Docket No. 10-72104

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWEST RESOURCE INFORMATION CENTER,

Petitioner,

v.

NORTHWEST POWER AND CONSERVATION COUNCIL,

Respondent.

On Petition for Review of Final Decision of
the Northwest Power and Conservation Council
under the Northwest Power Act

BRIEF OF INTERVENOR PUBLIC POWER COUNCIL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Intervenor Public Power Council states that it is a non-profit corporation, duly incorporated and organized under the laws of the State of Washington, with its principal office in Portland, Oregon. Public Power Council has no stock and no parent corporation.

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I. STATEMENT OF JURISDICTION

Intervenor Public Power Council ("PPC") agrees with the Petitioner and the Northwest Power and Conservation Council (the "Council") that this Court has jurisdiction pursuant to section 9(e) of the Pacific Northwest Electric Power Planning and Conservation Act ("NWPA" or the "Act"), 16 U.S.C. §§ 839f(e)(1)(A) and 839f(e)(5), to review the Council's Sixth Power Plan and the issues presented by the petition.

II. STATEMENT OF ISSUES

A. Whether the Sixth Power Plan gives "due consideration" to the protection, mitigation, and enhancement of fish and wildlife and related spawning grounds and habitat, pursuant to section 4(e)(2) [16 U.S.C. § 839b(e)(2)] of the NWPA?

B. Whether the Sixth Power Plan includes an appropriate methodology for determining quantifiable environmental costs and benefits of resources pursuant to section 4(e)(3)(C) [16 U.S.C. § 839b(e)(3)(C)] of the NWPA?

C. Whether the Council acted arbitrarily and capriciously when it included, in an appendix to the draft of the Sixth Power Plan, Bonneville Power Administration's ("BPA's") reported costs of implementing the Council's 2009 Fish and Wildlife Program?

Pursuant to Ninth Circuit Rule 28-2.7, all pertinent statutory provisions are set forth in the Addendum to the Petitioner's Opening Brief.

III. STATEMENT OF THE CASE

At issue here is the adequacy of the Council's Sixth Power Plan (the "Plan"). Petitioner claims that certain aspects of the Plan are arbitrary, capricious, and contrary to law, and asks the Court to vacate those portions of the Plan and remand them back to the Council for further consideration. Petitioner's Opening Brief ("Opening Brief") at 15, 37. Petitioner alleges three specific errors: (1) in developing the Plan, "the Council has failed to meet its due consideration obligations under § 839(b)(e)(2) [sic] [section 4(e)(2) of the NWPA]," (Opening Brief at 37); (2) "[t]he Plan does not outline (or apply) a methodology to quantify or consider the environmental costs and benefits of any of existing or future generating resources and conservation measures," (Opening Brief at 42); and (3) the Council acted arbitrarily and capriciously when it included BPA's reported costs of implementing the Council's 2009 Fish and Wildlife Program in the draft Plan, (Opening Brief at 43).

The Council denies the Petitioner's claims and urges the Court to affirm the Sixth Power Plan and dismiss the petition as without merit. Specifically, the Council maintains that it acted consistently with all relevant provisions of the NWPA and argues that Petitioner's interpretation of the Act is contrary to the Act's

express language, the Council's long-standing interpretation of the Act, and the congressional intent.

PPC is a non-profit trade association that represents the interests of consumer-owned electric utilities in the Northwest, which are statutory preference customers of BPA. PPC represents its members on wholesale power supply and related policy issues. PPC has intervened in this case on behalf of the Council.

IV. STATEMENT OF FACTS

Although it may not seem like it, the relevant facts here, and the statutory context in which those facts have to be applied, are fairly straightforward.

BPA is a federal agency charged with marketing electric power generated by the federal hydroelectric projects in the Pacific Northwest. 16 U.S.C. §§ 832-832m. "In 1980, to assist BPA in balancing its responsibilities to provide low-cost energy while protecting fish and wildlife, Congress passed the [NWPA]." *Northwest Environmental Defense Center v. Bonneville Power Administration*, 477 F.3d 668, 673 (9th Cir. 2007) (citations omitted). The Act authorized the establishment of the Council, an interstate compact agency, which was to be composed of representatives from four states – Idaho, Montana, Oregon and Washington. *Id.* (citations omitted). The Act then charged the Council with two fundamental tasks: (1) preparing and periodically reviewing a program to protect, mitigate, and enhance fish and wildlife ("fish and wildlife program" or the

"program") and (2) preparing and periodically reviewing a regional conservation and electric power plan to aid BPA in acquiring and developing power resources ("power plan" or the "plan"). 16 U.S.C. § 839b(a)(1); *Northwest Environmental Defense Center*, 477 F.3d at 673.

