

*No. 15-71482*

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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NORTHWEST RESOURCE INFORMATION CENTER, INC.,

*Petitioner,*

v.

NORTHWEST POWER AND CONSERVATION COUNCIL,

*Respondent,*

and

KOOTENAI TRIBE OF IDAHO, SPOKANE TRIBE OF INDIANS, STATE OF  
MONTANA, STATE OF IDAHO, BONNEVILLE POWER  
ADMINISTRATION, NORTHWEST RIVERPARTNERS, and PUBLIC POWER  
COUNCIL,

*Respondent-Intervenors.*

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**NORTHWEST RIVERPARTNERS AND PUBLIC POWER COUNCIL'S  
ANSWERING BRIEF**

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## CORPORATE DISCLOSURE STATEMENT

Respondent-Intervenor Northwest RiverPartners is a non-profit corporation.

It has no parent corporation and does not issue stock.

Respondent-Intervenor Public Power Council is a non-profit corporation. It

has no parent corporation and does not issue stock.

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## I. INTRODUCTION

Through its Petition For Review, Petitioner Northwest Resources Information Council (“NRIC”) seeks to reverse this Court’s prior precedent and to turn the Northwest Power and Conservation Council (the “Council”) and its Fish and Wildlife Program (“Program”) into something that Congress never intended. Respondent-Intervenors Northwest RiverPartners and the Public Power Council (“the Customers”) intervened in this case because their members ultimately pay for this multibillion-dollar programmatic effort, and oppose NRIC’s efforts to expand the Program and the Pacific Northwest Electric Power Planning and Conservation Act (“Power Act” or “Act”) beyond anything ever contemplated by Congress.

NRIC claims that the Council has a statutory obligation to craft a Program that goes beyond the recommendations of the federal, state, and tribal entities responsible for fish and wildlife management in the Columbia Basin. NRIC seeks an Order from this Court to require the Council to develop its own set of measures (rather than using those recommended by regional anadromous fish experts) that depart from the mitigation measures recommended by the regional fisheries managers, including the mitigation measures required by the National Marine Fisheries Service (“NOAA Fisheries”) in the Federal Columbia River Power System (“FCRPS”) biological opinion (“BiOp”) issued pursuant to the Endangered Species Act (“ESA”).

Ironically, the last time NRIC sued the Council over its Program, it successfully urged this Court to cabin the Council's authority to prescribe conservation measures in the Program, in deference to the federal, state, and tribal fish and wildlife experts with far greater scientific expertise. *Nw. Res. Info. Ctr., Inc. v. Nw. Power Planning Council*, 35 F.3d 1371, 1388 (9th Cir. 1994) (“*NRIC I*”). NRIC hopes this Court has a short memory because now, more than 20 years later, it seeks a decision that essentially reverses that precedent, and elevates the Council into the “superfish and wildlife entity” that this Court previously cautioned the Council from becoming. *Id.*

To accomplish its goal of upending this Court's prior precedent and the manner in which the Council has historically produced its Program, NRIC advances arguments that are entirely at odds with the Power Act, its legislative history, and this Court's prior rulings. Much of NRIC's Petition is grounded in an attempt to rewrite the Act to include a greater scientific, technical, and policy role for the Council to substantively evaluate whether measures submitted to it by the regional experts “actually” protect, mitigate, and enhance fish and wildlife and to require the Council itself to develop a “suite of measures that will assure protection, mitigation, and enhancement for anadromous fish.” NRIC Brief (“Br.”) at 15, 43, 46.



The statute requires a different process and result. Rather than establishing specific measures itself, the Council “is required to develop a fish and wildlife program based on the recommendations, public commentary, and consultations with the federal and state fish and wildlife agencies,” the “appropriate Indian tribes,” and the federal agencies operating the hydrosystem. *Nw. Res. Info. Ctr., Inc. v. Nw. Power & Conservation Council*, 730 F.3d 1008, 1012 (9th Cir. 2013) (“*NRIC II*”). Instead of relying on its own judgment and expertise, the Council is required to “rely heavily on the fish and wildlife agencies of the State and Federal Governments and not try to become a superfish and wildlife entity.” *NRIC I*, 35 F.3d at 1388 (internal quotation marks and citation omitted). The recommended measures adopted in the Program are then funded by power customers (namely the members of Northwest RiverPartners and the Public Power Council) and carried out by the federal agencies operating the FCRPS and their state, local, and tribal partners.

In enacting the 2014 Program, the Council did precisely what the Act requires. As detailed below, the Council crafted the Program based on the recommendations submitted by the region’s fish and wildlife managers. These recommendations include adopting the “specific hydrosystem actions and performance standards” imposed as required conditions in the FCRPS BiOp. The Council reviewed all the recommendations for consistency with the substantive

requirements of the statute. It reconciled inconsistencies between recommendations and, in a few instances, rejected recommendations that were plainly inconsistent with the Act. Nothing more was required or permitted.

One additional point merits initial emphasis. Since NRIC filed its opening brief, a federal district court issued a decision finding fault with the analysis and framework used by NOAA Fisheries in the FCRPS BiOp. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, Case No. 3:01-cv-00640-SI, Doc. No. 2065 (D. Or. May 4, 2016) (“*NWF Opinion*”). Presumably, NRIC will seize on this opinion to fuel its arguments on reply that more needs to be done through the Program.

As detailed below, the district court’s decision has no impact on the issue before this Court. The Council fully anticipated and explained in the Program itself that the analysis in the FCRPS BiOp could be rejected (as has happened in the past), and was careful to adopt only protection, mitigation, and enhancement measures identified in the FCRPS BiOp – not the opinions, conclusions, or analytical framework contained therein. As to those specific measures, the district court recognized that they provide “quantifiable improvements” to listed salmon and steelhead (*id.* at 118) and, in fact, ordered the federal agencies to “continue to fund and implement” those measures during remand (*id.* at 149). Accordingly, the Program remains viable, regardless of the fate of the FCRPS BiOp. Any argument made by NRIC to the contrary on reply should be rejected.

## II. STATEMENT OF JURISDICTION

The Customers accept the statement of jurisdiction set forth by NRIC.

## III. STATEMENT OF ISSUES

1. Whether the Council complied with the requirements of Section 4(h) of the Act (16 U.S.C. § 839b(h)) by developing the Program based on the recommendations of state, federal, and tribal fish and wildlife managers to include measures and objectives contained in NOAA Fisheries' BiOp for the FCRPS.
2. Whether the Council complied with Section 4(h) of the Act (16 U.S.C. § 839b(h)) when it declined to include in the Program measures such as dam removal or experimental spill that were either outside the scope of the Act or inconsistent with the measures and objectives contained in the BiOp.
3. Whether the Council was required by Section 4(h) of the Act (16 U.S.C. § 839b(h)) to develop its own "quantitative" biological objectives and include those objectives in the Program.
4. Whether the relief requested by NRIC exceeds the scope of the Act.<sup>1</sup>

As required by Ninth Circuit Rule 28-2.7, the Customers have set forth the relevant statutes verbatim in the Addendum to this brief.

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<sup>1</sup> The Customers incorporate, adopt, and rely on the Council's arguments addressing both NRIC's so-called "conspiracy" theory and its arguments based on the Columbia Basin Fish Accords. In resolving those aspects of NRIC's Petition, the Customers urge this Court to read the comment letter submitted to the Council by NRIC to understand the genesis and nature of NRIC's "concerns." *See* Council's Supplemental Excerpts of Record ("SER") at 1234.

#### IV. STATEMENT OF THE CASE

##### A. **The Power Act Requires The Council To Develop The Fish And Wildlife Program As Part Of The Overall Power Planning Process.**

The Power Act was passed in 1980 to “assist the electrical consumers of the Pacific Northwest.” Pub. L. No. 96-501, 94 Stat. 2697 (1980) (preamble). It accomplished that objective by: (1) establishing that the FCRPS be used to “achieve cost-effective energy conservation” and (2) “establish[ing] a representative regional power planning process” that would “assure the region of an efficient and adequate power supply.” *Id.* The Act was initially drafted to address forecast power shortages facing the Pacific Northwest in the late 1970s. H.R. Rep. No. 96-976, pt. I, at 30 (1980) (explaining that early versions of the Act were introduced “in an effort to provide a solution to the electric power planning problems identified within the region at the time”).

Through passage of the Act, Congress sought to provide for long-term power planning and “a legislative solution to the region’s electric power planning problems.” *Id.* at 27. The focus on power planning and power conservation is evident throughout the Act, including the congressional declaration of statutory purpose, which encourages energy conservation and assures the region of “an adequate, efficient, economical, and reliable power supply.” 16 U.S.C. § 839(1), (2).

In addition to the need for regional power planning, the Power Act addressed concerns about the impacts of federal dams on fish and wildlife in and around the Columbia River. *Id.* § 839(6). In particular, the Act recognized that salmon and steelhead “are of significant importance to the social and economic well-being of the Pacific Northwest and the Nation,” and that the conditions those species need are “substantially obtainable from the management and operation of the Federal Columbia River Power System.” *Id.* Based on the recommendations of a broad coalition that included the Bonneville Power Administration (“BPA”) and its power customers, the House Committee on Interstate and Foreign Commerce (“Committee”) proposed to add to the bill destined to become the Act “effective provisions concerning fish and wildlife of the Columbia River and its tributaries.” H.R. Rep. No. 96-976, pt. I, at 33.

The resulting legislation created the Program, now found at Section 4(h) of the Act (16 U.S.C. § 839b(h)). Section 4(h) requires the Council to “promptly develop and adopt . . . a program to protect, mitigate, and enhance fish and wildlife.” 16 U.S.C. § 839b(h)(1)(A). The Act established a prescriptive process that the Council must use to create its Program. The Act requires the Council to “request . . . from the Federal, and the region’s State, fish and wildlife agencies and from the region’s appropriate Indian tribes, recommendations for” fish and wildlife conservation “measures.” *Id.* § 839b(h)(2). These “measures” must be measures

that “can be expected to be implemented” by BPA “to protect, mitigate, and enhance fish and wildlife . . . affected by the development and operation of any hydroelectric project on the Columbia River and its tributaries.” *Id.*

§ 839b(h)(2)(A). After allowing for public comment on the recommended measures, the Act then requires the Council to “develop a program on the basis of such recommendations,” which “shall consist of measures to protect, mitigate, and enhance fish and wildlife . . . while assuring the Pacific Northwest an adequate, efficient, economical, and reliable power supply.” *Id.* § 839b(h)(5).

Section 4(h)(6) (16 U.S.C. § 839b(h)(6)) provides the substantive criteria that the Council must apply to recommended measures before including them in the Program. The Council “shall include in the program measures which it determines” will (A) “complement the existing and future activities” employed by fish and wildlife managers; (B) “be based on . . . the best available scientific knowledge”; (C) use, where appropriate, “the alternative with the minimum economic cost”; (D) “be consistent with the legal rights of appropriate Indian tribes”; (E) “provide for improved survival of . . . fish at hydroelectric facilities located on the Columbia River system”; and (F) “provide flows of sufficient quality and quantity . . . to improve production, migration, and survival of such fish as necessary to meet sound biological objectives.” *Id.* § 839b(h)(6)(A)-(E). These

provisions of Section 4(h)(6) are “mandatory” and constitute “*substantive* criteria” that apply to all recommended program measures. *NRIC I*, 35 F.3d at 1389.

Congress not only dictated the sorts of measures that must be included in the Program, it also specified the circumstances under which the Council may reject a Program measure. The Council may reject a measure that is (1) “inconsistent” with Section 4(h)(5) (Program “shall consist of measures to protect, mitigate, and enhance fish and wildlife . . . while assuring the Pacific Northwest an adequate, efficient, economical, and reliable power supply”); (2) “inconsistent” with Section 4(h)(6) (substantive criteria for measures); or (3) “less effective than the adopted recommendations for the protection, mitigation, and enhancement of fish and wildlife.” 16 U.S.C. § 839b(h)(7)(A)-(C). Congress further mandated that the Council provide a written explanation for rejecting any measure recommended by a regional fish and wildlife manager. *Id.* § 839b(h)(7). It then directed the Council to resolve any “inconsistency” between recommendations by consulting with various independent scientific bodies specified in the statute and by giving “due weight to the recommendations . . . of the Federal and the region’s State fish and wildlife agencies and appropriate Indian tribes.” *Id.*

Accompanying these provisions, however, was a clear explanation that it was “not the Committee’s intention to make fish and wildlife superior to power or other recognized needs” of the region. H.R. Rep. No. 96-976, pt. I, at 49. Instead,

the Committee intended that fish and wildlife would be treated as a “co-equal partner with other uses in the management and operation of hydro projects.” *Id.* The Committee envisioned “a balance for all uses of the river” and “[did] not intend that [the fish and wildlife] provisions be used to subvert the power objectives of this bill.” *Id.* at 56-57.<sup>2</sup> This concept is particularly important to the Customers, who ultimately pay for the costs of the Council’s Program as implemented by BPA.<sup>3</sup>

**B. The Council’s Fish And Wildlife Program Has Been Protecting, Mitigating, And Enhancing Fish And Wildlife For Nearly 35 Years.**

Consistent with the requirements of the Act, the Council produced its first Program in 1982. SER 2. Over the course of the next three and a half decades, the

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<sup>2</sup> For example, the Committee recognized that while some power losses might result on account of fish and wildlife protection measures, such losses “should not be a burden on the consumers of the region.” H.R. Rep. No. 96-976, pt. I, at 57. The Committee reinforced the notion that the Act’s objective “should be to avoid, or at least minimize, losses, while meeting fish and wildlife needs.” *Id.* In fact, it was anticipated that “because of the importance of nonfirm power sales outside the Pacific Northwest,” “at least some of [the] recommendations [the Council receives for its Program] will explore alternative methods by which fish migration can be improved without unnecessary spillage of water.” H.R. Rep. No. 96-976, pt. II, at 44 (1980).

