



## Department of Energy

Bonneville Power Administration  
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ENVIRONMENT, FISH AND WILDLIFE

June 18, 2008

In reply refer to: KE-4

Mr. Bill Booth, Council Chair  
Northwest Power & Conservation Council  
851 SW Sixth Avenue, Suite 1100  
Portland, Oregon 97204-1348

Dear Chairman Booth:

Thank you for the opportunity to comment on recommendations for amending the Columbia River Basin Fish and Wildlife Program (Program). Given that 65 entities made recommendations to amend the Program totaling thousands of pages, these Bonneville Power Administration (BPA) comments focus primarily on those recommendations that raise some of the more significant legal or policy issues. Please note that BPA does not necessarily either support or oppose other recommendations not addressed in these comments.

### **Significant Legal and Policy Issues Posed by Certain Recommendations**

BPA's review indicates that some recommendations from major program participants do not meet the Northwest Power Act's (Act) criteria for appropriate Program amendments. Under the Act, each individual recommendation for an amendment intended for BPA implementation must meet the following criteria:

1. Detailed information and data must support "all recommendations."<sup>1</sup>
2. The "best available science" must support all recommendations.<sup>2</sup>
3. Proposals must "complement the existing and future activities" of the region's fish and wildlife resource managers.<sup>3</sup>
4. The alternative with minimum economic costs must prevail when two or more alternatives would meet the same sound biological objective.<sup>4</sup>
5. Measures that coordinate actions under the program "to deal with impacts caused by factors other than the development and operation of electric power facilities and programs" must "be implemented in accordance with agreements among the appropriate parties providing for the administration and funding" of those measures.<sup>5</sup>
6. BPA ratepayers shall bear the cost of mitigation measures for the Federal Columbia River Power System (FCRPS) only.<sup>6</sup>

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<sup>1</sup> 16 U.S.C. § 839b(h)(3).

<sup>2</sup> *Id.* at § 839b(h)(6)(B).

<sup>3</sup> *Id.* at § 839b(h)(6)(A).

<sup>4</sup> *Id.* at § 839b(h)(6)(C).

<sup>5</sup> *Id.* at § 839b(h)(8)(C).

<sup>6</sup> *Id.* at § 839b(h)(8)(B).

BPA's comments in sections one through six below follow these criteria.

## 1. Supporting Detailed Information and Data.

- Unsupported Recommendations

As described above, the Act provides that “all recommendations shall be accompanied by detailed information and data in support of the recommendations.” However, several entities provided recommendations without supporting information and data. For example, “Section 6.0 Appendix: Supporting Documentation,” of the Columbia Basin Fish and Wildlife Authority (CBFWA) recommendation lacks any supporting documentation for 34 sections out of the 72 sections listed.<sup>7</sup> Similarly, the Shoshone-Paiute Tribes’ recommendation omitted any reference to supporting documentation.<sup>8</sup> Oregon submitted 86 numbered recommendations with citations to supporting documentation for only one.<sup>9</sup> Absent “detailed information and data in support of the[se] recommendations,” they do not meet an essential non-discretionary requirement for Program amendments.<sup>10</sup>

- Changes to Subbasin plans

Another concern is the treatment of subbasin plans in the CBFWA proposal. The proposal provided updated summaries for each subbasin, including updated objectives. While some of the updates rely on recovery plans for ESA-listed anadromous fish, and such plans were developed with public input and review, the use of recovery plans for this purpose isn't clearly identified. (The “Supporting Documentation” in section 6 of CBFWA’s recommendations does not list any recovery plan or other science-based public process providing supporting data underpinning the recommended updates to subbasin plans.) Clarification of the process engaged in by CBFWA to update subbasin plan summaries based on recovery plans would be helpful.

It appears that the updates to resident fish and wildlife elements of subbasin plans, however, were done without an open public process. Once again, clarification of the process engaged in by CBFWA would be helpful. The Power Act’s specific call for public participation on recommendations “and supporting documents”<sup>11</sup> does not seem to have been met for the non-ESA portions of the changes/updates proposed by CBFWA. BPA suggests, therefore, that these changes should not be viewed as meeting the Act’s legal requirements.

