



# Anadromous Fish Law Memo



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## A REEXAMINATION OF COLUMBIA BASIN FISH AND WILDLIFE PROGRAM ISSUES

Originally scheduled for publication in late July, the Pacific Northwest Electric Power and Conservation Planning Council has delayed public release of its proposed Fish and Wildlife Program until mid-September. This delay provides the Regional Council additional time in which to study the issues and consult with fish and wildlife agencies, Indian tribes, federal water managers and utilities. But it also leaves less than 2 months for the Council to obtain public response to its draft program, revise the program, and publish it by the statutory deadline of November 15, 1982. In fact, the wisdom of adhering to this deadline is open to question if the result is to limit the Council's ability to adequately respond to public comment and demonstrate that its program adheres to the standards established by the Power and Conservation Act.

In any event, this tight time frame will place a premium on focused public comment. There will be little time for the Council to respond to comments which are not directed to specific issues.

This issue of the Memo attempts to facilitate effective public comment on the Council's proposal by reviewing the forces that resulted in the congressional mandate to develop a program that would restructure hydroelectric system operations to enfranchise fish and wildlife as a co-equal partner with power generation. The Memo then briefly discusses the steps taken in developing the Fish and Wildlife Program during the last year and examines the role of the Council in approving and implementing a viable program. Finally, some of the key issues that must be resolved by the Council are critically evaluated.

Due to the revised time frame, it will not be possible for a subsequent Memo to analyze the Council's proposed program during the public comment period. There is no question, however, that the Council both needs and desires widespread comment from a concerned and critical public. The goal of this Memo is to increase the quality of that public comment.

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INSIDE: Fish Law "Briefs" on: State Department Interpretation of the Columbia River Treaty; FERC ALJ Decision on the Mid-Columbia; Proposed Salmon River Dams; Rock Island Dam Relicensing; Washington Department of Ecology's Proposed Revisions to the Columbia Instream Protection Program; Proposed Oregon Mainstem Columbia Program; and Recent Publications.



## I. Background

This section of the Memo places the Fish and Wildlife program approval issues in context by briefly examining the state of both the anadromous fish and hydropower resources prior to the passage of the Power and Conservation Act; the forces which led to the passage of the Act; and the provisions of the Act designed to preserve and restore the Columbia Basin's fish and wildlife.

### A. State of the Anadromous Fish Resource

By the late 1970s, there was little doubt that a significant portion of the Pacific Northwest's unique natural resource, its anadromous fish runs, was imperiled.<sup>1</sup> Faring the worst were the upper Basin runs, traditionally the most prized element of the resource.<sup>2</sup> In fact, the condition of these runs, the heart of what the House Commerce Committee described as "probably the most valuable water-related resource of the Region,"<sup>3</sup> had reached a crisis. Without significant remedial action, some of those runs would almost certainly be extinguished.<sup>4</sup>

Many activities have contributed to this decline, which, it should be noted, amounted to a precipitous slide since the mid-1950s.<sup>5</sup> But virtually every study by a disinterested party has concluded that the principal cause of the depleted status of the upper Basin runs is the development and operation of an integrated system of federal and non-federal dams in the Columbia and Snake River Basins.<sup>6</sup> These dams,

1. See, e.g., A. Netboy, The Columbia River Salmon and Steelhead Trout: Their Fight for Survival (U. Wash. Press 1980).

2. See, e.g., E. Chaney, A Question of Balance: Water/Energy -- Salmon and Steelhead Production in the Upper Columbia Basin 2 (Pacific Northwest Resources Center, 1978).

3. House Commerce Committee, H.R. Rep. 976, pt. 1, 96th Cong., 2d Sess. 45 (1980).

4. In fact, endangered species designation was under active consideration. See 43 Fed. Reg. 45,628 (1978); and Bodi, "Protecting Columbia River Salmon Under the Endangered Species Act," 10 Env't'l. L. 349 (1980).

5. See National Marine Fisheries Service et. al., 4(h) Anadromous Fish Recommendations reprinted in Northwest Power Planning Council, Recommendations for Fish and Wildlife Program Under the Pacific Northwest Electric Power Planning and Conservation Act, vol. 1, at 98-106 (graphic depictions of run size declines).

6. The latest study to arrive at this conclusion is a study commissioned by the Regional Council; see Biosystems Analysis, A Comparative Analysis of Anadromous Salmoid Stocks and Possible Cause for Their Population Decline in Selected Watersheds of the Eastern Pacific Coast (June 30, 1982) (see Recent Publication #2 in Fish Law "Briefs"); see also U.S. General Accounting Office, Impacts and Implications of the Pacific Northwest Power (con't.)

most of which became operational in the years since the mid-1950s, serve multiple purposes. Chief among the authorized purposes of the federal dams are navigation and flood control. Irrigation is a primary purpose only of dams far upriver; hydroelectric energy production is a decidedly secondary purpose; in addition, "downstream flow regulation" and "other beneficial purposes" such as anadromous fish protection, are also frequently mentioned in project purposes.<sup>8</sup>

However, in the 1970s, the operational realities of this integrated system of dams belied their authorized purposes. Little attempt was made to deny the fact that the most prominent constraint on the operation of the integrated system was hydroelectric energy schedules.<sup>9</sup> Hydropower operations effectively denied downstream migrating anadromous fish the high spring flows they required to reach the ocean by storing much of the spring freshet for release to meet power loads later in the year.<sup>10</sup> Fisheries officials repeatedly requested changes in water project operations, but with the exception of the drought year of 1977 (when about 0.0016 of the annual unappropriated flow was released to supply survival level fish flows<sup>11</sup>), no significant operational changes were made, despite the existence of a federal statute requiring "equal consideration" of fish and wildlife in water project construction and operation.<sup>12</sup> Federal water managers even asserted (erroneously) that they lacked authority to take into account the fisheries implications of their actions.<sup>13</sup>

Bill, Rep. No. EMD-79-105 at 20, IV.1 (1979).

7. See, e.g., Hittle, Larson, Randall, and Michie, "Pacific Northwest Power Generation, Multiple Use of the Columbia River, and Regional Energy Legislation: An Overview," 10 Env't'l. L. 235, 250-62 (1980).

8. See generally Blumm, "Hydropower vs. Salmon: The Struggle of the Pacific Northwest's Anadromous Fish for a Peaceful Coexistence with the Federal Columbia River Power System," 11 Env't'l. L. 211, 223-49 (1981).

9. Bonneville Power Admin., Final EIS on the Role of BPA in the Pacific Northwest Power Supply System, Including Its Participation in a Hydro-Thermal Power Program at IV-305 (1980). On the operation of the system, see Anadromous Fish Law Memo #10 (Oct. 1980), #18 (May 1982).

10. "Hydropower vs. Salmon," note 8 above, at 220-21.

11. See House Commerce Committee Report, note 3 above, at 47 (quoting Ed Chaney).

12. Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666c; see "Hydropower vs. Salmon," note 8 above, at 268-76; and Anadromous Fish Law Memo #6 (March 1980); and #17 (April 1982) at 3-5.

13. See Hydropower vs. Salmon, note 8 above, at 221-22, n.43 (citing statements by the U.S. Army Corps of Engineers and the Bonneville Power Administration).

## B. State of the Hydropower Resource

With the completion of the Canadian projects authorized by the Columbia River Treaty in the mid-1970s,<sup>14</sup> nearly all of the attractive Columbia Basin sites for large-scale dams were developed. But although these Treaty projects doubled the Basin's storage capacity, they did not signal an end to project construction. On the contrary, this increased storage capability induced downstream project operators to install additional generating units to augment the integrated system's capacity to meet peak load demands.<sup>15</sup> The use of the hydropower resource primarily for peaking, while employing thermal (coal and nuclear) plants to serve base loads, became a central tenet in the region's projected hydrothermal energy mix. Unfortunately for the anadromous fish resource, this mix, which became known as the Hydro-Thermal Power Program,<sup>16</sup> required significant and frequent streamflow fluctuations (to coincide with daily peaks) and also retention of what had been the spring freshet in storage reservoirs to provide power flows later in the year (to meet seasonal peaks).<sup>17</sup>

However, implementation of the Hydro-Thermal Program was stalled because of difficulties encountered by the thermal component of the program. First, in 1973, the Internal Revenue Service ruled that the financing arrangements under which the federal government subsidized construction of the initial generation of thermal plants could no longer be employed.<sup>18</sup>

Second, in 1975 the federal courts ruled that implementation of a new financing scheme had to be delayed pending analysis of the environmental impacts of the program by the Bonneville Power Administration in an environmental impact statement.<sup>19</sup> BPA's inability to

14. The Treaty is analyzed in *id.*, at 243-47. For a recent State Department interpretation, see this Issue's Fish Law "Briefs."

15. See *id.*, at 246 (noting ongoing project construction at Bonneville, Chief Joseph, Grand Coulee, Libby, and Lower Monumental Dams as of April 1, 1979).

16. See, e.g., Final BPA Role EIS, note 9 above.

17. The output of thermal plants cannot be economically altered to meet variable demands; on the other hand, hydropower supplies an ideal peaking resource because of the relative engineering ease of manipulating streamflows.

18. 26 C.F.R. § 1.103, removing the tax exempt status of bonds financing future projects for which BPA purchased more than 25% of the project's capability. This effectively terminated BPA's practice of "net billing," the means by which it underwrote WPPSS 1, 2, and 3 and the Trojan nuclear plants.

19. Port of Astoria v. Hodel, 8 E.R.C. 1156 (D. Or. 1975), *aff'd.* 595 F.2d 467 (9th Cir. 1979) [BPA must prepare an EIS on its issuance of a power sale contract to proposed Alumax plant and the relationship of such (con't.)

prepare this EIS in a timely fashion delayed initiation of additional projects. These delays came at a time when Pacific Northwest forecasters were predicting steady rates of growth in demands for electricity. Coupled with project delays, these forecasts (which have turned out to be unrealistic) made it appear that the region was facing an electric power crisis.<sup>20</sup> Indeed, BPA issued a "Notice of Insufficiency," stating that after mid-1983 it could no longer meet the new load growth of its preference customers,<sup>21</sup> and a BPA-administered allocation scheme governing access to low-cost hydropower seemed to be a necessity.<sup>22</sup>

## C. Evolution of the Northwest Power Bill

In the late 1970s, most of the region's utilities and other large customers of BPA, such as its direct service industries, clamored for a congressional solution to the Northwest's electricity problems. Although a number of different bills were considered by Congress, their common denominator was a provision that would equip BPA with authority to make long-term purchases<sup>23</sup> of the output of new generating facilities in order to meet the perceived electric power shortage and to forestall

contracts to Phase 2 of the Hydro-Thermal Power Program]; see also NRDC v. Hodel, 425 F. Supp. 590 (D. Or. 1977) *aff'd.* 626 F.2d 134 (9th Cir. 1980) [BPA actions in furtherance of the Hydro-Thermal Power Program enjoined pending preparation of a program EIS].

