



Anadromous Fish Law Memo



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IMPLEMENTING THE REGIONAL POWER ACT: AN ANALYSIS OF SOME PRESSING ISSUES

I. Introduction

As readers of this publication are aware, the recently-enacted Pacific Northwest Power Planning and Conservation Act (Regional Power Act) contains a number of provisions that may operate to reduce or eliminate conflicts between fish and wildlife protection and power production. In order for these provisions to be effective, widespread participation on the part of fish and wildlife agencies, Indian tribes, and the general public will be required. Such participation, if it occurs, will fulfill one of the fundamental purposes of the Regional Power Act. This publication — spared at least a year from the effects of attempts to gut the Sea Grant budget (see Fish Law Briefs) — will periodically apprise the public of significant issues associated with implementation of the Regional Power Act. This issue of the Anadromous Fish Law Memo examines a number of important issues

that have surfaced as a result of the Bonneville Power Administration's (BPA's) implementation efforts during the first five months since the Act was signed into law.

A considerable amount of controversy surrounds the ongoing negotiations between BPA and parties entitled to new long term contracts under section 5 of the Regional Power Act. BPA began the negotiation process without encouraging public participation. After receiving pressure from fisheries and environmental interests, among others, the agency decided to solicit public comment on a variety of issues concerning its immediate obligations under the Regional Power Act. However, it remains uncertain, as this issue goes to press, whether BPA's actions with respect to the power contracts will fully comport with the letter and spirit of the Regional Power Act and other applicable laws.

INSIDE: "Fish Law Briefs" on Mid-Columbia FERC Settlement; Recent Publications; and
Sea Grant Funding



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II. Background
A. BPA's New Long Term Contracts

Under section 5(g) of the Regional Power Act, by September 5, 1981, BPA must offer long term power contracts¹ to public and private utilities,² federal agencies, electric utilities participating in "residential exchange," and direct-service industries (DSIs).³ Under both the Bonneville Project Act of 1937⁴ and the Regional Power Act,⁵ public utilities have first right and priority to low-cost hydropower produced at federal projects. Section 5(c) of the Regional Power Act entitles private utilities to exchange their relatively high-cost power, in an amount equivalent to their residential loads,⁶ for low-cost BPA power. The exchange contracts that BPA must enter into with the private utilities will require BPA to purchase the utilities' power at their "average system cost," while the utilities will purchase the BPA exchange power at the standard low rates.⁷ The net savings effected through this exchange must be passed on to the utilities' residential customers.⁸ The net cost of this residential rate relief will be borne by the DSIs, whose rates are expected to increase from 160 to 230 percent (2 1/2 to 3 1/3 times) on October 1.⁹

1. The Act does not specify the duration of the long term contracts. However, the Commerce Committee report states that they should be twenty years in duration. House Comm. on Interstate and Foreign Commerce, H.R. Rep. No. 976, pt. I, 96th Cong., 2d Sess. 61 (1980) [hereinafter, Commerce Report].

2. Oregon is served largely by investor-owned (i.e., private) utilities, while Washington ratepayers are served primarily by public utilities. See House Comm. on Interior and Insular Affairs, H.R. Rep. No. 976, pt. II, 96th Cong., 2d Sess. 27 (1980) [hereinafter, Interior Report].

3. Direct-service industries are aluminum and other electro-process industries, most of which were attracted to the region in the 1940s and 1950s by the abundance of low-cost federal hydropower. Id. There are 15 such industrial BPA customers in the region operating a total of 51 plants. They account for approximately one-third of BPA's energy sales. Id. at 27-28. A list of BPA's DSI customers, including their location, products, and major uses of their products, appears in Bonneville Power Administration, Draft Environmental Impact Statement, The Role of the BPA in the Pacific Northwest Power Supply System, App. C at IV-121.

4. 16 U.S.C. §§ 832c(a), 832d(a).

5. Regional Power Act, § 5(a), 94 Stat. 2697, 2712 (1980).

6. For 1981, the utilities may exchange no more than 60% of their residential loads. The amount they may exchange increases by 10% each year until 1985, when they may exchange 100% of their loads. Id., § 5(c)(2), 94 Stat. 2713.