- Use of the All-H Analyzer

CBFWA’s recommendations included some of the results of a modeling exercise using the so-called All-H Analyzer, or AHA model. Specifically, the CBFWA recommendations include estimates of

<sup>7</sup> CBFWA, Final Recommendations, Section 6.0 Appendix: Supporting Documentation (Apr. 4, 2008) (showing the following recommendation sections lacked any supporting documentation: 1.0, 1.6, 2.0, 2.0.1, 2.0.2, 2.0.3, 2.0.3.1, 2.0.5, 2.0.8, 2.0.9, 2.1, 2.1.1, 2.1.2, 2.1.4, 2.1.4.4, 2.1.4.5, 2.1.5, 2.1.5.1, 2.1.5.3, 2.1.5.6, 2.1.5.7, 2.1.5.8, 2.1.5.12, 2.1.6, 2.1.7, 2.1.8, 2.2, 2.2.1, 2.2.2, 2.2.5, 2.2.6, 2.2.7, 2.2.8, 2.3.7, 2.3.8).

<sup>8</sup> Shoshone-Paiute Tribes recommendations (Apr. 4, 2008).

<sup>9</sup> Oregon Department of Fish and Wildlife (ODFW) Attachment 1, recommendation no. 25 (Apr. 4, 2008).

<sup>10</sup> 16 U.S.C. § 893b(h)(3).

<sup>11</sup> 16 U.S.C. § 839b(h)(4)(B).

the potential population response to a “no passage effect” management scenario, which is apparently intended to represent potential salmon abundance in the absence of large hydroelectric projects—in effect, a “no dams” scenario.

It is not clear whether and to what degree AHA modeling has informed CBFWA’s recommendations. It appears that the modeling results are being presented to indicate a view of the magnitude of the hydro system’s mitigation responsibility. (The estimates can be found for selected populations in the Limiting Factors and Threats tables in Section 3 of the recommendation. The modeling is described in sources found on the Council’s website.) The inclusion of AHA analyses in CBFWA’s recommendations, as well as the lack of a public process and independent science review of the modeling process, raises a number of legal, policy, and technical concerns.

According to its developers, the AHA model is primarily a hatchery management tool which enables managers to “project the effects of various hatchery scenarios, under differing harvest and habitat assumptions, on the productivity and abundance of associated natural spawners of natural and hatchery origin, in terms of whole population performance.”<sup>12</sup> BPA believes AHA may serve a useful role in the region’s ongoing hatchery reviews, but even in this case it is important that the model developers provide adequate documentation, as numerous reviewers have indicated that the model is inadequately documented, lacks peer review and validation, and have urged caution about its appropriate use.

For example, in 2005 the Independent Scientific Review Panel (ISRP) and Independent Scientific Advisory Board (ISAB) reviewed the AHA model (at the Council’s request) and observed:

“...an expert system predicting salmon productivity in the presence of wild/hatchery interactions will have unpredictable performance, and probably low reliability. At best, such a system will offer a useful way to organize assumptions and quantify the implications of adopting those assumptions, provided the tool carefully documents its own assumptions, as well as the user-supplied inputs, along with its output of predictions. If the tool is adequately documented, and adequately documents inputs as part of its output, the proper use of the tool is to generate hypotheses that should be tested, rather than accepted at face value.”<sup>13</sup>

The ISRP/ISAB then recommended as follows:

“Recommendation. The AHA model should not be used to aid in the development of draft numerical objectives for anadromous fishes, including natural returns, hatchery escapement, and harvest at the subbasin, province, and Columbia Basin levels until it is properly documented and validated in a substantive review.”<sup>14</sup>

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<sup>12</sup> The All-H Hatchery Analyzer (AHA), Hatchery Reform Technical Discussion Paper (Aug. 2005) found at [http://www.lltk.org/pages/hatchery\\_reform\\_project/HRP\\_Publications.html](http://www.lltk.org/pages/hatchery_reform_project/HRP_Publications.html)

<sup>13</sup> Independent Scientific Review Panel/Independent Scientific Advisory Board, Review of the All-H Analyzer (AHA) (ISAB 2005-5) (February 4, 2005).

<sup>14</sup> *Id.*

Other reviewers reached similar conclusions. The Puget Sound Technical Recovery Team organized a review of the model, which was being used to inform hatchery management in the Puget Sound region. The expert reviewers, all respected fisheries scientists, also served on various Northwest Technical Recovery Teams. Their conclusions, reached in 2005, remain relevant today because CBFWA did not present information showing that the model changed to address those criticisms. Key excerpts are as follows:

“The lack of documentation is a major weakness of the model. Without documentation describing the model and its assumptions, the model could be misused or the results could be easily misinterpreted.”<sup>15</sup>

“The reviewers agreed that ... the AHA model is best used heuristically to explore different strategies. The model should not be relied upon to allocate effects between different “H”s or decide “how much is enough,” especially in the absence of supporting empirical data or independent analyses.”<sup>16</sup>

“The model is currently undocumented, making scientific peer review impossible. Without an independent scientific review based on adequate documentation, it would be irresponsible for managers to assign much weight to the quantitative predictions of the model in making expensive and potentially risky decisions. Decisions need to be based on “best available science” and current “best available” scientific practice relies on the independent review process.”<sup>17</sup>

“In my opinion, this model is NOT appropriate for conducting a comprehensive analysis of alternative recovery scenarios.”<sup>18</sup>

If, in fact, fisheries managers choose to use AHA modeling to inform or support their views about appropriate biological goals, the use of AHA should be limited to developing hatchery management goals, as it was developed for.

