September 17, 2013

Bill Bradbury, Chairman
Northwest Power and Conservation Council
851 S.W. Sixth Avenue, Suite 1100
Portland, OR, 97204

Re: Northwest Power and Conservation Council's Fish and Wildlife Amendment Process

Dear Bill:

The Public Power Council, Northwest RiverPartners, PNGC Power, and Northwest Requirements Utilities, who collectively represent regional utility customers, ports, farmers and other businesses, have a keen interest in the Northwest Power and Conservation Council's Fish and Wildlife Program. The Program is unrivaled in its protection, mitigation and enhancement efforts as well as its costs, which are paid for by utility customers through their electric bills. The FCRPS also provides the Northwest with the vast majority of its clean, renewable energy and its firm generation allows for the integration of additional renewable resources. These facts underscore that the Program's efforts must be effective, efficient and economical.

The decisions the Council makes during this amendment process will define the Council and its Program for the next five years. Given the finite Program budget, the Council has an obligation to carefully consider new projects proposed in the amendment process, and to prioritize projects offering the greatest benefit to fish and wildlife. Projects which have outlived their usefulness should be retired.

This package includes both our specific comments on the Program as well as a legal analysis of statutory directives the Council must adhere to in its review and consideration of amendments and subsequent adoption of a Fish and Wildlife Program that protects, mitigates and enhances fish and wildlife affected by the FCRPS while also maintaining an adequate, efficient, economical, and reliable power supply.

On behalf of the funders of the Fish and Wildlife Program, our organizations are eager to engage with the Council in the most collaborative and effective manner possible. We look forward to working with you on the Fish and Wildlife Amendment Process.

Sincerely,

John Prescott, President and CEO
PNGC Power

Terry Flores, Executive Director
Northwest RiverPartners

John Saven, CEO
Northwest Requirements Utilities

Scott Corwin, Executive Director
Public Power Council

Enclosures: 2

Cc: Phil Rockefeller, Member and F&W Committee Chairman, Washington NWPCC
Bill Booth, NWPCC Member, Idaho
Jennifer Anders, NWPCC Member, Montana
Henry Lorenzen, NWPCC Member, Oregon
Tom Karier, NWPCC Member, Washington
Jim Yost, NWPCC Member, Idaho
Pat Smith, NWPCC Member, Montana
Steve Crow, Executive Director, NWPCC
Tony Grover, Director of Fish and Wildlife, NWPCC
Lorri Bodi, Vice President Environment Fish and Wildlife, BPA

NW Power and Conservation Council 2014 Fish and Wildlife Amendment Process

BPA Customer Group Recommendations
September 17, 2013

1. This is a Mature Program and Does Not Need to Be Rewritten:

a) The Council's Fish and Wildlife Program (Program) has been in existence for over 30 years and is unprecedented in its magnitude and expense. It is a mature program with a breadth that is appropriate for its purpose.

b) The Program has substantial overlap with the FCRPS BiOp and the "Fish Accords" negotiated with many of the region's states and tribes. The Council needs to insure that the revised Program does not conflict with these important legal requirements and concurrent binding contracts that do not expire until 2018.

c) The Program should incorporate by reference and ensure consistency with provisions of the NOAA Biological Opinion which will be completed by the end of this year.

2. The Next 5-Year Period Should be Used to Refine and Improve the Focus of the Program:

a) Research, Monitoring and Evaluation - The Council should ensure a robust and efficient RM&E Program but needs to reduce the overall costs which now represent half the entire cost of the Program:

- Clearly define and estimate the costs of current RM&E efforts.
- Delineate research from ongoing monitoring.
- Establish a policy framework to prioritize and recommend RM&E projects based on an evaluation of cost, risk, and certainty as developed by your staff.

b) Habitat Project Evaluation- The Council should conduct an evaluation of the habitat monitoring efforts to date and determine how much is necessary:

- Define the fish habitat improvement efforts conducted under the Program.
- Evaluate extent of habitat monitoring work to date.
- Assess the usefulness and necessity of continued monitoring for habitat improvements.

c) Project Proposal Process - The Council should establish a methodology to prioritize potential projects and reach agreement on the projects of highest priority prior to recommending them to BPA.

d) Adaptive Management, Hatchery and Harvest Recommendations - The Council should address the recent ISAB review of the Program with respect to adaptive management, hatchery policies and harvest practices.