7. Id., § 5(c)(1).

8. Id., § 5(c)(3).

9. See Western Aluminum News, p. 1, col. 1 (April 1981).

The new contracts with the DSIs will provide them with power in an amount equivalent to that provided them under their existing contracts with BPA.¹⁰ Power sales to new DSIs are prohibited.¹¹

The existing DSI contracts provide power reserves to the region. These reserves are created by conditions included in the contracts enabling BPA to interrupt the delivery of power to the DSIs to meet other obligations.¹² However, BPA is reluctant to interrupt power to the DSIs because it has obligated itself to provide them with monetary credits as compensation for the power disruptions.¹³ In addition, BPA routinely makes "advances" of energy to the DSIs when it interrupts power service to them. This advance energy is made available by drawing down federal reservoirs to levels below those necessary to maintain firm power loads.¹⁴ Environmental

10. Regional Power Act, § 5(d)(1)(8), 94 Stat. 2714.

11. Id., § 5(d)(3). However, BPA entered into a power supply contract with the Alumax Corporation (which has proposed to build an aluminum reduction plant near Umatilla, Oregon), prior to enactment of the Regional Power Act. The Act preserves Alumax's right to a power contract (see id., § 5(d)(4)(C)(i)), and permits Alumax to transfer its rights under the contract to a "successor in interest" in connection with a reorganization or transfer of all major assets of the corporation. Since the Alumax plant has not been built, the corporation's assets are probably quite limited, and it presumably would be a simple matter for Alumax to exercise its right to sell its power entitlement to another DSI.

12. The Commerce Committee report describes the reserves supplied by the DSI contracts as follows:

The contracts with the DSI's now provide reserves for the region. These are basically capacity reserves and energy reserves. Under certain conditions, BPA can interrupt power sold to DSI's. Capacity reserves permit brief interruptions of the entire DSI load and repeated two-hour interruptions (up to five minutes) [sic] of half the load. In this manner, the authority to interrupt provides peaking reserves and reserves for forced outages and system reliability. The energy reserves are of two types, an operating reserve and a planning reserve . . .

Commerce Report, note 1 above at 62.

13. U.S. Comptroller General, Impacts and Implications of the Pacific Northwest Power Bill, Rep. No. EMD-79-105, at III.5 (1979):

When BPA exercises the right to interrupt the DSI loads for more than one hour, it grants the DSIs discounts known as availability credits. During a 3½ year period . . . BPA withheld almost 9 billion kilowatt hours of energy, which is equal to about 9 percent of the total planned DSI load for that period. For these interruptions, the DSIs were granted a total of almost \$38 million in credits--about 14 percent of BPA's gross sales to them.

14. Id.

impacts associated with such drawdowns include inhibited migration of anadromous fish due to temperature changes and increased fish mortality due to passage through turbines.¹⁵

The form the residential exchange and DSI contracts take, then, can significantly influence the ability of BPA and other entities to conform their actions to the Regional Power Act's "equitable treatment" mandate and to the fish and wildlife program to be developed by the Regional Power Council.¹⁶ For example, since the private utilities' entitlement to low-cost BPA power will increase as their residential loads increase, they may have little or no incentive to encourage their residential and farm customers to conserve energy.¹⁷ Moreover, if the DSI contracts and associated BPA services to the DSIs are not amended to enable the agency to fully take advantage of the energy reserves the DSIs are supposed to provide, BPA will probably remain reluctant to interrupt DSI power supplies when necessary to provide flows for fish, and will also, in all likelihood, continue to provide advance energy to the DSIs, thereby perpetuating the mortality rates that Columbia Basin salmon and steelhead runs now suffer.

B. Potential BPA Actions
in the Absence of the Council's Energy Plan

Under the Regional Power Act, BPA is authorized to acquire resources before the Regional Council adopts an energy and conservation plan.¹⁸ Such acquisitions must give priority to resources that are "cost effective," and must give preference to conservation, followed in order of decreasing importance by renewable resources, co-generation facilities, and, finally, thermal and other resources.¹⁹ In addition, in acquiring power resources, BPA must find that each acquisition is (1) consistent with environmental quality; (2) compatible with the existing regional power system; and (3) consistent with the protection, mitigation, and enhancement of fish and wildlife, "including sufficient quantities and qualities of flows for successful migration, survival, and propagation of anadromous fish."²⁰