BPA therefore strongly encourages the Council to scrutinize any proposed amendments that rely implicitly or explicitly on AHA analyses that go beyond hatchery management questions. While AHA has apparently undergone further development since the above referenced reviews, it remains largely undocumented. This renders its use, whether for biological objectives or other purposes, highly questionable. A critical precursor to any broader use of AHA should be a public process where the developers and users of AHA share current information, data, and assumptions in a transparent manner. In addition, meaningful scientific peer review should be provided so that clear and defensible judgments about the applicability of the CBFWA materials can be made.

Until AHA is adequately documented and subjected to independent scientific review, AHA modeling should not be thought of as meeting the Act’s requirements for “detailed information and data” and “the best available scientific knowledge.”

<sup>15</sup> Review of the All-“H”-Analyzer Model, Puget Sound Technical Recovery Team (2005).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* comments of Paul McElhaney.

<sup>18</sup> *Id.* comments of Michael Ford (emphasis in original).

## 2. Applying the Best Available Science.

- Biological Objectives

In addition to the AHA model issues noted above, CBFWA and most of its individual member agencies and tribes recommended modifying the Program's existing biological objectives, particularly those related to anadromous fish.<sup>19</sup> We note that none of the proposals that continue to advance biological objectives in the 2000 Fish and Wildlife Program address the assumptions that the Independent Scientific Advisory Board identified as unsupported when it reviewed the Program's biological objectives.<sup>20</sup> Consequently, the resulting biological objectives in these proposals do not seem to incorporate the best available science as required for Program amendments.

- Smolt-to-Adult Survival Rates

Several entities make recommendations for the Program to continue to include an interim-objective for smolt-to-adult survival rates in the 2-6% range.<sup>21</sup> BPA believes this objective does not fit well in a Program established to mitigate a hydroelectric system because it is not appropriate to hold the hydrosystem alone accountable for SARs given the many non-hydro influences and environmental conditions (e.g. ocean conditions) and other lifecycle impacts (e.g., harvest). In addition, the 2-6% SARs are probably not a meaningful Program benchmark in light of the best available science. NOAA Fisheries, for example, raised concerns about the utility of SARs given the influences of "numerous conditions, including ocean survival."<sup>22</sup>

- Adaptive Management

CBFWA recommends that BPA implement the program as hundreds of "experiments" with hypotheses, controls, study designs, monitoring, and adjustments based upon observed results. The ISRP in its 2007 Retrospective Report noted that to meaningfully employ adaptive management, the co-managers needed to "reassess goals" "and reconfigure priorities when repeated efforts do not appear to yield tangible results."<sup>23</sup> If the Program continues to use or attempts to expand the use of adaptive management principles, then to employ the best available science the region must prepare to do a better job of rigorously reassessing goals and reconfiguring priorities at every level from individual projects to basin-wide policies.

- Resident Fish

It is BPA's view that resident fish issues continue to confound regional mitigation planning for the hydrosystem. Invasive species like bass and walleye receive protection as regulated sport fish, yet

<sup>19</sup> See, e.g., CBFWA Recommendations § 2.1.2, page 35; Idaho Department of Fish and Game recommendations pages 9-10 (Apr. 4, 2008).

<sup>20</sup> ISAB, Review of the Biological Objectives of the 2000 Fish and Wildlife Program (ISAB 2001-6) (July 26, 2001).

<sup>21</sup> See, e.g., CBFWA Recommendation § 2.1.2; Idaho Recommendation page 10.

<sup>22</sup> NOAA Fisheries recommendation page 3 (Apr. 4, 2008).

<sup>23</sup> ISRP, Retrospective Report 2007, Adaptive Management in the Columbia River Basin, page 15 (ISRP) 2008-4) (Apr. 11, 2008).

they multiply and prey increasingly on native salmonid and resident fishes, or may otherwise compromise natural ecological processes and functions. While many fisheries managers support segregating resident fish mitigation from wildlife or anadromous fish, the Program emphasizes mitigating ecosystems, because in most instances resident fish historically shared habitats with anadromous fish or wildlife, or both.