- The Council should promote hatchery production that supports and does not conflict with conservation objectives. The Council should require implementation of the Hatchery Science Review Group recommendations as well as explicitly incorporating adaptive management strategies for Program-funded hatchery programs.

- The Council should support selective harvest methods and policies that reduce the incidental catch of ESA listed and naturally spawning fish but increase harvest of hatchery origin stocks. The Program should assess the extent to which harvest slows recovery of naturally-reproducing populations and implement adaptive management strategies for harvest measures in the Program.

3. The Council Needs to Manage the Program's Focus and Ensure a Hydro Nexus

a) The Council must resist pressure to move beyond the scope of funding in the NW Power Act that is focused on mitigating the effects of the FCRPS. The Program needs to be focused on the mandates in the Act in order achieve what have become increasingly significant mitigation goals. The Council has an opportunity to prioritize, eliminate redundancies, and create efficiencies during this process.

b) The NW Power Act assigned the responsibility for preparing the Program to the Council because the numerous and sometimes conflicting recommendations given to the Council need to be reconciled and incorporated into a framework consistent with directives in the Act. <u>We have also submitted legal support of these comments containing statutory directive regarding Program development, content, and funding.</u>

c) The Council should revisit Protected Area designations in the Program in light of current changes in national priorities to encourage renewable resource development and in support of federal legislation recently passed to streamline the licensing of new hydropower projects. Decisions to protect large amounts of potential habitat, some of which is not in the Columbia River basin, need to be reviewed and updated to reflect current priorities by the current Council in this Program amendment process. New hydropower generation will directly help to further reduce carbon emissions in the region and throughout the west and aid in backing up or shaping new renewables that are developed.

d) The Program's given authority under the Northwest Power Act relates directly to, "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." As such, the Program and the projects it recommends for funding by BPA must have a clear and obvious hydro nexus.

- In addition to a clear and obvious hydro nexus, the primary purpose for the recommended projects shall also be for hydro mitigation.

- The Council must resist the temptation to expand the Program into measures that are not caused or related to the development and operation of the FCRPS because it will distract from the goals of the Act and dilute the effect of available funding from BPA's customers. This is especially true for calls to expand the Program to address invasive species and toxics.

4. Role of Science – ISRP and ISAB

a) The Program's credibility, in particular with the region's utility customers, who fund the Program, is supported in large measure by the Council's requirement that the ISRP provide a rigorous scientific review of each measure proposed for funding by BPA.

b) The Council needs to also recognize its responsibility to oversee the management of the Program and critically evaluate scientific recommendations that have a tendency to recommend more study and ever increasing budgets for research, monitoring and evaluation.

c) The Program should not establish aspirational goals that lack scientific credibility. An example is the Council's proclamations concerning goals for smolt to adult returns (SARs). SARs goals are beyond the scope of the Act because they incorporate all sources of mortality throughout the fish's lifecycle, not just those caused by the existence and operation of the FCRPS. The current SAR goals provide no function in the Program and are an inappropriate basis for the Council to base any decisions in the Program.