In 1982, the Council adopted its first fish and wildlife program and has reviewed, reformulated and amended it several times since then. *Northwest Environmental Defense Center*, 477 F.3d at 673. Most recently, the Council began the process to amend its fish and wildlife program in November of 2007 and, following a very public two-year review process as required by the NWPA, the Council adopted its current version of the program in February of 2009 (the "2009 Program" or the "2009 Fish and Wildlife Program"). Respondent's Supplemental Excerpts of Record ("SER") 933; Brief of Respondent Northwest Power and Conservation Council ("Response Brief") at 15-16. Although the Council provided ample opportunity for public participation (SER 933), the Petitioner did not submit recommendations for amendments to the program, did not provide comments on the submitted recommendations or on the draft 2009 Program and did not participate "in any other way in the public process the Council engaged in to produce the [2009 Program]," (Response Brief at 16). The Petitioner did not challenge the Council's final decision to adopt the 2009 Program either. Response Brief at 16.

Since adopting its first Power Plan in 1983, 48 Fed. Reg. 24,493-01 (June 1, 1983), the Council has reviewed and revised it every five years as required by the NWPA. *See* 16 U.S.C. § 839b(d)(1). Most recently, the Council began the process to review and revise its power plan in December of 2007. SER 1033-1044.[1] That process was separate but parallel with the Council's process to revise its 2009 Fish and Wildlife Program because, ultimately, the Council's fish and wildlife program is incorporated into the Council's power plan. *See* 16 U.S.C. § 839b(e)(3)(F). Over the next two years, the Council completed the immense technical, policy, and drafting work needed to produce a draft of the Sixth Power Plan, which was published in September of 2009 and summarized the Council's key findings.[2] SER 1027-1028; 1030-1031. Following an extensive public process, which included review and analysis of written comments and oral testimony (SER 1182-1202; 1027-1028; 996-1026), the Council revised the draft Plan and adopted the final Sixth Power Plan in February of 2010 (SER 1-296). Petitioner now claims that

[1] Although the document titled "Issues for the Sixth Pacific Northwest Power and Conservation Plan" is undated, the Council has represented that it was released in December of 2007. Response Brief at 18.

[2] The Council has described to the Court the "extraordinary scope and scale" of the policy and technical effort required to produce the power plan. Response Brief at 16-23. And although this Court is generally familiar with the enormity of the necessary effort, it is worth reminding the Court that if printed out, the administrative record for the Sixth Power Plan's technical and policy analyses, and public comment would run tens of thousands of pages.

certain aspects of this Plan are arbitrary, capricious, and contrary to the provisions of the NWPA.

V. STANDARD OF REVIEW

The Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706 governs the Court's review of Council actions. 16 U.S.C. § 839f(e)(2). The Council's adoption of the Sixth Power Plan is a final action subject to judicial review for purposes of the APA. 16 U.S.C. § 839f(e)(1)(A). In considering the Council's decisions under the APA in the past, this Court has held that the Council's actions may be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Conservation Planning Council*, 786 F.2d 1359, 1366 (9th Cir. 1986), *cert. denied*, 479 U.S. 1059 (1987) (citing 5 U.S.C. § 706(2)(A)).

"Review under this standard is to be 'searching and careful,' but remains 'narrow,' and a court is not to substitute its judgment for that of the agency." *Northwest Resource Information Center, Inc. v. Northwest Power Planning Council*, 35 F.3d 1371, 1383 (9th Cir. 1994) (quoting *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989). In fact, where the Court has been asked to review the Council's interpretation of the NWPA, it has done so with deference to the Council. *See Seattle Master Builders Ass'n*, 786 F.2d at 1367. The Court has explained that "[t]he preparation and consideration of the [power]

plan is a matter within Council authority over which the Act accords the Council considerable flexibility," and, for the same reasons this Court has deferred to BPA's expertise in interpreting other sections of the Act, it "will defer to the Council's interpretations of § 839b if reasonable." *Id.* Under this deferential standard, therefore, the Court examines only the reasonableness of the Council's interpretation and does not need to find that the Council's interpretation of the NWPA is the only reasonable one, or even that it is the interpretation that the Court would have reached had the issue arisen before it in the first instance. *Id*. at 1366 (citations omitted).

In addition, the Court will also defer to the Council where "the challenged decision implicates substantial agency expertise." *Northwest Resource Information Center, Inc.*, 35 F.3d at 1393 (citation omitted).

VI. SUMMARY OF THE ARGUMENT

None of Petitioner's challenges to the Sixth Power Plan have any merit and all should be dismissed by the Court. Petitioner's first and primary challenge revolves around the Council's obligation to develop a power plan with "due consideration" for the protection, mitigation, and enhancement of fish and wildlife, as well as a number of other factors listed in section 4(e)(2) of the NWPA. Petitioner argues that despite just having spent two years reviewing, evaluating and revising measures for the protection, mitigation, and enhancement of fish and

wildlife as part of a rigid statute-driven process that culminated in the adoption of the 2009 Fish and Wildlife Program, the Council should have repeated that process all over again during its power plan development. Having failed to do that, the Council failed to give "due consideration" to the protection, mitigation, and enhancement of fish and wildlife as required by the NWPA.