BPA must acquire sufficient resources to meet its contractual obligations and to assist in meeting the requirements of section 4(h) (the fish and wildlife provisions) of the Act.²¹ The agency has stated that it intends to acquire enough resources so that "in adverse water years, water can be made available for fish and/or wildlife purposes without jeopardizing our ability to carry all required loads."²² Since the fish and wildlife program will be developed prior to the energy plan,²³ BPA will likely attempt to acquire resources before the energy plan is adopted. It will be able to acquire these resources without concurrence of the Regional Council, so long as the resource has a planned capacity of fifty megawatts or less.²⁴

In making resource acquisitions prior to the adoption of the energy plan by the Regional Council, BPA will be empowered to unilaterally decide whether a given resource or conservation measure is "cost effective."²⁵ The Act's priority scheme, which gives conservation the highest priority and thermal resources the lowest, applies only to "cost effective" resources.²⁶ In order to be cost effective, a resource must be forecast to be "reliable and available within the time period it is needed."²⁷ Given BPA's conservative history with regard to forecasting and FCRPS operations, it may be very difficult for nonconventional resources or conservation measures to meet the "reliability" test.²⁸ It is accordingly of critical importance that BPA duplicate, to the maximum extent feasible, the public involvement procedures to which the Council would be subject when BPA takes action in the absence of an energy plan. Given the wide range of possible effects on fish and wildlife associated with Bonneville's impending resource acquisitions and contractual agreements, it is extremely important for the agency to solicit and respond to comments from fish and wildlife agencies, appropriate Indian tribes, and the general public on issues included within the scope of the potential resource acquisitions and the contracts that are under development.²⁹

15. U.S. Dep't of Energy, Bonneville Power Administration, Final Environmental Impact Statement, The Role of the [BPA] in the Pacific Northwest Power Supply System IV-91 (1980).

16. See Anadromous Fish Law Memo # 11 at 11-12.

17. The survival-level fish flows supplied during the drought of 1977 were, according to one estimate, made possible by ten days of voluntary conservation efforts. See id. at 5 n.32. E. Chaney, A Question of Balance 18 (1978).

18. Regional Power Act, § 6(b)(3), 94 Stat. 2717.

19. Id., § 4(e)(1).

20. Id., § 4(e)(2). See 6(b)(2).

21. Id., § 6(a)(2)(A)-(B).

22. Letter from Stanley E. Efferding, Bonneville Power Administration, to H.A. Larkins, National Marine Fisheries Service (March 27, 1981).

23. See Anadromous Fish Law Memo #12 at 9.

24. See Regional Power Act, §§ 3(12), 94 Stat. 2699, 6(b)(2), 94 Stat. 2717.

25. See note 19 above and accompanying text.

26. Id.

27. Regional Power Act, § 3(4)(A), 94 Stat. 2698.

28. In conjunction with regional utilities, BPA has consistently overestimated power load growth and has demanded that the FCRPS be operated in an extremely conservative manner. See Anadromous Fish Law Memo #10 at 4 & n. 25.

29. Widespread public participation in the development of regional energy and fish and wildlife plans, as well as in efforts to provide environmental quality, is one of the fundamental purposes of the Act. See Regional Power Act, 2(3)(A)-(C), 94 Stat. 2697. See also id., 4(h)(4) (directing the Regional Council to provide for public participation and comment in the development of the fish and wildlife program).

III. Public Participation in BPA's Efforts to Implement the Act

A. Legal Bases for Public Involvement

The Regional Power Act directs BPA and the Regional Council to "encourage the cooperation, participation, and assistance of appropriate Federal agencies, State entities, State political subdivisions, and Indian tribes."³⁰ Moreover, the National Environmental Policy Act requires each federal agency proposing to undertake any major action having a significant effect on the environment to prepare and distribute to interested agencies and members of the public an environmental impact statement which explores alternatives to the proposed action.³¹ The agency must respond to all comments received on its proposed action.³²