20. In 1977, the Pacific Northwest Utilities Conference Committee was predicting load growth at 4.5% annually. See K. Lee, D. Klemka, and M. Marts, Electric Power and the Future of the Pacific Northwest 135 (1980). Even in 1980, PNUCC was predicting an 80% probability that the region could not meet its firm energy load growth by 1984-85. See Jackson, "The Pacific Northwest Electric Power Planning and Conservation Act -- Solution For A Regional Dilemma," 4 U. Puget Sound L. Rev. 7, 8 n.6 (1980). Now that regional energy forecasters have finally acknowledged the price elasticity of electricity demand, BPA is predicting surpluses of generating capacity throughout the 1980s. See Anadromous Fish Law Memo #18 (May 1982), at 13.

21. Letter of BPA Administrator Donald Hodel to BPA Preference Customers (June 24, 1976).

22. BPA published a proposed allocation scheme on October 5, 1979, 44 Fed. Reg. 5784.

23. Since 1974, BPA possessed "short-term" (5 year) purchase authority pursuant to § 11(b)(6) of the Federal Columbia River Transmission Act, 16 U.S.C. § 8381(b)(6). The lack of long-term purchase authority constituted a fundamental difference between BPA and the Tennessee Valley Authority. For an argument that BPA possesses implied purchase authority, or least did prior to the passage of the Power and Conservation Act, see Luce and McLennan, "Acquisition of Energy Resources Under the Pacific Northwest Electric Power Planning and Conservation Act: a look at the future," 5 U. Puget Sound L. Rev. 61, 74-81 (1981).

implementation of a BPA allocation scheme. As the proposals meandered through the legislative process, provisions were added to allay fears that this new purchase authority would be invoked to commit the region to costly (and risky) nuclear plants.<sup>24</sup> Thus, the new purchase authority was combined with a "cost effective" test<sup>25</sup> and a congressionally prescribed priority scheme favoring conservation programs and renewable resources over large central generating stations like coal and nuclear plants.<sup>26</sup> Further, the Act responded to public dissatisfaction with BPA's past decisions and decision-making procedures by placing primary planning responsibility in a new interstate Regional Council<sup>27</sup> and by establishing detailed requirements designed to ensure public involvement in all major Council and BPA decisions.<sup>28</sup> A bill with these provisions passed the Senate in August, 1979.<sup>29</sup>

While the bill was under consideration by the House, suggestions were made that the legislation be amended to provide provisions aimed at preserving and restoring the Basin's depleted anadromous fish runs and requiring that henceforth fish and wildlife be considered a co-equal partner with other authorized project purposes.<sup>30</sup> Congressman John Dingell, Chairman of the House Commerce Committee's Subcommittee on Energy and Power, took these suggestions seriously. The bill approved by the Commerce Committee contained detailed criteria and procedures designed to compensate for past fish and wildlife losses due to hydropower development and operations and to ensure that fish and wildlife considerations were factored into all hydropower decisionmaking.

With minor exceptions, the fish and wildlife provisions inserted by the Committee were

24. See Cavanagh, "The Pacific Northwest Electric Power Planning and Conservation (And Thermal Power Plant Relief) Act," 4 U. Puget Sound L. Rev. 27 (1980).

25. See § 4(e)(1) [requiring all resource acquisitions to be cost effective]; § 3(4) [defining cost effective].

26. § 4(e)(1). See Michie, "Impacts of the Pacific Northwest Electric Power Planning and Conservation Act on the Development of Energy Resources in the Pacific Northwest: An Analysis of the Resource Acquisition Priority Scheme," 4 U. Puget Sound L. Rev. 299 (1981).

27. See generally § 4 of the Act, 16 U.S.C. § 839b.

28. See, e.g., § 2(3) [public involvement is one of the Act's basic purposes]; and § 4(g) [BPA and the Council to maintain comprehensive public involvement programs]. Of course, increased public involvement in regional energy policies was one of the primary goals of the NEPA suits, which, it should be noted, BPA both resisted and lost. See note 19 above.

29. See 125 Cong. Rec. S11601-07 (daily ed. Aug. 3, 1979); and Senate Energy and Natural Resources Committee, S. Rep. No. 96-272, 96th Cong., 1st Sess. (1979).

30. See Anadromous Fish Law Memo #4 (Oct. 1979); and GAO Report, note 6 above.

adopted by the House Interior Committee, which also had jurisdiction over the bill. Thus, the legislation passed by the House in November, 1980, contained the basic framework authored by the Commerce Committee. Although there were indications that power interests, who testified to the House that they were "anxious to accommodate fish and wildlife needs,"<sup>31</sup> would attempt to use a House/Senate Conference Committee to weaken the bill's fish and wildlife provisions,<sup>32</sup> no such Conference Committee was convened. Instead, the Senate accepted the House version of the legislation, and the President signed the amended bill into law as the Pacific Northwest Electric Power Planning and Conservation Act on December 5, 1980.<sup>33</sup>

While power interests have argued to the Regional Council that the legislative history compiled by the House Commerce Committee should be discounted, there is no sound interpretive basis for doing so.<sup>34</sup> When resort to the

31. House Commerce Committee, note 3 above, at 49.

32. See Anadromous Fish Law Memo #9 (Sept. 1980) at 6.

33. Pub. L. 96-501, 96 Stat. 2697, 16 U.S.C. § 839 et seq.

34. The Pacific Northwest Utilities Conference Committee, in a legal analysis submitted to the Regional Council, contends that the effect of the Interior Committee's consideration of the bill passed by the Commerce Committee was to reject wholesale the Commerce provisions, resulting in "no significant, substantive changes in pre-Act obligations and authorities." PNUCC Memorandum to Regional Council on Legislative History at 5, 16 (Feb. 8, 1982). The apparent basis for this contention rests with the fact that the Interior Committee amended a Commerce version that would have assigned less discretion to the Council (in deviating from the fish and wildlife recommendations in fashioning its 4(h) program. [The Commerce version required the Council to adopt the preferred recommendations unless it found them inconsistent with the Act's purposes; House Commerce Committee, above note 3, at 7-8. The Interior version, closely resembling § 4(h)(5)-(7) of the Act, enabled the Council to deviate from these recommendations, so long as it explained its rationale and so long as the measures the program did adopt met a number of standards added by the Interior Committee. See House Interior Committee, H.R. Rep. No. 96-76, pt. II, at 8 (1980); see also text accompanying notes 42-43 below (summarizing the program approval standards).] PNUCC's position is faulty because with the exception of this provision, all of the Commerce provisions were incorporated into the Interior bill, which indicated no intention to override the fish and wildlife program provisions instituted by the Commerce Committee. Thus, where provisions inserted by the Commerce Committee were not modified or deleted, the Commerce Committee is the best source of legislative intent. See Letter of Michael Blumm to Curt Marshall, Regional Council Fish and Wildlife Program Manager (Feb. 11, 1982); see also 126 Cong. Rec. E 5092 (Dec. 1, (con't.))

legislative history is necessary to resolve ambiguities in the statute, the Commerce Committee, as the Committee which authored the overwhelming majority of the Act's fish and wildlife provisions, is the best source of congressional intent. Only where provisions inserted by the Commerce Committee were later deleted or modified should that Committee's interpretation be discounted. This conclusion is not only warranted by time-honored principles of statutory construction, but also by political realities: the fish and wildlife constituency which supported the bill formed an integral part of a delicate coalition essential to the passage of the legislation. Without widespread backing of the fish and wildlife community, the Act would probably not have passed Congress, at least not in 1980.

**D. Fish and Wildlife Provisions of the Act**

Although it is not practicable to supply a detailed analysis of the Power and Conservation Act's fish and wildlife provisions here, it is essential to note that one of the fundamental purposes of the Act is the preservation and restoration of fish and wildlife resource adversely affected by hydroelectric development and operation.<sup>35</sup> The principal, although by no means the only,<sup>36</sup> means of accomplishing this objective is through the criteria and procedures established by § 4(h) of the Act. Under § 4(h), the Regional Council (notably, not BPA) is required to develop a remedial fish and wildlife program to improve the fish and wildlife of the Columbia River and its tributaries.<sup>37</sup> The procedures outlined in § 4(h) call for the Council to solicit recommended program measures from a variety of interests as well as the public.<sup>38</sup>

The Act gives the Council one year to consider and subject to public review these recommendations,<sup>39</sup> which were submitted to the Council last November 15.<sup>40</sup> If the Council decides to reject or modify any recommendations, it must explain in writing the basis of its decision.<sup>41</sup> Further, all fish and wildlife measures included in the Council's program must

satisfy a number of specific criteria, including (1) complementing existing and future activities of fish and wildlife agencies and Indian tribes; (2) being supported by best available scientific knowledge; (3) achieving sound biological objectives, including specifically flows and by pass systems designed to improve anadromous fish survival; (4) employing a minimum economic cost criterion only where there are "equally effective" means of achieving the same sound biological objective; and (5) being consistent with Indian treaty rights.<sup>42</sup> The program itself must be based on the recommendations and subsequent public involvement and consultation and must also assure the region an "adequate, efficient, economical, and dependable power supply."<sup>43</sup>

The 4(h) program is required to be approved prior to the Council's electric power plan, but it will also constitute a fundamental component of that plan.<sup>44</sup> Thus, the Fish and Wildlife Program should be viewed not only as a constraint around which the power plan must be built, but also a basis of incentives to continuously integrate hydroelectric power planning and operations with fish and wildlife protection, so as to achieve the dual goals of the Act: "cost effective" electricity<sup>45</sup> and improved fish and wildlife protection, particularly the restoration of anadromous fish runs.<sup>46</sup>

**II. The 4(h) Process Thus Far**

The Regional Council originally requested 4(h) recommendations in June of 1981. Voluminous recommendations were submitted from a coalition of fish and wildlife agencies and Indian tribes and the Washington Department of Ecology on November 15, 1981.<sup>47</sup> Documents were

42. § 4(h)(6). See also Anadromous Fish Law Memo #17 (April 1982), at 6-7 (a more detailed listing, containing the 10 standards supplied by the statute).

43. § 4(h)(5).

44. § 4(e)(3)(F); see "Promising Parity," note 37 above, at 523, n.118.

45. By definition, these costs include quantifiable environmental costs and benefits (§ 3(4)); non-quantifiable environmental costs must also receive due consideration (§ 4(e)(2)).

46. Implementation of the program is problematic, since the Act leaves this task to federal water managers, such as BPA, the Corps of Engineers, the Bureau of Reclamation, and the Federal Energy Regulatory Commission. See § 4(h)(10) and (11); and Anadromous Fish Law Memo #17 (April 1982), at 22-23 [arguing for detailed implementation procedures and a strong oversight role for the Council]. See § IV.F below.

47. See Anadromous Fish Law Memo #16 (Dec. 1980). A detailed implementation plan, including estimated costs, schedules, and priorities was submitted to the Council by the coalition of the agencies and tribes on April 16, 1981. This document was subsequently evaluated in a contractor's report to the Council. See Recent Publication #3 in Fish Law "Briefs."

1980) (remarks of Cong. Swift).

35. § 2(6).