Confronted with the fact that the Act does not expressly define "due consideration," and recognizing that the Court's analysis of this challenge will turn on the meaning of that standard, Petitioner supplies its own distorted definition. Relying on this Court's interpretation of a considerably different standard, Petitioner argues that Congress intended for the Council to provide an in-depth analysis and give significant weight to the fish and wildlife measures in its power plan.

But the NWPA does not require what the Petitioner claims it does. In fact, contrary to the Petitioner's interpretation, a plain reading of the Act reveals that in the power plan, Congress required the Council to do nothing more than to take into account, as the circumstances may merit, the measures that the Council had adopted earlier in its fish and wildlife program, and then granted the Council considerable flexibility in preparing the power plan. This is also the Council's reading of the NWPA and it is further supported by the general purpose of section 4(e) and the Act's other provisions.

The purpose of sections 4(d) and 4(e) is to provide for the development of a power plan that will guide the future acquisition of resources and *not* for the development of fish and wildlife measures. After all, the exploration and development of the measures necessary to protect, mitigate, and enhance fish and wildlife is exactly what the fish and wildlife program is for. Certainly, because the NWPA mandates that the fish and wildlife program ultimately be incorporated into the power plan, the two have to be harmonious. And that is precisely why the Act directs the Council to take into account in the power plan, to the extent appropriate, the fish and wildlife measures that it had previously adopted in its fish and wildlife program. The record is clear that in the Sixth Power Plan, the Council gave the required "due consideration" to the fish and wildlife measures it developed and adopted in its 2009 Fish and Wildlife Program and, for that reason, Petitioner's first challenge has no merit.

Petitioner's second challenge to the Sixth Power Plan pertains to the requirement in section 4(e)(3) that the power plan include, in such detail as the Council deems appropriate, a methodology for determining quantifiable environmental costs and benefits of conservation measures and resource acquisitions. Quantifiable environmental costs and benefits are among the elements that make up the "system cost" of a resource or measure, which is used to evaluate the cost-effectiveness, and therefore priority, of that resource or measure.

Petitioner argues that the Sixth Power Plan does not outline or apply the required methodology, particularly as it pertains to existing hydroelectric resources.

Contrary to Petitioner's assertions, the Sixth Power Plan carefully outlines and defines the components of the Council's methodology for determining quantifiable environmental costs and benefits. The Plan also applies this methodology to new conservation measures and resource acquisitions considered by the Council. The NWPA does *not* require the Council to develop a methodology to evaluate the cost-effectiveness of existing resources because Congress clearly intended for the existing resources to continue to operate. The Council, therefore, did not need to develop or apply an environmental cost-benefit methodology for existing resources and, for that reason, Petitioner's second challenge has no merit either.

The Court should dismiss Petitioner's final challenge to the Sixth Power Plan even more quickly than the first two. Petitioner argues that the Council acted arbitrarily and capriciously when it included information on BPA's reported costs of implementing the 2009 Fish and Wildlife Program in an appendix to the draft Sixth Power Plan. But the Council did not consider or otherwise use these cost figures in the development of its resource acquisition strategy and included them purely for informational purposes. Therefore, there are no grounds for the Court to find that the Council acted arbitrarily and capriciously.

VII. ARGUMENT

A. The Council complied with section 4(e)(2) of the NWPA by giving "due consideration" to the protection, mitigation, and enhancement of fish and wildlife and related spawning grounds and habitat in the Sixth Power Plan.

Petitioner claims that the Council failed to give "due consideration" to the protection, mitigation, and enhancement of fish and wildlife in its Sixth Power Plan as required in section 4(e)(2) [16 U.S.C. § 839b(e)(2)]. As the Council aptly points out, this is a case of statutory construction because to decide this issue, the Court has to determine the meaning of section 4(e)(2)'s mandate that the power plan give "due consideration" to the factors identified in that section.

1. The meaning of "due consideration."

Section 4(e)(2) states that the Council's power plan "shall set forth a general scheme for implementing conservation measures and developing resources pursuant to section 839d of [the NWPA]," with "due consideration by the Council" to four factors:

> (A) environmental quality,
>
> (B) comparability with the existing regional power system,
>
> (C) protection, mitigation, and enhancement of fish and wildlife and related spawning grounds and habitat, including sufficient quantities and qualities of flows for successful migration, survival, and propagation of anadromous fish, and
>
> (D) other criteria which may be set forth in the plan.

16 U.S.C. § 839b(e)(2).

At the outset, Petitioner concedes that the phrase "due consideration" is not defined in the NWPA. Opening Brief at 20. Petitioner then attempts to supply a definition that is contrary to the plain language and purpose of the NWPA, the Council's interpretation of the NWPA, and the courts' uniform interpretation of the same phrase in varied contexts. For example, Petitioner argues that the phrase "due consideration" in section 4(e)(2) requires the Council to "provide *in-depth* consideration" (Opening Brief at 18), "give *significant* weight to" (Opening Brief at 21), "do *more than* 'consider'" (Opening Brief at 24), and "'*heavily*' consider" the protection (Opening Brief at 25), mitigation, and enhancement of fish and wildlife in the Sixth Power Plan. (All emphasis added.)

a. Cases offered by Petitioner do not support and, in fact, contradict its interpretation of "due consideration."

