Power Planning Council, 35 F.3d 1371 (9<sup>th</sup> Cir. 1994).

<sup>11</sup> The case was the first legal challenge to a Council decision since the Seattle Master Builders challenged the Council’s Electric Power Plan nearly a decade earlier. *See Seattle Master Builders Association v. Northwest Power Planning Council*, 786 F.2d 1359 (9<sup>th</sup> Cir. 1986)(affirming the constitutionality of the Council under the Compacts Clause).

<sup>12</sup> Northwest Resource Information Center, 35 F. 3d at 1386.

recommendation of the fishery managers if the recommendation is “less effective than an adopted recommendation in achieving protection, mitigation, and enhancement.”<sup>13</sup> Otherwise, the Council must incorporate the managers’ recommendations into the Program.

The NRIC court explained that the fish and wildlife provisions of the Northwest Power Act and the legislative history clearly required that the Council give a “high degree of deference” to fishery managers’ interpretations and recommendations for program measures.<sup>14</sup> The court reasoned that the decision by Congress to provide deference to the fishery managers resulted from their unique experience and expertise in fish and wildlife management. The court explained its position as follows:

In light of the NPA's legislative history and text, it follows that fishery managers, as well as the Council, be given deference in interpreting the fish and wildlife provisions of the Act. This conclusion is consistent with our holding in Public Util. Dist. 1, 947 F.2d at 390, that BPA is due deference in interpreting the power plan provisions of the NPA because it was involved in the drafting of the Act. The role that fishery managers had in the promulgation of the NPA's fish and wildlife provisions demands no less of us here. Furthermore, the unique experience and expertise of fishery managers makes their interpretations of §839b, especially §839b(h)(6), particularly helpful. We find it inherently reasonable to give agencies and tribes, those charged with the responsibility for managing our fish and wildlife, a high degree of deference in the creation of a program and the interpretation of the Act's fish and wildlife provisions.<sup>15</sup>

In 1996, Congress amended the Northwest Power Planning Act to establish an Independent Scientific Review Panel (ISRP) to review projects proposed for funding under the Council’s Program. Section 512 of the FY 1997 Energy and Water Appropriations Act directed the Council to appoint an eleven-member Independent Scientific Review Panel (ISRP) --

to review projects proposed to be funded through that portion of the Bonneville Power Administration's annual fish and wildlife budget that implements the Council's fish and wildlife program.<sup>16</sup>

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<sup>13</sup> Id. at 1384 (citing § 839b(h)(7)).

<sup>14</sup> Id. at 1388.

<sup>15</sup> Id. at 1388-89.

<sup>16</sup> Northwest Power Act, Section 4(h)(10)(D)(i), 16 U.S.C. § 839b(h)(10)(D)(i).

The FY 1997 Appropriations Act does not significantly alter the institutional relationship between the agencies and tribes and the Northwest Power and Conservation Council. The statutory criteria under which the Council may reject the managers' recommendations for Program measures are described in section 4(h)(7) of the Act. Nowhere in the Appropriations Act is there a statutory basis for the Council to ignore the recommendations of the fish and wildlife managers, regardless of whether suggested program measures are project-specific proposals for Bonneville funding or programmatic recommendations.<sup>17</sup> Congress intended for the Council to rely heavily on the fish and wildlife agencies to develop the Program "and not try to become a super fish and wildlife entity."<sup>18</sup> Instead, the Northwest Power Act requires the Council to develop the Columbia Basin Fish and Wildlife Program based primarily on the expertise of those entities interested by law with managing the fish and wildlife resources.<sup>19</sup> In the recent words of the Ninth Circuit Court of Appeals, the Northwest Power Act "contemplates a participatory process in which the varied constituencies of the Pacific Northwest advise BPA on how it should exercise its discretion."<sup>20</sup> The unique experience and expertise of the fish and wildlife managers is entitled to substantial weight.<sup>21</sup>

## II. Scope of the Program

The "Legal Outline" further asserts that the Program should not include individual projects, be limited to addressing specific hydrosystem impacts and cannot include measures that address impacts for which other entities are authorized or required to fund.