The Council received numerous recommendations for new loss assessment methodologies and the reassessment of FCRPS impacts on resident fish. Those recommendations conflict with the effort, cost, and stated purposes associated with subbasin plan development. In 2005 the Council amended the Program with subbasin plans, developed through an extensive process at substantial cost to the region's ratepayers, that included resident fish as focal species. Those plans assessed resident fish mitigation needs and the factors limiting their productivity. To the extent the Program needs to target resident fish apart from the ecosystems affected by the FCRPS, subbasin plans provide a menu for mitigation efforts by the hydrosystem and also for mitigation of impacts by other regional entities.

Conducting new loss assessments at this time would shift resources away from on-the-ground mitigation. Assessments may also inappropriately shift non-FCRPS or non-hydropower impacts from other entities onto ratepayers. Such shifts neither promote action by others to address the impacts that they caused nor do they leverage cost-sharing. BPA urges the Council not to support new assessment methodologies or loss assessments that are not already planned or underway. Instead, the Program should concentrate effort more on directly mitigating the ecosystems affected by FCRPS construction and operation, guided by the menu of potential actions already included in subbasin plans.

### **3. Existing and Future Activities of the Region's Fish and Wildlife Managers.**

- The 2008 FCRPS Biological Opinion and Fish Accords

The Act calls for Program measures that will “complement the existing and future activities” of the Federal and the region's state fish and wildlife agencies and tribes.<sup>24</sup> Two recent sets of documents describe existing and future activities for the next 10 years: the three 2008 NOAA Fisheries Biological Opinions on the FCRPS, Upper Snake operations, and *U.S. v Oregon* management, respectively, and the Columbia River Fish Accords entered into with two states and four tribes. Under the Act, the Program amendments should complement these new 10 year action plans formally endorsed by federal, state, and tribal fishery managers. In particular, the Program should reflect Biological Opinion and Fish Accord provisions overall as priority actions and performance targets for anadromous fish and other included species.

It appears that not all of CBFWA's recommendations mesh well with the Biological Opinions and the Accords. BPA has identified the following CBFWA recommendations that may be inconsistent with the 2008 NOAA Fisheries FCRPS Biological Opinions or the Accords, or both.

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<sup>24</sup> 16 U.S.C. § 839b(h)(6)(A).

- Research monitoring and evaluation. The Accords expressly embrace the RM&E identified in section 2.1 of the FCRPS Action Agencies’ Biological Assessment.<sup>25</sup> In addition, the Accords provide funding for many RM&E projects. The tribes and states entering into the Accords have affirmed the adequacy of these efforts. CBFWA’s RM&E recommendation exceeds the robust effort already supported by the Accord parties, and calls for RM&E that provides “existing and planned status and trend, hatchery, harvest, hydro system and habitat monitoring into a framework that addresses local and regional needs.”<sup>26</sup> In addition, the recommendations identify “catch per effort”—needed for harvest management—as a hydrosystem performance standard.<sup>27</sup> These recommendations go well beyond both what the Biological Opinions require and what the Federal agencies need for robust implementation of efforts linked to mitigating hydrosystem effects. Additionally, CBFWA’s RM&E recommendations go well beyond the commitments and affirmation of adequacy of them reflected in the Accords.
- Project Solicitation. CBFWA requested that project solicitation and selection processes rely on the limiting factors in ESA recovery plans.<sup>28</sup> BPA expects future solicitations for ESA projects to be focused on meeting outstanding Biological Opinion requirements that are not already addressed in the Fish Accords. However, it should be clarified that the 2008 Biological Opinion and Accords include comprehensive mitigation packages that address ESA needs for 10 years based on a thorough review of biological priorities and limiting factors at the ESU and population levels consistent with recovery plans. A suggestion that further additional solicitations based on recovery plans that exceed that needed to meet the Biological Opinion post-2009 requirements would not be consistent with these agreements and plans.
- Clean Water Act Planning. The CBFWA recommendations contemplate Program guidance for regional Clean Water Act compliance plans.<sup>29</sup> The FCRPS Action Agencies have already taken steps in both the Biological Opinions and the Accords to address their Clean Water Act responsibilities, and the state and tribal Accord signatories agreed that those commitments sufficiently met the agencies’ responsibilities. In addition, Clean Water Act planning has been delegated to certified states and tribes and operates independent of the Program.
- Performance Standards and Objectives. The Biological Opinions and Accords rely on a system of specific “gap filling” objectives and specific performance standards and metrics that track improved fish survival. For example, hydro performance standards are 96% dam survival for spring migrants and 93% for summer migrants, with other performance relevant metrics of in river survival, delay, and SPE used for informed

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<sup>25</sup> 2008 Columbia Basin Fish Accords MOA between the Three Treaty tribes and FCRPS Action Agencies § II.A.2.