5. A Proposed "Spill Experiment" is Illegal, Inappropriate and Unnecessary

a) The proposals for the Council to adopt into the Program an experimental spill management program that would increase spills to the point where they exceed existing Total Dissolved Gas waivers from the states are illegal because the proposal cannot be initiated given the regional implementation of existing laws.

b) The Council and the Program lack the authority and responsibility to recommend actions that are in violation of current water quality standards promulgated pursuant to the Clean Water Act.

c) In the Draft BiOp NOAA looks into this proposal and rejects it based on a lack of scientific validity.[1]

d) Current estimates of dam survivals are exceeding the Performance Standards in the BiOp with more than 96% of spring migrants and 93% of summer migrants surviving dam passage. The measured survivals of juvenile salmon and steelhead are at the practical upper limit and to attempt to achieve greater survivals will be well beyond the point of diminishing returns. This is why the Program and the BiOp have extensive off-site mitigation as a very high priority.

6. The Budget is Limited and the Current Program is at Fiscal and Management Capacity

a) As noted by the Council in its annual report on fish and wildlife costs, approximately one-third of Bonneville's wholesale rate of about $30 per megawatt hour is estimated to be associated with its Fish and Wildlife Program.

b) The funding of the direct program exceeds $260 million per year, having nearly doubled over the last decade. This level of funding has reached a critical capacity where its current size is all that the Council and Bonneville can adequately manage. Further increasing funding significantly increases the risk that funds could be expended unproductively and wastefully.

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[1] From the Draft 2013 FCRPS BiOp – "For example, an obvious variable that is missing from the CSS survival models is total dissolved gas. A model that predicts survival using a monotonic association with spill, and does not include mortality at higher levels of spill and thus total dissolved gas, will make the unrealistic prediction of increasing survival regardless of the level of total dissolved gas. Additional years of data under the current operations and configuration of the system (completed in 2010) will shed light on whether or not the CSS hypothesis is supported by the empirical data. Adult returns from the 2011 and 2012 outmigrations (high flow, high spill years) and 2010 (a lower flow, high spill year) should be especially instructive."

c) BPA has a finite budget and both BPA and the Council have a responsibility to provide an, "adequate, efficient, **economical**, and reliable power supply." The Council should keep these guiding principles in mind to create a program that is in line with the limits of program budgets and can be efficiently and cost-effectively managed. Where increased spending is needed in particular areas, this should come from reductions in other areas that may have outlived their purpose or usefulness within the program.

d) BPA's Role in Funding Decisions

- While BPA looks to the Council to make funding recommendations to the Program, BPA is the final arbiter of budget size and how it is allocated to projects in order to meet the requirements of the NW Power Act. (Section 4(h)(10)(a)). This necessitates the Council coordinating with BPA in the various phases of program planning and budgeting.

- There needs to be an agreement between the Council and BPA on the overall fish and wildlife budget. Budget agreements provide planning certainty for the Council and allow BPA and its customers to better plan for costs and to set rates. The total budget for the direct program needs to be further allocated into broad funding categories such as RM&E, wildlife, anadromous and resident fish, etc.

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September 17, 2013

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Re: RiverPartners' Recommendations for Power Council's 2014 Fish and Wildlife Program Amendments

Dear Terry:

As you requested, I am forwarding a letter on behalf of NW RiverPartners to send to the Northwest Power and Conservation Planning Council regarding their upcoming Fish and Wildlife Program Amendment process. After an extensive review of the Pacific Northwest Electric Power Planning and Conservation Act (Act), 16 U.S.C.§ 839 *et seq* and legislative history, this letter provides my legal guidance with respect to how the Council should approach Program development, content and funding. It is my hope that the Council will use this guidance in evaluating the recommendations received from state, federal, and tribal fish and wildlife managers in the coming months.