As BPA entered its third month of contract negotiations, it had given no indication of how, if at all, it intended to comply with the letter and spirit of the Regional Power Act and NEPA insofar as public participation was concerned. This prompted Congressman Ron Wyden in late March to express his concern, in a letter to the Acting BPA Administrator, that "Bonneville has failed to make adequate provisions for public participation in a proceeding that is integral to the implementation of the new Act."³³ Noting that BPA had established no formal comment procedures with respect to the framing of the long-term power contracts, Wyden asserted that BPA's decision to proceed with the contract negotiations by merely permitting citizens to participate on a "space available" basis was "patently inconsistent with the spirit of the National Environmental Policy Act . . ."³⁴ The Congressman suggested that BPA (1) compile and publish a list of contract negotiation issues that bear on fish and wildlife protection concerns and on incentives for development of the resources accorded highest priority in the Act (conservation, renewable resources and cogeneration); (2) establish a schedule for receipt of written and oral comments by interested parties on such issues; and (3) respond to the points raised by commenters.³⁵

Largely in response to Wyden's criticisms, BPA announced that it would hold public meetings in Washington and Idaho to receive public comments on the contract negotiations.³⁶

30. Id., § 4(g)(3), 94 Stat. 2707. BPA is also authorized to provide technical assistance to states (and their political subdivisions) and to Indian tribes to help them establish conservation, renewable resource, and fish and wildlife objectives. Id.

31. 42 U.S.C. § 4332(2)(C).

32. Id.

33. Letter from Hon. Ron Wyden to Earl Gjelde, Acting Administrator, Bonneville Power Administration (March 27, 1981).

34. Id.

35. Id. at 2.

36. See Bonneville Power Administration, Notice of Public Meetings to Receive Comments on Contract Negotiation Matters, Request for Agenda Items, 46 Fed. Reg. (April 1981).

However, although BPA published a list of "discussion items" it had received from outside parties, it did not develop a list of issues of its own, nor did the agency indicate that it would respond in any way to the comments received at the meetings.³⁷

Congressman Wyden's assertion that BPA should both solicit and respond to public comment on specific issues surrounding the contracts under negotiation finds strong support in both NEPA and other applicable law. As this issue went to press, BPA had not indicated whether, and if so how, it would comply with NEPA before offering the contracts.³⁸ In light of the nine-month time limit within which BPA must offer the contracts, it is possible that the agency could be exempt from NEPA's EIS requirements.³⁹ However, an experienced agency can produce a draft statement within three to five months, and final action can be taken three months (or less) thereafter.⁴⁰ Even if BPA could be excused from NEPA's impact statement requirements, NEPA would still require BPA to (1) use "all practicable methods" to improve and coordinate the issuance of contracts with the impending regional energy plan and fish and wildlife program; (2) employ a systematic, interdisciplinary approach to analyzing the contracts; (3) employ ecological information in the formulation of contract conditions; and (4) consider alternative courses of action (and explain the reasons behind rejection of each alternative).

Moreover, since the Regional Power Act expressly makes all final actions of BPA subject to judicial review, a reasoned explanation from BPA regarding its actions on each of the contract issues facing it would seem to be compulsory.⁴¹ BPA should also involve

37. Id. Earlier, BPA had published a notice inviting public participation in the contract negotiation process. 46 Fed. Reg. 18,331 (1981). The notice solicited oral and written comment, and stated that a weekly schedule of negotiation sessions (and papers distributed at the sessions) would be made available upon request. Id.

38. The Ninth Circuit Court of Appeals has twice held that BPA must comply with NEPA--especially its environmental impact statement requirement--before executing power contracts. *Port of Astoria v. Hodel*, 595 F.2d 467 (9th Cir. 1979), aff'g *Port of Astoria v. Hodel*, 8 E.R.C. 1156 (D. Or. 1975); *Natural Resources Defense Council v. Munro*, 14 *Envir. Rep. (BNA) (ERC)* 2199 (9th Cir. 1980).

39. See *Flint Ridge Development Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776 (1976).

40. Id. at 789 n.10

41. See, e.g., *Natural Resources Defense Council v. Environmental Protection Agency*, 478 F.2d 875 (1st Cir. 1973). That case involved a challenge to unexplained approval of state air implementation plans by the EPA. Although the Clean Air Act amendments did not require an explanation, the First Circuit observed that "[t]he judicial review provision [of the Act] necessarily confers authority to compel such information from the E.P.A. to the extent needed to determine whether the Administrator's action is in accordance with law." Id. at 881.

the public in the contract negotiation process through notice and comment rulemaking. Courts have held that agency action similar to that which BPA is undertaking qualifies as a "rule" subject to the Administrative Procedure Act's notice and comment provisions.⁴² According to the Department of Energy Organization Act, BPA must respond to "all major comments, criticisms, and alternatives offered during the comment period" for any action having the effect of a rule.⁴³