<sup>26</sup> CBFWA recommendations § 2.0.3, page 28.

<sup>27</sup> CBFWA recommendations § 2.0.3, page 28.

<sup>28</sup> CBFWA recommendations § 1.5, page 24.

<sup>29</sup> CBFWA recommendations § 1.6, page 25

decision-making.<sup>30</sup> In the Biological Opinions and the Accords, fish trends over time are examined as part of an “All-H” and full life-cycle diagnostic process (with check-ins in 2013 and 2016) because these trends are influenced by many factors beyond the hydrosystem.

CBFWA uses a different performance standard than the Biological Opinions or the Accords: “progress towards meeting the overarching biological objectives identified in the Program are indicators of whether implementation of the Program is adequate to meet mitigation responsibilities.”<sup>31</sup> Throughout section 3 in its recommendations, CBFWA also proposes different performance standards than those found in the FCRPS Biological Opinion or agreed to in the Accords.<sup>32</sup> Consequently, CBFWA’s biological objectives and performance standards seem to be inconsistent with those in the Biological Opinions and the Accords.<sup>33</sup>

Similarly, ODFW presented hydro recommendations that conflict with these resource management plans, particularly in the area of hydro performance. The prescriptive spill and flow regimes, specific project operations, and recommendations for new passage technologies that ODFW proposes<sup>34</sup> conflict with the performance standard-based approach reflected in the Biological Opinions and Accords by seven CBFWA members—NOAA Fisheries, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Colville Tribes, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Yakama Nation, the State of Idaho, and the State of Washington.

- Limiting Factors. CBFWA includes delayed mortality and latent mortality as limiting factors and considers transportation a “Threat.”<sup>35</sup> This is inconsistent with the Biological Opinion in that the Biological Opinion continues the spread-the-risk transportation strategy. Delayed or latent mortality is addressed in the Biological Opinions, and endorsed in the Accords, in a manner consistent with the advice of the ISAB (related to both empirical studies as well as COMPASS modeling).<sup>36</sup>

- Relationship to Existing Wildlife Mitigation Agreements

CBFWA calls for the Program to direct BPA to mitigate 200% of the documented habitat losses, and then appears to also recommend doubling the habitat losses shown in Table 11-4 of the

<sup>30</sup> See generally, NOAA Fisheries, Issue Summaries of the 2008 FCRPS Biological Opinion <http://www.nwr.noaa.gov/Salmon-Hydropower/Columbia-Snake-Basin/upload/Final-Issue-Sums.pdf>; 2008 Columbia Basin Fish Accords MOA between the Three Treaty tribes and FCRPS Action Agencies, Attachment A.

<sup>31</sup> CBFWA recommendations § 2.0.1, page 27.

<sup>32</sup> CBFWA recommendations § 3.0.

<sup>33</sup> See generally, 2008 Columbia Basin Fish Accords MOA between the Three Treaty tribes and FCRPS Action Agencies § II.A.1 (adopting performance targets, standards, and metrics from the FCRPS Action Agencies’ 2007 Biological Assessment (pages 2-3 through 2-6) and the then draft FCRPS Biological Opinion).

<sup>34</sup> ODFW recommendations pages 27-30.

<sup>35</sup> CBFWA recommendation §§ 2.1.3-2.1.4, pages 37-38.

<sup>36</sup> ISAB, Latent Mortality Report (2007-1) (Apr. 6, 2007); ISAB, Review of the Comprehensive Passage Model (2008-3) (June 2, 2008).

Council's 2000 Program.<sup>37</sup> If this is an accurate conclusion to draw, it amounts to CBFWA calling for 4:1 crediting. Whether for 2:1 or 4:1 crediting, the CBFWA recommendation would be in direct conflict with the numerous existing wildlife mitigation agreements BPA has with 19 CBFWA members who all acknowledge 1:1 crediting for BPA.