36. For other provisions supplying fish and wildlife protection, see Anadromous Fish Law Memo #17 (April 1982) at 5, n.11. A subsequent issue of the Memo will devote special attention to the protection provided non-Columbia Basin fish and wildlife in the Pacific Northwest by § 4(e)(2) of the Act.

37. See generally Blumm and Johnson, "Promising a Process for Parity: The Pacific Northwest Electric Power Planning and Conservation Act and Anadromous Fish Protection," 11 Env't'l. L. 409 (1981).

38. § 4(h)(2).

39. § 4(h)(9).

40. See Anadromous Fish Law Memo #16 (Dec. 1980).

41. § 4(h)(7).



also submitted by other interested parties, including BPA and the Pacific Northwest Utilities Conference Committee (PNUCC), although it is doubtful that these comments satisfied the statutory criteria for a recommendation.<sup>48</sup>

The Council formally requested public comment on the recommendations this January and conducted a series of public hearings in March. The comment period closed on April 1. Detailed comments on the recommendations of the fish and wildlife agencies and tribes were submitted by a variety of interests, notably BPA and PNUCC.<sup>49</sup> Since April 1, the Council has been undergoing a series of formal "consultations" and formulating a draft program, which it expects to propose in mid-September, a two-month slippage from the Council's original July target date. Following this proposal, which will likely be published by the time this Memo is distributed, will be another round of public review and comment. Public hearings will be held in mid-October, with the close of the public comment period scheduled for October 25. To comply with the statute, a final program must be promulgated by November 15, which gives the Council only about 3 weeks to respond to public comment and promulgate a final program. If the costs of meeting the November 15 deadline are abbreviated public participation and limited time in which the Council can fully and adequately respond to public comment, the public would be better served by delaying program promulgation beyond the November 15 date.

Although the Council has delayed release of its draft program, it has distributed two preliminary documents which indicate some of the directions its program may take. On July 15, the Council released a preliminary staff draft for the mid-Columbia reach.<sup>50</sup> On September 1, a more comprehensive "Staff Briefing Memorandum" on the major issues to be addressed in the program was issued.<sup>51</sup> These two documents will be analyzed in Section IV below. However, first the appropriate role of the Regional Council in fashioning and implementing the 4(h) Program warrants consideration, for an accurate understanding of both the Council's responsibilities

48. See *id.*, at 12, n.96; at 13, n.102. § 4(h)(3) requires detailed information and supporting data to accompany "recommendations." § 4(h)(7) obliges the Council to respond in writing only to "recommendations" when deciding not to adopt them.

49. Bonneville Power Administration, Comments to the Northwest Power Planning Council on Recommendations for the Fish and Wildlife Program (April 1, 1982); Pacific Northwest Utilities Conference Committee, Response to Pacific Northwest Electric Power and Conservation Planning Council on Recommendations for Fish and Wildlife, 2 vols. (April, 1982).

50. Northwest Power Planning Council, Draft Mid-Columbia Passage Alternatives (July 15, 1982).

51. Northwest Power Planning Council, Draft Fish and Wildlife Program Briefing Memorandum (Sept. 1, 1982).

and limitations will facilitate public awareness of the issues that must be resolved.

### III. The Role of the Regional Council

Although the Congress directed the Regional Council to develop a Fish and Wildlife Program that preserves and restores Columbia Basin fish and wildlife adversely affected by hydroelectric development and operations, it expected the Council to accomplish this formidable task within a complex array of institutional relationships and statutory standards. Both in the approval and in the implementation of the 4(h) program, the Council is to rely on entities with expertise in fish and wildlife management and experience in hydroelectric system operations. However, there is also no question that Congress expected the Council to be an active participant with these entities, in order to assure that the statutory standards established for the program are achieved and maintained.

#### A. Program Approval

This publication has supplied a detailed account of program approval process and criteria.<sup>52</sup> For present purposes it is sufficient to note that the program must be based on "recommendations" solicited from a variety of entities and subsequent public comment and consultation.<sup>53</sup> If the Council deviates from these recommendations, it must explain in writing why they are inconsistent with the standards established in § 4(h) (5) and (6) of the Act, or why its program measures are more protective of fish and wildlife than the recommendations.<sup>54</sup> The text, structure, and legislative history all indicate that Congress expected the Council to give substantial deference to the recommendations of the region's fish and wildlife agencies and Indian tribes.<sup>55</sup> In short, those recommendations enjoy a rebuttable presumption of consistency with the statutory standards. Only if the Council meets its burden of supplying a rationale linked to the standards of the Act may it reject such recommendations.

The most problematic 4(h) standard is the directive "to protect, mitigate, and enhance fish and wildlife ... while assuring the Pacific Northwest an adequate, efficient, economical, and reliable power supply."<sup>56</sup> This publication has argued that this standard should not be interpreted to override the more specific

52. See generally Anadromous Fish Law Memo #17 (April 1982).

53. See note 49 above and accompanying text. § 4(h)(3) requires recommendations to be accompanied by detailed information and supporting data.

54. See note 42 above and accompanying text.

55. See Anadromous Fish Law memo #17 (April 1982) at 12-15.

56. § 4(h)(5).

standards contained in § 4(h); rather, all the standards should be interpreted to reinforce each other.<sup>57</sup> Thus, we have suggested that a two-pronged test of (1) biological soundness and (2) economic and technical feasibility as an appropriate interpretation of the balancing implied in § 4(h)(5).<sup>58</sup>

However, power interests seem to assume that the Council has plenary authority to reject proffered recommendations on the basis of a cost-benefit test.<sup>59</sup> Such a test will not satisfy the statutory directives of deference to the resource managers, preference for biological over economic results, and effectuation of treaty rights. A cost-benefit test will sanction rejection of feasible and biologically sound fish and wildlife measures solely on the basis of their purported costs. Moreover, a cost-benefit test will not only conflict with a number of 4(h) program approval standards, it will lead to poor policy choices. Such a test is particularly inappropriate where it increases the influence of those who have control over the cost figures, where the risks of failing to take protective action are not known, where innovation and technological breakthroughs may reduce implementation costs significantly, and where equity considerations outweigh efficiency concerns. All of these factors are present in the 4(h) program approval process.

On the other hand, a feasibility standard avoids problems associated with economic figures that are based on questionable assumptions supplied by unreliable sources. A feasibility standard will not, however, place the Regional Council in a straitjacket; economic costs are not entirely irrelevant under this standard and a phased implementation approach seems permissible. The use of a feasibility standard, to judge the merits of 4(h) program measures is the best means of ensuring that the Pacific Northwest will have both viable upriver anadromous fish runs and an economical and reliable power supply.<sup>60</sup>

57. Anadromous Fish Law Memo #17 (April 1982) at 9-11.

58. Id. at 1, 2, 11, 18.

59. See e.g., Letter of Janet McLennan, Acting Assistant Power Manager for Natural Resources, to Ed Sheets, Executive Director, Northwest Power Planning Council, attached as an appendix in BPA 4(h) Comments to the Northwest Power Planning Council (April 1, 1982) at 3:

BPA believes that the cost of any recommended measure, if unjustified by the commensurate benefit, may be sufficient reason for the Council to reject that measure when the measure, alone or in combination with other measures, imposes a significant burden on the consumers of the region's power system.

60. The preceding two paragraphs are excerpted from Blumm, "Fulfilling the Parity Promise: A Perspective on Scientific Proof, Economic Cost, and Indian Treaty Rights in the (con't.)"

## B. Program Implementation

Just as the approval process involves institutional pluralism, the implementation of the Council's program will require concerted action on the part of a number of entities. For example, the region's fish and wildlife agencies and Indian tribes will be charged with carrying out much of the enhancement work of the program, which will be supported by funding from BPA. And the region's federal water managers -- BPA, the Corps of Engineers, the Bureau of Reclamation, and the Federal Energy Regulatory Commission -- will also play a crucial role, particularly concerning the restructuring of hydroelectric system operations.

But while it is true that the Council is not an operating agency, the view that it is not an implementing agency is not accurate. The Act equips the Council with important oversight functions,<sup>61</sup> and there is little question that it must aggressively employ them or run the risk that recalcitrant water managers will fail to take their fish and wildlife responsibilities seriously. Moreover, the program itself must establish implementation mechanisms if the congressional directives contained in § 4(h)(10) and (11) are to be effective. Thus, the Council should establish procedures that will enable BPA to demonstrate consistency of its actions with the program and the other water managers to demonstrate they have taken the program into account to the maximum extent practicable.<sup>62</sup> These procedures should result in publicly reviewable records and should also document that required consultation obligations have been fulfilled and that all actions achieve results that are equitable to fish and wildlife.<sup>63</sup>

Reviewers of the Council's draft program should carefully evaluate the measures it contains in light of these institutional arrangements. The Council must bear the burden of deviations from the recommendations in light of the Act's standards and must include implementation procedures if its program is to be effective.

Approval of the Columbia Basin Fish and Wildlife Program," 13 Env'tl. L. (forthcoming, 1982).

61. E.g., § 4(h)(12)(A) [annual report to Congress]; § 4(i) [review of BPA actions].

62. § 4(h)(10)(A) requires BPA to use its authorities and funding in a manner "consistent" with the program; however, § 4(h)(11) does not require unqualified consistency of the actions of other water managers, since it sanctions inconsistency where consistency is not "practicable." The distinction is explainable on the grounds that while Congress wanted unqualified consistency of BPA's system-wide actions (e.g., system operating plans), it would countenance some inconsistencies of other, more site-specific actions of the other water managers (e.g., existing statutory and regulatory constraints on reservoir drawdowns).

63. See Anadromous Fish Law Memo #17 (April 1982) at 22-23.

#### IV. Key 4(h) Program Issues

It is impossible to comprehensively evaluate the 4(h) program issues in the absence of a proposed program. However, there is no question that the critical element of a viable program is a streamflow regime sufficient to efficiently transport juvenile fish to the ocean. Nearly as important are effective bypass systems, necessary to reduce power turbine mortalities, at each dam. Other important issues include enhancement measures, measures to protect resident fish and wildlife, project criteria that new hydropower projects must meet, and, not to be overlooked, implementation mechanisms. Related to this last issue is the question of whether implementation of the program must be delayed pending preparation of an environmental impact statement.