B. Council Oversight of BPA's Actions

Recognizing the critical importance of BPA's action with respect to the contracts, the Regional Power Council, at its first meeting, voted unanimously to ask BPA to either consult with it concerning the contracts or explain why it could not do so.⁴⁴ BPA had set a May 1 deadline on "consultation" and a July 1 deadline for completion of draft power supply contracts.⁴⁵ Former Washington Governor Daniel J. Evans, the newly-elected Council Chairman, remarked that he would be "very dismayed if through signing these power supply contracts we put ourselves in a box."⁴⁶ BPA agreed to delay action on the contracts to allow the Council to comment.⁴⁷ This early indication that the Council is prepared to actively monitor and question BPA's activities under the Act should enhance prospects for reasoned decisionmaking.

C. Importance of BPA Responsiveness to Public and Council Input

While BPA's openness to comments from both the Council and the public is refreshing, it is important that BPA formally identify issues, propose alternative forms of action, and respond to all significant comments received. It is simply not enough for the agency to publish a list of "discussion items" submitted by the public and then hold two public meetings to receive comments on them.⁴⁸ The public must know what BPA views as the significant issues, what BPA proposes to do about them, what BPA views as feasible alternatives to its proposed action, and how BPA responds to comments on its proposals.

42. See, e.g., *P.A.M. News Corp. v. Hardin*, 440 F.2d 255 (D.C. Cir. 1971) (treating a decision of the U.S. Dep't of Agriculture to enter into an agreement with AT&T to establish a government news wire service as a "rule" subject to the APA's notice and comment procedures).

43. 42 U.S.C. §§ 7101, 7191. See generally K. Davis, *Administrative Law Treatise* § 6:12 (2d Ed. 1978).

44. *The Oregonian*, April 29, 1981, at C3, col. 3.

45. *Id.*

46. *Id.*

47. *The Oregonian*, May 2, 1981, at A12, col. 5.

48. See note 36 above and accompanying text.

If BPA fulfills these obligations to the public, it will provide an early, welcome sign that the agency recognizes that the Regional Power Act requires the fullest public participation in the agency's decisionmaking process. Unfortunately, the signs are not entirely encouraging thus far.

IV. Immediate Issues Facing the Regional Council

As the recently-formed Regional Council begins to function, its immediate duty (along with monitoring BPA's actions) will be to develop the fish and wildlife program called for in the Act.⁴⁹ An even more pressing task for the Council, however, is the publication of information concerning its organization, practices, procedures, and work plan, as required by the Regional Power Act.⁵⁰ If this information is made available prior to the development of the fish and wildlife program, it should make it considerably easier for interested groups and individuals to participate in the formulation of the program.

The rules of practice and procedure developed by the Council should reflect the Regional Power Act's overriding objective to facilitate maximum public involvement in Council and BPA functions. To ensure that its practices and procedures are consistent with the objectives of the Act (including its public participation purpose), the Council should publish procedural rules in draft form and solicit public comment on them. In addition, the Council should develop a program for funding the participation of federal agencies, state entities⁵¹ and political subdivisions, and Indian tribes, as the Act expressly authorizes and encourages.⁵²

49. Regional Power Act, § 4(h)(1)(A) states that the Council "shall promptly develop and adopt" such a program. See generally *Anadromous Fish Law Memo #11*.

50. Regional Power Act, § 4(e)(4), 94 Stat. 2704.

51. The term "state entity" is obviously not to be equated with state political subdivisions, since these are also expressly mentioned in section 4(g)(3) of the Act. The term may refer to PUDs; however, it seems reasonable to include within the scope of the term non-profit organizations with certificates of incorporation from the state. This would enable citizen groups to qualify for public participation funding, which would be consistent with the Act's public participation purpose (*id.*, § 2(3), 94 Stat. 2697-98) and undoubtedly would be sustained by the courts as a reasonable interpretation of the Act. See, e.g., *Chamber of Commerce v. United States Dep't of Agriculture*, 459 F. Supp. 216 (D.D.C. 1978).