BPA observed publicly in 2002 that the 2:1 crediting recommendation conflicts with other provisions within the same program and would violate valid existing crediting contracts between BPA and its wildlife mitigation partners.<sup>38</sup> Moreover, BPA notes that under the Dworshak and Montana Wildlife Mitigation "trusts," Idaho, Montana, and the Nez Perce Tribe must not support additional wildlife mitigation in their states for the dams covered by those agreements for 60 years, and if more wildlife mitigation is indeed needed then they agreed to hold harmless and indemnify BPA for those costs. Absent any supporting documentation or data indicating new information or changed circumstances that warrant the change from 1:1 to 2:1 crediting, and because that change has potential implications for the contracts supporting both past and ongoing wildlife mitigation efforts, there does not appear to be a compelling reason for pursuing programmatic changes regarding the longstanding wildlife crediting ratio.

#### **4. Taking Economic Costs into Account when Alternatives may achieve the Same Biological Objective.**

- Reducing Wildlife Mitigation Costs

After BPA submitted its amendment recommendations regarding wildlife, some resource managers questioned several of its proposals. Some resource managers seemed particularly concerned that BPA might move funding away from historic state and tribal wildlife managers and into new, innovative partnerships with other entities.

The arguments made against changing the dominant wildlife paradigm are misplaced. BPA advocates developing more partnerships to expand the footprint of wildlife protection efforts, and to bring greater flexibility, funding, and accountability into the Program. The cost-effectiveness of partnerships, even in acquiring easements, becomes apparent quickly: one-time stewardship funding<sup>39</sup> to oversee a landowner's adherence to a perpetual easement will cost much less (typically 1%-3% of an easement's cost) than even one year's O&M at the rates resource managers seek through the Program for similarly situated properties that they own (often 10% of fee purchase price annually).

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<sup>37</sup> See, e.g., ODFW Attachment 1, recommendation no. 73 (supporting Table 2.3.1 in the CBFWA Recommendation which doubles all the habitat units lost shown in Table 11-4 from the 2000 Program); CBFWA recommendations § 2.3.1, page 64.

<sup>38</sup> Letter from Stephen Wright, BPA Administrator/CEO, to Larry Cassidy, Council Chairman (regarding wildlife crediting history and policy) (Mar. 1, 2002).

<sup>39</sup> 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.

In addition, BPA believes that exploring emerging markets like carbon credits could attract new mitigation partners and expand the Program’s mitigation reach. For example, with the Zena conservation easement near Salem, BPA acquired the carbon sequestration and credit rights at no additional cost. Now BPA is actively working with the Trust for Public Land and ODFW to use those carbon sequestration and credit rights to leverage other partners into expanding the project at a lower cost to ratepayers.

## **5. Limiting Recommendations to Hydrosystem Responsibilities.**

- Expanding the Status of the Resource Report (SOTR)

Several fish and wildlife managers support CBFWA’s recommendation that BPA have sole funding responsibility for the SOTR. The value of the SOTR is regional in nature, and arises from many entities, not just the hydrosystem and its ratepayers. For instance, the proposal seeks to include “catch rates” in the SOTR<sup>40</sup> even though the Council in the past determined that fisheries managers should fund their own harvest monitoring.<sup>41</sup> The CBFWA proposal also broadly states the SOTR should include population monitoring reports on all target species in a subbasin—even on species and subbasins unaffected by the FCRPS.

Expanding the SOTR as proposed first requires firm agreements to share the information gathering and reporting costs for both these kinds of off-site impacts caused by sources other than the FCRPS.<sup>42</sup> In addition, some of the basic information collection proposed, particularly status monitoring, is at least in part the legitimate responsibility of the fish and wildlife managers themselves. It should also be noted that the FCRPS Biological Opinions, recent Fish Accords, the Council’s High Level Indicators initiative, Pisces and associated Report Center, and other actions already include extensive data gathering and reporting requirements. And the FCRPS Action Agencies have legally enforceable commitments to gather, analyze, and report data annually and to produce periodic comprehensive evaluations.<sup>43</sup> These are commitments that the Program should reflect. In addition, as the legislatively established Washington Forum on Monitoring noted, the SOTR lacks standardized categories of information “which makes it difficult if not impossible to ‘roll up’ this information so that it can be displayed by overall or ‘high-level’ indicators that are clear.”<sup>44</sup>

All these reasons indicate that the SOTR, if pursued as scoped by CBFWA, would expand well beyond FCRPS mitigation reporting needs and Action Agency responsibilities. Therefore, before becoming part of the Program it must be supported with substantial, assured cost-sharing by other appropriate entities.

<sup>40</sup> CBFWA recommendations § 2.0.3, page 28.

<sup>41</sup> Council, 1984 Program Appendix B at 15 (Oct. 10, 1984) (“The Council has concluded that gathering escapement data is a traditional fishery management agency responsibility.”). Where FCRPS management requires escapement data, it may be appropriate for BPA to fund other entities to collect it.