##### A. The Streamflow Issue and the "Water Budget"

The region's fish and wildlife agencies' recommendations included a detailed schedule of minimum flows for every month of the year. These "minimum" flows, however, would be increased in high water years and subject to a 25% cutback in low water years.<sup>64</sup> Because they believe their treaty rights entitle them to biologically optimum flows, the Columbia Basin Indian tribes refused to concur in these recommendations.<sup>65</sup> It should be noted, however, that, while they did not recommend optimum flows, the fish and wildlife agencies recommended that the Council study the possibility of increasing the frequency of optimum flows.<sup>66</sup>

The preliminary response of the Regional Council has been innovative, but not without serious unanswered questions. The Council has suggested establishing a "water budget," essentially a fixed block of water that would be made available to the fish and wildlife agencies and the tribes to facilitate downstream migration during the spring.<sup>67</sup> The water budget is an attractive concept because (within the constraints set by the budget) it would give the agencies and tribes control over the timing and amount of flows. This would force the agencies and tribes to use the water available to them in the most efficient manner possible. The estimated firm power loss associated with the

suggested budgets is 550 megawatts, about 2.96% of the region's firm energy load carrying capability.<sup>68</sup>

There are, however, numerous problems with the concept. First of all, its adequacy obviously depends upon the amount of water in the budget. The Council's Staff Briefing Memorandum would set this amount by subtracting the difference between the minimum flows recommended by the agencies and the flow achieved under a power requirements-only hydro-regulation.<sup>69</sup> The result is a budget of 58 thousand cubic feet per second for one month (Kcfs-months) on the mid-Columbia and 27 Kcfs-months on the lower Snake. But because of apparent storage limitations on the lower Snake, the Council staff would reduce the lower Snake budget to 20 Kcfs-months.<sup>70</sup> No offsetting increase on the mid-Columbia is now suggested, although one was originally proposed in order to maintain flows on the lower Columbia.<sup>71</sup> If the Council establishes budgets only for the mid-Columbia and the lower Snake, physical limitations on the Snake would reduce flows on the lower Columbia, despite available storage on the upper Columbia.<sup>72</sup>

A second problem with the water budget concept concerns its assumption of a continuation of power "base flows." It must be emphasized that the suggested water budgets are not biologically sound by themselves; they are increments built upon existing planned power flows. If these flows are not fixed and relatively constant, then the water budget concept collapses. There is no indication in the Staff Draft that these premises are sound.

Third, another premise upon which the concept is based is the notion that shaped flows will result in more efficient transportation of juveniles to the ocean. There is no question that shaped spills can supply more efficient bypass around dams, but there is no indication in the 4(h) record that shaped flows are superior to fixed flows. If they are not biologically superior, then they are open to

64. See Anadromous Fish Law Memo #16 (Dec. 1981) at 6.

65. Id. The U.S. Fish and Wildlife Service refused to concur in the recommended low water year cutbacks. According to this publication, optimum flows are justified if they are sound biologically and feasible to implement. Economic feasibility has been judicially construed. See Anadromous Fish Law memo #17 (April 1982) at 18, n.100.

66. Fishery Agency 4(h) Recommendations, note 5 above, at 205.

67. The water budget is discussed in Northwest Power Planning Council, 1 Northwest Energy News No. 5 (Aug. 1982) at 3-4.

68. Draft Briefing Memorandum, note 51 above, at 9. This does not mean, however, that less power will be generated in most years; it means only that under the hydroelectric system's "worst case" planning assumptions, less hydropower would be assuredly produced if the lowest 42-1/2 months of streamflows on record were repeated. See generally Anadromous Fish Law Memo #18 (May 1982).

69. See Northwest Power Planning Council, Fish and Wildlife Subcommittee Minutes (June 18, 1982) at 2 (explanation of Curt Marshall).

70. Draft Briefing Memorandum, note 51 above, at 8.

71. Subcommittee Minutes, note 69 above, at 2.

72. The recommendations of the fishery agencies called for flows on the lower Snake, mid-Columbia, and lower Columbia by requesting flows at Lower Granite, Priest Rapids, and The Dalles Dams. See Fishery Agency 4(h) Recommendations, note 5 above, at 180.



serious question, since it is likely that the power generated by fixed flows can be marketed at considerably higher rates than flows that are variable upon only a few days notice. Section 4(h)(6)(C) of the Act requires the use of the minimum cost alternative where equally effective alternative means of achieving the same sound biological alternative exist.<sup>73</sup>

Fourth, the Staff Draft suggests that the budgets are effective only during the April 15-June 15 spring downstream migration. Not only is the fixed nature of these dates open to question, but the fishery agencies' recommendations called for flows throughout the year.<sup>74</sup> Downstream migrating summer and fall chinook will fare poorly without sufficient flows later in the year.

Finally, a basic postulate of the fishery agencies' recommendations was that in good water years flows would be increased, while in poor water years fisheries would share in the shortage.<sup>75</sup> Because the water budget is a fixed amount of water, apparently fisheries will neither share in shortages, nor surpluses. Because the Council has the authority to adopt more protective measures than those recommended,<sup>76</sup> eliminating the recommended 25% cutback is justified; but if higher flows in good water years are biologically sound, the Council must justify this change.

These criticisms are not meant to suggest that the water budget is a faulty concept; only that the Council must supply rationales in the proposed program that justify its alterations in the recommendations submitted to it. These rationales should explain why the recommendations were inconsistent with the statutory standards, or why Council changes would result in greater fish and wildlife protection than the recommendations.

**B. The Bypass Issue**

In order to reduce mortalities of downstream migrants at hydroelectric projects (estimated at 17-25% at each dam), the fishery agency recommendations called for the identification and installation of best available bypass systems (e.g., submersible traveling screens and ice-sludge skimmers designed to guide fish out of power turbine intakes) at dams without such facilities. Five mid-Columbia PUD dams (Wells, operated by Douglas County PUD; Rocky Reach and Rock Island, operated by Chelan County PUD; and Wanapum and Priest Rapids, operated by Grant County PUD) and 3 Corps of Engineer dams (John Day on the Columbia and Ice Harbor and Lower Monumental on the Snake) are the objects of these recommendations. Pending the installation of effective bypass systems, the agencies and tribes recommended interim spills "sufficient to minimize losses," which in the mid-Columbia FERC

proceedings (see Fish Law "Briefs") they believe to be 40% of the flow.

The mid-Columbia staff draft circulated by the Council on July 15 attempted to respond to these recommendations by calling for completion of prototype testing at all 5 PUD dams by March 1984, and installation of facilities by March 1986.<sup>77</sup> However, in the September 1 draft, the Council deferred these dates until March 1985 and March 1987, respectively.<sup>78</sup> More controversial was the provision in the July 15 draft to allow Grant County PUD to begin testing "short haul" transportation (by truck and barge) around Priest Rapids Dam. This "short haul" testing would be conducted in two phases, could extend until December, 1988, and could substitute for the installation of bypass facilities if the Council determined it was "likely to be as effective" as a bypass system.<sup>79</sup> Despite an uproar of protest from fish and wildlife interests at this concession to Grant County PUD, and despite the fact that the administrative law judge presiding over the mid-Columbia settlement proceedings expressly rejected "short haul" transportation as an unrealistic alternative (see Fish Law "Briefs"), the Council staff has retained this controversial provision in its September 1 draft.<sup>80</sup>

Just as controversial has been the Council's approach to interim spills. The July 15 draft deferred to the FERC Settlement Agreement concerning spills (10%), although it also urged the PUDs to use their "best efforts" to achieve spill levels that would achieve survival levels comparable to the best available bypass systems.<sup>81</sup> The controversy engendered by the July 15 draft induced the Council staff in its September 1 memorandum to clarify that minimum

77. Mid-Columbia Draft, note 50 above, § 303(c).

78. Draft Staff Briefing memorandum, note 51 above, at 12.

79. Mid-Columbia Draft, note 50 above, § 303(c)(1)(C)-(H). The "likely to be as effective" language is not consistent with § 4(h)(6)(C) of the Act, which directs that cheaper cost alternatives be employed where they are "equally effective" in terms of protecting fish. This interpretation ignores the sense of urgency reflected in the time deadlines and legislative history of the Act. See e.g., Anadromous Fish Law memo #17 (April 1982) at 12.

80. Draft Staff Briefing Memorandum, note 51 above, at 12-13. One reason for the opposition to "short haul" transportation, apart from the lack of evidence that the length of the haul is a determining factor affecting successful returns, is the lack of fish to conduct studies. The mid-Columbia runs are so imperiled that the fishery agencies and tribes do not want to commit any smolts to such a questionable program. Even if the Council retains this provision, before the program could be implemented, the FERC ALJ would have to reconsider his decision not to permit "short haul" studies (see Fish Law "Briefs").

81. Mid-Columbia Draft, note 50 above, § 303(d).

73. See text accompanying note 42 above.

74. See Fishery Agency 4(h) Recommendations, note 5 above, at 180.

75. Id. at 179-83.

76. § 4(h)(7).

interim spills of 20% would be required.<sup>82</sup>

The issue of interim spill levels is not necessarily a complicated one. Although there may be disagreements over what constitutes best available bypass technology, while the studies are being conducted spill levels should be sufficient to provide survival rates at least as high as best operational bypass systems. Doubts should be resolved in favor of higher spills, since this will induce quicker installation of bypass systems. However, these spill levels must be specified -- exhortations about "best efforts" have not supplied effective protection in the past.

With respect to the 3 Corps of Engineer dams in question, the Council staff would accept the fishery agency recommendations regarding the completion of complete bypass systems at John Day and Ice Harbor and interim (albeit unspecified) spills. However, concerning Lower Monumental Dam, where there is no sluiceway capable of being modified for bypass, the staff apparently would reject the fishery agency and tribal recommendations for bypass installation, allowing the Corps another year to carry out their ongoing transportation program and present a study on that program to the Council. At that time if the program is found "inadequate," the Council staff suggests only that the Corps "would be directed to evaluate alternative screening and bypass systems."<sup>83</sup> No rationale is given for singling out Lower Monumental, nor how this satisfies the statutory program approval standards.

### C. Increased Production

The Council's staff draft is in general agreement with the fishery agency and tribal recommendations concerning natural and artificial enhancement measures, although the draft makes the important point that the appropriate balance between the two methods of production "has never received the thorough attention it deserves."<sup>84</sup> The approach of the Council would be to form two teams of experts that would formulate enhancement programs and address technical issues involved in natural and artificial production, respectively.<sup>85</sup> These teams will be responsible for determining the appropriate mix of natural and artificial production and will coordinate with any enhancement planning being conducted under the Salmon and Steelhead Enhancement Act.<sup>86</sup>

More controversial is the failure in the September 1 draft to include the recommended anadromous fishery goal of restoring populations to pre-McNary Dam levels.<sup>87</sup> While the goal may not be attainable in the short run, it is clearly warranted by the terms of the Act,<sup>88</sup> and it will serve as a useful guide to gauge the success of the 4(h) program in the years to come.

Also warranting some scrutiny is the September 1 draft's statement that the Council will not fund construction or operation of new hatcheries "unless there is adequate control over river and river harvest so that the stocks can be rebuilt."<sup>89</sup> While certainly the Council should not make investments without some assurance from harvest management agencies concerning attainment of escapement goals, delaying upriver enhancement measures until the Council satisfies itself that harvest management regulations are "adequate" may embroil the Council in matters beyond its jurisdiction and may not be fruitful given the significant cutbacks in ocean and inriver harvest seasons in recent years.