52. *Id.*, § 4(g)(3), 94 Stat. 2707. A number of federal agencies have established programs to provide financial assistance to persons and groups interested in participating in administrative proceedings. The National Oceanic and Atmospheric Administration makes persons or groups

Once the Council's organization, practices, and procedures are established, and once the participation of traditionally underrepresented interests in Council functions is facilitated through an adequate funding program, development of the fish and wildlife program can proceed in the healthy, pluralistic atmosphere that Congress clearly anticipated would surround the program. One of the many benefits of vigorous representation of all interested parties before the Council is that an incentive will be created for the Council to respond to the various views presented by clearly articulating the reasoning behind its decisions and the standards used in reaching them.⁵³ The integrity of the fish and wildlife program development process will thus be enhanced, as will public confidence in and acceptance of the Council's decisions.

eligible for compensation if the representation of their interest would contribute substantially to a fair determination of the issues involved in the proceeding, taking into account: (1) whether the interest is adequately represented by another party to the proceeding; (2) the number and complexity of the issues presented; (3) the importance of public participation; (4) the need to encourage participation by segments of the public with little economic incentive to participate; and (5) the need for representation of a fair balance of interests. See 15 C.F.R. § 904.3 (1980).

53. BPA and other water managers have never felt obliged to articulate the standards and reasons behind their decisions, even though those decisions have had a substantial impact on salmon and steelhead resources. See Anadromous Fish Law Memo #10 at 12.

Since the Council is not burdened with BPA's past record with respect to public involvement in water and power management decisions,⁵⁴ a valuable opportunity now exists for the public to become involved in such decisions. The Council should seize this opportunity that Congress has provided it and actively involve the public in the important energy and environmental issues which must be confronted in the course of planning and providing for the region's electrical power needs.

54. BPA has not complied with section 3(a) of the Administrative Procedure Act, 5 U.S.C. § 552, which requires each federal agency to "separately state and currently publish . . . for the guidance of the public," inter alia, (1) descriptions of its central and field organization and methods by which the public can obtain information; (2) statements of the general course and method by which its functions are determined; and (3) rules of procedure. BPA has also failed to follow Recommendation 71-3 of the Administrative Conference of the United States, which calls for the articulation of policies and standards by each agency that takes formal or informal action affecting substantial public or private interests. See Anadromous Fish Law Memo #6 at 8. BPA's only published public involvement procedure (see 45 Fed. Reg. 73, 531 (1980)) is limited to marketing policy formulation, and does not provide for publication of proposed actions by BPA, nor does it provide for BPA response to comments received.

ARTICLES ON FEDERAL DAM OPERATIONS, REGIONAL POWER ACT AVAILABLE

The editors of the Anadromous Fish Law Memo have recently published two law review articles that may of interest to those concerned with the plight of Columbia Basin fish and wildlife resources. Hydropower vs. Salmon: The Struggle of the Pacific Northwest's Anadromous Fish Resources for a Peaceful Coexistence with the Federal Columbia River Power System appears in volume 11, page 211 of the Lewis and Clark Law School's law journal, Environmental Law. Promising a Process for Parity: The Pacific Northwest Electric Power Planning and Conservation Act and Anadromous Fish Protection has been published at page 497 of volume 11 of Environmental Law. Reprints of these articles may be obtained by writing:

Oregon State University
Sea Grant College Program
Corvallis, OR 97331

MID-COLUMBIA SETTLEMENT HITS ROUGH WATER

Under a settlement agreement reached with the public utility districts (PUDs) that operate five dams on the mid-Columbia, the National Marine Fisheries Service, the U.S. Fish and Wildlife Service, Oregon and Washington fish and game agencies, and certain Indian tribes formed with the PUDs a "Studies Committee" to explore means by which fish passage mortalities at the PUD dams could be reduced or compensated. However, even though the PUDs are represented on the Studies Committee, they elected to form an independent "PUD Fisheries Coordinating Committee" — a committee not contemplated by the settlement agreement.¹ Through this "Coordinating Committee," the PUDs have apparently frustrated implementation of at least one agreement reached by the Studies Committee.² If studies agreed to by the Studies Committee are not carried out, as required by the settlement agreement, further proceedings before the Federal Energy Regulatory Commission (FERC) may be necessary.