<sup>3</sup> Congress established BPA as a self-funded agency that must recover all of its costs through the rates BPA charges its customers. 16 U.S.C. § 838g; *id.* § 838i; *id.* § 839e(a)(1); *id.* § 839e(a)(2)(B); *see Ass’n of Pub. Agency Customers, Inc. v. BPA*, 126 F.3d 1158, 1164 (9th Cir. 1997). Thus, BPA passes all of its costs to its customers, including as relevant here, the costs of funding the Council’s fish and wildlife program. *See Pac. Nw. Generating Coop. v. Dep’t of Energy*, 580 F.3d 792, 821 (9th Cir. 2008); 16 U.S.C. § 832c(a); *id.* § 839c(a).



Council's Program has directed the investment of billions of dollars to protect, mitigate, and enhance fish and wildlife impacted by the FCRPS. *Id.*

**1. The listing of 13 species of salmonids affected by the FCRPS under the ESA.**

The Council's Program requirements became more complicated when in 1991 NOAA Fisheries listed the Snake River sockeye as an endangered species under the ESA. NOAA Fisheries subsequently listed additional anadromous fish to the point where there are now a total of 13 Columbia Basin salmon and steelhead evolutionary significant units listed as threatened or endangered under the ESA. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 254 F. Supp. 2d 1196, 1200 (D. Or. 2003).

As a result of these listings, the federal agencies operating the FCRPS – the BPA, the U.S. Army Corps of Engineers (“Corps”), and the Bureau of Reclamation (“BOR”) – were required by Section 7 of the ESA to ensure that their continued operations are “not likely to jeopardize the continued existence” of listed species or “result in the destruction or adverse modification” of critical habitat for those species. 16 U.S.C. § 1536(a)(2). This result is achieved by consulting with NOAA Fisheries, which in turn issues a biological opinion as to the effects of the agencies' actions. *Id.* § 1536(b). If NOAA Fisheries concludes that the action will jeopardize a species or adversely modify or destroy critical habitat, it is required to develop a “reasonable and prudent alternative” (“RPA”) or other mitigation

measures to avoid that result. *Id.* § 1536(b)(3)(A). In the decades following the initial listing, NOAA Fisheries has issued a series of BiOps for the FCRPS, ranging in duration from one year to 10 years.

The Council's Program and the expansive protection, mitigation, and enhancement measures found therein have "served as a foundation" for many of the provisions in these BiOps. SER 2. The Program's measures "for dam operations and its strategies for habitat restoration and hatcheries were incorporated into federal biological opinions and recovery plans." *Id.* The ensuing FCRPS BiOps followed the Council's 2000 strategy shift toward a basin-wide, 4-H approach. *See Nat'l Wildlife Fed'n*, 254 F. Supp. 2d at 1201-02 (discussing adoption of basin-wide salmon recovery strategy and 4-H approach in 2000 FCRPS BiOp). The close coordination between the measures included in the FCRPS BiOps and those in the Council's Program is exactly what Congress intended. 16 U.S.C. § 839b(h)(11)(B) (BPA, Corps, and BOR "shall consult with" NOAA Fisheries and state and tribal fish and wildlife managers in "carrying out the provisions of this paragraph [Section 4(h)]" and "shall, to the greatest extent practicable, coordinate their actions"); *id.* § 839b(h)(6)(A) (measures must "complement the existing and future activities of the Federal and the region's State fish and wildlife agencies and appropriate Indian tribes").

## **2. The evolution of the Council's Program.**

The Council's early Programs focused on achieving mainstem system improvements for ocean-going fish, including water management changes (such as increasing spill) and fish passage across the dams. SER 2. As these improvements were implemented, the Council's Programs began to place greater emphasis on habitat restoration projects. *Id.*

Later Programs expanded habitat restoration and mitigation efforts. *Id.* By 2000, the Program shifted to a system-wide approach that considered strategies at different geographic levels and identified habitat, hydropower, hatcheries, and harvest ("4-H") when including substantive areas for mitigation. *Id.* This revised 4-H framework continues to guide the Program today. *Id.*

Over the years, the Council's Program has significantly improved and reshaped fish and wildlife habitat in the Columbia Basin. SER 20. The Program has improved over 2,400 miles of habitat, supporting hundreds of thousands of natural-origin juvenile salmon. *Id.* The Program helped bring Snake River fall Chinook from fewer than 1,000 fish in the 1980s to more than 56,000 today. *Id.* The Program provided critical funding to help save Snake River sockeye from extinction. *Id.* And, the Program improved salmon and steelhead passage at federal dams by including recommendations for flow regimes for improved fish

production, migration, and survival. *Id.* Today, the Program continues to innovate and adapt to changing circumstances and new information. SER 22.

### **3. The 2014 Program.**

In addition to incorporating the recommendations provided by regional fish and wildlife managers for use in both the BiOp and the Program, the Council included measures that went beyond the most recent BiOp to address the needs of *all* fish affected by the federal power system – not just those ESA-listed fish covered by NOAA’s FCRPS BiOp. Indeed, based on recommendations from regional fish and wildlife managers, the Council incorporated the mainstem measures contained in the Columbia Basin Fish Accords (SER 259) and “additional measures” mitigating impacts associated with mainstem FCRPS operations. SER 263-65 (listing additional measures beyond 2014 BiOp and explaining that many of these are “in addition to and not directly inconsistent with . . . the baseline mainstem measures taken from the FCRPS biological opinions, and are intended to benefit both listed and non-listed species”).

The 2014 Program also includes specific action measures within “tributary subbasins, specific mainstem reaches, and the estuary,” covering “an extensive array of habitat, production, and monitoring, evaluation and research activities.” SER 191. By including measures recommended by state, federal, and tribal managers that “go beyond” the measures upheld in the 2014 BiOp (a document

exclusively focused on ESA-listed fish), the Council did exactly as Congress intended to cover *all* fish affected by the hydrosystem.

## V. SUMMARY OF ARGUMENT

The Council fully complied with the requirements of the Act in developing the 2014 Program. The Council built the Program on the basis of the recommendations of the fish and wildlife managers, including those measures identified in the FCRPS BiOp. The Council also fully reviewed additional measures, and rejected those like dam removal that are plainly inconsistent with the Act. It modified others, like experimental spill that independent scientists determined were scientifically flawed and potentially harmful to the very salmon the experimental measures were designed to protect, as urged by the vast majority of fish and wildlife managers who were opposed to such measures' inclusion. In so doing, the Council acted exactly as Congress intended.

NRIC's ESA arguments are based on a mischaracterization of the record. The Council did not, as NRIC claims, satisfy its Power Act responsibilities by impermissibly relying on and rubber-stamping NOAA Fisheries' BiOp. Rather, NRIC included in the Program measures from the FCRPS BiOp based on the express recommendations of the majority of state, federal, and tribal fish and wildlife managers. This result not only is required by the Act, but is entirely reasonable because Congress directed the Council to devise its Program in a

manner compatible with and complementary to other statutory directives.

Moreover, the fact that the BiOp was recently held to have employed a faulty legal analysis does not change this result because the Power Act and the ESA are entirely different statutes, even if the measures contained in the BiOp and Program substantially overlap.

NRIC tries to rewrite the Act to impose substantive mandates on the Council to develop (its own suite of) “additional measures” rather than deferring to the recommendations submitted by the region’s fish and wildlife experts. NRIC seeks to require the Council to develop its own Program measures that would, in NRIC’s view, “actually” protect, mitigate, and enhance fish and wildlife. NRIC Br. at 30. NRIC’s arguments misread the plain language of the Power Act, its legislative history, and the governing case law.

NRIC’s arguments regarding “quantitative biological objectives” are similarly flawed. Although the Act does not require that the Program contain “quantitative” biological objectives, there is no factual dispute that the Program *includes* such objectives. While NRIC may desire more specificity or precision in the Program’s objectives, the Council’s decision to await scientific agreement before embarking down that path is entirely reasonable, appropriate, and consistent with the Act.

Finally, the relief requested by NRIC exceeds anything authorized by the Act. NRIC advances an *ultra-vires* statutory interpretation in its relief section, imposing mandates on the Program and substantive obligations on the Council that exceed the plain language of the Act and the Council's institutional competence.

For these reasons, and those set forth below, NRIC's Petition should be rejected.

## VI. ARGUMENT

### A. Standard Of Review.

The Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-706, governs review of actions taken by the Council. *Seattle Master Builders Ass'n v. Pac. Nw. Elec. Power & Conservation Planning Council*, 786 F.2d 1359, 1366 (9th Cir. 1986); 16 U.S.C. § 839f(e)(1)(A). Under the APA, the Court evaluates whether the Council's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 994 (9th Cir. 2014). As the Ninth Circuit explained, "[i]t is not the reviewing court's task to 'make its own judgment about' the appropriate outcome." *San Luis*, 776 F.3d at 994 (citation omitted). Rather, the Court's "responsibility is narrower: to determine whether the agency complied with the procedural requirements of the APA." *Id.* (citation omitted). Thus, courts "will 'sustain an agency action if the agency has articulated a rational

connection between the facts found and the conclusions made.” *Id.* (citation omitted).

The Court generally reviews de novo any legal questions associated with an agency decision, such as the proper interpretation of a statutory provision. *NRIC II*, 730 F.3d at 1015. At the same time, the Court gives “substantial deference . . . ‘to the interpretation given statutes by the officers or agency charged with their administration.’” *Id.* (citation omitted).

**B. NRIC’s ESA Arguments Have No Merit.**

NRIC’s primary argument is that the Council has unlawfully equated the ESA and the Power Act and thereby violated “substantive requirements on the Council to ‘protect, mitigate, and enhance’ anadromous fish.” NRIC Br. at 31. According to NRIC, compliance with the ESA does not demonstrate compliance with the Power Act – an argument that NRIC likely believes has become significantly stronger since the district court has found legal error with the FCRPS BiOp. These arguments are legally and factually baseless; they find no support in the district court’s opinion, which only confirms the importance of the actual measures in the FCRPS BiOp by ordering their continued implementation.

**1. The Council did not equate the ESA and the Power Act.**

The Council did not adopt or default to the FCRPS BiOp. Rather, the Council adopted and incorporated specific protection, mitigation, and enhancement



*measures* that were imposed in the BiOp as part of the RPA. There is no reasonable dispute that the RPA provides important benefits to listed salmon and steelhead. Indeed, even while finding fault with the legal methodology in the FCRPS BiOp, the district court concluded that the “RPA has resulted or is expected to result in quantifiable improvements to the number of juveniles passing through the turbines, the juvenile dam passage survival rate, juvenile travel time, and juvenile reach survival.” *NWF Opinion* at 118-19 (citations omitted) (addressing specifically the mainstem passage mitigation measures that NRIC complains about in this case).

The Council’s decision to adopt those specific measures from the RPA was effectively compelled by the Power Act. As required by Section 4(h)(2) of the Act (16 U.S.C. § 839b(h)(2)), the Council solicited “recommendations for . . . measures . . . to protect, mitigate, and enhance fish and wildlife” impacted by the FCRPS from the region’s fish and wildlife managers. SER 220, 335. The Council received recommendations from “the large majority of federal and state and fish and wildlife agencies and tribes” to include “the specific hydrosystem actions and performance standards from the FCRPS biological opinions and the actions in the Columbia Fish Accords.” SER 262. Those measures met the substantive criteria in the Act applicable to measures, and no managers objected. *Id.*; 16 U.S.C. § 839b(h)(5)-(7). By including measures that were recommended by regional

experts for both the Program and the BiOp, the Council diligently followed the required procedures of the Power Act.

Not only was the adoption of measures contained in the FCRPS BiOp legally required by the Act, it was entirely reasonable. The mitigation actions for the FCRPS BiOp and the Program have been linked for decades. The mitigation measures contained in the FCRPS BiOp “are largely built on the mainstem planning and implementation work developed under the Council’s program under the first 20+ years, and are consistent with and based on the program’s general strategies and biological objectives.” SER 22. It would make no sense for the Council to abandon the work it conducted in the first 20+ years of the Program simply because NOAA Fisheries adopted the same mitigation strategies as conditions in the FCRPS BiOp.

Nor is this a new development. The Council first began incorporating mitigation measures from the FCRPS BiOp in the 2003 Program, after the 2000 FCRPS BiOp adopted the comprehensive 4-H approach reflective of the Council’s revised Program framework. SER 261.<sup>4</sup> The Council followed the same approach

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<sup>4</sup> The Council’s 2003 Program adopted the mitigation measures in the 2000 BiOp *after* a district court found legal fault with and remanded the 2000 BiOp, again confirming that the propriety of the ESA analysis in that BiOp in no way impacts the value of the mitigation measures in that BiOp. Addendum at 17 (2003 Program at 59). Indeed, neither NRIC nor any other party challenged the 2003 Program on grounds that it contained many of the same measures included in the invalidated 2000 BiOp.

in 2009, and then again in 2014. *Id.* Since 2003, the Council has been including the spill, flow, and other measures as set forth in the FCRPS BiOp, while declining to “adopt recommendations that would have the Council call for the implementation of flow, spill and passage operations for salmon and steelhead that are in conflict with what the biological opinions call for or will allow for.” Addendum at 13, 18 (Council’s 2003 Program at 60).

Here too, the legislative history affirms the propriety of this commonsense approach. Having required the Council to develop its fish and wildlife program on the basis of recommendations from the region’s fish and wildlife agencies, Congress certainly anticipated the overlap between the Council’s Program measures and restoration efforts underway for the same species under different laws.

While the program shall include directly only those measures needed to deal with impacts caused by power facilities and programs, *it may be integrated* with similar efforts dealing with other impacts (or additional enhancement) to the extent the administration and funding of such additional efforts are provided through other provisions of law or ancillary agreements.