The Power Act's Restrictions on The Fish and Wildlife Program

In passing the Act, Congress established a dual obligation on the Council to both protect, mitigate, and enhance fish and wildlife affected by the development and operation of the Federal Columbia River Power System and in so doing, to assure the Region of an" adequate, efficient, economical and reliable power supply." 16 U.S.C. §§839(2); 839b(h)(5); 839b(h)(8)(c). Accordingly, the Council must closely assess the mitigation recommendations it receives from the various regional fish and wildlife managers during the upcoming Program Amendment process to ensure that they not only provide the necessary biological improvements, but that their adoption in the Program does not impede an "adequate, efficient, economical, and reliable power supply." *Id.*

In addition, Congress explicitly imposed geographical limitations on the scope of the Program to which the Council must closely adhere; the Program is applicable solely to fish and wildlife located on the Columbia River and its tributaries. 16 U.S.C. §839b(h)(1)(B). *See also* 16 U.S.C.

839b(h)(8)(A) (limiting offsite tributary enhancement measures to "appropriate circumstances."). This means that Program must be limited to providing measures affecting the River and its major tributaries (the Kootenai, Flathead, Clark Fork/Pend D'Oreille, Kettle, Okanogan, Methow, Spokane, Wenatchee, Yakima, Snake, Clearwater, Salmon, Owyhee, Grande Ronde, Walla Walla, Umatilla, John Day, Deschutes, Hood Willamette, Klickitat, Lewis and Cowlitz rivers). *See* 2009 Columbia River Basin Fish and Wildlife Program at 1, and Figure 1. The Program should not be expanded to extend to measures in the ocean, beyond the Columbia River estuary, or in tributaries to these major tributaries. This also means that measures directed at coastal or other waters that do not form a direct tributary to the River cannot be included in the Program as they are clearly beyond the geographical definition limiting the Program's boundary. *Id.*

In addition to these geographical boundaries, Congress expressly limited the Program to include "measures to protect, mitigate and enhance" fish and wildlife only to the extent that those species are impacted by hydroelectric facilities; the Program cannot be used to address impacts caused by other sources. 16 U.S.C. §839b(h)(8)(B). This limitation is derived from the plain language of the Act which provides that the measures included in the Program must be designed to address only those impacts "arising from" the development and operation of the hydroelectric facilities of the Columbia River and its tributaries 16 U.S.C. §839b(h)(8)(A).

Accordingly, Congress understood that fish would be impacted by many sources of environmental harm, but explicitly designed the Program to consist of measures addressing <u>only</u> those fish and wildlife impacts caused by the hydrosystem. *See also* 16 U.S.C. §839b(h)(8)(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*)." (emphasis supplied).

Finally, the Program must "complement the existing and future activities of Federal and the Region's State fish and wildlife agencies and appropriate Indian tribes" and must be based on the "best available scientific knowledge." 16 U.S.C.§ 839b(h)(6)(A)-(B). And, as established above, it must do all this, while ensuring compatibility with the existing regional power system 16 U.S.C.§§ 839(6); 839(b)(e)(2)(B); and 839(1). This means that the Program cannot call for the dismantling of any part of the FCRPS (including the lower Snake River dams), which would, by definition, be inconsistent with the Act and the intent that fish and wildlife measures be obtained from the continued operation of the Federal hydrosystem as an integral whole. In passing the Act, Congress intended that the FCRPS remain the primary means through which the Region is provided an adequate, cost effective and reliable form of renewable power while ensuring that affected fish and wildlife are protected through measures designed to balance these two compatible goals. The Snake River projects are a critical part of that effort.

The Power Act's Restrictions on Program Funding

In addition to the above-established limitations on the Program's scope, Congress established limits on the BPA Administrator's use of ratepayer- funding. BPA is authorized to use its fund 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."* 16 USC §839b(h)(10)(A). Accordingly, as established above, only those measures designed to directly address hydrosystem impacts can be funded by BPA, and those measures must be directed to the River and its tributaries. *Id.*

The Act also strictly limits BPA from using ratepayer funds to subsidize other programs, or obligations required by Congress, admonishing that expenditures from the fund "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. 839b(h)(10)A)(emphasis added). Put otherwise, the drafters of the Act did not intend that BPA funds would be used in place of funding required for other statutory programs affecting the Columbia River Basin. *See also* 126 Cong. Rec. H9648(1980)(remarks of Cong. Lujan ("the program will not call for duplication of measures already being implemented to protect, mitigate, or enhance fish and wildlife.").