The Studies Committee had agreed in February to a "systems mortality study" for 1981 and forwarded it to the PUDs.³ But after receipt of the agreement, PUD management and the PUD Fisheries Coordinating Committee unilaterally imposed certain preconditions to PUD participation in the study and established a deadline beyond which the PUDs would refuse to participate.⁴ The preconditions imposed by the PUDs basically concerned the manner in which the study program would be conducted and whether it would encompass the Hanford Reach area. The fisheries agencies responded that, in their view, the Studies Committee created by the settlement agreement has exclusive authority to determine whether and how studies should be conducted, and that interference with the committee's decision-making prerogatives by PUD legal and management staff is improper.⁵ This response did not satisfy PUD management, and the opportunity to initiate a systems mortality study in 1981 was accordingly lost.⁶

1. See Letter from Dale R. Evans, National Marine Fisheries Service, to Richard Whitney, Coordinator, Mid-Columbia Studies Committee (April 7, 1981).

2. Id.

3. See Letter from H.A. Larkins, National Marine Fisheries Service, to Larry Peterson, et al. (Grant, Chelan, and Douglas County PUDs) (March 13, 1981).

4. See Letter from Larry Peterson, et al. to Herbert Larkin, et al. (NMFS, WDF, USFWS, and ODFW) (March 5, 1981).

5. See, e.g., Letter from H.A. Larkins, note 3 above.

6. See Letter from Larry Peterson, et al. to Herbert Larkins, et al. (NMFS, WDF, USFWS, ODFW, Washington DOE, and Nez Perce, Umatilla Warm Springs, Yakima, and Colville Indian Tribes) (March 30, 1981).

Thus, the promise of reducing downstream migrant mortality rates offered by the mid-Columbia settlement agreement may not be fulfilled. These recent actions by the mid-Columbia PUDs, which indicate that they do not feel bound by agreements so painstakingly negotiated with federal and state fish and wildlife agencies, omen poorly not only for the viability of the 1979 FERC settlements, but also for the 1981 downstream migration season.

RECENT PUBLICATIONS

A number of useful publications have recently become available, most of which should be of interest to readers of the Anadromous Fish Law Memo. At the top of the list is a compilation of the legislative history of the Regional Power Act, prepared by the Bonneville Power Administration Library. Legislative History of the Pacific Northwest Electric Power Planning and Conservation Act (March 1981) is available from BPA at the address below. BPA has also published a comprehensive account of the development of the regional power system entitled Columbia River Power for the People: A History of Policies of the Bonneville Power Administration. Those interested in these documents should contact:

Bonneville Power Administration
P.O. Box 3621
Portland, OR 97208
(503) 234-3361, or
1-800-452-8429 (in Oregon), or
1-800-547-6048 (in other Columbia Basin states, including California)

Readers may also be interested in Agencies, Organizations and Interests Affecting Columbia River Anadromous Fish (April 1980), available from:

Pacific Northwest River Basins Comm'n
1 Columbia River
Vancouver, WA 98660

The U.S. Department of Agriculture has issued a series of reports entitled Influence of Forest and Rangeland Management on Anadromous Fish Habitat in Western North America. Write to:

Robert F. Tarrant, Director
Pacific Northwest Forest and Range
Experiment Station
809 N.E. Sixth Avenue
Portland, OR 97232
(503) 231-2072

Finally, the General Accounting Office recently issued a report entitled Federal Water Resources Agencies Should Assess Less Costly Ways to Comply With Regulations (Feb. 17, 1981). Copies of RPT. NO. CED-81-36 are available from:

U.S. General Accounting Office
Document Handling and Information
Services Facility
P.O. Box-6015
Gaithersburg, MD 20760

FISH LAW MEMO
PROVIDED A YEAR'S REPRIEVE

Despite well-publicized attempts to entirely delete funding of the National Sea Grant College Program from the Department of Commerce's budget, it now appears that the Program will survive, albeit at a reduced level of support. Although many uncertainties remained as to the level of federal support for the Program as this issue went to press, the Oregon Sea Grant Program has assured the Anadromous Fish Law Memo of at least another year of funding. Those readers who wrote to express their desire to see the Memo continue undoubtedly influenced this decision.

Nevertheless, given the many uncertainties surrounding the level of congressional support for the national program, readers may wish to contact Senator Bob Packwood, Chairman of the Senate Commerce Committee, who has long been an active supporter of the Sea Grant Program. Senator Packwood's address is: United States Senate, Washington, D.C. 20510.

Michael Blumm

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