H.R. Rep. No. 96-976, pt. II, at 45 (1980) (emphasis added); *see also* 16 U.S.C. § 839b(h)(8)(C).

In short, the Council's decision to adopt the measures in the FCRPS BiOp was reasoned, explained in the record, and entirely consistent with the Power Act. NRIC's Petition should therefore be rejected.<sup>5</sup>

**2. The Council was not required to depart from the measures also included in the FCRPS BiOp.**

NRIC insists that the Power Act is broader than the ESA and therefore requires the Council to develop its own suite of measures *beyond* those contained in the FCRPS BiOp. According to NRIC, there is a "clear recognition that legal requirements of Power Act for protecting these fish go beyond the requirements of the ESA." NRIC Br. at 19. This leads NRIC to then argue that the Program must contain measures that are in addition to (different from and more protective than) the measures in the BiOp. These arguments are legally and factually flawed.

To arrive at this conclusion, NRIC misreads both the ESA and the Power Act. While it is true that the Power Act requires the Council to include measures in its Program to address both ESA-listed and non-listed fish, it does not follow

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<sup>5</sup> NRIC also argues that "it is well-settled that even where statutes share similar purposes or goals, compliance with one does not equate to compliance with another." NRIC Br. at 32 n.18 (citing *Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 301-02 (9th Cir. 1991); *Wash. Toxics Coal. v. EPA*, 413 F.3d 1024, 1032 (9th Cir. 2005)). This argument has no basis. The Council did not decline to produce a Program or assert that it was excused from developing a Program based on the ESA. To the contrary, the Council complied with the requirements of the Power Act by producing a Program based on the recommendations of the regional fish and wildlife managers as required by the Act. NRIC's cited cases are plainly inapposite.

then that the Council must adopt measures for ESA-listed fish that go beyond, or are at odds with, measures included in NOAA Fisheries' BiOp. Congress intended that NOAA Fisheries – not the Council – would dictate those measures necessary to avoid jeopardy to the salmonids that NOAA Fisheries listed as endangered or threatened under the ESA. 16 U.S.C. § 1536(a)(2) (requiring consultation as to whether proposed action (*e.g.*, continued operation of the FCRPS) would jeopardize listed species or adversely modify its critical habitat); *id.* § 1536(b)(3)(A) (requiring Secretary to issue opinion and summary of information on which opinion is based on how agency's action affects the species or its critical habitat, and suggesting RPA if necessary to avoid jeopardy); Addendum at 19 (emphasizing that the “systemwide operational measures from the federal fish and wildlife agencies with ultimate jurisdiction under the ESA for listed species *carry by far the most weight with the federal operating agencies.* . . .”) (emphasis added).

Accordingly, the federal agencies operating the FCRPS (including BPA) must comply with the FCRPS BiOp issued by NOAA Fisheries and the required conditions and mitigation measures therein. 16 U.S.C. § 1536(b)(4) (requiring Secretary to issue a written statement specifying impact of incidental taking on species, measures necessary to minimize such impact, and the terms and conditions that *must* be complied with by the federal agency). If they do not comply with those terms and conditions, they can be subject to civil and criminal liability for

every threatened or endangered animal harmed by the operation of the FCRPS. *See id.* § 1536(o). That is why, as the Supreme Court explained, a biological opinion “has a powerful coercive effect on the action agency,” and an agency departs from a biological opinion “at its own peril.” *Bennett v. Spear*, 520 U.S. 154, 169-70 (1997). Thus, the terms and conditions of a biological opinion have a “virtually determinative effect.” *Id.* at 170; *see also San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1170 (9th Cir. 2011) (“[T]he determinative or coercive effect of a Biological Opinion stems directly from the Service’s power to enforce the no-take provision in ESA § 9.”).

Notwithstanding these requirements, NRIC claims that the Program should have included other additional measures like experimental spill or flow regimes (*e.g.*, the John Day Minimum Operating Pool). NRIC Br. at 32-33. But these measures would require BPA, the Corps, and BOR to pursue an entirely different spill and flow regime from that adopted in the FCRPS BiOp. SER 260-61. In essence, NRIC asks this Court to require the Council to add measures to the Program that the FCRPS agencies would have to implement “at their peril” of incurring civil and criminal liability under the ESA.

The Power Act does not contemplate such an absurd result. Rather, the Act instructs that BPA, Corps, and BOR “shall consult with” NOAA Fisheries and state and tribal fish and wildlife managers in “carrying out the provisions of this

paragraph [Section 4(h)]” and “*shall, to the greatest extent practicable, coordinate their actions.*” 16 U.S.C. § 839b(h)(11)(B) (emphasis added). The Act also provides that Program measures should “complement the existing and future activities of the Federal and the region’s State fish and wildlife agencies and appropriate Indian tribes.” *Id.* § 839b(h)(6)(A). To ensure that there was no doubt what it intended, Congress emphasized that the “purposes of this chapter, together with the provisions of other laws applicable to the Federal Columbia River Power System, are all intended to be construed in a consistent manner” and “consistent with applicable environmental laws.” *Id.* § 839. There is no plausible way to read the consultation, coordination, and complementary requirements of the Power Act as requiring the Council or any of the FCRPS agencies to act in a manner at odds with requirements imposed under the ESA, especially in light of the “virtually determinative” obligations imposed in a biological opinion.

Indeed, the Power Act expressly limits the kinds of recommendations that the Council can accept to “measures which can be expected to be implemented by the [BPA] Administrator.” *Id.* § 839b(h)(2)(A). Recommendations that depart from the FCRPS BiOp do not meet this basic requirement. The flow and spill measures in the BiOp are “virtually determinative” and highly coercive of the actions of BPA and other FCRPS agencies. They cannot reasonably “be expected” to depart from those measures and risk civil and criminal liability. That is

especially so in this case, where NOAA Fisheries (the entity that can bring these kinds of enforcement actions) does not support NRIC's suggested "additional" measures. SER 268.

Nonetheless, there may be, *in theory*, appropriate protection, mitigation, and enhancement measures affecting spill and flow that are not in the FCRPS BiOp, and that do not conflict with it either. The Council has consistently maintained (since it began incorporating BiOp measures into the Program in 2003) that it was willing to adopt such measures:

If the Council ever had a sense that the hydrosystem measures for salmon and steelhead pursued by the federal agencies were sufficient for ESA purposes but left out an obvious set of additional measures needed to meet requirements of the Power Act to "protect and mitigate" obligation for the same populations, separately recommended to the Council, the Council would adopt the recommendations and additional measures into the program.

Addendum at 21 (2003 Program at 63). The Council is thus fully willing to adopt additional, non-conflicting mitigation measures beyond those in the FCRPS BiOp.

But the record here demonstrates that no state, federal, or tribal manager has recommended adding such non-conflicting other measures. This is hardly surprising given the comprehensive nature of the mitigation measures in the FCRPS BiOp – comprised (as it is) of 73 specific mitigation measures. *See NWF Opinion* at 1.



For example, the Oregon Department of Fish and Wildlife and the Nez Perce Tribe “recommended implementation of increased juvenile passage spill as an experiment.” SER 268. This measure was rejected by the Council because it conflicted with the spill measures NOAA Fisheries required in the FCRPS, it “was not warranted by the science,” and the Independent Science Advisory Board (“ISAB”) (charged with peer reviewing recommendations for Program measures) concluded that it was based on a hypothesis that was “dependent on unwarranted assumptions.” *Id.*

The ISAB further found that “the spill test could instead result in a host of unintended adverse consequences for salmon survival.” SER 269. The ISAB (and others) explained that the experimental spill recommendation would violate state water quality standards for total dissolved gas set by the States of Washington and Oregon under the Clean Water Act, and that implementing the proposal would require changes in state law. *Id.*; SER 2093 (“juvenile in river survivals are currently approaching the level of survival that has been measured in some free-flowing streams,” and “spilling more at the dams would likely be counterproductive, possibly harming and even killing fish . . .”).

Because of its rejection by the ISAB, and because neither NOAA Fisheries nor any other state, federal, or tribal manager continued to “support the spill experiment” after learning of the ISAB’s conclusions, the Council reasonably

concluded that it was not appropriate for inclusion in the 2014 Program. SER 268-69. Thus, the Council did exactly as the Act required by consulting with NOAA Fisheries and, “to the greatest extent practicable, coordinat[ing] [its] actions.” 16 U.S.C. § 839b(h)(11)(B). Because the spill experiment plainly fails to “complement” the measures adopted in the FCRPS BiOp, the Council appropriately declined to adopt it.<sup>6</sup> *Id.* § 839b(h)(6)(A) (measures must “complement the existing and future activities of the Federal and the region’s State fish and wildlife agencies and appropriate Indian tribes”).<sup>7</sup>

**3. The recent district court decision on the FCRPS BiOp does not impact the Program.**

The recent district court decision invalidating the ESA legal analysis NOAA employed in the 2014 BiOP does not change the propriety of the Program the

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<sup>6</sup> NRIC repeats these arguments in Section II.B of its brief, arguing that the Council “systematically rejected any recommendation that would go beyond the mainstem actions to protect salmon from dam operations found in the FCRPS BiOps.” NRIC Br. at 42-49. These arguments fail for the same reasons. The Council appropriately rejected measures that were in conflict with the recommendation to adopt the measures contained in the FCRPS BiOp, or were otherwise less effective than the measures that were adopted. SER 259-71.

<sup>7</sup> The Council also appropriately declined to accept a recommendation from the Nez Perce Tribe and the environmental and fishing groups to call for yet another study of the “possible removal of the four lower Snake River dams.” SER 266. The Council explained that it had already performed that analysis and “that information remains available to the action agencies, fish and wildlife agencies and tribes.” *Id.* The Council further explained that “[m]ainstem dam removal issues are otherwise outside the scope of the Council’s considerations in the fish and wildlife program under the Northwest Power Act.” *Id.*; *see, e.g.*, 16 U.S.C. § 839b(h)(2)(A) (recommendations are for “measures which can be expected to be implemented by the Administrator”).

Council prepares under the Power Act. The district court found fault with the ESA jeopardy analysis and legal framework that NOAA Fisheries utilized in reaching its conclusions in the FCRPS BiOp. The district court remanded the 2014 BiOp for further consultation but declined to vacate it, and ordered the federal agencies to “continue to fund and implement the 2014 BiOp until the 2018 biological opinion is prepared and filed.” *NWF Opinion* at 148.

The Customers anticipate that NRIC will argue in its reply brief that the district court’s decision undermines the 2014 Program. It does not. The Council anticipated this potentiality and expressly addressed it in the Program:

The possibility that federal courts may find fault with some aspect of the ESA decision associated with the 2014 FCRPS Supplemental Biological Opinion **does not affect the Council’s decision here**. As noted above, the Council has been careful not to adopt or incorporate the FCRPS biological opinions into the Council’s program, nor make any conclusions with regard to the sufficiency of the biological opinion under the ESA. The Council is instead simply recognizing the *actions* reviewed in the opinion as baseline measures in the Council’s program. The Council has no reason to believe that these measures will not continue to represent the basic core of the mainstem actions implemented by the federal agencies and their partners in the near future for listed salmon and steelhead. It may again be that if the litigation is successful, the court or other federal agencies may reassess or order additional measures under the ESA to benefit salmon and steelhead in the mainstem, tributaries or estuary. But no party is arguing in the [FCRPS BiOp] litigation not to implement these actions, asking for a court order not to implement these actions, or arguing that they do not provide some benefit to listed species.

To the extent that litigation produces a dramatically different context for action, the Council will need to revisit its program decisions.

SER 263 (emphasis added).

There is nothing in the district court's decision that undermines the Council's reasoning. The court explicitly ordered the federal agencies to continue to fund and implement the BiOp's measures. Thus, just as the Council predicted, there is "no reason to believe that these measures will not continue to represent the basic core of the mainstem actions implemented by the federal agencies and their partners in the near future." *Id.* The district court declined to address issues related to additional dam removal planning (*NWF Opinion* at 112) and *affirmed the conclusion in the BiOp* that mainstem operations (which include flow and spill) are not adversely modifying or destroying critical habitat (*id.* at 115-19).

Although it is *possible* that these measures could change sometime in 2018 as a result of the new BiOp, the Council has committed to revisiting its Program decisions at that time as necessary and will be re-issuing another Program revision in 2019 on its normal five-year schedule. SER 263.

Additionally, this situation is not new territory for the Council. As the Council explains, its 2003 and 2009 Programs also incorporated measures from FCRPS BiOps that the district court determined were based on improper legal analyses and/or relied on measures that were not sufficiently certain to occur. SER

262. That is precisely why the Council was careful in this Program to adopt only the specific *measures* included in the BiOp (like spill, flow, habitat restoration projects, etc.) and not the conclusions, opinions, analytical framework, or other analyses that are specific to the ESA. *Id.* The legal deficiencies found by the district court in the 2014 BiOp runs to NOAA Fisheries' legal conclusions under the ESA, not to the propriety of specific mitigation measures. And the district court did not – and could not, due to a lack of jurisdiction – consider whether they meet the substantive criteria for protection, enhancement, and mitigation measures under the Power Act.

Lastly, the district court's opinion, if anything, only underscores the impossibility of NRIC's argument that the Council should be adopting mainstem measures that depart from the FCRPS BiOp. Even if the FCRPS agencies were willing to depart from the mitigation measures related to flow and spill contained in the BiOp (at the peril of civil and criminal liability under the ESA), they are now under court order to “fund and implement the biological opinion until the 2018 biological opinion is prepared and filed.” *NWF Opinion* at 148. Departing from those measures at this time would require the federal agencies to violate an express court order.