The Council Must Ensure that 2013 Program Amendments Comply With These Express Limitations On Program Scope and BPA Funding Limits

As it proceeds to evaluate the state, federal, and tribal recommendations, RiverPartners urges the Council to honor the above- described congressional program and funding limits.

1. Program amendments should not include measures outside the river basin

More specifically, recommended measures promoting ocean-based studies should be excluded from the Program as beyond congressionally-imposed geographic boundaries and beyond BPA's limited funding authority. Some examples of measures that should not be adopted in Program Amendments include: those directed towards use of coded wire tagging for catch-sampling and harvest management, ocean-based research, mitigation, protection, or enhancement measures, including those attempting to address ocean conditions such as acidification. Of course, they also include any measures attempting to address radio-active contamination stemming from Fukishima. Recognizing that salmon travel thousands of miles in their life span, and encounter many different sources of contamination and physical harm, only those impacts stemming from the power system can be addressed through the Program, and then again, only through measures directed at the major tributaries within the Basin and the Columbia River itself.

2. Measures designed to aid harvest restrictions or enhancements are precluded

Similarly, measures intended to address concerns associated with harvest levels or enhancement are not hydropower impacts and are outside the scope of BPA's funding obligations. The Act prohibits funds that are in "lieu of" expenditures authorized by other state or federal requirements. Because harvest restrictions and associated measures are designed to address harvest impacts-- not hydropower impacts--and are otherwise imposed by other state and federal laws, court-supervised negotiated Consent Decrees, and Treaties, the Program's limited funding should not be used to substitute for those measures. 16 U.S.C. §839b(h)(8)(C).

3. Mitchell Act hatchery measures should not be funded by BPA

The Council should also refrain from funding Mitchell Act hatcheries to the extent that those hatcheries are already funded by Congress under that Act; nor should the Council seek to fund Mitchell Act hatcheries to the extent that Congress may be refusing to fund them at all, or under-appropriating sufficient funds for these programs. 16 U.S.C. §839b(h)(8)(use of BPA funds shall not be" in lieu" of other funds). Indeed, the Mitchell Act requires the Secretary of Commerce to:

> (1) conduct such investigations, and such engineering and biological surveys and experiments, as may be necessary to direct and facilitate conservation of the fishery resources of the Columbia River and its tributaries;
>
> (2) to construct, install, and maintain devices in the Columbia River Basin for the improvement of feeding and spawning conditions for fish, for the protection of migratory fish from irrigation projects, and for facilitating free migration of fish over obstructions; and
>
> (3) to perform all other activities necessary for the conservation of fish in the Columbia River Basin in accordance with law.

16 U.S.C. §756. Because the Mitchell Act very broadly requires the Secretary of Commerce to fund "all activities necessary for the conservation of fish in the Columbia River Basin", BPA should ensure that it is not duplicating this effort, or funding "in lieu" of the Commerce Department's express legislative mandate. 126 Cong. Rec H9648(1980)("the program will not call for duplication of measures already being implemented to protect, mitigate, or enhance fish and wildlife.").

4. The Program should not be used to address toxics, and should not be used to fund other environmental measures addressed by FERC

Likewise, measures intended to address water pollution from sources other than the hydrosystem are prohibited, including those intended to clean up toxics from industrial, agricultural or municipal discharges or storm water runoff. Not only are such measures not related to the power system, they are otherwise addressed by obligations imposed by other federal statutes including the Comprehensive Emergency Response Compensation and Liability Act, 42 U.S.C. §9601 *et sec;*, the Resource Conservation and Recovery Act, 42 U.S.C.§ 6901 *et seq*., and the Clean Water Act, 33 U.S.C.§ 1251 *et seq*. And, to the extent that recommendations include measures already required under existing licenses -- including Federal Energy Regulatory Commission hydropower licenses -- they should be excluded from the scope of the Program and not funded through BPA resources.