In support of its distorted definition of "due consideration," Petitioner relies on a case where this Court interpreted the meaning of the phase "due weight" found in section 4(h)(7) of the NWPA, 16 U.S.C. § 839b(h)(7), which pertains to the Council's development and adoption of its fish and wildlife program. *See Northwest Resource Information Center, Inc.* , 35 F.3d at 1386. The Council's fish and wildlife program consists of measures to protect, mitigate, and enhance fish and wildlife, which are based on recommendations of certain groups. 16 U.S.C. § 839b(h)(2)-(5) [section 4(h)(2)-(5)]. Section 4(h)(7) mandates that if there are

inconsistencies in those groups' recommendations, the Council must resolve the inconsistencies by giving "due weight" to the recommendations and expertise of the fishery managers (fish and wildlife agencies and Indian tribes). 16 U.S.C. § 839b(h)(7).

In analyzing the meaning of "due weight," the Court compared section 4(h)'s fish and wildlife provisions with section 4(e)'s power plan provisions and found them "[i]n stark contrast" with each other. *Northwest Resource Information Center, Inc.*, 35 F.3d at 1387. Section 4(h)'s fish and wildlife provisions "significantly circumscribe the Council's discretion," and if reconciliation of program recommendations is required, Congress intended that the Council give "due weight" or "heavily rely upon" or "defer" to the fishery managers. *Id.* at 1388-89. In contrast, "[t]he power plan provisions of the Act [sections 4(d) and 4(e)] are cast in broad terms" and "grant the Council considerable flexibility in preparing a power plan; indeed the Council's function under these provisions is essentially legislative." *Id.* at 1387. Certainly, in developing the Plan under section 4(e), the Council must "consider several enumerated factors and 'other criteria that may be set forth in the plan,'" *id.*, but nothing more than mere consideration is required.

Conflating the meaning of "due weight" with the meaning of "due consideration," Petitioner asserts that "due consideration" in section 4(e) requires

the Council to "do more than 'consider'" or to "give significant weight to [ ] the needs of anadromous fish" in its development of a power plan. Opening Brief at 24, 21. But *Northwest Resource Information Center, Inc.* makes clear that the difference between the power plan provisions requiring the Council to give "due consideration" to a list of factors, and the fish and wildlife provisions requiring the Council to give "due weight" to a particular group, "is a contrast of generous discretion and bound discretion." *Id.* The key lies not in the meaning of "due" as Petitioner suggests, but in the contrast between "consideration" and "weight."

By requiring the Council to give "due *weight*" to the fishery managers, Congress tempered the Council's discretion over the fish and wildlife program, mandating that it give preference to the recommendations of one group over all others. By requiring the Council to give "due *consideration*" to several enumerated factors in the development of a power plan, Congress gave no indication as to the weight to be assigned to each factor, leaving that decision to be made at the sound discretion of the Council in the context of the particular power plan. *See The Sierra Club v. U.S. Dept. of Agriculture*, 116 F.3d 1482, No. 96-2244, 1997 WL 295308, at *6, (7th Cir. May 28, 1997) (Where Congress gave no indication as to the weight to be assigned to each value by the Forest Service, it must be assumed that the decision as to the weight given to all the values and proper mix of uses within any particular area is left to the sound discretion of the

Forest Service.) (citations omitted)). "To give due consideration to a particular factor necessarily means to give such weight or significance to it as under the circumstances it seems to merit, *and this, of course, involves discretion*." *U.S. ex rel. Maine Potato Growers & Shippers Ass'n v. Interstate Commerce Commission*, 88 F.2d 780, 783 (D.C. Cir. 1937) (citation omitted) (emphasis added).

Quite simply, the requirement to give "due consideration" means nothing more than "rational" or "practical" consideration as the circumstances may merit. *See General Ins. Co. of America v. Pathfinder Petroleum Co.*, 145 F.2d 368, 370 (9th Cir. 1944) (In interpreting an insurance policy, the court found "due consideration" to mean "rational" consideration.); *see also Washington Restaurant Corporation v. General Ins. Co. of America*, 390 P.2d 970, 976 (Wa. 1964) ("[T]he term 'due consideration' contained in paragraph 1(b) of the policy has acquired a generally understood and accepted meaning synonymous with 'practical' or 'rational.'") (citations omitted)). Therefore, so long as the Council rationally considered the protection, mitigation, and enhancement of fish and wildlife and related spawning grounds and habitat in the context of developing its Sixth Power Plan, it fulfilled the "due consideration" requirement of section 4(e)(2). This is also how the Council interprets the NWPA, which is further supported by the plain language and purpose of section 4(e)(2), as well as the Act's other provisions.

b. The plain language and purpose of the NWPA contradicts Petitioner's interpretation of the "due consideration" requirement in section 4(e).