**C. NRIC Tries To Rewrite The Power Act And The Court's Decision In *NRIC I*.**

To accomplish its goal of requiring the Council to “go beyond” the BiOp in developing its Program, NRIC advances arguments that are premised on a fundamental re-writing of the Act that would cede to the Council powers that Congress never intended for it to have. Section 4(h)(6) (16 U.S.C. § 839b(h)(6)) imposes substantive criteria for the Council to use in deciding whether it “shall” include various recommendations for “measures” from the region’s fish and wildlife managers. Measures that meet the criteria “shall” be included, while those that do not meet the criteria shall not. *See NRIC I*, 35 F.3d at 1393 (“[T]he standards in § 839b(h)(6) [are] substantive criteria that each program measure must meet.”).

Recognizing that the Council is a political body, this Court previously held that the Council “should rely heavily on the fish and wildlife agencies of the State and Federal Governments and not try to become a superfish and wildlife entity.” *Id.* at 1388 (quoting 126 Cong. Rec. E10683 (1980)). The Court succinctly summed up the Council’s Program role by emphasizing that the Act “significantly circumscribe[s] the Council’s discretion with respect to fish and wildlife.” *Id.* at 1389.

Dissatisfied with the statute as written, NRIC transposes the substantive criteria in Section 4(h)(6) that apply to the Council’s review of whether specific

“measures” should be included in the Program into substantive criteria that *apply directly to the Council*. More specifically, NRIC argues that the Act (a) “imposes substantive requirements on the Council to ‘protect, mitigate and enhance’ anadromous fish,” and (b) imposes an affirmative obligation to develop and “include in the Program . . . those measures that “will provide for the improved survival’” of these fish past dams. NRIC Br. at 31 (quoting Section 4(h)(6)(E), 16 U.S.C. § 839b(h)(6)(E)). According to NRIC, it was not enough for the Council to adopt the recommendations of the fish and wildlife managers because Section 4(h)(6) imposes “requirements” for the Council to adopt a “suite of measures that will assure protection, mitigation, and enhancement for anadromous fish.” *Id.*

This reading turns the statute and this Court’s holding in *NRIC I* upside down. The “standards in § 839b(h)(6)” are “substantive criteria that *each program measure must meet*.” *NRIC I*, 35 F.3d at 1393 (emphasis added). Those substantive criteria do not apply directly to the Council, and are not criteria against which the Program as a whole must be assessed. The Council is not “a superfish and wildlife entity,” and thus Congress never intended for it to develop a “suite of measures that will assure protection, mitigation, and enhancement for anadromous fish.” NRIC Br. at 31. Instead, the Council’s role is much more “circumscribe[d].” *NRIC I*, 35 F.3d at 1389. Its role is to solicit recommendations

from the expert fish and wildlife managers and include those measures to meet the substantive criteria in Section 4(h)(6).

This role is consistent with the Council's composition and intended purpose. The Council is composed of two members from each state, politically appointed by the governors to "facilitate cooperation among the States of Idaho, Montana, Oregon, and Washington, and with the Bonneville Power Administration" regarding the use of hydropower resources. 16 U.S.C. § 839b(a)(2). Its main function is to engage in power planning. *Id.* § 839b(d). The Act neither requires nor expects the Council to develop its own "suite of measures" to "assure protection, mitigation, and enhancement for anadromous fish." *See* NRIC Br. at 46.

Similarly, NRIC repeatedly attempts to create a substantive and measurable obligation on the Council to "protect, mitigate, and enhance." It does this by variously claiming:

- that the Act has a "*requirement* to 'protect, mitigate, and enhance' fish and wildlife (*id.* at 1, 2 (emphasis added));
- that the Council has a "plain legal duty to 'protect, mitigate, and enhance'" (*id.* at 35);
- that the Council has a duty to "implement measures necessary to protect and enhance" (*id.* at 11);



- that the Program must contain “measures necessary to actually protect, mitigate and enhance” (*id.* at 13);
- that the Program must contain “additional measures to actually protect, mitigate and enhance” (*id.* at 29);
- that the Act contains a “mandate to protect, mitigate and enhance” (*id.* at 18); and
- that the Act imposes on the Council an obligation to “explain why its measures were adequate to meet the fish and wildlife protection requirements of the Power Act” (*id.* at 29).

Indeed, NRIC goes so far as to claim that the Council has a “separate and broader legal duty to adopt a program with measures that not only ‘protect, mitigate, and enhance,’ . . . but also ‘provide improved survival.’” *Id.* at 37 (citing 16 U.S.C. § 839b(h)(6)); *see also id.* at 46.

But none of these so-called “obligations” for the Council to go beyond the recommendations of the experts can be found in the statute. The statutory obligations are plain. Under Section 4(h) the Council must “develop and adopt, pursuant to this subsection, a program to protect, mitigate, and enhance fish and wildlife . . . on the Columbia River and its tributaries.” 16 U.S.C. § 839b(h)(1)(A). The Council satisfies its obligation by soliciting recommended measures from the

expert managers, reviewing those measures against the substantive criteria, and developing the Program based on those measures. *Id.* § 839b(h)(2), (5), (6).

The Act does not set a bar for adequacy and does not define what constitutes necessary protection, mitigation, and enhancement. The level of protection, mitigation, or enhancement that is necessary or adequate is determined by the individual recommendations of the fish and wildlife managers – not the Council or NRIC (or the courts). *See Lands Council v. McNair*, 537 F.3d 981, 988 (9th Cir. 2008) (court is not to “act as a panel of scientists” that picks and chooses between alternatives); *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Gutierrez*, 606 F. Supp. 2d 1195, 1214 (E.D. Cal. 2008) (“A federal court lacks the expertise and/or background in fish biology, hydrology, hydraulic engineering, water project operations, and related scientific and technical disciplines that are essential to determining how the water projects should be operated on a real time, day-to-day basis.”).

Similarly, NRIC’s efforts to expand the scope and purpose of the Program by insisting on the “restoration purposes of the Act” are contrary not only to the language of the Act, but also to Congress’s intent. NRIC Br. at 20 n.13, 42, 54 (seeking an order from this Court requiring the Council to develop biological objectives necessary to comply with what NRIC claims is the Act’s so-called restoration goals).

The primary purpose of the Act is to ensure a long-term reliable power supply. 16 U.S.C. § 839(2) (encouraging energy conservation to assure the region of “an adequate, efficient, economical, and reliable power supply”). Congress also emphasized the need to “protect, mitigate and enhance the fish and wildlife” affected by federal dams, but there is no evidence that it intended to “restore” fish and wildlife to some pre-dam condition. *Id.* § 839(6).<sup>8</sup>

The legislative history confirms this point. As emphasized by Senator McClure, Congress had “no intent to develop any program” under the Act “which would attempt or have the effect of a retroactive application for such development, operation, and management activities taken under the past 50 or 60 years for hydroelectric projects or facilities in the Columbia River Basin, its tributaries and the Pacific Northwest.” 126 Cong. Rec. S14,696 (daily ed. Nov. 19, 1980) (statement Sen. McClure). The Act was to govern “future actions only” because “the Senate [did] not intend that the fisheries provisions [of the Act] would attempt to restore conditions to those prior to the development and operation of the Pacific Northwest hydroelectric system.” *Id.*

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<sup>8</sup> NRIC’s tendency to “slip in” words and concepts in its briefing as though they were legal mandates is illustrated by its “restoration” argument, but is by no means the only example. *See supra* at 37-38 (listing a series of examples of the latitude NRIC grants itself in adding requirements to the Power Act).

**D. The Act Does Not Require The Council’s Program To Have “Quantitative Biological Objectives.”**

NRIC argues that Council failed to meet the requirements of the Act because it failed “to adopt quantitative, measurable, biological objectives.” NRIC Br. at 38. NRIC argues that there is an “urgent need for measurable, quantitative biological objectives as part of the 2014 Program,” and that it is “plainly arbitrary” for the Council not to have adopted those objectives. *Id.* at 40-41.

The fundamental flaw with this argument is that there is no statutory obligation in the Act to include “quantitative biological objectives.” As this Court has previously explained to NRIC, merely

articulating . . . [an] approach that the Council chose not to follow is insufficient to meet NRIC’s burden of showing that the Council acted in a manner that was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.”

*NRIC II*, 730 F.3d at 1018 (citation omitted). The fact that NRIC would simply “like” the Council to develop quantitative biological objectives fails for the same reason.

While not clear from its briefing, NRIC appears to argue that “quantitative biological objectives” are essential (in its view) to determining whether the Program is meeting its statutory obligations to *actually* protect, mitigate, and enhance. NRIC Br. at 15, 31, 46-47. This argument fares no better. There is no obligation on the Council to *actually* protect, mitigate, and enhance (as detailed

above), and in any event, courts “are not free to “impose on the agency [our] own notion of which procedures are ‘best’ or most likely to further some vague, undefined public good.”” *McNair*, 537 F.3d at 993 (brackets in original; citation omitted); *NRIC I*, 35 F.3d at 1388 (discussing legislative history showing that Congress chose not to define “protect, mitigate and enhance”). Nor may courts “impose ‘procedural requirements [not] explicitly enumerated in the pertinent statutes.’” *McNair*, 537 F.3d at 993 (brackets in original; citation omitted).

While the Council is not required to have included “quantitative biological objectives” in the Program, the Program in fact has those objectives. The Program “continues to include qualitative goal statements and quantitative objectives,” as well as “a set of quantitative goals and related timelines for anadromous fish.” SER 29. These goals and objectives include “increasing adult salmon and steelhead runs to an average of 5 million annually by 2025,” and achieving “smolt-to-adult return rates in the 2-6 percent range.” *Id.* The Program “describes the changes needed to achieve” those goals, and provides a method for monitoring and evaluating progress through an adaptive management strategy. *Id.*

The Program’s “two broad quantitative goals for salmon and steelhead” (five million by 2025 and 2 to 6 percent returns) were carried over from the 2009 Program based on the recommendations of “a number of fish and wildlife agencies and tribes and conservation groups.” SER 229. The Council also received a long

list of “varied and complicated and not entirely consistent set of recommendations” for additional quantitative objectives. SER 230-32. Few of those recommendations included “specific quantitative objectives” and most simply called for the “development” of such objectives. SER 232. The Council attempted to resolve these conflicts through consultation, and ultimately “agreed with the fish and wildlife agencies and tribes to work together on an initiative that will begin in 2015 to collect, organize, and assess and report on what quantitative objectives already exist in the region.” SER 232-33. This effort will ultimately inform “what modifications may need to be made” to the Program. SER 233. NRIC fails to explain why this response is arbitrary and capricious.

Lastly, NRIC incorrectly argues that quantitative biological objectives are required because this Court held in *NRIC I* that a program must contain “sound biological objectives.” NRIC Br. at 41 (citing *NRIC I*, 35 F.3d at 1395).<sup>9</sup> But, the Court in *NRIC I* faulted the Council for not adopting tribal *recommendations* for specific biological objectives such as recruits per spawner or smolt-to-adult

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<sup>9</sup> In a footnote, the Court in *NRIC I* stated: “That the Council must adopt sound biological objectives is certainly implied if not expressly required in § 839b(h)(6)(C).” *NRIC I*, 35 F.3d at 1391 n.32. This statement is simply *dicta* (and incorrect) to the extent that it can be read as requiring the Council to develop a *Program* that has sound biological objectives. The cited provision, 16 U.S.C. § 839b(h)(6), provides the substantive criteria that applies to recommended *measures*, as the Court in *NRIC I* elsewhere explained. *Id.* at 1389. Those provisions do not place an express obligation on the Council to craft its own biological objectives.

returns. *NRIC I*, 35 F.3d at 1392. The Program now contains these biological objectives. In addition to “quantitative” population goals and return rates mentioned above (SER 229), the Program adopts and incorporates the FCRPS BiOp objectives of achieving the juvenile and adult fish passage performance standards (SER 158). NRIC’s argument is therefore entirely misplaced.

NRIC, no doubt, would like additional and more specific “quantitative objectives,” but the statute does not require that level of specificity. Moreover, the state, federal, and tribal fishery managers (who are entitled to deference in making such determinations) have not yet been able to agree on what those quantitative objectives should be and instead have recommended (and the Council has accepted) a process to identify such objectives. SER 233. The Council is not “a superfish and wildlife entity” and has no statutory authority or expertise to get out ahead of the fisheries managers in setting more specific objectives. *NRIC I*, 35 F.3d at 1388 (quoting 126 Cong. Rec. E10683). Because the Council’s approach is reasonable and consistent with the requirements of the Act, NRIC’s arguments must therefore fail.

**E. NRIC’s Requested Relief Exceeds The Scope Of The APA And The Act.**

Even if any of NRIC’s arguments had legal merit (and they do not), the relief NRIC requests exceeds what the Court can require. Indeed, the relief NRIC

solicits underscores its misreading of the Act. Each of the four orders sought by NRIC is infirm and should be denied.

*First*, NRIC asks the Court for an order requiring the Council to “develop and adopt the biological objectives necessary to comply with the Act’s anadromous fish restoration gals [sic] within 180 days.” NRIC Br. at 54. But as we previously demonstrated, the Act does not impose or articulate any “restoration g[o]als.” *See supra* at 39-41. Moreover, the Council has no mandate to “develop” biological objectives. Those objectives must come from state, federal, and tribal fisheries managers. 16 U.S.C. § 839b(h)(2). NRIC’s requested relief would therefore rewrite the Act, and turn the Council into “a superfish and wildlife entity” that this Court previously cautioned against. *NRIC I*, 35 F.3d at 1388 (quoting 126 Cong. Rec. E10683).

*Second*, NRIC requests the Court to order the Council to “consider and adopt, insofar as possible, the specific mainstem measures, beyond those already required by the FCRPS.” NRIC Br. at 54. But the Council’s authority to “adopt” measures is limited to “recommendations” from the state, federal, and tribal fisheries managers. The Council has stated its willingness to accept “additional measures” based on recommendations that go beyond the measures contained in the FCRPS BiOp, as long as those measures do not conflict with the BiOp measures. Addendum at 16-17 (2003 Program at 58-59).