### D. Future Hydroelectric Projects

With nearly 800 new hydroelectric projects with either applications pending before the Federal Energy Regulatory Commission or already in receipt of FERC preliminary permits (indicating ongoing feasibility studies) in the Pacific Northwest,<sup>90</sup> and with the Bonneville Power Administration projecting more than 4000 megawatts of electricity from small hydropower in its "least cost" mix of resource acquisitions,<sup>91</sup> new project development is obviously of serious concern to the fish and wildlife community. The fishery agency and tribal recommendations proposed procedural and substantive standards, including the consideration of cumulative impacts.<sup>92</sup> Although the September 1 Staff Draft does not suggest any specific standards or processes, it does propose a study to design cumulative assessment methods; a temporary halt to new developments on some (unspecified) streams pending completion of the cumulative impacts methodology; and regular Council review of FERC applications and Corps of Engineer and Bureau of Reclamation development proposals.<sup>93</sup>

82. Draft Staff Briefing Memorandum, note 51 above, at 12.

83. Id. at 13.

84. Id. at 25.

85. Id. at 27.

86. Id. Enhancement Act planning is behind schedule because of a lack of federal funding promised, but not delivered by the Act. See generally Anadromous Fish Law Memo #15 (Sept. 1981). The Staff Draft recommends that the Council consider funding implementation of some provisions of the Act (p.18).

87. See Anadromous Fish Law Memo #16 (Dec. 1981) at 4-5.

88. See Anadromous Fish Law Memo #17 (April 1981) at 4, n.5.

89. Staff Draft Briefing Memorandum, note 51 above, at 18.

90. Id. at 39.

91. See 1 Northwest Conservation Act Report #16 (Aug. 6, 1982) at 4-5.

92. See Anadromous Fish Law memo #16 (Dec. 1981) at 10.

93. Staff Draft Briefing Memorandum, note 51 above, at 40.

### E. Other Issues

For the most part, the September 1 Staff Draft proposes to adopt the fishery agency and tribal recommendations concerning improved survival of upstream migrants. These appear to be relatively noncontroversial, probably because they generally involve studies.<sup>94</sup> Resident fish measures proposed in the draft include specific limits on reservoir drawdowns at Hungry Horse and Libby Dams, although these limits would not be effective until November, 1987; specific flows for Montana's Flathead River below Hungry Horse; the purchase of water to protect stretches of Montana's Bitterroot River from being dewatered; and study designed to determine whether to construct a hatchery on Idaho's Lake Pend Oreille.<sup>95</sup> Wildlife measures proposed in the Staff Draft include funding of a wildlife coordinator, development of a mitigation status report, development of systemwide mitigation plans, future standards for funding land acquisition, and a directive to BPA to complete a memorandum of understanding with the states regarding transmission corridors.<sup>96</sup>

Finally, the Staff Draft supports the concept of additional storage to augment flows in the Yakima Basin but defers a decision on any specific course of action pending studies to be completed later in the year; also deferred is the establishment of specific flow regimes in the Yakima Basin pending completion of an ongoing U.S. Fish and Wildlife Service study.<sup>97</sup>

### F. The Implementation Issue and the EIS Question

As explained above, crucial elements of the 4(h) Program are its implementation provisions.<sup>98</sup> The fishery agency and tribal recommendations included detailed provisions aimed at restructuring decisionmaking procedures of federal water managers to ensure that they give equitable treatment to fish and wildlife, take into account the 4(h) program to maximum extent practicable, and equalize the probability of achieving fish and wildlife objectives with the probability of achieving power production objectives.<sup>99</sup>

The September 1 Staff Draft almost wholly ignores these recommendations. It does suggest,

94. Id. at 21-24. These studies concern flow and spill criteria at projects, improvements in the operation and maintenance of fish ladders, and investigation of the effects of disease problems associated with fish passage facilities.

95. Id. at 30-32.

96. Id. at 35-38. Apparently, BPA has asserted that mitigation of transmission corridor impacts on wildlife is beyond the scope of the 4(h) program, adopting a narrow interpretation of §§ 4(h)(2)(A), 4(h)(5), and 4(h)(8) of the Act.

97. Id. at 34.

98. See § III.B above.

99. See Anadromous Fish Law Memo #16 (Dec. 1981) at 9.

however, establishment of a "research and implementation board" (subsequently rechristened the "Fish and Wildlife Committee"), composed of 4 Council members, charged with overseeing research and data gathering, monitoring implementation of program measures, and developing implementation plans.<sup>100</sup> There is no question that an ongoing Council presence will be necessary to ensure effective implementation of the 4(h) program, but unless the program itself calls upon federal water managers to regularly document in publicly reviewable administrative records how their actions satisfy the implementation directives contained in §§ 4(h)(10) and (11) of the Act, the new Committee will be faced with an unmanageable task of attempting to restructure federal water manager decisionmaking in the absence of a clear charter. Just like vague exhortations to use "best efforts," a vague directive to "cooperate" in implementation will enable recalcitrant project operators to delay achieving fish and wildlife objectives. Such aspirational directives are not a substitute for detailed implementation standards and procedures.<sup>101</sup>

The risk of delay due to a lack of specific directives is suitably illustrated by what appears to be the first obstacle to expeditious program implementation. Because Congress did not explicitly exempt the 4(h) program from the requirements of the National Environmental Policy Act, BPA has indicated that implementation of the program may be delayed pending preparation of an environmental impact statement.<sup>102</sup> If an EIS is necessary, BPA has suggested it may take 2 years to complete it.<sup>103</sup> It may strike some critics as ironic

100. Staff Draft Briefing Memorandum, note 51 above, at 42-43.

101. See, e.g., Henderson and Pearson, "Implementing Federal Environmental Policies: The Limits of Aspirational Commands," 78 Columbia L. Rev. 1429 (1978) [suggesting that the only alternative to such specificity is to change structure and values of the implementing institutions; the latter alternative is clearly unrealistic given the imperative need for expeditious 4(h) program implementation].

102. Letter of BPA Administrator Peter Johnson to Regional Council Chairman Daniel Evans at 3, included in BPA Comments, note 49 above.

103. See "Preliminary Estimated Schedule for EIS on Implementation of Fish and Wildlife Program," attached as an appendix to Letter of BPA Administrator Peter Johnson to Dept. of Energy Asst. Secretary for Environmental Protection, Safety, and Emergency Preparedness (June 30, 1982). The Administrator's letter suggests that the Power and Conservation Act "does not direct BPA to implement the [Fish and Wildlife] Program per se .... Consequently, the program will not simply provide BPA a package of actions to execute, but will serve as policy guidance, to which we will accord great weight." It bears repeating that § 4(h)(10)(A) of the Act requires BPA to use its funding and its authorities under the Power and Conservation Act and other laws to protect, mitigate, and (cont.)

that the same agency which has been sued over its unwillingness to perform an EIS on its power sale contracts<sup>104</sup> would be so interested in performing an EIS on 4(h) program implementation; however, it is true that some of the agency's power customers might challenge the failure to perform an EIS, which could further delay effective program implementation.

There are a number of reasons why a 2-year delay pending EIS preparation on the 4(h) program may not be necessary. Like the Clean Air Act and the Endangered Species Act, the Power and Conservation Act calls for expeditious decisionmaking and provides for orderly consideration of diverse environmental factors.<sup>105</sup> Thus, the 4(h) process itself might be considered the "functional equivalent" of an EIS. It may also be possible to complete NEPA procedures in much less than the suggested two years.<sup>106</sup> Moreover, actions taken during the pendency of NEPA procedures (e.g., flows and spills during 1983, prototype testing of bypass systems, institutional directives, etc.) may justifiably be considered to have no significant environmental impacts,<sup>107</sup> given their short-term nature.

In short, there seem to be a variety of options available to avoid delaying implementation of remedial fish and wildlife measures in the name of environmental quality. But it should also be recognized that a system-wide EIS, if it is of proper scope,<sup>108</sup> could fulfill a very important function: increasing awareness of the public, the agencies, and Congress of how and why the hydroelectric system operates and the environmental impacts of reasonable alternative courses of action. Such an EIS has been urged in these pages before.<sup>109</sup> However, this EIS should not be used to second-guess the Council's 4(h) program; its purpose would be to determine how to most effectively implement it.<sup>110</sup>

enhance fish and wildlife "in a manner consistent" with the 4(h) Program and the purposes of the Act.

104. See Anadromous Fish Law Memo #17 (April 1982) at 25.

105. See Amoco Oil Co. v. EPA, 501 F.2d 722, 750 (D.C. Cir. 1974) (Clean Air Act); Pacific Legal Foundation v. Andrus, 657 F.2d 829, 834-835 (6th Cir. 1981) (Endangered Species Act). Notably, these cases focus attention on the goals and processes established by the statutes, not simply the documents accompanying the agency's final action.

106. For example, by designating as "lead agency" (40 C.F.R. § 1501.5) an agency that can more expeditiously comply with NEPA procedures; by setting strict time limits (40 C.F.R. § 1501.8); by issuing the EIS as a supplement to related EISs (40 C.F.R. § 1502.9(c)), or by "tiering" the EIS to eliminate duplication with previous EISs (40 C.F.R. §§ 1502.20, 1508.28).

107. 40 C.F.R. § 1508.13.

108. Id. § 1508.25.

109. Anadromous Fish Law Memo #10 (Oct. 1980) at 7-9.

110. Congress did not empower the federal water managers to override the Council's pro-(con't.)

Finally, if it is determined to go ahead with an EIS, that EIS should be a comprehensive one, in keeping with the Power and Conservation Act's system-wide objectives.<sup>111</sup> It should not consider existing hydropower operations as the norm from which the 4(h) program is a proposal to deviate. The Power and Conservation Act makes it clear that the status quo is not acceptable.<sup>112</sup> Thus, existing power operating plans are not immune from NEPA scrutiny. There is simply no justifiable reason for delaying fish flows during 1983 while proceeding with hydropower operations as if the Council's Fish and Wildlife Program did not exist.

## V. Conclusion

The Regional Council's task in formulating an effective 4(h) program is obviously a considerable one, in large measure because achieving the Act's fish and wildlife objectives requires restructuring ways of doing business that have evolved over a long period of time. Water managers which have not embraced fish and wildlife responsibilities in the past perhaps understandably want time to accustom themselves to what they believe are new responsibilities. Project operators which have long been successful in substituting lengthy studies for effective remedial actions want a reconsideration of alternatives that do not require significant changes in their operations. If the conflicts between power operations and fish and wildlife protection were not longstanding and well-studied ones, and if the state of the Columbia Basin's anadromous fish runs was not so imperiled, perhaps delays in 4(h) program implementation would be more justifiable. But as Congress recognized in enacting the Power and Conservation Act, for some runs time is a critical factor.<sup>113</sup> While certain this does not imply that no more studies are warranted, it does mean that any further deferrals of action pending studies must be accompanied by significant, immediate remedial relief.

As a result, the public should focus particular attention on proposed 4(h) program measures that will be effectuated during the next year. Just as important as these short-term measures are the provisions of the program designed to restructure decisionmaking procedures. Focused comment from a concerned public

gram -- BPA must act consistent with it (note 103 above), and the other federal agencies must take it into account "to the fullest extent practicable" (§ 4(h)(11)(A)(11)). The latter directive implies full compliance unless prohibited by specific statutory or regulatory requirements, see, e.g., 15 C.F.R. § 930.32 (NOAA regulations implementing the Coastal Zone Management Act), 40 C.F.R. § 1500.3 (Council on Environmental Quality regulations implementing NEPA).