### A. "Project" v. "Program Measure"

A central issue in the customer representatives' "legal outline" is a discussion about the extent to which the Council should include project-specific recommendations in the Fish and Wildlife Program. To grasp the nature of this discussion it is appropriate to consider the evolution of the Council's treatment of project-specific recommendations, and to consider the relationship under the

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<sup>17</sup> See Section 512 of the 1997 Energy and Water Appropriations Act, *codified in* Section 4(h)(10)(D) of the Northwest Power Act, 16 U.S.C. § 839b (h)(10)(D).

<sup>18</sup> 126 Cong. Rec. E10683 (1980)(Remarks of Rep. Dingell), *quoted in* Northwest Resource Information Center, 35 F. 3d at 1388.

<sup>19</sup> Northwest Resource Information Center, 35 F. 3d at 1387.

<sup>20</sup> Northwest Environmental Defense Center v. Bonneville Power Administration, 477 F.3d 668, 685 (9<sup>th</sup> Cir. 2007).

<sup>21</sup> Golden Northwest Aluminum v. Bonneville Power Administration, 501 F.3d 1037, 1051 (9<sup>th</sup> Cir. 2007); Northwest Resource Information Center, 35 F.3d at 1388.

Act between program recommendations and the ISRP. There has been a long-running debate about the appropriate legal relationship between the fish and wildlife agencies and tribes, the Council and the ISRP. As previously stated, the 1980 Act required the Council to solicit recommendations from the fish and wildlife managers, and required the Council to pay a high degree of deference to the managers' recommendations. The 1997 Appropriations Act added a new provision requiring the ISRP to review "projects proposed to be funded" by BPA to implement the Council's Fish and Wildlife Program.<sup>22</sup> The Appropriations Act used the term "projects proposed to be funded" or "projects to be funded" in four separate places.<sup>23</sup> In contrast, Section 4(h)(2)(A) of the 1980 Act, which requires the Council to seek recommendation from the fish and wildlife managers, refers to "measures which can be expected to be implemented by the [BPA] Administrator." Similarly, sections 4(h)(5) and 4(h)(6) refer to "program measures," and section 4(h)(7) refers to "recommendation[s] of the fish and wildlife agencies and Indian tribes as part of the program, or any other recommendation . . . ."<sup>24</sup>

The Northwest Power Act does not include statutory definitions for the terms "program," "program measure" and "project," even though they are used repeatedly in section 4(h). Webster's Dictionary defines "program" as "an outline of work to be done; a prearranged plan of procedure."<sup>25</sup> The same dictionary defines "measure" as "means to an end; anything done as a preparatory step toward the end to which it is intended to lead; an act, step, or proceeding designed for the accomplishment of an object." Thus a "program measure" is an act, step or proceeding designed for the accomplishment of a prearranged plan of procedure or an outline of work to be done. A "project" is

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<sup>22</sup> At the time this occurred, the fundamental question was whether the 1997 Appropriations Act, by amending the 1980 Northwest Power Act, specifically the development of the ISRP, changed the institutional relationship between the fish and wildlife managers and the Council as set forth in the original Act and explained in the Ninth Circuit's Northwest Resource Information Center decision.

<sup>23</sup> Northwest Power Act, Section 4(h)(10)(D)(i), (ii), (iv), and (v), 16 U.S.C. § 839b(h)(10)(D)(i), (ii), (iv), and (v).

<sup>24</sup> Northwest Power Act, Section 4(h)(7), 16 U.S.C. § 839b(h)(7).