However, as detailed above, no such measures were submitted for the 2014 Program. Like NRIC's first request for relief, this request attempts to rewrite the Act by imposing an obligation on the Council to establish such additional measures in the first instance, and should be denied.

*Third*, NRIC asks the Court to order the Council to "recognize" NRIC's proffered interpretation of the Act. NRIC Br. at 54. NRIC is not entitled to such relief because its interpretation is statutorily infirm. Put bluntly, NRIC provides this Court with no reason to order the Council to "recognize" its rewrite of the Power Act.

*Fourth*, NRIC requests that the Court order the Council to "develop and adopt a timeline to implement such measures." *Id.* Here too, NRIC seeks to rewrite the Act. The Council does not "implement" the Program's suite of measures. The measures are funded by BPA's customers (those represented by Northwest RiverPartners and Public Power Council) (16 U.S.C. § 839b(h)(10)(A)) and implemented by BPA, the Corps, BOR, and the many federal, state, local, and tribal partners throughout the Columbia Basin who are responsible for fish and wildlife management. Accordingly, like the requests for relief discussed above, this request goes well beyond anything contemplated by the Act and should be denied.

## VII. CONCLUSION

For the foregoing reasons, and those stated in the Council's brief, NRIC's claims have no merit and its Petition should be denied.

DATED: May 13, 2016.

Respectfully submitted,

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*s/Beth S. Ginsberg*

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PUBLIC POWER COUNCIL

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,202 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point font in Times New Roman type style.

DATED this 13th day of May, 2016.

STOEL RIVES LLP

*s/Beth S. Ginsberg* \_\_\_\_\_  
Beth S. Ginsberg  
Attorneys for Respondent-Intervenors  
Northwest RiverPartners and  
Public Power Council

### **STATEMENT OF RELATED CASES**

Pursuant to Circuit Rule 28-2.6, Respondent-Intervenors Northwest RiverPartners and Public Power Council are not aware of any related cases pending before this Court.

**CERTIFICATE OF SERVICE**

I hereby certify that on May 13, 2016, I electronically filed the foregoing ***NORTHWEST RIVERPARTNERS AND PUBLIC POWER COUNCIL'S ANSWERING BRIEF*** with the Clerk of the Court for the U.S. Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All the participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

*s/Beth S. Ginsberg* \_\_\_\_\_

Beth S. Ginsberg

# **Addendum**

**ADDENDUM**

No. 15-71482

*Northwest Resource Information Center, Inc.,*

v.

*Northwest Power And Conservation Council, Respondent,*

and

*Kootenai Tribe Of Idaho, Spokane Tribe Of Indians, State Of Montana, State Of Idaho, Bonneville Power Administration, Northwest RiverPartners, And Public Power Council, Respondent-Intervenors.*

Addendum  
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**16 U.S.C. § 839. Congressional declaration of purpose**

The purposes of this chapter, together with the provisions of other laws applicable to the Federal Columbia River Power System, are all intended to be construed in a consistent manner. Such purposes are also intended to be construed in a manner consistent with applicable environmental laws. Such purposes are:

(1) to encourage, through the unique opportunity provided by the Federal Columbia River Power System--

- (A) conservation and efficiency in the use of electric power, and
- (B) the development of renewable resources within the Pacific Northwest;

(2) to assure the Pacific Northwest of an adequate, efficient, economical, and reliable power supply;

(3) to provide for the participation and consultation of the Pacific Northwest States, local governments, consumers, customers, users of the Columbia River System (including Federal and State fish and wildlife agencies and appropriate Indian tribes), and the public at large within the region in--

- (A) the development of regional plans and programs related to energy conservation, renewable resources, other resources, and protecting, mitigating and enhancing fish and wildlife resources,
- (B) facilitating the orderly planning of the region's power system, and
- (C) providing environmental quality;

(4) to provide that the customers of the Bonneville Power Administration and their consumers continue to pay all costs necessary to produce, transmit, and conserve resources to meet the region's electric power requirements, including the amortization on a current basis of the Federal investment in the Federal Columbia River Power System;

(5) to insure, subject to the provisions of this chapter--

- (A) that the authorities and responsibilities of State and local governments, electric utility systems, water management agencies, and other non-Federal entities for the regulation, planning, conservation, supply, distribution, and use of electric power shall be construed to be maintained, and
- (B) that Congress intends that this chapter not be construed to limit or restrict the ability of customers to take actions in accordance with other



applicable provisions of Federal or State law, including, but not limited to, actions to plan, develop, and operate resources and to achieve conservation, without regard to this chapter; and

(6) 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.

**16 U.S.C. § 839b. Regional planning and participation (Section 4)****(a) Pacific Northwest Electric Power and Conservation Planning Council; establishment and operation as regional agency**

(1) The purposes of this section are to provide for the prompt establishment and effective operation of the Pacific Northwest Electric Power and Conservation Planning Council, to further the purposes of this chapter by the Council promptly preparing and adopting (A) a regional conservation and electric power plan and (B) a program to protect, mitigate, and enhance fish and wildlife, and to otherwise expeditiously and effectively carry out the Council's responsibilities and functions under this chapter.

(2) To achieve such purposes and facilitate cooperation among the States of Idaho, Montana, Oregon, and Washington, and with the Bonneville Power Administration, the consent of Congress is given for an agreement described in this paragraph and not in conflict with this chapter, pursuant to which--

(A) there shall be established a regional agency known as the "Pacific Northwest Electric Power and Conservation Planning Council" which (i) shall have its offices in the Pacific Northwest, (ii) shall carry out its functions and responsibilities in accordance with the provisions of this chapter, (iii) shall continue in force and effect in accordance with the provisions of this chapter, and (iv) except as otherwise provided in this chapter, shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law; and

(B) two persons from each State may be appointed, subject to the applicable laws of each such State, to undertake the functions and duties of members of the Council.

The State may fill any vacancy occurring prior to the expiration of the term of any member. The appointment of six initial members, subject to applicable State law, by June 30, 1981, by at least three of such States shall constitute an agreement by the States establishing the Council and such agreement is hereby consented to by the Congress. Upon request of the Governors of two of the States, the Secretary shall extend the June 30, 1981, date for six additional months to provide more time for the States to make such appointments.

\* \* \*

**(d) Regional conservation and electric power plan**

(1) Within two years after the Council is established and the members are appointed pursuant to subsection (a) or (b) of this section, the Council shall prepare, adopt, and promptly transmit to the Administrator a regional conservation and electric power plan. The adopted plan, or any portion thereof, may be amended from time to time, and shall be reviewed by the Council not less frequently than once every five years. Prior to such adoption, public hearings shall be held in each Council member's State on the plan or substantial, nontechnical amendments to the plan proposed by the Council for adoption. A public hearing shall also be held in any other State of the region on the plan or amendments thereto, if the Council determines that the plan or amendments would likely have a substantial impact on that State in terms of major resources which may be developed in that State and which the Administrator may seek to acquire. Action of the Council under this subsection concerning such hearings shall be subject to section 553 of Title 5 and such procedure as the Council shall adopt.

(2) Following adoption of the plan and any amendment thereto, all actions of the Administrator pursuant to section 839d of this title shall be consistent with the plan and any amendment thereto, except as otherwise specifically provided in this chapter.

**(e) Plan priorities and requisite features; studies**

(1) The plan shall, as provided in this paragraph, give priority to resources which the Council determines to be cost-effective. Priority shall be given: first, to conservation; second, to renewable resources; third, to generating resources utilizing waste heat or generating resources of high fuel conversion efficiency; and fourth, to all other resources.

(2) The plan shall set forth a general scheme for implementing conservation measures and developing resources pursuant to section 839d of this title to reduce or meet the Administrator's obligations with due consideration by the Council for (A) environmental quality, (B) compatibility 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.

(3) To accomplish the priorities established by this subsection, the plan shall include the following elements which shall be set forth in such detail as the Council determines to be appropriate:

- (A) an energy conservation program to be implemented under this chapter, including, but not limited to, model conservation standards;
- (B) recommendation for research and development;

(C) a methodology for determining quantifiable environmental costs and benefits under section 839a(4) of this title;

(D) a demand forecast of at least twenty years (developed in consultation with the Administrator, the customers, the States, including State agencies with ratemaking authority over electric utilities, and the public, in such manner as the Council deems appropriate) and a forecast of power resources estimated by the Council to be required to meet the Administrator's obligations and the portion of such obligations the Council determines can be met by resources in each of the priority categories referred to in paragraph (1) of this subsection which forecast (i) shall include regional reliability and reserve requirements, (ii) shall take into account the effect, if any, of the requirements of subsection (h) of this section on the availability of resources to the Administrator, and (iii) shall include the approximate amounts of power the Council recommends should be acquired by the Administrator on a long-term basis and may include, to the extent practicable, an estimate of the types of resources from which such power should be acquired;

(E) an analysis of reserve and reliability requirements and cost-effective methods of providing reserves designed to insure adequate electric power at the lowest probable cost;

(F) the program adopted pursuant to subsection (h) of this section; and

(G) if the Council recommends surcharges pursuant to subsection (f) of this section, a methodology for calculating such surcharges.

(4) The Council, taking into consideration the requirement that it devote its principal efforts to carrying out its responsibilities under subsections (d) and (h) of this section, shall undertake studies of conservation measures reasonably available to direct service industrial customers and other major consumers of electric power within the region and make an analysis of the estimated reduction in energy use which would result from the implementation of such measures as rapidly as possible, consistent with sound business practices. The Council shall consult with such customers and consumers in the conduct of such studies.

\* \* \*

#### **(h) Fish and wildlife**

(1)(A) The Council shall promptly develop and adopt, pursuant to this subsection, a program to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, on the Columbia River and

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

**(B)** This subsection shall be applicable solely to fish and wildlife, including related spawning grounds and habitat, located on the Columbia River and its tributaries. Nothing in this subsection shall alter, modify, or affect in any way the laws applicable to rivers or river systems, including electric power facilities related thereto, other than the Columbia River and its tributaries, or affect the rights and obligations of any agency, entity, or person under such laws.

**(2)** The Council shall request, in writing, promptly after the Council is established under either subsection (a) or (b) of this section and prior to the development or review of the plan, or any major revision thereto, from the Federal, and the region's State, fish and wildlife agencies and from the region's appropriate Indian tribes, recommendations for--

**(A)** measures which can be expected to be implemented by the Administrator, using authorities under this chapter and other laws, and other Federal agencies 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 in a manner designed to protect, mitigate, and enhance fish and wildlife; and

**(C)** fish and wildlife management coordination and research and development (including funding) which, among other things, will assist protection, mitigation, and enhancement of anadromous fish at, and between, the region's hydroelectric dams.

**(3)** Such agencies and tribes shall have 90 days to respond to such request, unless the Council extends the time for making such recommendations. The Federal, and the region's, water management agencies, and the region's electric power producing agencies, customers, and public may submit recommendations of the type referred to in paragraph (2) of this subsection. All recommendations shall be accompanied by detailed information and data in support of the recommendations.

**(4)(A)** The Council shall give notice of all recommendations and shall make the recommendations and supporting documents available to the Administrator, to the Federal, and the region's, State fish and wildlife agencies, to the appropriate Indian tribes, to Federal agencies responsible for managing, operating, or regulating hydroelectric facilities located on the Columbia River or its tributaries, and to any customer or other electric utility which owns or operates any such facility. Notice shall also be given to the public. Copies of such recommendations and supporting documents shall be made available for review at the offices of the Council and shall be available for reproduction at reasonable cost.

**(B)** The Council shall provide for public participation and comment regarding the recommendations and supporting documents, including an opportunity for written and oral comments, within such reasonable time as the Council deems appropriate.

**(5)** The Council shall develop a program on the basis of such recommendations, supporting documents, and views and information obtained through public comment and participation, and consultation with the agencies, tribes, and customers referred to in subparagraph (A) of paragraph (4). The program shall consist of measures to protect, mitigate, and enhance fish and wildlife affected by the development, operation, and management of such facilities while assuring the Pacific Northwest an adequate, efficient, economical, and reliable power supply. Enhancement measures shall be included in the program to the extent such measures are designed to achieve improved protection and mitigation.

**(6)** The Council shall include in the program measures which it determines, on the basis set forth in paragraph (5), will--

**(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.

(7) The Council shall determine whether each recommendation received is consistent with the purposes of this chapter. In the event such recommendations are inconsistent with each other, the Council, in consultation with appropriate entities, shall resolve such inconsistency in the program 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. If the Council does not adopt any recommendation of the fish and wildlife agencies and Indian tribes as part of the program or any other recommendation, it shall explain in writing, as part of the program, the basis for its finding that the adoption of such recommendation would be--

- (A) inconsistent with paragraph (5) of this subsection;
- (B) inconsistent with paragraph (6) of this subsection; or
- (C) less effective than the adopted recommendations for the protection, mitigation, and enhancement of fish and wildlife.

(8) The Council shall consider, in developing and adopting a program pursuant to this subsection, the following principles:

- (A) Enhancement measures may be used, in appropriate circumstances, as a means of achieving offsite protection and mitigation with respect to compensation for losses arising from the development and operation of the hydroelectric facilities of the Columbia River and its tributaries as a system.
- (B) Consumers of electric power shall bear the cost of measures designed to deal with adverse impacts caused by the development and operation of electric power facilities and programs only.
- (C) To the extent the program provides for coordination of its measures with additional measures (including additional enhancement measures to deal with impacts caused by factors other than the development and operation of electric power facilities and programs), such additional measures are to be implemented in accordance with agreements among the appropriate parties providing for the administration and funding of such additional measures.
- (D) Monetary costs and electric power losses resulting from the implementation of the program shall be allocated by the Administrator consistent with individual project impacts and system-wide objectives of this subsection.

**(9)** The Council shall adopt such program or amendments thereto within one year after the time provided for receipt of the recommendations. Such program shall also be included in the plan adopted by the Council under subsection (d) of this section.