<sup>42</sup> 16 U.S.C. § 839b(h)(8)(C).

<sup>43</sup> 2008 Columbia Basin Fish Accords MOA between the Three Treaty tribes and FCRPS Action Agencies § II.A.

<sup>44</sup> Washington Forum on Monitoring recommendations (Mar. 21, 2008)

## **6. BPA Ratepayers shall bear the cost of mitigation measures for the FCRPS only.**

Several recommendations misunderstood the ratepayer mitigation responsibility and the FCRPS nexus needed to justify BPA funding. Program measures applicable to BPA must be provided as mitigation for the effects of the FCRPS, and must be in addition to and not “in lieu” of obligations that must be met by others, including other hydro operators.<sup>45</sup> There are numerous examples of recommended actions that go beyond the scope of FCRPS responsibilities. ODFW seeks “measures to address the potential impacts of global climate change and population growth on fish and wildlife resources” and lamprey passage at Portland General Electric’s Willamette Falls project.<sup>46</sup> IDFG seeks ratepayer funding to “quantify smallmouth predation” in Hells Canyon, an area dominated by Idaho Power Company’s three-dam Hells Canyon Complex; to reduce illegal fish harvest with new “easy to read road side signs that will inform anglers of the fishing regulations;” and to “address legacy sedimentation issues, such as road obliteration/decommissioning.”<sup>47</sup> BPA urges the Council to develop a broad, All-H Program, but to limit Program measures addressing BPA responsibilities to those with a clear FCRPS nexus.

### **Incorporation of Columbia Basin Fish Accords**

The FCRPS Action Agencies and the state and tribal Accord parties agreed to a 10 year commitment of actions in support of the Action Agencies’ obligations both generally under the Northwest Power Act, as well as specifically for anadromous species listed under the ESA. The commitments include support for the actions in the 2008 Biological Opinions for the FCRPS and the Upper Snake. The commitments also include actions already reviewed and recommended by the Council to BPA, as well as expanded and new actions. The Parties found these commitments consistent with the Program and the Council’s intent to integrate Power Act and ESA responsibilities. The expanded and new actions are, moreover, subject to reasonable modifications determined by the Parties based on Council and ISRP review. BPA therefore encourages the Council to incorporate the Accords in their entirety into the amended Program through a general reference.

### **Other Important Considerations Noted in BPA’s Recommendations**

The recommendations that BPA filed with the Council on April 4 anticipated many of the potential issues posed by recommendations from other entities. The following sections elaborate on several of those issues.

#### **1. Implementation Provisions**

Many resource managers seek to have the Program set BPA budgeting, accounting, and crediting policies. Given their role as BPA contractors, these resource managers have some general experience with these policies; but these are not matters where they possess the statutory expertise contemplated for recommendations to the Council. The Northwest Power Act neither calls for the

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<sup>45</sup> 16 U.S.C. § 839b(h)(10)(A).

<sup>46</sup> ODFW recommendations, Attachment 1, nos. 11 and 46.

<sup>47</sup> Idaho Department of Fish and Game (IDFG) recommendations pages 51, 67, 69, and 71.

Program to include such provisions nor suggests that resource managers should expect deference to them.

Moreover, long-standing administrative and constitutional law principles dictate that federal agencies shoulder the primary responsibility for budgeting and accounting processes, capitalization policies, and statutory interpretations of their enabling acts. Comments and criticism on those processes, policies, and interpretations are always welcome, and BPA will consider them fully. But BPA cannot legally delegate its internal financial and management policy making responsibilities to state and tribal entities.

## 2. Level of Detail for Program Measures

Along with BPA, most other entities making recommendations for amendments supported the broad, thematic framework of the 2000 Program. Nevertheless, the Council also received many narrow, specific recommendations earmarking individual projects as proposed measures for the Program. The perceived need for such a shift from the framework established in the 2000 Program originates with two unfounded assumptions.

First, identifying projects and contracts in the Program supports an attempt to create a legally enforceable means of ensuring that BPA will fund specific entities for particular tasks. Looking to the Ninth Circuit's Fish Passage Center decision, those resource managers seem to be seeking an earmark of their projects, believing that Program language singling out their projects will ensure them a legal right under the Northwest Power Act for indefinite funding.

This perceived need originates with a fear that BPA intends to reduce its mitigation funding commitments. To the contrary, the Columbia Basin Fish Accords, the 2008 FCRPS Biological Opinion, and BPA's initial proposal for 2010-2011 mitigation budgets in the Integrated Program Review all indicate that the fish and wildlife mitigation funding will not just be stable but instead will be significantly increased.