<sup>25</sup> Webster's New Twentieth Century Dictionary (2d ed. 1971). When there is no indication that Congress intended a specific legal meaning for the term, the courts will look to sources such as dictionaries for a definition. *See e.g., Muscarello v. United States*, 524 U.S. 125, 118 S. Ct. 1911, 1914-16, 141 L. Ed. 2d 111 (1998); *United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir. 1999). Consequently, where a term is not defined in the statute, the courts accord the term its "ordinary meaning." Northwest Forest Resource Council v. Glickman, 82 F. 3d 825, 833 (9th Cir. 1996).

defined as “an undertaking; as a unit of work done by one of the various governmental agencies.” Presumably, a “project” is undertaken in furtherance of a prearranged plan or outline of work. Thus the terms “program measures” and “projects” nearly are synonymous for purposes of reconciling the respective roles of the fish and wildlife agencies, the Council and the ISRP.<sup>26</sup>

Courts often assume that where Congress uses different terms, a different result is intended.<sup>27</sup> This rule of statutory interpretation has led to arguments that the fish and wildlife agencies and tribes are no longer entitled to deference for project-related recommendations to implement the Fish and Wildlife Program. If there is in fact a difference between the scope of authority implied by the different terminology used in section 4(h)(2), (5), (6) and (7) on the one hand, and section 4(h)(10) on the other, it works to limit the role of the ISRP, not the agencies and tribes. As previously shown, there is no practical difference between a “program measure” and a “project.” There is a significant difference, however, between a “program” (meaning “a plan of action”), and a “project,” (meaning “an undertaking to implement a plan of action”). Taking into account the ordinary meaning of the statutory terms, the Council is required to defer to agency and tribal recommendations both for the program<sup>28</sup> and for measures to

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<sup>26</sup> Merriam Webster’s Webster Dictionary provides definitions that are even less distinguishable. There, the term “program” is defined as “a plan or system under which action may be taken toward a goal.” The term “measure” is defined as “a step planned or taken as a means to an end.” The term “project” is defined as “a planned undertaking.” See <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary>. A review of the previous versions of the Council’s Columbia Basin Fish and Wildlife Program supports the view that the terms “program measures” and “projects” have the same meaning. For example, the 1982 Program, based in large part on the collective recommendations of the fish and wildlife agencies and tribes, does not distinguish between the two types of activities. In both the 1982 and the 1984 versions of the Program, many of the activities described in the ISRP’s Report as “projects” were in fact included under the heading: “Program Measures.” See e.g., Section, 704, COLUMBIA BASIN FISH AND WILDLIFE PROGRAM at 7-4 (1982); Section 704, COLUMBIA BASIN FISH AND WILDLIFE PROGRAM at 47 (1984). In fact, some of the very same “projects” reviewed by the ISRP (such as the Nez Perce Tribal Hatchery) consistently have been described in previous versions of the Council’s Fish and Wildlife Program under the heading “Program Measures.” So in terms of implementation of the Act, the Council and the agencies have not in the past treated “program measures” and “projects” any differently.

<sup>27</sup> Legacy Emanuel Hosp. and Health Center v. Shalala, 97 F.3d 1261, 1265 (9th Cir. 1996).

<sup>28</sup> Under section 4(h)(2), the Council is required to solicit agency and tribal recommendations on the document, and to defer to their recommendations unless they fall within the three criteria for rejecting agency and tribal recommendations outlined in



implement the program. Conversely, the ISRP's role is limited to review of projects, being undertakings to implement the program.

The FY 1997 Appropriations Act did not explicitly amend section 4(h) other than to add a new subsection. An elementary canon of statutory interpretation is that the courts will attempt to reconcile various enactments "to create a harmonious whole."<sup>29</sup> Thus an interpretation of the two enactments that reconciles an apparent inconsistency will be favored over an interpretation that suggests the later enacted statute repeals by implication provisions contained in the former statute.<sup>30</sup>

The amendments to the Northwest Power Act contained in Section 512 of the Energy and Water Appropriations Act add the ISRP as a participant in the review of projects to be funded by BPA to implement the Council's Program. The ISRP's role is limited to review of projects proposed to be funded by BPA to implement the Council's Program and does not include programmatic initiatives.<sup>31</sup> The ISRP may recommend against funding a project put forward by the fish and wildlife managers, but only under specified criteria. The Council may reject the ISRP's recommendations. If so, the Council must explain its decision in writing. Thus Section 4(h)(10)(D) imposes a procedural requirement that the Council explain its reasons for rejecting the ISRP's recommendations. But there are no substantive restrictions on the Council's ability to reject ISRP recommendations. This statutory provision stands in stark contrast to section 4(h)(7)'s substantive restrictions on the Council's ability to reject recommendations from the fish and wildlife managers.