111. § 4(h)(1)(A).

112. See Anadromous Fish Law Memo #17 (April 1982) at 4-5 and n.4.

113. Id. at 13.

on these issues during the forthcoming comment period will help the Council fashion a program that will achieve the Power and Conservation Act's objective of preserving and restoring the Columbia Basin's fish and wildlife resources.

**Fish and Wildlife Program  
Approval Schedule**

Mid-September	15	-	Public release of Proposed Program
October	12	-	Portland Hearing
October	15	-	Boise Hearing
October	18	-	Missoula Hearing
October	22	-	Seattle Hearing
October	25	-	Close of Public Comment Period
November	15	-	Final Program Promulgation

Further information can be obtained from the Council, Suite 200, 700 S.W. Taylor, Portland, OR 97205 (503) 222-5161.

**FISH LAW BRIEFS**

**State Department Says Columbia River Treaty Does Not Preclude Fish Flows**

Responding to a request by the Regional Council, the U.S. Department's Bureau of Oceans and International Environmental and Scientific Affairs has concluded that "use of Canadian Reservoir water for [anadromous fish flows] is not, in principle, precluded by the terms of the [Columbia River] Treaty."<sup>1</sup> As noted in this publication some time ago,<sup>2</sup> the State Department observes that the Treaty "contains no explicit prohibition against use of stored water for fish flows."<sup>3</sup> The opinion also states that "the benefits expected to be derived from water storage under the Treaty are by no means confined exclusively to power generation," and that "the possibility that water control mechanisms established under the Treaty could provide benefits to fish populations in the Region was clearly noted in the President's message transmitting the Treaty to the Senate and was specifically considered in hearings on the

1. Letter from Theodore G. Kronmiller, Deputy Assistant Secretary for Oceans and Fisheries Affairs to Regional Council Chairman Daniel J. Evans (July 30, 1982).

2. Anadromous Fish Law Memo #10 (Dec. 1980) at 2. See also Blumm, "Hydropower vs. Salmon: The Struggle of the Pacific Northwest's Anadromous Fish For a Peaceful Coexistence with the Columbia River Power System," 11 *Env't'l. L.* 211, 243-47 (1981).

3. State Dept. Letter, note 1 above, at 1.

Treaty before the Senate Foreign Relations Committee."<sup>4</sup>

Although there is nothing in the Treaty which precludes the use of Treaty projects to assist in supplying fish flows, the State Department cautions that this conclusion "should not, of course, be taken to imply that any particular proposed use of Columbia River Basin waters for fish flow purposes would necessarily be compatible with the Treaty ...."<sup>5</sup> The Department suggests deferring consideration of the compatibility of flows with the Treaty until the Council adopts specific flows in its 4(h) program, but also suggests that reservoir operations of Treaty projects might be a suitable item for consideration by the U.S. and Canadian delegations to the bilateral Pacific Salmon Interception Negotiations.<sup>6</sup>

The opinion suggests that the Treaty's "annual assured operating plans" supply the framework by which fish flows can be accommodated by existing Treaty procedures, but it fails to point out that these plans are not effective until 5 years in the future. Certainly in passing the Power and Conservation Act, Congress did not intend that adequate fish flows to be delayed a half decade. Consequently, there still remain important unresolved questions concerning the use of Treaty projects (which constitute half of the storage capacity in the Basin) for fish flows.<sup>8</sup> For example, the

4. Id.

5. Id. at 2.

6. Id. These negotiations concern Canadian interception of Columbia River Basin salmon.

7. See "Hydropower vs. Salmon," note 2 above, at 250-51. However, some adjustments in Treaty project operations have been made for fish flows in the past, albeit on ad hoc basis. The 1979 report of the Columbia River Treaty Permanent Engineering Board reports:

Streamflows have been manipulated for nonpower purposes such as accommodating construction in river channels and providing water to assist the downstream migration of juvenile fish in the United States. These arrangements supplement Treaty operating plans and have not created conflicts with operations under those plans. The effects have been beneficial in both countries in accordance with the intent of the Treaty.

See Wash. Dept. of Ecology, Fish and Wildlife Program Recommendations to the Regional Council, reprinted in Pacific Northwest Power Planning Council, Recommendations for Fish and Wildlife Program Under the Pacific Northwest Power Planning and Conservation Act, vol. III, at 15.

8. If fish flows would "in the view of either Canada or the United States ... depart substantially from the immediately preceding operating plan ... in order to be effective [the flows must] be confirmed by an exchange of notes between Canada and the United States of (con't.)"



U.S. representatives to the Treaty are the Bonneville Power Administrator and the Corps of Engineers' Division Engineer. Readers of this publication are well aware that in the past, BPA and the Corps have proved to be obstacles, not advocates for the establishment of adequate fish flows.

While the State Department opinion quashes long-standing power operator arguments that fish flows were foreclosed by the Treaty, the procedural hurdles that remain may be protracted. Thus, while alteration of Treaty project operations may supply greater system flexibility (by enabling reservoir drawdowns to be spread throughout all of the region's major storage projects), and higher levels of fish flows in the future, the Regional Council's 4(h) program may not be able to count on such changes during the 1983 downstream migration season. Unquestionably, the Council should not defer the flow issue pending Treaty procedures or attempt to assign responsibility for securing adequate flows to U.S. and Canadian negotiators.

**FERC Judge Orders Prototype  
Bypass Testing on Mid-Columbia;  
Orders Study On Interim Spill Levels**

In early August, Stephen Gressman, the Federal Energy Regulatory Commission's Administrative Law Judge (ALJ) presiding over the mid-Columbia Settlement Agreement, ordered the Public Utility Districts (PUDs) to immediately begin testing prototype bypass facilities on the 5 mid-Columbia dams licensed by FERC. The decision specifically rules out a proposed "short haul" artificial transportation system, which Grant County PUD urged as a substitute for bypass facilities at Priest Rapids and Wanapum Dams.<sup>9</sup>

The Washington Departments of Fisheries and Game, the Oregon Department of Fish and Wildlife, and the National Marine Fisheries Service opposed the "short haul" transportation concept, alleging that PUD estimates of benefits "are simply not borne out by the results of 15 years of transportation research."<sup>10</sup> As a result, the

America." Art. IV(1), Columbia River Treaty, 15 U.S.T. 1555, T.I.A.S. No. 5638 (1964).

9. A copy of the decision was unavailable at the time of this writing; a summary appears in 1 Northwest Conservation Act Report #17 (Aug. 20, 1982).

10. National Marine Fisheries Service et al., Comments on Licensees' Proposals for Studies and Procedures, FERC Docket No. E-9569 (Aug. 16, 1982) at 5. The fishery agencies concluded that "current research conducted at Oregon State University indicates that the length of the haul does not alter or affect fish survival, and therefore that short haul transportation does not have an improved prospective for success. Collection and handling, not the distance transported, is apparently the major factor which induces stress in transported (con't.)

fishery agencies concluded that the PUD's transportation proposals were not sound biologically<sup>11</sup> and instead urged FERC to order interim spills and the installation of bypass systems.

Although apparently both the fishery agencies and the PUDs agree that increased interim spills above the current 10% are necessary, the agencies want a 40% spill rate, while the PUDs suggest further monitoring of existing spills.<sup>12</sup> The ALJ determined that there was enough uncertainty over the benefits of various spill levels to warrant a report on this issue from a joint fishery agency/PUD Studies Committee by December 1.<sup>13</sup>

While this decision is a victory for fishery interests, it is not an unqualified one. First of all, the ruling is only an interim order, and it only requires prototype testing, not bypass installation. Second, the ALJ's decision may not reflect the sentiments of the FERC Commissioners, who will ultimately rule on any long-term remedial relief. FERC's recent decision to grant a new license to Chelan County for the Rock Island project indicates that the Commissioners are not yet ready to fully embrace the region's fish and wildlife goals.<sup>14</sup> Third, the issue of appropriate spill levels (necessary to supply downstream migrants with interim relief pending installation of effective bypass systems) remains unresolved, although it no longer seems possible to ignore giving serious consideration to the efficacy of alternative spill regimes.

Finally, while the decision indicates that PUD attempts to defer meaningful remedial action while awaiting the results of PUD-suggested studies will not invariably succeed,<sup>15</sup> the

smolts." Id. at 4. Notably, the fishery agencies do not oppose transportation studies in principle, but they apparently believe that any expansion of artificial transportation beyond the existing program on the lower Snake must be preceded by a resolution of the stress problem induced by collection and handling, since "ongoing transportation programs have been unsuccessful for salmon when adult returns are viewed as the measure of success." Id. at 4-5. This is because "even with some improvement over the years and with larger and larger numbers of spring chinook being transported, adult runs have continued to decline." Id. at 12.

11. The standard suggested by the agencies "is a program which can return numbers of adult fish sufficient to maintain a harvestable surplus, generation after generation, in a manner that does not jeopardize the genetic integrity of the populations." Id. at 5.

12. Id. at 7. The agencies estimate that 40% spill would provide approximately 95% survival rate at each dam, or 44% through the PUD system, about double the survival rate without spill. Id.

13. See 1 Northwest Conservation Act Report #17 (Aug. 20, 1982) at 2.

14. See text accompanying notes 28-42 below.

15. It should be noted, however, that (con't.)

viability of the 1980 Settlement Agreement remains uncertain. For example, it is not clear that the ALJ decision will terminate the PUD strategy of classifying certain issues as "policy" issues (e.g., the transportation issue) in an attempt to remove them from the purview of the Studies Committee (which the parties to the Settlement Agreement agreed to establish to resolve "technical" issues).<sup>16</sup> However, there are already indications that Judge Gressman's decision is prompting the Regional Council's staff to reevaluate their pliability to PUD-suggested studies, which some critics believe to be dilatory.<sup>17</sup> Thus, the decision's most

enduring result might be a stronger 4(h) program.

**Proposed Salmon River Drainage  
Dams Threaten Upriver Stocks**

Citing "an emerging but clear pattern of high intensity small hydroelectric development" that would "adversely affect existing anadromous fishery resources for the Salmon River Basin and significantly impede efforts to restore and rebuild those resources," the National Marine Fisheries Service (NMFS) has asked the Federal Energy Regulatory Commission to delay licensing approximately 30 proposed Salmon River drainage projects until their individual and cumulative impacts can be studied in systematic fashion.<sup>18</sup> Listing some 15 streams in the drainage that are threatened by hydroelectric projects,<sup>19</sup> NMFS specifically requests that (1) such projects be denied license exemptions under the terms of the 1980 Energy Security Act;<sup>20</sup> (2) FERC consolidate all proposed projects in the Salmon Basin into a single proceeding to resolve questions about cumulative effects on anadromous fish runs; (3) FERC require project developers to conduct, in consultation with fish and wildlife entities, studies of site specific and cumulative fish and wildlife impacts; (4) FERC prepare an environmental impact statement<sup>21</sup> evaluating the need for power and alternative means of producing it without adverse fish and wildlife effects (e.g., conservation and load management); and (5) FERC comply with the terms of the Power and Conservation Act by making written findings of equitable treatment for fish and wildlife and of how its

recalcitrance among the PUDs to undertake meaningful actions is not uniform. The fishery agencies report that "progress with Chelan County PUD has been especially promising; progress with Douglas County PUD has been encouraging; and progress with Grant County PUD has been elusive." Fishery Agency Comments, note 10 above, at 1-2.