Second, some entities propose amending the Program with specific projects to shield them from the potential funding instability that arises with unfavorable independent scientific review.<sup>48</sup> They believe that if the program lists individual projects, the projects can effectively avoid independent scientific scrutiny because, they argue, under the Act the ISRP reviews only "projects" proposed for funding from BPA's annual budget, not "measures" amended into the Program.<sup>49</sup>

The Council, however, can and has had the ISRP and ISAB review Program elements, whether "projects" or "measures," as it did with the Program's biological objectives in 2001. Calling a project a measure doesn't insulate it from independent scientific review.

Moreover, excluding measures from independent scientific review would defeat the sound public policy underlying section 4(h)(10)(D) of the Act, which mandated ISRP review: Congress saw that when the same entities proposed, reviewed, ranked, selected, developed budgets for, and then

<sup>48</sup> See, e.g., ODFW recommendations, Attachment 4.

<sup>49</sup> See, e.g., ODFW comments, Attachment 4, pages 27-28 (June 12, 2008)

received ratepayer funding to implement their own projects, there arose an inherent conflict of interest.<sup>50</sup>

For these reasons BPA strongly urges the Council not to amend additional specific projects or contracts into the Program.

### 3. Improving the Program's Effectiveness and the Region's Ability to Track It

The 2000 Program advanced a scientific framework to structure mitigation planning more comprehensively than past programs. The Council sought to shift the Program from a compilation of projects to a well-organized, focused, and scientifically supported plan directed at mitigating ecosystems. In response, the region added more projects. This improved the connections between many existing projects by adding new ones in between. Yet in 2001 the Council's Independent Scientific Advisory Board showed how the Program's biological objectives were neither sufficiently grounded in science, nor structured well enough to meaningfully measure the success of mitigation efforts.<sup>51</sup> The new framework, in other words, could not by itself ensure project or budget proposals that addressed the basin's highest biological priorities—the key factors limiting properly functioning ecosystems.

Advancements in capturing and sharing information and ongoing initiatives to develop a comprehensive framework for reporting can serve as the backbone for measuring and reporting on Program implementation and effectiveness. For example, the initiative of the Council to develop “high level indicators” provides a regional context for comprehensive as well as Program-level reporting. The parties to the recent Biological Opinions and Fish Accords adopted clear biological objectives and metrics, with acknowledged reporting requirements and deadlines. The states, agencies, and tribes that adopted these reporting criteria and schedules did so after a years-long collaborative process that included the Council.

For species not protected under the ESA, particularly focal resident fish and wildlife species in the Program (and the ecosystems they depend on), BPA looks forward to working collaboratively with the Council, states, agencies, and tribes to adopt appropriate indicators to reflect progress of FCRPS mitigation efforts and its potential effectiveness to fish and wildlife and their habitats.

### 4. Basing Mitigation Efforts on Ecosystems and Emphasizing Biologically Measurable Performance

For a decade now, monetary issues have tended to overshadow questions about how to implement the program so as to be the most biologically effective. With the new Biological Opinions, Accords, and planned program funding increases, BPA made legally binding commitments for 10 years to significantly increase funding, and to track mitigation results more effectively. This should better enable focus on effective implementation and questions about funding levels, long-term stability, and predictability should therefore subside.

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<sup>50</sup>142 Cong. Rec. S10623 (daily ed. Sept. 17, 1996) (statement of Sen. Slade Gorton); *see also*, ISRP, Retrospective Report 1997-2005 pages 99-100 (ISRP 2005-14) (Aug. 31, 2005).

<sup>51</sup> ISAB, Review of the Biological Objectives in the 2000 Fish and Wildlife Program (2001-6) (July 26, 2001).

In working to improve program planning and implementation, BPA will continue mitigating the unique ecosystems relied upon by resident fish and wildlife that the FCRPS affected, and to provide substitution in appropriate circumstances. As such, mitigation efforts to address FCRPS impacts throughout the region should be focused on localized ecosystem needs and objectives. This should come as no surprise because virtually all the entities that provided recommendations to the Council supported a planning framework based on programmatic priorities determined within a hierarchy of ecological and biological objectives. As part of this, evaluations of programmatic effectiveness and priorities should include a focus on ecosystem benefits, as compared to separate and distinct assessments of project spending categorized as resident fish, anadromous fish, or wildlife, given the broad multi-species ecosystem-oriented benefits of many projects.

Thank you for this opportunity to comment on the recommendations provided to the Council for amending the Program.

Sincerely,



Gregory K. Delwiche  
Vice President, Environment, Fish and Wildlife