#### B. *In-Lieu Funding*

Another key issue for the customer representatives is the effect of the Northwest Power Act's "in-lieu" funding restriction. The Northwest Power Act requires BPA to use the Bonneville Fund to protect, mitigate and enhance fish and wildlife to the extent adversely affected by hydroelectric development,

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section 4(h)(7) and described at length in the Ninth Circuit's Northwest Resource Information Center decision.

<sup>29</sup> Officers for Justice v. San Francisco Civil Service Commission, 979 F.2d 721, 725 (9th Cir. 1992).

<sup>30</sup> Morton v. Mancari, 417 U.S. 535, 549-50, 94 S. Ct. 2474, 2482-83, 31 L.Ed.2d 290 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.").

<sup>31</sup> Likewise, the ISRP does not have authority to review implementation measures suggested for other federal agencies such as the Federal Energy Regulatory Commission, the Bureau of Reclamation or the U.S. Army Corps of Engineers.

consistent with the Council's Program. But the Act prevents BPA from making expenditures that merely substitute ratepayer funding for other sources. Specifically, section 4(h)(10)(A) requires that -

Expenditures of the Administrator pursuant to this paragraph shall be in addition to, not in lieu of, other expenditures authorized or required from other entities under other agreements or provisions of law.<sup>32</sup>

There is substantial overlap between BPA's responsibilities under the Northwest Power Act and the statutory responsibilities of the region's fish and wildlife management entities.<sup>33</sup> Consequently, the customer representatives' reading of the in-lieu provision would implicate nearly every project recommended in the Columbia Basin Fish and Wildlife Program and would greatly undermine efforts to implement the Program. According to a recent study by the U.S. General Accounting Office, a "multilayered collection" of

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<sup>32</sup> 16 U.S.C. § 839b(h)(10)(A).

<sup>33</sup> In fact, other federal agencies are prohibited under the Anti-deficiency Act (31 U.S.C. § 1341) from accepting funds from other sources for otherwise unauthorized activities. Several federal laws provide blanket authority to agencies to undertake actions to protect and restore fish and wildlife. For example, the Fish and Wildlife Coordination Act of 1946 added fish and wildlife protection as an authorized project purpose for all federal water resource projects constructed or modified after the date of enactment of the Act. *See* 16 U.S.C. § 663. Furthermore, the Act authorizes agency appropriations in "such amounts as may be necessary to carry out the provisions of this Act." 16 U.S.C. § 666. The Multiple-Use Sustained-Yield Act directs the Forest Service to administer national forests for "wildlife and fish purposes." 16 U.S.C. §§ 528-31. The Mitchell Act directs the Secretary of Commerce to carry on activities for the conservation of fishery resources in the Columbia River Basin. 16 U.S.C. § 755. The Fisheries Restoration and Irrigation Mitigation Act of 2000 directs the Secretary of the Interior to establish a program to implement projects, such as installation of fish screens and fish passage devices, to mitigate impacts on fisheries associated with basin irrigation projects. *See* 16 U.S.C. § 777. The National Indian Forest Resources Management Act directs the Interior Secretary to undertake management activities on Indian forest lands with tribal participation. 25 U.S.C. § 3101 *et seq.* Indian tribal governments and the Bureau of Indian Affairs are authorized to acquire land and undertake projects to protect and enhance fish and wildlife, both within the boundaries of Indian reservations and in many instances even in ceded areas. Furthermore, fish and wildlife and land management agencies in the four Pacific Northwest states all are authorized to undertake programs to protect and enhance fish and wildlife and to protect and restore habitat.

federal laws define federal responsibilities for Columbia Basin fish and wildlife.<sup>34</sup> Numerous federal laws create nationwide responsibilities.<sup>35</sup> Many of these authorize federal agency funding for fish and wildlife protection.<sup>36</sup> Other federal laws provide basin-specific directives and authority.<sup>37</sup> Many federal laws provide agency-mission specific authority.<sup>38</sup> Finally, some federal laws provide project-specific authority.<sup>39</sup>