5. Because the Fish Accords fully fund off-site mitigation, additional tributary measures are not necessary at this time

Nor should the Council further fund off-site mitigation, in light of the billion dollars already allocated for such measures by BPA's Fish Accords. As BPA's ratepayers are currently funding that **billion dollars** effort over a ten years period (which has five years remaining), the Council should formally adopt the programs currently being funded, and those future measures scheduled to be funded by the Accords, as part of its Program Amendments to formally account for this extraordinary effort. Given the vast amount of funds already appropriated for tributary enhancement, the Council should refrain from adopting additional measures. Indeed, it is clear from the explicit language in Section IV of the Accords entitled "Forbearance, Withdrawal, and Dispute Resolution" that further tributary funding cannot be sought by the state and tribal parties as part of the Council's Program Amendment process: "This means, for example, that the Tribes agree not to request additional fish or wildlife funding from BPA in on-going and future BPA rate making/approval/review proceedings during the term of this Agreement . *See Columbia Basin Fish Accords, Section IV A.2.(c) and C.1(directing the action agencies and tribal Accord signatories to submit recommendations in accordance with this prohibition).* This sort of monetary prudence was exactly what Congress intended by limiting off-site tributary enhancement to "appropriate circumstances." 16 U.S.C. §839b(h)(8).

6. The Council needs to take into account BPA's review of its "in lieu" obligations under the law.

From 2006-2009, BPA undertook an effort to review its on-going projects for consistency with the "in lieu" prohibition. This effort resulted in a 15% reduction in funding of on-going projects that presented "in lieu" problems. Similarly, tribal and non-tribal signatories to the Columbia Basin Fish Accords affirmatively agreed to identify other sources of subbasin funding for Accord measures to avoid an "in lieu" violation. *See* Section G of the Accords at 18. RiverPartners encourages the Council to enforce this Accord obligation and continue its general efforts to eliminate "in lieu" funding as it considers Fish and Wildlife Program Amendments.

7. In addition to these limitations, the Program Amendments must be consistent with the FCRPS Biological Opinion and based on best available science

The Council should ensure that the Program Amendment process is harmonized with the on-going FCRPS Supplemental BiOp development process. Congress intended that the Program would be consistent with other federal obligations concerning the River Basin, including most importantly, Endangered Species Act obligations. Accordingly, the Council must use the soon-to-be-issued 2013 FCRPS Biological Opinion to establish the baseline against which the Program Amendments should be balanced. 16 U.S.C. §839b(h)(6)(A) (the Program must "complement" the existing and future activities of the Federal and the regions' State fish and wildlife agencies and appropriate Indian tribes).

In addition, the Program must be based on and supported by the "best available scientific knowledge." This includes the spill measures found in the recently released Draft BiOp which proposes to return to a more balanced approach between spill and transport. The Draft BiOp recognizes that the best available science would require a return to a 50/50 split between spill and transport and takes steps to better achieve that balance, including proposals for increased in-river transport and reduced spill and a return to biologically-based spill triggers. In short, because the Draft BiOp reflects the best available science on spill and transport, the Council should adhere to spill and flow measures incorporated therein.

In contrast, RiverPartners cautions the Council *not* to re-adopt its prior spill regimes based on prior court orders because spill at those artificially imposed levels is not based on the best science. Prior spill regimes required spill "around the clock" for a period of four months at the Snake River projects, regardless of whether spill at that level was biologically necessitated. Rather than corresponding to the actual biological needs of migrating salmon, prior spill measures were based on calendar dates. This blunt approach to spill should be more finely

honed to balance both the biological risks and potential passage benefits of spill, to insure that unnecessary spill is not required when few fish are present at the hydropower projects, having already migrated past. This is particularly true in late August when juvenile fall Chinook from the Snake River are present in very small numbers and are generally not migrating past the hydropower projects. Spill at those times serves only to waste valuable renewable hydropower and increase carbon emissions while doing little to nothing for listed salmonids. *See generally*, analysis contained in Power Council's November 2007 "Carbon Dioxide Footprint of the Northwest Power System." We further note that years when the Region experienced high levels of spill and flow corresponded with lower levels of adult return rates. *See* Draft Biop at p. 354. This means that higher spill rates does not necessarily correlate with survival benefits and must be balanced against its associated economic and attendant carbon costs.