16. Id. at 2:

The study-related items identified as 'policy' issues are actually technical, which have been discussed in the Studies Committee in the past. Such matters should remain within a technical forum such as the Studies Committee for resolution on a scientific basis with meaningful agency involvement. If such a forum as the Studies Committee is to continue, then both the Fishery Agencies and the PUDs should be committed to it.

It appears that the PUDs wish to have the best of both worlds. They are willing to have the Studies Committee address matters on which there is a general consensus with the Fishery Agencies. However, on technical matters where controversy may be anticipated, the PUDs prefer to handle the matter outside the Committee in order to avoid what they regard as an undesirable result. This 'fair weather' commitment to the Studies Committee is little commitment at all.

See also Anadromous Fish Law Memo #16 (Dec. 1980) at 15; #15 (Aug. 1981) at 17 [noting the interest of the PUDs to create alternative forums to reargue their cases].

17. The July 15 Draft of the Regional Council's Mid-Columbia Program would have sanctioned a "short haul" transportation demonstration study for Priest Rapids (to last until December 31, 1985) and relegated interim spills beyond the 10% committed to in the Settlement Agreement to the PUDs' "best efforts" to achieve results comparable to best available collection and bypass systems. Northwest Power Planning Council, Draft Columbia River Basin Fish and Wildlife Program, Mid-Columbia Passage Alternatives (July 15, 1981) § 303(c) and (d). In contrast, the September 1 Staff Draft would require a minimum 20% spill, although it would still sanction a short haul transportation study around Priest Rapids. Northwest Power Planning Council, Draft Fish and Wildlife Briefing Memo (con't.)

random (Sept. 1, 1982) at 12-13. See discussion accompanying notes 77-83, above.

18. National Marine Fisheries Service, Petition to Intervene and Motion for Consolidation and Other Relief in Federal Energy Regulatory Projects Nos. 5965, 3503, and 5865 (May 13, 1982) at 5,4.

19. Id. at 4.

20. Under this Act and FERC's implementing regulations, projects under 5 megawatts that use an existing non-federal dam or an "existing natural water feature" without the need for a dam or man-made impoundment qualify for a licensing exemption. 16 U.S.C. § 2708, 18 C.F.R. § 4.102(1). NMFS claims that because many of the proposed projects would divert flows, they cannot be considered to be using "natural water features." Moreover, the applicants have not consulted with fish and wildlife agencies, a prerequisite to an exemption. NMFS Petition, note 18 above, at 5-6.

21. The Council on Environmental Quality's regulations implementing the National Environmental Policy Act note that a single EIS may be employed to evaluate the cumulative effects of a number of actions occurring in the same general location, and that the cumulative impacts of closely related actions should be considered in one EIS. 40 C.F.R. §§ 1502.4(c)(1), 1508.25(a). See also id. §§ 1508.27 and 1508.7.

actions will take into account the 4(h) program.<sup>22</sup>

The NMFS petition asserts that although the fish runs of the Salmon River and its tributaries have been greatly diminished in recent years (due to domestic and agricultural pollution, mining, overgrazing, logging and road building), the Salmon River system remains "the mainstay of chinook salmon and steelhead trout production in Idaho."<sup>23</sup> As a result, NMFS asserts that it is imperative to evaluate the potential impacts of these developments on a system-wide basis. In the federal fisheries agency's opinion, consolidated review of the projects is essential in order to satisfy the "comprehensive plan" requirements of the Federal Power Act, as well as the requirements of the Fish and Wildlife Coordination Act and the National Environmental Policy Act.<sup>24</sup>

The Salmon River hydroelectric boom is actually part of a nationwide rush to small-scale hydropower, precipitated by the 1978 Public Utilities Regulatory Practices Act and the 1980 Windfall Oil Profits Tax Act. The former statute requires local utilities to purchase the electric output from such projects at the utilities' "avoided cost" (generally thermal plant costs, which are much higher than hydroelectric development costs), while the latter gives project developers a federal tax credit of 21% (a \$235 million subsidy in 1981).<sup>25</sup> Importantly, however, neither these Acts, nor the 1980 Energy Security Act, waives the applicability of fish and wildlife protective measures, such as those contained in the Fish and Wildlife Coordination Act and the Power and Conservation Act.<sup>26</sup> In fact, since terms and conditions

recommended by fish and wildlife agencies pursuant to Coordination Act consultation must be included in all license exemption granted by FERC,<sup>27</sup> it is clear that Congress intended to encourage hydroelectric development only where it is fully compatible with fish and wildlife protection.

### FERC Upholds Rock Island Dam License

On June 4, 1982, FERC denied an appeal filed by NMFS and the Yakima Indian Nation over issuance of a new 40-year license to the Chelan County Public Utility District for the continued operation and maintenance of the Rock Island Dam on the mid-Columbia.<sup>28</sup> NMFS and the Yakimas (petitioners) contended that FERC's May 13, 1981 decision to issue the new license failed to address their request for specific license provisions concerning installation of "best available technology" to protect downstream migrating anadromous fish and provide improved flows and spills.<sup>29</sup> They also alleged that FERC failed to comply with the requirements of the National Environmental Policy Act, the Power and Conservation Act, and Stevens Treaty fishing rights.

The FERC decision is a significant disappointment to regional fish and wildlife interests, calling into question FERC's willingness to take its fish and wildlife responsibilities seriously and underscoring again the imperative necessity for the Regional Council's 4(h) program to include a strong commitment to implementation.<sup>30</sup> FERC not only

not needing any dam or impoundment, the conferees expect the Federal Energy Regulatory Commission to insure that the use of such site for electrical power production will not have any adverse effect on natural water features at the site, including water flow and water level, or on fish and wildlife.

1980 U.S. Code Cong. & Ad. News at 3398, cited in NMFS Petition, note 9 above, at 10.

27. See 18 C.F.R. §§ 4.105-.106.

28. Federal Energy Regulatory Comm'n., Project No. 943-011 (Order on Appeal), 19 FERC ¶61,223 (June 4, 1982).

29. Although NMFS and the Yakimas originally made these requests in a September, 1978, petition to the FERC, fishery agencies have been attempting to convince Chelan County PUD to install downstream migrant facilities since 1971, when the utility began efforts to install a new powerhouse. More than 10 years later, and 8 years after securing FERC approval to proceed with the second powerhouse, NMFS reports "no identifiable progress" toward implementation of specific fishery protective mechanisms. See National Marine Fisheries Service et al., Petition Appealing Order Issuing New Major License (Sept. 4, 1981) at 3-5. (This petition amended an earlier July 10, 1981 position, summarized in Anadromous Fish Law Memo #15 (Sept. 1981) at 17-18.)

30. See, e.g., Anadromous Fish Law Memo (con't.)

22. NMFS Petition, note 18 above, at 9. On the requirements that the Power and Conservation Act imposes on FERC, see Anadromous Fish Law Memo #17 (April, 1982) at 22-23, #18 (May, 1982) at 11.

23. NMFS Petition, note 18 above, at 3. Adverse effects are especially severe in the Little Salmon River and the South Fork of the Salmon. Id.

24. Id. at 5.

25. See B. Warren, "Salmon River: Salmon Against Hydropower," in Issue 2 of Fishermen's News (June 1982) [supplying an overview of federal subsidy programs for small-scale hydropower and an evaluation of their effects in the salmon drainage]. The Northwest hydroelectric boom is illustrated by BPA's resource acquisition policy, which estimates 4,000 megawatts of "cost effective" small-scale hydropower to be available during the next 20 years. See 1 Northwest Conservation Act Report #16 (Aug. 6, 1982), at 4-5.

26. In fact, the Conference Report on the 1980 National Energy Security Act stated that "full compliance" with such protective measures was required before any license exemption under the Federal Power Act could be granted. The conferees further stated:

In considering a license application for a small hydroelectric project at a site (con't.)

rejected the petitioners' substantive claims, but also refused to allow the Washington Department of Fisheries and Game, the Oregon Department of Fish and Wildlife, and the National Wildlife Federation to join in the appeal.<sup>31</sup>

The petitioners' contended that the May 13, 1981, license -- issued without benefit of any hearings -- should be withdrawn because the accompanying order failed to explain why specific fish protection measures were not included in the license and because Chelan County PUD failed to file (and still has yet to file) a required fish and wildlife report (Exhibit S). FERC rejected these arguments, claiming that the proceedings under the 1980 interim mid-Columbia Settlement Agreement would supply "system-wide approach" rather than a "piecemeal approach" to anadromous fish protection,<sup>32</sup> and that issuing the license without an Exhibit S would not limit the options available to FERC.<sup>33</sup> FERC also rejected the petitioners' arguments that an EIS was required on the license decision, apparently on the grounds that "continuing" adverse impacts on the fisheries resource are not "significant" impacts with the meaning of NEPA.<sup>34</sup> This position is an extremely tenuous one<sup>35</sup> and, if

#17 (April 1982) at 22-23. Cf. Anadromous Fish Law Memo #16 (Dec. 1981) at 15 (PNUCC suggestion that the Regional Council defer to FERC regarding fisheries measures at FERC-licensed projects).

31. FERC claimed that these petitions were filed after the deadline for appeals passed. See FERC Order, note 28 above, at 1, nn.1 and 3. However, it should be noted that these appeals were filed within a time extension for which NMS successfully petitioned FERC. FERC seems willing to read its rules of practice extremely narrowly in order to deny participation by the states and the Wildlife Federation. The probable reason is to reduce the prospects of these entities to secure relief in the courts (NMS, a federal agency, cannot sue FERC, and if the courts deny relief to the states and the Wildlife Federation for failing to participate in the administrative proceedings, only the Yakimas will be able to judicially challenge the FERC action).

32. FERC Order, note 28 above, at 3. It will be interesting to see if FERC is as concerned about maintaining such a comprehensive approach concerning the Salmon River drainage. See preceding Fish Law "Brief."

33. FERC Order, note 28 above, at 4. However, FERC did require Chelan's Exhibit S to be filed by August, 1982, overruling an earlier decision that would have allowed a delay until May of 1984. Chelan has appealed this decision, seeking a reinstatement of the 1984 date. Federal Energy Regulatory Comm'n., Project 943, Licensee's Application for Rehearing (July 2, 1982) at 1-4.

34. FERC Order, note 28 above, at 4-5. As authority for this proposition, FERC cites a 10-year old appeals court case [Hanly v. Kleindienst 471 F.2d 823, 830 (2d Cir. 1972)], ignoring relevant 1978 CEQ regulations such as those described in the following note.

35. The CEQ regulations state that an (con't.)

it becomes standard FERC operating practice, may effectively curtail public involvement in all re-licensing decisions.