The fish and wildlife managers believe the prohibition applies more narrowly, i.e., when funding actually is available to undertake the same activity as is recommended by the Council for funding by BPA, or when another entity, such as a non-federal hydroelectric license holder, is legally required to undertake an expenditure. The statutory language regarding in-lieu funding restrictions is ambiguous. Unfortunately, the legislative history of the Northwest Power Act reveals little about congressional intent behind this provision. During final passage of the bill on the House floor, Congressman Lujan described the problem of fish enhancement as “one of the touchiest problems involved in the bill.”<sup>40</sup> Congressman Lujan was the primary sponsor of the committee amendments to balance fish and wildlife and power interests. In his floor statement on final passage, Congressman Lujan explained that –

The job of both committees to whom the bill was referred was to bring out a bill that provides a regional answer to this regional problem and to make certain that none of the

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<sup>34</sup> U.S. General Accounting Office (GAO), *Columbia River Basin: A Multilayered Collection of Directives and Plans Guides Federal Fish and Wildlife Activities*, GAO-04-602 (June 2004)(2004 GAO Report).

<sup>35</sup> E.g., Endangered Species Act, 16 U.S.C. §§ 1531-1544; Federal Water Pollution Control Act (*i.e.*, Clean Water Act), 33 U.S.C. §§ 1251-1387; Fish and Wildlife Coordination Act of 1946, 16 U.S.C. §§ 661-666c; Federal Water Project Recreation Act, 16 U.S.C. §§ 4601-12 to 1-21.

<sup>36</sup> See 2004 GAO Report, *supra* note 129.

<sup>37</sup> E.g., Fisheries Restoration and Irrigation Mitigation Act of 2000, 16 U.S.C. § 777; Mitchell Act, 16 U.S.C. §§ 755-757.

<sup>38</sup> E.g., National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§ 668dd, 668ee;

<sup>39</sup> Tualatin Federal Reclamation Project Act, Pub. L. No. 89-596, 80 Stat. 822; Yakima River Basin Water Enhancement Project Act, Title XII, Act of October 31, 1994; 108 Stat 4550, 5 Federal Reclamation and Related Laws Annotated 4039 (prelim. ed. 2001).

<sup>40</sup> 126 Cong. Record H9845 (daily ed. Sept, 1980)(Remarks of Rep. Lujan).

other States will have to pay, in any way, for that regional solution.<sup>41</sup>

Congressman Lujan was one of the floor managers of the House bill. His remarks, as well as those of the bill's sponsors, indicate that they saw the responsibility as a "new obligation on the region, the BPA, and other Federal agencies to protect, mitigate and enhance fish and wildlife."<sup>42</sup> Yet this was an obligation to be borne by the region's ratepayers, not by the federal taxpayers.

The more narrow interpretation suggests that the in-lieu prohibition applies only when money is actually available, or is required of an entity as a non-discretionary expenditure. Our reading of the statute suggests in-lieu problems arise only if expenditures are available, having already been appropriated, or where legally required. There are several permutations. The first is where an entity is required to make expenditures. Mandatory funding requirements could arise under a license condition for a non-federal hydroelectric project, an enforcement order under the Clean Water Act, or under legislative mandate.<sup>43</sup> The second is where a specific earmark is included in an appropriations bill. Third is where a non-specific basin or mission-specific appropriation is provided, but a specific project or project is described in a congressional committee report. Fourth is where an agency's budget justification identifies a specific measure to support a budget request. Finally, the situation may arise where legislative history and the agency's budget request are silent, but where an appropriations request is made by an individual member of Congress or other extrinsic evidence clearly indicates that an appropriation has been justified to support a project or program for which BPA otherwise would provide funding.

### *C. On-Site Mitigation*

The "legal outline" asserts that the Northwest Power Act establishes a "distinct priority" for mitigation at the dams and in the reservoirs before the Council should consider off-site measures. The outline also explains that off-site impacts should be addressed by "secure[ing] agreements for funding and administering these measures from the entities responsible for the impacts that are addressed."