As noted above, in interpreting the meaning of "due consideration" in section 4(e)(2) of the NWPA, Petitioner argues that "Congress chose to require the Council to do more than 'consider,'" "'heavily' consider," and "give significant weight to" the needs of anadromous fish and other factors enumerated in section 4(e)(2) while developing the power plan. Opening Brief at 24, 25, 21. But such a construction would require the Court to *add* words that are not there to the language used by Congress, which runs counter to one of the most basic principles of statutory construction. *See U.S. v. Watkins*, 278 F.3d 961, 965 (9th Cir. 2002).

In interpreting a statute, courts may not omit or add to the plain meaning of the statute and have no right, under the guise of statutory construction, to either add words to or eliminate words from the precise language used by Congress. *Matter of Borba*, 736 F.2d 1317, 1320 (9th Cir. 1984); *De Soto Securities Co. v. C.I.R.*, 235 F.2d 409, 411 (7th Cir. 1956). Courts must merely construe the words Congress has written without adding or subtracting words or distorting their meaning. *62 Cases, More or Less, Each Containing Six Jars of Jam v. U.S.*, 340 U.S. 593, 596 (1951). Unless the statute defines the words in question, they "will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. U.S.*, 444 U.S. 37, 42 (1979). "An appropriate place to look for the common

meaning is in the dictionary." *In re Shelley*, 184 B.R. 356, 361 (9th Cir. BAP 1995) *affd.* 109 F.3d 639 (9th Cir. 1997) (citation omitted).

The Merriam-Webster's Collegiate Dictionary defines "due," in relevant part, as "satisfying or capable of satisfying a need, obligation, or duty" or as "according to accepted notions or procedures," and offers the word "appropriate" as a synonymous cross-reference. Merriam-Webster's Collegiate Dictionary 357 (Frederick C. Mish et al. eds., 10th ed. 2002). It defines "consider," in relevant part, as "to think of [especially] with regard to taking some action" or "to take into account." *Id.* at 246. And it defines "consideration," in relevant part, as "a matter weighed or taken into account when formulating an opinion or plan" or "a taking into account." *Id.* Incidentally, the legal dictionary, citing to *U.S. ex rel. Maine Potato Growers & Shippers Ass'n*, 88 F.2d at 783, defines "due consideration" as "[t]o give such weight or significance to a particular factor as under the circumstances it seems to merit, and this involves discretion." *Black's Law Dictionary* 448 (5th ed. 1979).

These definitions make clear that when Congress required the Council to develop an electric power plan "with due consideration" to the factors it listed in section 4(e)(2), it intended for the Council "to think of" or "to take into account" those factors as may be appropriate under the circumstances of a particular power plan, but required nothing further. Congress gave no indication as to the weight to

be assigned to each of the factors and did not prescribe a specific method for the Council's consideration process, thereby empowering the Council with wide discretion over those decisions. Certainly, Congress knew how to give the Council more explicit directions (as is evidenced by Congress' mandate in section 4(h) of the Act to give "due weight" to fishery managers in the fish and wildlife program), but intentionally declined to do so here. Therefore, so long as the Council rationally took into account the protection, mitigation, and enhancement of fish and wildlife in formulating the Sixth Power Plan, it satisfied the "due consideration" requirement of section 4(e)(2) of the NWPA.

This analysis is further supported by other provisions of the Act. Petitioner acknowledges that the criteria the Council is required to consider with regard to the anadromous fish in developing an electric power plan "mirror" the criteria that the Council must include in its fish and wildlife program. Opening Brief at 22. Before developing a power plan, the Council must develop its fish and wildlife program. 16 U.S.C. § 839b(h)(2). That program "shall consist of measures to protect, mitigate, and enhance fish and wildlife," which will "provide flows of sufficient quality and quantity between such [hydroelectric] facilities to improve production, migration, and survival of such [anadromous] fish." 16 U.S.C. §§ 839b(h)(5), 839b(h)(6)(E)(ii). In developing the power plan, the Council has to give "due consideration" to virtually the same criteria: "protection, mitigation, and

enhancement of fish and wildlife and related spawning grounds and habitat, including sufficient quantities and qualities of flows for successful migration, survival, and propagation of anadromous fish." 16 U.S.C. § 839b(e)(2)(C).

That Congress would require the Council, in developing an electric power plan, to consider the very fish and wildlife measures that it directed the Council to methodically develop in a separate process makes very good sense. The Council's fish and wildlife program eventually becomes part of the Council's power plan. 16 U.S.C. § 839b(e)(3)(F). Because the program exists independent of the plan and as a part of it as well, *Northwest Resource Information Center, Inc.*, 35 F.3d at 1379 (quoting 126 Cong.Rec. 10683 (Rep. Dingell)), it has to harmonize with the plan. And the most obvious way to achieve that harmony is to require the Council to take the fish and wildlife program measures into account, as the circumstances may merit, during the development of the power plan.