**(10)(A)** The Administrator shall use the Bonneville Power Administration fund and the authorities available to the Administrator under this chapter and other laws administered by the Administrator to protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries in a manner consistent with the plan, if in existence, the program adopted by the Council under this subsection, and the purposes of this chapter. 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.

\* \* \* \*



## **16 U.S.C. § 1536, Interagency Cooperation**

### **(a) Federal agency actions and consultations**

\* \* \*

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an “agency action”) is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

### **(b) Opinion of Secretary**

\* \* \*

(2) Consultation under subsection (a) (3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

(3)(A) Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion

is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a) (2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

**(B)** Consultation under subsection (a) (3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a) (2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

**(4)** If after consultation under subsection (a)(2) of this section, the Secretary concludes that--

**(A)** the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

**(B)** the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

**(C)** if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to section 1371(a)(5) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that--

**(i)** specifies the impact of such incidental taking on the species,

**(ii)** specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

**(iii)** in the case of marine mammals, specifies those measures that are necessary to comply with section 1371(a)(5) of this title with regard to such taking, and

**(iv)** sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

\* \* \* \*



# MAINSTEM AMENDMENTS

TO THE  
COLUMBIA RIVER BASIN

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## FISH AND WILDLIFE PROGRAM

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NORTHWEST POWER AND CONSERVATION COUNCIL

## APPENDIX B

### FINDINGS ON THE RECOMMENDATIONS FOR MAINSTEM PLAN AMENDMENTS TO THE 2000 COLUMBIA RIVER BASIN FISH AND WILDLIFE PROGRAM

#### Introduction

On March 14, 2001, the Northwest Power and Conservation Council<sup>1</sup> requested that state and federal fish and wildlife agencies, Indian tribes and others submit recommendations for amendments to the Council's *2000 Columbia River Basin Fish and Wildlife Program* concerning the mainstem Columbia and Snake rivers. A memorandum accompanying the request for recommendations outlined certain points to consider in developing mainstem amendment recommendations. Council Document No. 2001-04.

By the June 15, 2001, deadline for submitting mainstem amendment recommendations, the Council received nearly 1,000 pages of recommendations and supporting information from 22 entities and individuals. As required by Section 4(h)(4) of the Northwest Power Act, the Council released the recommendations to the public for an opportunity for review and comment, until October 2001. Council Document No. 2001-16; <http://www.nwcouncil.org/library/recommend/mainstem/Default.htm>.

In October 2002, the Council released for public review and comment a draft of proposed mainstem amendments to the fish and wildlife program, and at the same time invited further comment on the mainstem amendment recommendations originally received. The Council held a number of public hearings in the four states of the Council (Washington, Oregon, Montana and Idaho) and received extensive written comments on the draft amendments and the recommendations. Written comments on the draft mainstem amendments and recommendations are posted on the Council's website, at <http://www.nwcouncil.org/fw/program/mainstem/2002-16Comments/default.asp>. After reviewing the recommendations and the comments on the draft mainstem amendments, the Council revised the draft and adopted substantive mainstem amendments to the program in April 2003.<sup>2</sup>

In this section of the program, the Council provides written findings explaining its disposition of the mainstem amendment recommendations, as required by Section 4(h)(7) of the Power Act. When the Council rejected a rec-

- 
- 1 When the Council issued the call for recommendations, it was known by the name Northwest Power Planning Council. In mid-2003, the Council changed the name by which it is known to the Northwest Power and Conservation Council. Both names are short forms of the Council's official legal name, the Pacific Northwest Electric Power and Conservation Planning Council.
  - 2 The Council's final decision on the mainstem amendments occurred more than a year after the Council received the recommendations for mainstem amendments. See Northwest Power Act, Section 4(h)(9) ("The Council shall adopt such program or amendments thereto within one year after the time provided for receipt of the recommendations."). The Act does not specify the consequences for failing to meet the specified date, nor a procedure for extending the date to act on the recommendations.

In March of 2002, knowing that it would not be able to complete its consideration of and adopt final mainstem amendments within the one-year time period, the Council decided, at its regular Council meeting for that month, to adopt a revised schedule that would move the completion of the mainstem amendments beyond the one-year date, and provided notice of this decision and its reasons to those who submitted recommendations and other interested parties. No recommending party or any one else complained about or challenged the Council's decision to extend the schedule. The reasons given included the fact that the power system operational issues in 2001 especially were extraordinary, diverting the Council and relevant staff away from being able to give the level of attention to the mainstem recommendations that they deserved. Yet the Council, staff and the public needed more time than usual to understand the general system planning issues in the context of the reliability crisis of that year. The Council had not been dilatory; the members and staff worked consistently on the mainstem plan recommendations and related mainstem issue since receiving the recommendations. Even so, it was not possible to complete the mainstem amendment process by mid-June 2002 and provide sufficient consideration and public attention to the proposed amendments.

ommendation, these findings explain how the Council's decision comports with the standards in that section of the Act. In the course of responding to the recommendations, these findings also address the major issues raised by commentors on the draft amendments. References in these findings to the 2003 Mainstem Amendments are to what is called the "Pre-Publication Copy," Council Document No. 2003-04 (April 2003).

## Context and Scope of the Mainstem Amendments

### — General Findings on Recommendations

#### *2000 Fish and Wildlife Program*

The mainstem amendments are the second step in what will eventually be a comprehensive revision of the fish and wildlife program. In the first phase, which resulted in the 2000 Fish and Wildlife Program, the Council reorganized the program around a comprehensive framework of scientific and policy principles. The fundamental elements of the revised program are the vision, which describes what the program is trying to accomplish with regard to fish and wildlife and other desired benefits from the river; basinwide biological objectives, which describe in general the fish and wildlife population and habitat characteristics needed to achieve the vision; implementation strategies, which will guide or describe the actions needed to achieve the desired ecological conditions; and a scientific foundation, which links these elements and explains why the Council believes certain kinds of actions should result in desired habitat conditions and why these conditions should improve fish and wildlife populations in the desired way.

The program amendments in 2000 set the stage for the subsequent phases of the program revision process, in which the Council will adopt specific objectives and strategies for the river's mainstem and tributary subbasins, consistent with the basinwide vision, objectives and strategies in the program and its underlying scientific foundation. These findings conclude the adoption of a set of program amendments relevant to the mainstem Columbia and Snake rivers. The Council next intends to incorporate specific objectives and measures for tributaries into the program in locally developed subbasin plans for the more than 60 subbasins of the Columbia River.

The role of the mainstem amendments was described in the 2000 Fish and Wildlife Program, in the section on Basinwide Hydrosystem Strategies and in the section entitled Schedule for Further Rulemakings. The Council repeated this guidance in the March 14, 2001, request for mainstem amendment recommendations. The mainstem amendments are to contain the specific objectives and strategies (or measures) for the federal operating agencies and others to implement in the mainstem Columbia and Snake rivers to protect, mitigate and enhance fish and wildlife affected by the development and operation of hydroelectric facilities while assuring the region an adequate, efficient, economical and reliable power supply. The final amendments thus include objectives and strategies relating to, among other matters:

- the protection and enhancement of mainstem habitat, including spawning, rearing, resting and migration areas for salmon and steelhead, resident salmonids and other anadromous and resident fish;
- system water management;
- passage spill at mainstem dams;
- adult and juvenile passage modifications at mainstem dams;
- juvenile fish transportation;
- reservoir elevations, operational requirements and habitat conditions to protect resident fish and wildlife;
- water quality conditions; and
- research, monitoring and evaluation.

In developing the mainstem amendments, the Council asked the recommending entities to consider, among other things, the consistency of their mainstem recommendations with the basinwide provisions in the 2000 Fish and Wildlife Program, especially the role of a mainstem plan in a multispecies, habitat-based, basinwide program. The Council evaluated the mainstem recommendations and the draft and final program amendments for consistency with the program framework elements adopted in 2000, including the vision, biological objectives, habitat and

hydrosystem strategies, and underlying scientific principles. The Council also evaluated the draft and final amendments for consistency with, and a basis in, the mainstem recommendations, as explained in these findings.

*Biological Opinions on the operation of the federal Columbia hydrosystem*

In the past, the Council's fish and wildlife program included detailed provisions for the configuration and operation of the hydrosystem to benefit fish and wildlife. In December 2000, NOAA Fisheries (formerly the National Marine Fisheries Service) and the U.S. Fish and Wildlife Service issued biological opinions for the operation of the Federal Columbia River Power System to benefit populations of salmon, steelhead, bull trout and white sturgeon listed as threatened or endangered under the federal Endangered Species Act and found throughout the mainstem. The mainstem and hydrosystem objectives and measures in these biological opinions run to hundreds of pages of detail and hundreds of actions on water management, system configuration, river flows, reservoir management, passage improvements, spill, juvenile transportation, predator management, mainstem habitat and more. The federal system operating agencies — the Corps of Engineers, Bureau of Reclamation and Bonneville Power Administration — agreed in subsequent Records of Decision to implement the hydrosystem measures in the biological opinions. These measures affect the entire mainstem and every species of fish and wildlife in the mainstem, whether listed or not. And these measures are built on foundations developed in the Council's program over the last 20 years.

Thus in developing the mainstem amendments, the Council asked the recommending entities to consider, among other things, how the mainstem amendments should relate to the biological opinions on hydrosystem operations. The recommendations received by the Council in response may be grouped into four categories:

- recommendations that the Council adopt mainstem amendments that incorporate or at least are consistent with the objectives and measures in the biological opinions;
- based on a conclusion that the biological opinions did not prescribe sufficient flow, spill and passage operations to benefit listed (as well as non-listed) salmon and steelhead, recommendations that the Council adopt additional or different measures to that end;
- based on a conclusion that the operations specified in the biological opinions are not optimal or sufficient to protect, enhance or mitigate for the adverse effects of the hydrosystem on resident fish, recommendations that the Council adopt objectives and measures for that purpose that would be supplemental to the biological opinion operations, or would require a shift in current implementation of the biological opinions but within the apparent flexibility of the opinions; or would be in conflict with biological opinion operations; and
- based on the conclusion that the biological opinions exceeded what is necessary in terms of flow and spill to benefit listed fish, to the unreasonable detriment of the power supply and other uses of the river, recommendations that the Council call for scaled-back flow and spill operations, or at least immediate evaluations of the current operations to determine the most biologically and cost effective set of operations.

Given this set of recommendations, and the current state of federal mainstem operations for fish and wildlife, the Council decided on the following approach for adopting mainstem objectives and strategies, an approach with three main elements:

First, the Council incorporated the hydrosystem objectives and measures from the two biological opinions into the Council's program as the baseline set of federal system operations for fish affected by the Columbia hydrosystem. The objectives and measures in the biological opinions represent the recommendations of the federal fish and wildlife agencies with jurisdiction under the Endangered Species Act (and the recommendations of others as well) concerning the appropriate biological conditions and hydrosystem operations to protect and improve the status of

the listed species spread across the mainstem, from migrating salmon in the lower parts of the Columbia and Snake rivers to bull trout and Kootenai River white sturgeon in the upper parts of the system. These operations also strongly affect non-listed anadromous and resident fish, largely but not always in beneficial ways.<sup>3</sup>

Second, the mainstem amendments include a set of habitat considerations, objectives and strategies intended to protect, mitigate and enhance all the fish and wildlife of the Columbia River Basin in the mainstem, whether listed or not, a broader focus required of the Council by the Power Act. Because the 2000 biological opinions concern only the listed species (even as they affect other fish in the system), and because most of the listed salmon and steelhead spawn and rear outside of the mainstem above or below the mainstem hydroprojects, the biological opinion measures may not be complete or optimal when the broader habitat needs of a broader range of fish and wildlife are taken into account. So, based on recommendations submitted, and consistent with the basinwide vision, biological objectives and strategies in the 2000 Program, the Council adopted mainstem objectives and strategies intended to allow for the appropriate mainstem habitat conditions to benefit a wide range of multiple species of salmon, steelhead, other anadromous fish, resident fish and wildlife affected by the hydrosystem, not just listed species.

When the strategies intended to benefit non-listed species appear to conflict with the measures in the biological opinions, or when the strategies intended to benefit upriver resident fish, whether listed or not, appear to conflict with the measures in the salmon and steelhead biological opinion, the Council does not mean that the federal operating agencies should act contrary to the biological opinions in order to implement strategies in the Council's program. The Council's intent instead is that the federal operating agencies make every effort practicable to use the operational flexibility inherent in the biological opinions to meet the biological opinion requirements while attempting to meet the objectives and implement the other strategies in the Council's program.

Third, the mainstem amendments include a specified set of evaluations, tests and experiments related to hydro-system operations for fish. Scientific and policy uncertainty continues to plague a number of the mainstem actions in the NOAA Fisheries biological opinion intended to benefit salmon and steelhead. This leads to an inability to measure the extent of the benefits gained and to great differences of opinion as to the value of continuing these actions, especially as some may have adverse effects on resident fish and significant costs to the power system.

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3 The federal district court of Oregon recently declared NOAA Fisheries' 2000 hydrosystem biological opinion to be unlawful and remanded that opinion to NOAA. The court concluded that NOAA Fisheries, in determining that the combined suite of mainstem and off-site measures in the opinion's reasonable and prudent alternatives would avoid jeopardy, improperly relied on the occurrence of a number of non-federal off-site mitigation actions that are not reasonably certain to occur, and improperly relied on the occurrence of a handful of federal actions that have not yet undergone an ESA Section 7 consultation, both contrary to what is required for a jeopardy analysis in NOAA Fisheries' own regulations implementing the ESA. "Opinion and Order," *National Wildlife Federation v. National Marine Fisheries Service*, CR 01-640-RE (May 7, 2003).