The Northwest Power Act was drafted to address the impacts of the hydroelectric system on the Columbia River Basin's fish and wildlife. The

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<sup>41</sup> *Id.*

<sup>42</sup> See 126 Cong. Record H10682 (daily ed. Nov. 17, 1980)(Remarks of Rep. Dingell).

<sup>43</sup> E.g., Fisheries Restoration and Irrigation Mitigation Act of 2000, 16 U.S.C. § 777; Mitchell Act, 16 U.S.C. §§ 755-757.

purpose of the Program is to “protect, mitigate and enhance” the Basin’s fish and wildlife populations, and Congress clearly recognized that in order to do so the Council will need to not only address the impacts of individual hydro facilities but their cumulative effect on the entire Basin and its fish and wildlife populations. Congress clearly expressed that one of the NPA’s purposes was:

to protect, mitigate and enhance the fish and wildlife, including related spawning grounds and habitat, of the Columbia River and its tributaries, particularly anadromous fish which are of significant importance to the social and economic well-being of the Pacific Northwest and the Nation and which are dependent on suitable environmental conditions substantially obtainable from the management and operation of the Federal Columbia River Power System and other power generating facilities on the Columbia River and its tributaries.<sup>44</sup>

The courts have also explained that the impact of the hydroelectric system is much larger than what occurs on-site; rather, the impacts of the dams are extensive and cumulative.<sup>45</sup> As the U.S. General Accounting Office described in its report to the Chairman of the House Committee on Energy and Power:

it is the cumulative effect of hydro facilities that is so destructive. Each facility poses a separate and sometimes different set of problems for migrating smolts, and each contributes to a cumulative deterioration of the downstream migration.<sup>46</sup>

The Program needs to consider not only measures that will provide for a safer passage through hydro facilities but also measures that aid in the protection of fish and wildlife which often require projects not directly adjacent to hydro facilities.

#### *D. Baseline Conditions*

The “legal outline” also argues that the Northwest Power Act’s mandate to “protect, mitigate and enhance” does not require a full recovery of the historic population. The BPA customers argue that the Northwest Power Act precludes the Council from relying on the historic population demographics as baseline data.

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<sup>44</sup> Northwest Power Act, 16 U.S.C. § 839(6); *See also* Golden Northwest, 501 F.3d at 1048.

<sup>45</sup> Northwest Resources Information Center, 35 F.3d at 1376.

<sup>46</sup> H.R. Rep. No. 96-976, pt. I, 96<sup>th</sup> Cong., 2d Sess., at 46, 1980 U.S. Code Cong. & Ad. News at pp. 5989, 6044 (1980); *See also* Northwest Resource Information Center, 35 F.3d at 1376.

The Northwest Power Act marked an important shift in federal policy for the Columbia River Basin. The Act raised the standard, requiring that federal agencies provide “equitable treatment” for fish and wildlife, on par with other uses of the Columbia River basin.<sup>47</sup> The Act’s treatment of the Basin’s fish and wildlife resources emerged out of the realization that previous legislative efforts requiring that “equal consideration” be given to fish and wildlife did not reduce the decline of fish runs.<sup>48</sup> Congress recognized that the Basin’s hydropower system was “a major factor in the decline of some salmon and steelhead runs to the point of near extinction,” and enacted fish and wildlife provisions of the Northwest Power Act with the expectation of reviving the fish and wildlife populations of the Basin.<sup>49</sup>

The outline relies on the Ninth Circuit case, American Rivers v. FERC for this assertion. In American Rivers, the court upheld FERC’s interpretation that the Federal Power Act did not require it to use the river’s historic conditions as a baseline for fish and wildlife protection measures.<sup>50</sup> The Federal Power Act states that all licenses shall provide “for the adequate protection, mitigation, and enhancement of fish and wildlife (including related spawning grounds and habitat) . . . .”<sup>51</sup> The Northwest Power Act directive far exceeds the FPA, it states that the Council’s Program must provide “protection, mitigation and enhancement” to address the “development and operation of the hydroelectric facilities.”<sup>52</sup> Unlike the FPA, the Northwest Power Act requires the consideration of the “development and operation” not just the operation. Moreover, the Northwest Power Act specifically created a program to ensure that fish and wildlife of the Basin are given “equitable treatment.”