This is how the Council has interpreted and applied the NWPA in the last thirty years. *See* Response Brief at 25-26. And this interpretation is reasonable because, as the Council points out, the purpose of the power plan is not to develop and adopt measures "to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat," as *that* is precisely the purpose of the Council's fish and wildlife program. *See* 16 U.S.C. § 839b(h)(1)(A). The purpose of the power plan is to develop a conservation and generating resource plan that

will guide the future acquisition of resources, which must be developed "with due consideration" for, among other factors, the fish and wildlife measures adopted in the fish and wildlife program. *See* 16 U.S.C. § 839b(e).

Petitioner argues that by setting out the criteria to be included in the fish and wildlife program in section 4(h) and then repeating them again in section 4(e) as the criteria the Council has to consider in the development of the power plan, Congress intended for the Council to independently review, analyze and revise the needs of anadromous fish *twice* – once in the fish and wildlife program and then again in the power plan. But in light of the fact that the fish and wildlife program is eventually incorporated into the power plan and the purpose of the plan is to develop a resource acquisition strategy and not fish and wildlife measures, such a construction is simply irrational and must be rejected. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.")

The Court should defer to the Council's interpretation of section 4(e) and hold that as long as the Council rationally took into account the protection, mitigation, and enhancement of fish and wildlife in formulating the Sixth Power Plan, it satisfied the "due consideration" requirement of section 4(e)(2).

2. The Council gave "due consideration" to the protection, mitigation, and enhancement of fish and wildlife and related spawning grounds and habitat in the Sixth Power Plan.

In developing the Sixth Power Plan, the Council gave ample consideration to the "protection, mitigation, and enhancement of fish and wildlife and related spawning grounds and habitat, including sufficient quantities and qualities of flows for successful migration, survival, and propagation of anadromous fish." *See* 16 U.S.C. § 839b(e)(2)(C). The Council appropriately dedicated a significant portion of its brief to summarizing all the ways in which it gave due consideration to the protection, mitigation, and enhancement of fish and wildlife in the Sixth Power Plan. Highlighting only a few here ought to satisfy the Court of the Council's compliance.

After sorting through a multitude of recommendations from various stakeholders and following extensive technical review and public examination processes, the Council finalized an aggressive fish and wildlife program. The 2009 Fish and Wildlife Program consists of measures to protect, mitigate, and enhance fish and wildlife species in the Columbia River Basin. SER 834-38. It is a habitat-based program and, therefore, includes measures to "rebuild healthy, naturally producing fish and wildlife populations by protecting, mitigating, and restoring habitats and the biological systems within them." SER 839, 841-42, 846-850, 868-71. It also includes substantial system-wide water management measures,

including flow augmentation measures that would aid the migration, survival and propagation of anadromous fish without unnecessarily disadvantaging any other species. SER 840; 870-71.

The Council then developed a plan for implementing conservation measures and developing new resources that accommodated the fish and wildlife measures it had adopted in the 2009 Fish and Wildlife Program. In fact, the Council explicitly provided in its Sixth Power Plan that "[b]y statute, hydroelectric operations to improve fish survival that are specified in the fish and wildlife program become part of the power plan and *the plan must be designed to accommodate these operations and their cost*." SER 33 (emphasis added). Indeed, the Council followed through on this requirement when, for example, in estimating the capacity and energy output of the existing hydrosystem facilities for the Sixth Power Plan, the Council used the flow passage measures adopted in the 2009 Fish and Wildlife Program as hard nonpower constraints on the hydrosystem. Response Brief at 27. The Council then built its entire plan for acquisition of new resources on the basis of these capacity and energy output estimates. *Id.*

In addition, in the Sixth Power Plan, the Council adopted the "action plan," which describes the actions that need to happen in the five years following the adoption of the Plan in order to implement the Plan's priorities. SER 12. With regard to fish and wildlife, the action plan identified six items that are "designed to

improve the way in which [the Council] plan[s] for the long-term needs of both power and fish and wildlife," suggested opportunities for finding "synergies that may exist between power and fish operations," and identified integration of variable generation resources as a critical topic for discussion because of its "possible consequences for fish and wildlife." SER 33-34. If this is not good evidence that the Sixth Power Plan gives "due consideration" to the protection, mitigation, and enhancement of fish and wildlife, it is difficult to imagine what evidence would be.

B. The Sixth Power Plan includes an appropriate methodology for determining quantifiable environmental costs and benefits.