The court's action in remanding the biological opinion to NOAA Fisheries does not affect the Council's mainstem amendments. The Council was careful not to adopt or incorporate the two biological opinions themselves into the Council's program. Instead, the Council concluded that the mainstem hydrosystem objectives and measures in the biological opinions recommended to the federal operating agencies would become the baseline mainstem hydrosystem objectives and measures in the Council's program as well. These measures and objectives are now independently part of the Council's program.

The Council has no reason to believe that these measures will not represent the basic core of the federal operating agencies' operations for fish and wildlife in the near future. As noted above, the system operating agencies — the Corps of Engineers, Bureau of Reclamation and the Bonneville Power Administration — have executed Records of Decision identifying the hydrosystem measures in the biological opinion as the measures they will be implementing in the next few years. The issues that the plaintiffs raised in the biological opinion litigation included the adequacy of the extinction analysis used by NOAA Fisheries and the validity of relying on a suite of off-site mitigation measures to offset in part the jeopardy impacts of the hydrosystem. The plaintiffs did not challenge the hydrosystem measures themselves (except for an emergency clause that allow the operations to be curtailed under certain circumstances, and which is not part of the hydrosystem measures that the Council adopted); the plaintiffs did not name the operating agencies as defendants, and the court's opinion does not address or find fault with these mainstem measures. It may be that the plaintiffs pursue additional measures in the mainstem for salmon and steelhead, but no party argued that the basic hydrosystem operations already in the biological opinion are inappropriate or should not be implemented. These measures are the starting point or baseline for further considerations.



This is a large part of the reason the federal and state fish and wildlife agencies and lower river tribes have produced different plans, programs and recommendations regarding the appropriate mainstem operations for salmon and steelhead, including conflicting program amendment recommendations to the Council.

The Council concluded that many of the biological opinion measures must be subject to systematic and rigorous monitoring and evaluation to determine if the measures have the biological benefits expected and represent the most cost-effective actions to achieve these benefits. Some of the recommended strategies to benefit resident fish in upriver reservoirs suffer from similar uncertainties and costs, and similarly need implementation and evaluation, often in the form of implementation through an experimental design.

For these reasons, the mainstem amendments include not only the detailed set of evaluations, tests and experiments for the hydrosystem, they also include an approach for prioritizing mainstem research as well as specific priorities for that research; and recommendations for how better to integrate research, monitoring and evaluation results into decisions about mainstem actions and power system operations. The Council calls for certain tests and experiments even when they may require implementing within a range of system operations, so as to focus on areas where the quantitative benefits from biological opinion operations require additional understanding or verification, or where benefits to non-listed species from varied operations may be significant without adverse impacts on listed species, or both. The Council believes this approach is consistent with the biological opinions, which allow considerable flexibility to conduct necessary tests. The opinions were adopted with the recognition that as new scientific information is developed, actions called for in the opinions could and would be changed where appropriate. As information is gleaned from these evaluations and tests, the Council's goal is to provide recommendations to the federal hydrosystem operating agencies and fish and wildlife agencies for the most biologically effective spill, flow and other mainstem operations and actions at the minimum economic cost.

In settling on this approach, the Council adopted, modified or rejected the recommendations in the four categories described above in the following manner:

**General Finding No. 1:** Recommendations to incorporate into the program the objectives and measures in the biological opinions. The federal fish and wildlife and operating agencies submitted this recommendation, but others did, too. For example, incorporating the biological opinion measures into the program was the centerpiece of the recommendations from the Washington Department of Fish and Wildlife. The Council adopted these recommendations.

Also included in this category are certain recommendations the Council received for the purpose of protecting and improving mainstem habitat (broadly considered) for a wide range of populations and species of anadromous and resident fish and wildlife, not just listed species. These recommendations did not necessarily refer to, or have a basis in, the biological opinions but were not incompatible with the particular provisions of those opinions. The Council adopted a number of objectives and measures based on recommendations of this type, as highlighted in the summary of specific recommendations that follows this general section of the findings.

**General Finding No. 2:** Recommendations based on a conclusion that the biological opinions did not prescribe sufficient flow, spill and passage operations to benefit listed (as well as non-listed) salmon and steelhead, thus calling for the Council to adopt additional or different measures for that purpose. The Council did not adopt recommendations that would have the Council call for the implementation of flow, spill and passage operations for salmon and steelhead that are in conflict with what the biological opinions call for or will allow for.

The category analyzed here included, for example, recommendations from the fish and wildlife agencies of Oregon and Idaho and the Columbia River Inter-Tribal Fish Commission for additional and different flow and spill measures. The Commission also recommended the breaching of the federal dams in the lower Snake River. These recommendations carried over into the Council program amendment process disputes these entities had with NOAA Fisheries in the development of the biological opinion concerning what are the appropriate measures for salmon and steelhead. The Save Our Wild Salmon Coalition and the Northwest Resource Information Center, Inc., joined in these recommendations. All of these recommendations would have additional costs to the power system in terms of lost energy and dollars, some would have impacts to upriver listed and unlisted resident fish.

By rejecting the recommendations that would have the Council call at this time for additional or different flow, spill and passage measures for salmon and steelhead, the Council does not mean or imply that it has evaluated the science underlying the different positions and concluded that NOAA Fisheries is correct and the Oregon and Idaho agencies and the Commission are incorrect, or that the Council gave greater weight to the biological judgments of the federal agencies and less or none to the judgments of the others. Program amendment recommendations from all fish and wildlife agencies and tribes are due special consideration by the Council under the Power Act. The Council recognizes that the different positions are based in legitimate differences in opinion as to the meanings to be drawn from imperfect scientific information and from different managerial perspectives and assumptions of risk. Time and more information may reveal that the federal agencies are correct in the decisions about what is needed to prevent extinction and recover listed salmon and steelhead, or that these state agencies and tribes are correct, or that neither is correct. The difficulty for the Council was how to decide what the Council's program should say at this time about mainstem configuration and operations for salmon and steelhead in light of the different recommendations from the federal and state fish and wildlife agencies and tribes. The standards for adopting and rejecting recommendations in Section 4(h) of the Power Act are essentially premised on the assumption that the recommendations of the fish and wildlife agencies and tribes will coincide, and that any conflicts found in the recommendations will be between fish and wildlife managers and other river users. The standards are not well adapted to situations in which the federal salmon agency differs from state and tribal salmon agencies as to what are the appropriate measures for salmon and steelhead. One reason the Council gave at least presumptive weight to the federal agency recommendations, at least as the baseline or starting point for the measures in the program, is because the ultimate focus is on adopting a set of operations that the Council can expect the federal operating agencies to implement to benefit salmon and steelhead. The systemwide operational measures from the federal fish and wildlife agencies with ultimate jurisdiction under the ESA for listed species carry by far the most weight with the federal operating agencies and, in fact, are now the basic set of hydrosystem operations that those agencies have adopted in their Records of Decision for operations, and thus are the operations for the Council to establish as the baseline for the program. The issue then has been what to do with the different or additional recommendations of the state and tribal managers.

The Council concluded that the hydrosystem measures in the biological opinions themselves held a key to resolving this dilemma. The biological opinions represented the culmination of a complicated multi-year process by the federal fish and operating agencies to evaluate the effects of hydrosystem operations on the listed fish species spread throughout the Columbia. That process included a thorough airing of the different scientific and policy views of the federal, state and tribal fish managers as well as the views of environmental groups, industry groups and others, resulting in an extensive administrative record and resolution of key issues by NOAA Fisheries and U.S. Fish and Wildlife Service, the agencies with ultimate responsibility to determine what are the appropriate actions to take to protect and improve the conditions for listed species. Most important here, the hydrosystem part of the NOAA Fisheries' salmon and steelhead biological opinion recognized the uncertainties and legitimate differences in opinion. The biological opinion included measures and mechanisms to test key assumptions and uncertainties about flow, spill, passage and

system configuration; to monitor progress in reversing the population trends; and to adapt management prescriptions as more is learned about the status of the stocks and the effects of measures taken. The biological opinion measures thus internalized the debates and left room for the evaluation and possible implementation of precisely these recommendations of the state fish and wildlife agencies and tribes. The Council did not believe the region would be well served by having the Council adopt program amendments now calling for the federal operating agencies to engage in the different operations recommended rather than allowing the evaluation and adaptive management process of the biological opinions to work. The Council chose instead to emphasize evaluating the current extensive set of operations against a set of alternatives before firmly deciding on new directions.

It is true that the Council's and the federal agencies' responsibilities under the Power Act are different and broader than under the Endangered Species Act. The Power Act is concerned with protecting all fish and wildlife, not just listed species, from the adverse effects of the hydrosystem and with mitigating for the adverse effects that cannot be avoided. And while "mitigation" is not defined in the act, clearly it means a mitigation goal that is greater than just avoiding jeopardy to the continued existence of listed species and presumably greater than recovering populations just to the point of being able to delist them but derive no other benefit. This is reflected in the Vision of the 2000 Program (repeated in the mainstem amendments) of "mitigating across the basin for the adverse effects to fish and wildlife caused by the development and operation of the hydrosystem and providing the benefits from fish and wildlife valued by the people of the region," including "abundant opportunities for tribal trust and treaty right harvest and for non-tribal harvest" as well as "allowing for the recovery of the fish and wildlife affected by the operation of the hydrosystem and listed under the Endangered Species Act." Thus, it might be argued that while the measures in the biological opinions may be sufficient to avoid jeopardy and start down the path toward recovery of the listed species, the different or additional flow, spill and passage actions in the state and tribal recommendations are necessary to provide additional improvements in the status of all salmon and steelhead populations in the system to meet the greater mitigation goals of the Power Act and the program.

The problem with this argument, however, is that the recommendations from the state agencies and tribes are not presented in this way, nor are the biological opinions constructed in this way. The water management and passage measures in the biological opinions affect and benefit all the salmon and steelhead in the river. NOAA Fisheries did not adopt the hydrosystem measures with an understanding that these measures would provide a self-limited benefit to the listed populations — up to but not above what is required to satisfy the Endangered Species Act — while leaving on the table a host of operational and passage measures for salmon and steelhead that could be implemented but that NOAA could ignore because they would provide greater protection and survival benefits than required for the ESA, or because they would benefit only non-listed salmon, or because they would produce abundance for harvest opportunities beyond the requirements of the ESA. (To the contrary, an assumption throughout the biological opinion is that one purpose for the federal government's efforts is to recover these populations to allow for, and even while allowing for, salmon harvest opportunities.) Instead, NOAA Fisheries included every reasonable and prudent hydrosystem operation and passage improvement it believed appropriate and optimal for salmon and steelhead (short of dam removal), and called for implementation of those that can be implemented now and for evaluation and implementation within a short-time period for those that were not yet ready for implementation. In the latter category, for example, the biological opinion called for "a detailed feasibility analysis of modifying current system flood control operations to benefit the Columbia River ecosystem, including salmon" (RPA Action 35), echoing the Commission's recommendation to the Council that a substantial rethinking of flood control is necessary to provide the more normative river hydrograph the Commission believes is necessary for salmon. The Council incorporated both types of measures into the program, with emphasis on points important to the state and tribal recommendations. These include, for example, an explicit statement by the Council in its water man-

agement strategies that the Corps of Engineers should “place a priority on conducting the further comprehensive review of flood control operations called for in the NOAA Fisheries 2000 Biological Opinion.”

Conversely, the state agencies and tribes that recommended additional or different hydrosystem actions for salmon and steelhead did *not* do so based on an analysis or explanation that the measures in the biological opinion satisfy what the populations require under the ESA, but that the additional or different measures are needed to meet a higher population standard under the Power Act. Instead, as noted above, these agencies and tribes simply disagree with NOAA Fisheries on what are the appropriate operations for salmon and steelhead, whether listed or not.

For just one example, the recommendations from Oregon, the Columbia River Inter-Tribal Fish Commission, and the Idaho Department of Fish and Game call for more spill than the biological opinion, such as 24-hour instead of 12-hour spill at certain projects. NOAA Fisheries did not call for less spill because only that amount was needed to meet ESA requirements. Instead, NOAA Fisheries sought to establish optimal levels of spill for salmon survival through the dams. And the contrary recommending entities do not call for greater spill operations because that is needed to satisfy Power Act obligations beyond the ESA. These entities, too, seek to establish what they believe are optimal levels of spill for salmon survival. Recognizing the uncertainties and differences of opinion, the biological opinion measures do not call just for a certain set of spill operations. They also include an extensive set of spill assessments, tests, investigations, actions and evaluations to better determine optimal spill levels for salmon, including among many other matters an assessment of shifting to 24-hour spill. (Biological Opinion, pages 9-84 to 9-102, 9-119 to 9-126; RPA Actions 54-57, 60, 68-72, 75, 77, 80, 82-83, 130-40.) No standard or obligation in the Power Act would be served by the Council calling for the operating agencies to implement different spill operations at this time on the basis of the recommendations of Oregon, Idaho and CRITFC, rather than recognizing and incorporating the spill operations *and* evaluation process set out in the biological opinion, which became in this forum the recommendations of NOAA Fisheries. Moreover, the different spill operations recommended would reduce the power output of the system, thereby further reducing the adequacy, reliability, efficiency and economy of the power system, a Power Act concern of the Council. So the Council chose instead to add its own emphasis to the importance of an experimental approach for determining the optimal levels of spill. And the analysis is precisely the same for the other additional or different flow and passage measures for salmon and steelhead in the state and tribal recommendations.

If the Council ever had a sense that the hydrosystem measures for salmon and steelhead pursued by the federal agencies were sufficient for ESA purposes but left out an obvious set of additional measures needed to meet requirements of the Power Act to “protect and mitigate” obligation for the same populations, separately recommended to the Council, the Council would adopt the recommendations and additional measures into the program. That is not the situation here. Also, the Council is always cognizant of the need to adopt additional measures to protect non-listed salmon and steelhead (and other) populations in those moments when even the extensive federal hydrosystem measures do not reach or benefit those non-listed populations. For one of many examples, the Council called for the federal agencies, in deciding on spill operations as compared to the benefits of transportation, to give priority recognition to important although not listed populations of salmon and steelhead that cannot be transported or are not effectively transported, giving examples (2003 Mainstem Amendments, at 15). For another example, the Council called for the federal agencies to manage flows to benefit the Hanford Reach fall chinook population on an equal basis with managing water to benefit listed species (2003 Mainstem Amendments, at 7, 19).