In addition to being wasteful, current spill measures have proven to be harmful to migrating fish in certain situations, by, *inter alia*, reducing adult survival. The BiOp's recent Comprehensive Evaluation and information presented in the recently released Draft 2013 BiOp demonstrates that current spill operations appear to be reducing the survival of adults migrating upstream. Increased spill has been known to cause the fallback of adult salmon and steelhead; these fish are sucked back through the spillway which forces them to re-climb fish ladders, and reduces their energy reserves. Higher levels of spill also leads to increased amounts of in-river total dissolved gas, which at certain levels also harms migrating salmon. For all these reasons, the Council should resist all recommendations to increase spill and to spill beyond established "gas caps" which are set by the Washington Department of Ecology and the Oregon Department of Environmental Quality to ensure that gas produced by spill is not biologically harmful to salmon and other aquatic biota.

The Council should balance this information regarding spill with the known fact that transportation of juveniles can result in substantial benefits at certain times in the year. Both the Comprehensive Evaluation and the 2013 Draft BiOp report that "overall, transportation at collector projects results in higher adult returns for most stocks in most years [concluding that] juvenile transportation remains an important management tool." Comprehensive Evaluation at 317. Indeed, the Independent Scientific Advisory Board ("ISAB") recommended spreading the risk between transport and in-river migration (on a 50/50 basis) yet prior spill requirements made this impossible. Both the Comprehensive Evaluation and the Draft BiOp demonstrate that there are survival benefits for fish transported in May which are not being achieved because of current spill practices. The Council should reconcile the conflict between the ISAB's recommendation and Judge Redden's prior spill orders in favor of utilizing best science, and follow the Draft 2013 FCRPS BiOp's approach to spill; when applied, the best available science would lead to "smarter spill" at levels that better match the biological needs of the migrating fish. The Act

requires this sort of re-balancing, especially when such alternative and less expensive measures have been shown to be equally or more effective at achieving the same biological objective. 16 U.S.C. § 839b(h)(6)(C).

Finally, when incorporating elements from the 2013 BiOp into the Program, the Council should be mindful that the obligation to "protect, mitigate and enhance" under the Act does not equate to or supplant the recovery objective uniquely established in section 4 of the ESA. NOAA Fisheries alone has the duty to establish recovery goals and the means to achieve these goals, which cannot be supplanted by the Council's Program amendments. Recovery is the obligation of the region as a whole- not the federal hydrosystem, or the BPA fund in particular. Any program recommendation intended to assist in the "recovery" of listed species is outside the scope of the Act and should be rejected.

Conclusion

In conclusion, RiverPartners appreciates this opportunity to provide the Council with recommendations for its upcoming Program Amendments. The Council should avoid "in lieu" funding, should limit Program measures to those that directly address effects of the hydrosystem, and more generally require use of BPA funds in a more circumscribed manner to better reflect the limitations Congress imposed on the Program in the Power Act. The Council should also ensure that the recommendations it adopts are consistent with the measures adopted under the final 2013 FCRPS Biological Opinion. Finally, in the case of spill, the Council should follow the "best available science", which requires "spreading the risk" between spill and transport, as transport is less expensive and has "been shown to be equally or more effective at achieving the same biological objective" as spill. 16 U.S.C.§ 839b(h)(6)(C).

Very truly yours,

Beth S. Ginsberg