In its second assignment of error, Petitioner alleges that the Sixth Power Plan does not "outline (or apply) a methodology to quantify or consider the environmental costs and benefits of any existing or future generating resources and conservation measures." Opening Brief at 42. Section 4(e)(3)(C) of the NWPA requires the Council to include in the power plan "in such detail as the Council determines to be appropriate" "a methodology for determining quantifiable environmental costs and benefits under section [3(4)]" of the NWPA. 16 U.S.C. § 839b(3)(C). Section 3(4), in turn, supplies a definition of "cost-effective" for the Council to use in determining which resources are cost-effective and, therefore, entitled to priority in development. 16 U.S.C. § 839a(4)(A); *see* 16 U.S.C.

§ 839b(e)(1) ("The plan shall … give priority to resources which the Council determines to be cost-effective.").

To determine which resources are cost-effective based on the NWPA's definition, the Council must compare their "estimated incremental system cost." 16 U.S.C. § 839a(4)(A)(ii). "System cost" of a resource is an estimate of "all direct costs" of a resource over its effective life, including its "quantifiable environmental costs and benefits." 16 U.S.C. § 839a(4)(B). As noted above, the power plan is to include, in such detail as the Council deems appropriate, a methodology for determining these quantifiable environmental costs and benefits. 16 U.S.C. § 839b(3)(C).

1. Including the methodology for determining quantifiable environmental costs and benefits in the appendix to the Sixth Power Plan was not arbitrary and capricious.

As an initial matter, Petitioner argues that the Council neglected to include the methodology for determining quantifiable environmental costs and benefits in the *draft* of the Sixth Power Plan, but acknowledges that it was included in the final Plan as an appendix. Opening Brief at 38. Petitioner seems to object to the fact that the methodology was "relegated" to the appendix and argues that the NWPA requires the methodology "to be detailed and applied within the Plan itself." Opening Brief at 38. In reality, however, Congress said only that "the plan shall include" the methodology and certain other elements found in section 4(e)(3)

and did not specify exactly where in the plan each of the elements must be placed. 16 U.S.C. § 839b(e)(3). Thus, so long as the Council included a methodology for determining quantifiable costs and benefits as part of the final Sixth Power Plan – and there is no dispute that it did – the Council complied with section 4(e)(3) of the NWPA.

2. Omission from the draft Plan of the explicit description of the methodology the Council used for determining quantifiable environmental costs and benefits was a harmless error.

Although the Council neglected to include an explicit description of the methodology in its draft of the Sixth Power Plan, the way the Council assessed the environmental costs and benefits of new resources was discussed and applied in the draft Plan. For example, in the draft Plan, the Council analyzed conservation and resource scenarios that would reduce carbon emissions, along with information on the actions needed to achieve such reductions. SER 1194. In response to comments that the Council should advocate more assertively for carbon reductions and should explore the costs of meeting a specific carbon reduction goal, the Council acknowledged its "responsibility to consider quantifiable environmental costs," but then explained how it complied with that responsibility with regard to carbon emissions:

> The costs of compliance with current environmental regulations are included in Council's analysis, and the potential cost of future carbon policies is included as a quantified risk in the [draft] plan.

* * *

> The draft plan provided differences in net present value system costs, rates, and customer bills among a number of scenarios that had different carbon reduction effects.

Id. Evidently, the Council's analysis of various carbon emissions scenarios in the draft Plan was sufficiently clear to generate public comments and, ultimately, the Council included a full description of the methodology as part of the final Plan, as required by section 4(e)(3)(C).

To the extent the Court assigns error to the Council's omission of the methodology description from the draft of the Plan, it should find the error harmless. *See Paulsen v. Daniels*, 413 F.3d 999, 1006 (9th Cir. 2005) (In reviewing agency action under the APA, the court must take "due account" of the harmless error rule.). An agency's error is harmless when it clearly had no bearing on the procedure used or the substance of decision reached. *Sagebrush Rebellion, Inc. v. Hodel*, 790 F.2d 760, 764-65 (9th Cir. 1986). Here, the Council discussed and applied the methodology for determining the quantifiable environmental costs and benefits in the draft Plan and subsequently considered the comments it received in response. In addition, the Council ultimately included in the Sixth Power Plan a description of the methodology it applied in the draft Plan, so the omission of the description from the draft Plan had no bearing on what methodology the Council used or how it was applied.

3. The methodology the Council used for determining quantifiable environmental costs and benefits is appropriate.

Next, Petitioner argues that the Council's methodology "fails to provide a rational method for calculating environmental costs and benefits of resources or measures necessary to meet the goals of the Act." Opening Brief at 39. Specifically, Petitioner alleges that the Council did not develop a "defined" methodology (Opening Brief at 40), and the methodology that it did develop "largely relies on" other existing law (Opening Brief at 39). These arguments are simply inaccurate.

In the Sixth Power Plan, the Council explained that there are four components to its methodology for determining quantifiable environmental costs and benefits: (1) existing environmental regulations and their costs; (2) the potential cost of revised or new regulations; (3) consideration of environmental benefits; and (4) recognition of residual environmental costs. SER 822. The Council then carefully defined each of the components and explained how they would be applied. SER 822-24. Petitioner does not challenge the validity of any particular component and does not raise doubt about the accuracy of the methodology as a whole.