For these reasons, the Council concludes that adopting the recommendations of those state agencies, tribes and environmental groups to call now in the program for additional or different hydrosystem flow, passage and spill objectives and measures for salmon and steelhead than those in the biological opinions would be:

- less effective in protecting, mitigating and enhancing salmon and steelhead in the mainstem than adopting the recommendations of the federal agencies to incorporate the biological opinion measures and objectives in the program (which includes the measures allowing for extensive evaluation of alternative operations), *see* Power Act, § 4(h)(7)(C);
- inconsistent with the information and the comments in the record concerning the most appropriate way to handle the debates over appropriate salmon measures, *id.*, § 4(h)(5), (7)(A), (C);
- inconsistent with an effort to reconcile the conflicting recommendations of all the fish and wildlife agencies and tribes in a way that deals with the river as a system, *see* Power Act, § 4(h)(1)(A), (6), (7), (7)(B);and
- inconsistent with the Council's efforts to assure the region an adequate, reliable, efficient and economical power supply while protecting, mitigating and enhancing fish and wildlife affected by the hydrosystem, *id.*, § 4(h)(5), (7)(A).

**General Finding No. 3:** Recommendations based on a conclusion that the operations specified in the biological opinions are not optimal or sufficient to protect, enhance or mitigate for the adverse effects of the hydrosystem on resident fish, calling for the Council to adopt objectives and measures for that purpose that would be supplemental to the biological opinion operations, or would require a shift in current implementation of the biological opinions but within the apparent flexibility of the opinions; or would be in conflict with biological opinion operations. Two sets of recommendations best illustrate the recommendations in this category. The Spokane and Colville Tribes recommended reservoir elevation minimums for Lake Roosevelt to benefit resident fish in the lake that would result in Grand Coulee operations and summer river flows in the lower river different from the Grand Coulee operations in the NOAA Fisheries 2000 Biological Opinion. And the Montana Department of Fish, Wildlife and Parks recommended summer operations at Hungry Horse and Libby dams to benefit resident fish in the reservoirs and in the river reaches below the dams that would change operations at both projects compared to biological opinion operations and reduce summer flows in the lower river.

The Council defers to the judgments of these fish and wildlife agencies and tribes as to what would be the most appropriate operations to protect and mitigate the resident fish in the areas under their jurisdictions. And so the Council reflected these recommendations in the mainstem amendments, to a certain extent. But, the operations recommended by these entities for resident fish were often inconsistent with the systemwide water management operations in the salmon and steelhead biological opinion and the operations recommended to the Council by the salmon agencies and tribes to protect and mitigate the salmon populations of the system. The comments on the draft amendments and the Council's own power system analysis also indicated that implementation of the alternative operation at Grand Coulee would have significantly more adverse effects on the ability of the hydrosystem to meet electricity demand in the region. The Council concluded, in the face of this conflict, that it would not be an improvement to ignore or back away from the baseline operations recommended to the Council for salmon and steelhead protection in order to provide operations for resident fish based on other agency and tribal recommendations. And again, the Council believes the solution to this dilemma is for the Council and the other entities to work within the flexibility and adaptive management principles in the hydrosystem measures of the salmon and steelhead biological opinion.

Thus, as noted above, the Council did include strategies to benefit resident fish species, both listed and non-listed, that in some cases conflict with the current implementation of the measures in the salmon and steelhead biological opinion. The Council does not mean by that action that the federal operating agencies should act contrary to the biological opinions in order to implement these other strategies in the Council's program. The Council's intent instead is that the federal

operating agencies make every effort practicable to use the operational flexibility inherent in the biological opinions to meet the biological opinion requirements and implement the other strategies in the Council's program.

For example, the Council calls for spring and summer operations at Grand Coulee consistent with biological opinion operations and with ordinary hydrosystem power operations, but then calls on the federal agencies, working with the tribes, the Council and others, to work toward meeting the reservoir elevations and water retention times recommended by the Lake Roosevelt area tribes when possible. The Council took an additional step with regard to summer operations at Hungry Horse and Libby, calling on the federal agencies to implement the operation recommended by Montana (limits on reservoir drafting that result in higher reservoir levels and steady outflows) as an experimental design within the adaptive management capabilities of the hydrosystem measures of the biological opinion. The Council called on the operating agencies to consult with a team formed from the Council, the Independent Scientific Advisory Board and others to design the experiment, with the hypothesis that the proposed operations will significantly benefit listed and non-listed resident fish in the reservoirs and in the portions of the rivers below the reservoirs without discernible effects on the survival of juvenile and adult anadromous fish when compared to ordinary operations under the biological opinions. The Council noted that little hard information exists about the relationship, if any, between levels of flow, flow augmentation and juvenile and adult salmon survival through the lower Columbia hydro-system reach. The Council concluded that the experiment called for would allow for that kind of information to be gathered in a systematic way, while also testing the predicted benefits of the proposed operation to resident fish.

In conclusion, the Council adopted modified versions of these types of recommendations for the reasons described here and finds what it adopted to be:

- consistent with an effort to reconcile the conflicting recommendations of all the fish and wildlife agencies and tribes in a way that deals with the river as a system, *see* Power Act, § 4(h)(1)(A), (6), (7), (7)(B);
- more effective than the original recommendations in the protection, mitigation and enhancement of *all* the fish and wildlife affected by the hydrosystem, *id.*, § 4(h)(7)(C); and
- consistent with the best available, if at times conflicting, scientific knowledge presented by different fish and wildlife agencies and tribes to support conflicting recommended operations for the fish species of their particular concern, *id.*, § 4(h)(6)(B), (7), (7)(B), (C).

**General Finding No. 4:** Recommendations based on the conclusion that the biological opinions exceeded what is necessary in terms of flows and spill to benefit listed fish, to the unreasonable detriment of the power supply and other uses of the river, and so the Council should call for scaled-back flow and spill operations, or at least immediate evaluations of the current operations, to determine the most biologically and economically efficient operations to allocate the region's limited resources. In this category, for example, the Columbia-Snake River Irrigators Association, Eastern Oregon Irrigators Association, Northwest Irrigation Utilities and Idaho Water Users recommended that the Council call for reductions in flow augmentation and spill compared to what is in the NOAA Fisheries biological opinion. Similar to recommendations based on concerns that measures in the biological opinions were insufficient (See General Finding No. 2), these recommendations carried into the Council program amendment process a dispute these entities have with NOAA Fisheries and the salmon managers in general as to the biological efficacy and cost effectiveness of the flow and spill measures for salmon.

The Council declined to adopt recommendations of this type for a number of related reasons. The recommendations that would have the Council call for reduced spill and flow operations as not needed for salmon and steelhead were not supported by any of the fish and wildlife agencies and tribes concerned with salmon, whatever the differences among them. Moreover, statutory responsibility for deciding which hydrosystem actions to take to protect

and improve the conditions for listed species lies with NOAA Fisheries and the U.S. Fish and Wildlife Service, not with private entities challenging those agencies. Except in unusual circumstances, the Council will defer under the Power Act to the biological judgments of the fish agencies and tribes on these matters. That is especially true here, where the biological opinions represented the culmination of a complicated multi-year process by the federal fish and operating agencies to evaluate the effects of hydrosystem operations on the listed species spread throughout the Columbia. As noted, that process included a thorough airing of the different views and information of all the interested entities, including the fishery agencies and tribes, federal operating agencies, Bonneville customers and other industry groups, environmental groups and others, resulting in an extensive administrative record and resolution of the key issues by NOAA Fisheries in the final salmon and steelhead biological opinion.

This does not mean that the Council considers these recommendations to raise frivolous issues. As also noted above, considerable scientific uncertainty exists as to what are the optimal levels of flow and spill for salmon and steelhead survival. A number of the recommending entities from industry — from the Public Power Council and the Pacific Northwest Generating Cooperative, for example — did not recommend that the Council adopt specific spill and flow operations contrary to the biological opinions, but did raise the point that some scientific information calls into question whether the extensive spill and flow measures in the biological opinion are required to obtain the levels of survival that salmon need through the hydrosystem. Moreover, these measures are costly to the region's power system. And so these entities recommended that the Council place a high priority on flow and spill evaluations aimed at determining the most cost-effective levels of spill and flow. Based in part on recommendations of this type and on supporting information and comments submitted by Bonneville customers and industry groups, the Council recognized the need for aggressive testing of certain assumptions and uncertainties embedded in the biological opinion measures as they relate to spills, flow augmentation, reservoir drafting and other matters, in order to determine what are the most biologically effective spill, flow and other mainstem operations and actions at the minimum cost to the power system. And as explained above, the salmon and steelhead biological opinion allows for precisely these kinds of evaluations and adaptive management actions.

For these reasons, to the extent that the recommendations in the category call for the Council to adopt specific spill and flow actions contrary to and less than the hydrosystem measures in the biological opinions, the Council concludes that adopting these recommendations would be less effective in protecting, mitigating and enhancing salmon and steelhead in the mainstem than adopting the recommendations of the federal agencies to incorporate the biological opinion measures and objectives in the program (which includes the measures allowing for extensive evaluation of alternative operations), *see* Power Act, § 4(h)(7)(C), and would not be consistent with giving due weight to the recommendations and expertise of the fish and wildlife and agencies or tribes or complement their existing and future activities, *id.*, § 4(h)(6), (7), (7)(B).

#### *Regional Power System Problems*

The Power Act requires the Council to adopt a fish and wildlife program that not only protects, mitigates and enhances fish and wildlife but also ensures that the region will continue to enjoy an adequate, efficient, economical and reliable power supply. With regard to the latter, the Council evaluated current hydrosystem operations under the biological opinions, the recommendations for mainstem amendments and the draft and final mainstem amendments to ensure that the adopted objectives and measures for mainstem hydrosystem operations are consistent with the Council's power supply obligations.

Energy systems, markets and policy changed radically since the last revision of the fish and wildlife program in the mid-1990s. Federal hydrosystem operations in 2001 brought a concrete example of a problem that the Council had seen developing over the last half-decade — electricity demands placed on the federal hydrosystem were increasingly

greater than what the federal system could produce in a year of historically low runoff and river levels. The Bonneville Power Administration did not acquire new, long-term resources that could have closed the gap, largely due to the dynamics of regional and West Coast energy developments. Additional problems with West Coast power markets in 2000 and 2001 prevented Bonneville from being able to make up the energy deficit in those markets through power purchases, leading to a situation in 2001 in which the federal agencies curtailed regional load and reduced system operations intended to benefit fish and wildlife in order to maintain the reliability of the region's power system. Even with significant changes to the hydropower operations specified for fish, the system still produced inadequate energy to meet the region's demands. This forced many of the region's utilities to curtail loads while still spending large sums to purchase power. When surplus energy was available for purchase, it was at a cost that resulted in significant rate increases and made it difficult to maintain an economical power supply in the region.

For these reasons, the Council's analysis of the adequacy, efficiency, economy and reliability of the region's power supply, which accompanies the mainstem amendments and these findings (Appendix A to the 2003 Mainstem Amendments), includes consideration of the current status of the region's power system. The Council's conclusion is that the region's power system should be adequate and reliable for the next few years due to the development of new power supplies, reductions in demand and loss of loads that have occurred since early 2001. The objectives and measures to protect, mitigate and enhance fish and wildlife included in the mainstem amendments do not affect that conclusion. The analysis also concludes, however, that the region faces the possibility in later years of spiraling back into the power supply problems seen in 2001 unless measures are taken to ensure that new resources are added to the regional power supply in a more certain fashion. The analysis suggests possible actions by the federal agencies and others in the region to ensure that the federal system provides the specified operations for fish and wildlife and meets the electricity demands in most, if not all, low-water years. The Council is reviewing and revising its 20-year power plan as called for by the Act. The power plan will address the region's power supply and reliability issues in more detail.

**General Finding No. 5:** Given this context, the Council received a number of recommendations relating to power supply and power planning actions. This is unusual for a fish and wildlife program amendment process. These included recommendations from the Columbia River Inter-Tribal Fish Commission, the Columbia Basin Fish and Wildlife Authority, the State of Oregon, the Northwest Energy Coalition, the Save Our Wild Salmon coalition, and others. The thrust of these recommendations was that the Council should call for hydrosystem operations, system configuration changes and energy resource actions that would allow the system to provide the operations needed for fish even in low water years, while also ensuring that the region has an adequate, reliable, efficient and economical power supply. The Council does not disagree with the premise or goals of these recommendations. The Act calls for hydrosystem operations and a regional power system that provide both protection for fish and wildlife and for an adequate, reliable and economical power supply. One of the central tasks faced by the Council in the revision of the power plan is to help ensure both of these goals in the long run. Deferring full consideration of this matter to the power plan is appropriate, given the conclusions of the Council in the analysis of the region's power supply and the effects of the fish and wildlife measures on that power supply, which showed resources to be adequate in the near term.

The Council also received power supply-related recommendations from Bonneville customer groups, such as the Public Power Council and the Pacific Northwest Generating Cooperative, recommending that the Council call for evaluations and decisionmaking processes that analyze fish and wildlife actions to determine their impacts on the region's power supply and to search aggressively for efficiencies and cost-effectiveness in fish and wildlife operations. The Council agreed with these recommendations, too, as described above — calling for changes in evaluations and decisionmaking processes to better incorporate power supply considerations and calling for rigorous evaluation of current flow and spill measures and alternatives to determine what levels of both are necessary to provide the biological benefits needed for fish at the least cost to the power system.