### III. Conclusion

The Northwest Power Act provides a clear framework for the relationship between the Northwest Power and Conservation Council, the ISRP and the fish and wildlife managers. The Act requires the Council to solicit recommendations from the fish and wildlife managers for measures to include in the Fish and

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<sup>47</sup> Northwest Power Act, Section 4(h)(11)(A)(i), 16 U.S.C. § 839b(h)(11)(A)(i); Northwest Resource Information Center, 35 F.3d at 1377 n.15.

<sup>48</sup> Northwest Resource Information Center, 35 F.3d at 1377.

<sup>49</sup> Id. at 1376 (quoting 126 Cong. Record H10687 (daily ed. Nov. 17, 1980)(letter from Comptroller General)).

<sup>50</sup> 201 F.3d 1186 (9<sup>th</sup> Cir. 2000).

<sup>51</sup> 16 U.S.C. § 803.

<sup>52</sup> Northwest Power Act, Section 4(h)(2), (h)(5), (h)(8)(A) & (B), (h)(10)(A), 16 U.S.C. § 839b(h)(2), (h)(5), (h)(8)(A) & (B), (h)(10)(A).

Wildlife Program. The fish and wildlife managers may respond with both programmatic and project-specific recommendations. The Council also may receive proposals from others, including the water and hydroelectric managers, their customers, and the public generally. The Act requires the Council to provide deference to recommendations from the agency and tribal fish and wildlife managers. The Act requires the Council to set forth in writing its reasons for rejecting recommendations of the agency and tribal fishery managers. The Act limits the basis upon which the Council may reject agency and tribal recommendations.

The Region's fish and wildlife managers are entitled to considerable deference in the formation of the Council's Fish and Wildlife Program. The Act requires the Council to adopt the recommendations of federal, state and tribal fish and wildlife agencies as part of the Fish and Wildlife Program, unless the Council explains in writing that the recommendations are inconsistent with the Act or less effective than the adopted recommendations. The recommendations of the agencies and tribes entrusted with managing the Basin's fish and wildlife resources are a fundamental part of the process for amending the Columbia Basin Fish and Wildlife Program.

Needless to say, CBFWA's Program recommendations demonstrate a much broader view of the proper scope of the Program than the views asserted in the legal outline. The fish and wildlife managers' position is fully justified under the Northwest Power Act. The Act directs the Council to develop a Program that will fully address the impacts of the hydrosystem on fish and wildlife within the Columbia River Basin and to address hydro-related impacts in the context of the Columbia River and its tributaries as a system. This ecosystem approach allows the Council to include offsite mitigation for hydro-related impacts. Cost-sharing and other funding arrangements are a separate matter. Finally, the Council may include project-specific measures recommended by the managers so long as they satisfy statutory criteria for measures to include in the Program.

Once the agencies and tribes have recommended a program measure, the Council must adopt the recommendation unless the Council determines they are inconsistent with section 4(h)(7). The Council then must explain in writing its reasons for rejecting the recommendation. The fact that the ISRP recommended against funding a project, standing alone, does not justify Council rejection of a recommended program measure, even if the measure relates to an individual project. The reasons also must fit within the statutory framework provided by section 4(h)(7). Conversely, the Council may reject an ISRP recommendation for any reason, so long as the Council's reason is explained in writing. Nothing in the FY 1997 Appropriations Act diminishes the statutory deference owed by the Council to the fish and wildlife managers. The role of the agencies and tribes

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regarding program measures remains intact, a fact consistently -- and repeatedly -- confirmed by the Ninth Circuit Court of Appeals.

Sincerely,

MENTOR LAW GROUP, PLLC

A handwritten signature in black ink that reads "Joe Mentor". The signature is written in a cursive style with a large, sweeping "J" and "M".

JOE MENTOR, JR.