Instead, citing to a law review article, Petitioner argues that the Council's methodology is deficient because it cannot be applied to determine the

environmental and social costs of *existing* hydropower resources. Opening Brief at 40. But the Council has never developed a methodology to evaluate the cost-effectiveness of existing resources because the NWPA leaves no doubt that Congress intended for existing resources to continue to operate. *See* 16 U.S.C § 839b(e)(2) (In developing its plan for implementing conservation measures and developing resources, the Council must give "due consideration" to the "compatibility [of those measures and resources] with the existing regional power system."). This is how the Council has always interpreted the Act because, given the explicit language used by Congress, that is the *only* reasonable way to interpret the Act.

Finally, the Council did not "bootstrap" its methodology to the existing law as Petitioner alleges, but simply stated that to the extent there are existing up-to-date regulations in place at the national, state, and local levels that address environmental effects of activities related to the production and use of electricity, "the Council assumes that policy makers have balanced environmental damage against mitigation alternatives and costs to determine the desirable levels of mitigation." SER 822. The Council was quick to caution, however, that because regulatory policies evolve as new information is gathered, "additional mitigation costs should be considered in planning" where there are no policies or where existing policies are being considered for revision. SER 822.

This is not the first time this Court has been asked to review a methodology developed or adopted by the Council in its power plan. *See Seattle Master Builders Ass'n*, 768 F.2d at 1370. After the Council adopted its First Power Plan, the Court considered a challenge to Council's methodology for determining its model conservation standards, and specifically the Council's reliance on existing industry standards and principles of analysis. *Id.* To begin with, the Court observed that "[t]he choice of methodology is a highly technical question which falls within the unique expertise of the Council," and "[u]nless an abuse of discretion is demonstrated, this court will not substitute its judgment on particular testing methodology." *Id.* (citation omitted). Relying on this highly deferential standard, the Court then held that the Council's interpretation of the NWPA was reasonable, that its model conservation standards were not arbitrary or capricious, and that it did not abuse its discretion when it chose to rely upon industry standards in calculating the value of various conservation components. *Id.*

The circumstances here are no different. The methodology for determining quantifiable environmental costs and benefits, which the Council developed and included in the Sixth Power Plan, was well-defined and appropriately tailored to assess the cost-effectiveness of only new resources. The Council's recognition of the existing regulations that are in place at the national, state, and local levels and that address environmental effects of activities related to the production and use of

electricity does not somehow undermine the validity of the methodology or the Council's compliance with section 4(e)(3).

C. The Council did not act unreasonably when it included BPA's reported costs of the 2009 Fish and Wildlife Program in the draft Sixth Power Plan.

In its final assignment of error, Petitioner criticizes the Council for including in the Appendix M to the draft Sixth Power Plan information on BPA's reported costs of implementing the 2009 Fish and Wildlife Program. Petitioner argues that the Council's inclusion of these costs in the Plan is arbitrary and capricious because it amounts to the Council's "*de facto* adoption" of these figures, which in turn infects the Plan. Opening Brief at 43. This argument can be disposed of swiftly and with little discussion.

The Council did not consider or otherwise use BPA's reported costs of implementing the 2009 Fish and Wildlife Program in its development of the Sixth Power Plan. That information played no role in the Council's analysis of its resource acquisition strategy and was included purely for informational purposes for the public. In response to comments on this issue, the Council explained:

> *The plan and the appendix note that the costs of the fish and wildlife program have no direct bearing on the development of the power plan's resource strategy.* The important parameters affecting the power plan are the physical impacts of fish operations: changes to annual, monthly, and hourly hydroelectric generating capacity. These physical changes have been incorporated into all of the Council's planning models and the resulting resource strategy in the power plan incorporates actions to deal with fish operation impacts.

Petitioner's Excerpts of Record 238-39 (emphasis added). Ultimately, the Council removed the discussion of the fish and wildlife costs from the final version of Appendix M because it was concerned that a controversy over costs that were actually irrelevant to the power planning process would distract from the relevant issues. Response Brief at 53.

As the Council points out, the costs that BPA reports are an important piece of information to many of its ratepayers, and that is why the Council initially included it. Response Brief at 52. The Council did not use that information in making its power planning decisions and ultimately removed it from the appendix altogether. Therefore, there are no grounds for this Court to find the Council's actions arbitrary and capricious.

VIII. CONCLUSION

For all the reasons stated in this brief, the Court should deny the petition and affirm the validity of the Sixth Power Plan.

Respectfully submitted this 21st day of December, 2012.

s/ Irene A. Scruggs
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that the attached brief of Intervenor Public Power Council is proportionally spaced, has a typeface of 14 points and contains 7,218 words.

s/ Irene A. Scruggs
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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Intervenor Public Power Council states that it is not aware of any related cases pending in this Court.

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2012, I electronically filed the foregoing Brief of Intervenor Public Power Council with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All of the participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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