Concerning alleged failure to comply with the terms of the Power and Conservation Act, FERC stated that the mid-Columbia Settlement proceeding "is providing a forum to ensure that the fisheries resource receives appropriate treatment,"<sup>36</sup> and that the Act's fish and wildlife consultation requirements were satisfied by requesting comments on the application and supplying Federal Register notice.<sup>37</sup> FERC also refused to include an article in the license requiring compliance with the 4(h) program, concluding that "compliance with the [4(h) program] by projects licensed by this Commission is not mandatory."<sup>38</sup> FERC did, however, include an article reserving the right to re-examine the project after the 4(h) program is adopted.<sup>39</sup>

impact is "significant" (requiring the preparation of an EIS) "if it is reasonable to anticipate a cumulatively significant impact," and stipulate that "significance cannot be avoided by terming an action temporary or breaking it down into small component parts." 40 C.F.R. § 1508.27(b)(7). Cumulative impacts are defined by the regulations to mean "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions [and] can result from individually minor but collectively significant actions taking place over a period of time." Id. § 1508.27. Thus, not only are continuing impacts not exempted from NEPA review, but past and future impacts should be totaled when evaluating whether the action is "significant." Even if past impacts are limited to fish losses due to the operation of the Rock Island Dam since 1971 (when the agencies began seeking changes), coupled with reasonably anticipated losses over the 40-year license term, it is hard to see how the decision to issue the license will not result in significant impacts. FERC's suggestion that continuing fishery impacts can be separated out from the license decision (and considered only in the settlement proceedings) ignores both the CEQ regulations and FERC's own pronouncements about the necessity to make comprehensive evaluations. See note 32 above and accompanying text. FERC supplies no reason why the decision to issue the license could not have been deferred until all relevant fishery information was compiled.

36. FERC Order, note 28 above, at 5-6. Of course, the Power and Conservation Act does not require FERC to give fish and wildlife "appropriate" treatment; § 4(h)(11)(A)(i) of the Act mandates "equitable" treatment, which anticipates a specific result, not just a "forum" or a process. See Anadromous Fish Law Memo #17 (April 1982) at 22-23.

37. FERC Memo, note 28 above, at 6. Thus, FERC believes that § 4(h)(11) of the Act imposes no additional obligations on it, a conclusion that might not withstand judicial scrutiny.

38. Id. [citing § 4(h)(11)(A)(ii) of the Act]. (con't.)

Finally, FERC rejected the Yakima's contention that the license decision ignored its obligations under the Phase II decision of U.S. v. Washington<sup>40</sup> by noting that the Yakima reservation is outside of the jurisdiction of the Phase II ruling and claiming that the treaty rights issue will be resolved in the ongoing settlement proceedings.<sup>41</sup>

The Rock Island decision typifies the consistent success that project operators have had in convincing water managers to defer taking meaningful remedial actions pending completion of ever more elaborate and unnecessary studies. Despite the fact that the Power and Conservation Act was designed to overcome this scenario of studies without effective action, it should be recalled that the Regional Council is being urged (by both FERC licensees and BPA) to adopt this familiar position in its 4(h) program.<sup>42</sup>

Note: On August 2, 1982, FERC granted petitions for reconsideration of its Rock Island decision filed by both NMFS and Chelan County PUD. But by not granting petitions filed by the National Wildlife Federation and the Yakimas, FERC effectively denied them, which may prompt judicial challenges.

39. Id. Chelan has appealed this decision, requesting that any such reconsideration include an opportunity to contest any changes in project facilities or operations in a FERC hearing. See Chelan PUD Appeal, note 33 above, at 4-6. FERC concluded that including an article requiring compliance with the 4(h) program would be "imprudent" because neither the program nor the extent of the project's adverse fisheries impacts are known. Id. Apparently, however, these unknowns were not sufficient for the agency to defer issuing the license, which once again serves to illustrate the double standards that water managers consistently employ when considering power and fisheries questions.

40. 506 F. Supp. 187 (W.D. Wash. 1980); see, e.g., Anadromous Fish Law Memo #17 (April 1982), at 19-21 and sources cited therein.

41. FERC Order, note 19 above, at 6-7. It should be noted that the Yakimas were parties to the Phase II decision.

42. See Anadromous Fish Law Memo #16 (Dec. 1981), at 12-15.

### Washington DOE Proposes To Diminish Instream Flow Program

On July 9, 1982, the Washington State Department of Ecology proposed changes to its Columbia River Instream Resources Protection Program that, if adopted, would reduce the effects of the program on future irrigation diversions. The alleged purpose of the proposed changes is to improve the enforcement capabilities of the program. It would accomplish this purpose by reducing the program's reach, thereby facilitating irrigation scheduling and construction of new water projects. Apparently, project proponents have found difficulties maintaining irrigation schedules and financing projects under the existing program, allegedly due to the uncertainties created by "off-again, on-again regulation."<sup>43</sup>

The proposed amendments are designed to ameliorate such difficulties by (1) expressly exempting from the program those waters withdrawn for the second half of the Columbia Basin irrigation project;<sup>44</sup> (2) exempting the first 8,000 cubic feet per second (cfs) of consumptive water rights under the program from regulation, except in years when the March 1 forecasted runoff at The Dalles is less than 60 million acre-feet (MAF) (approximately 1 year in 20);<sup>45</sup> (3) exempting water rights issued in excess of the initial 8,000 cfs when the forecasted runoff is greater than 88 million acre-feet (approximately 1 year in 2);<sup>46</sup> (4) changing the program's minimum average daily flows to minimum average weekly flows;<sup>47</sup> (5) exempting out-of-stream diversions from the program's instantaneous flow requirements (instantaneous flows would remain applicable to dam operators);<sup>48</sup> and (6) suspending

43. See Memorandum from Washington Dept. of Ecology Director Donald Moos (July 9, 1982) [describing proposed changes to W.A.C. chapter 173-563]. The Washington Instream Resources Protection Program is one of the recommendations pending before the Regional Council. See Northwest Power Planning Council, Recommendations for the Fish and Wildlife Program, vol. III (Dec. 1981), summarized in Anadromous Fish Law Memo #16 (Dec. 1981) at 11-12.

44. Proposed W.A.C. § 173-563-020(5). The exemption was promised in the 1980 final EIS and program document, but was not written into the regulations.

45. Proposed W.A.C. § 173-563-056(1). The March 1 forecast is for the period of April-September, as published by the National Weather Service. These restrictions will be confirmed when BPA's 30-day Power Operation Plan predicts flows of less than 60 MAF. Where predicted flows are greater than 60 but less than 88 million acre-feet, DOE will "encourage voluntary water conservation." Id.

46. Proposed W.A.C. § 173-563-056(2).

47. Proposed W.A.C. § 173-563-040. This proposed change was first signalled in DOE's 4(h) Recommendations, note 43 above, at 11. (cont.)



enforcement of program requirements where the Columbia borders Oregon until Oregon adopts similar requirements.<sup>48</sup>

A number of questions are raised by the DOE proposal, which apparently is designed to "improve enforcement" by insulating irrigation diversions<sup>50</sup> from the reach of the program in all but critical water years. First of all, the "on-again, off-again" regulation of water diversions is caused not by fisheries requirements, but by the alleged inability of the program to affect hydroelectric project operations.<sup>51</sup> Rather than attempt to enforce the program's requirements against hydropower operators,<sup>52</sup> DOE seems willing to impose the costs of the uncertainties concerning the program's jurisdictional authority on the fisheries resource.

Second, regardless of the ultimate wisdom of the proposed changes, DOE offers little support for its conclusion that the economic and environmental impacts of the proposed changes are "minimal" and, therefore, no new or supplemental environmental impact statement is required. The effect of the changes may well indeed be minimal, but this conclusion is not supported by the administrative record compiled by DOE.<sup>53</sup> Until DOE can demonstrate that no

significant impacts will result, it should employ the same rigorous process of public involvement (including preparation of an EIS) it followed in approving the existing regulation.<sup>54</sup>

An EIS on the proposed changes would require DOE to evaluate alternative means of stretching its limited enforcement resources, while maintaining effective fish flows. It would also serve to refocus public attention on the program, which has been diverted by the pendency of the Regional Council's 4(h) program. And it might induce DOE to explain why it has not been able to enforce its program against the federally-owned and licensed dams, whose operations are the cause of the streamflow fluctuations that are hampering the program's implementation.

Finally, it is not at all clear, given DOE's admitted lack of information concerning hydroelectric impacts and its failure to address the fisheries implications of its proposed exemptions,<sup>55</sup> why any DOE program changes should not

exemptions in W.A.C. § 173-563-056(1) [see text accompanying note 45] and (2) [see text accompanying note 46]. The only reason supplied for exempting the first 8,000 cfs. diverted under the program from regulation unless forecasted flows are below 60 MAF is "this, in conjunction with the already exempt second half of the Columbia Basin project, should cover [i.e., exempt] irrigation development for some time to come." Wash. Dept. of Ecology, Summary of Proposed Revisions to Chapter 173-563 W.A.C. (June, 1982), at 3. For a study arguing that the real costs furthering irrigation development in the Columbia Basin far exceeds its benefits, see Whittlesey, "Irrigation Development in the Pacific Northwest: A Mixed Blessing," 10 *Env't. L.* 315 (1980).

<sup>54</sup> DOE spent two years developing the program, including numerous meetings with federal and state agencies and interest groups, two draft program documents and two draft EISs, and five public hearings. See Wash. DOE 4(h) Recommendations, note 43 above, at 9. Three public hearings were held on the proposed changes, but apparently aroused little public attention, undoubtedly due in part to public preoccupation with the Regional Council's pending 4(h) program.

<sup>55</sup> See Wash. DOE Summary of Proposed Revisions, accompanying note 43 above, at 4:

It may be noted that whatever we might say about electric energy impacts at this time would be quite tentative in any case, pending development of the Northwest Power Planning Council's Fish and Wildlife Program and revisions which we may see fit to make to [the instream flow program] in response thereto. The same can be said with respect to fisheries.

It should also be observed that DOE proposes to delete, without explanation, the following language in existing W.A.C. § 173-563-060(1):

(con't.)

48. Proposed W.A.C. § 173-563-040.

49. Proposed W.A.C. § 173-563-140. The Oregon Water Policy Review Board is presently considering a program for the mainstem Columbia which might satisfy this requirement. See following Fish Law "Brief."

50. It is possible, however, that the proposed revisions might ultimately benefit Washington Water Power (WWP) Company's proposed Creston Coal Plant, which seeks approximately 24,000 acre-feet of water per year for its operations. WWP is attempting to purchase this water from the Bureau of Reclamation, which holds a variety of rights to water stored behind the Grand Coulee Dam in Roosevelt Lake, dating from 1938. If WWP can assume this 1938 priority date, operation of the Creston Plant would be immune from any requirements established by the 1980 DOE minimum flows. While DOE has argued to the Washington Energy Facility Site Evaluation Council that WWP cannot thus exempt itself from the instream flow program, the effect of the proposed changes in the program may be to make any WWP diversions from the Columbia more dependable, clearly a goal of the utility. See, e.g., Washington Water Power Co., Creston Generating Station, Application No. 80-1 Before the Washington Energy Facility Site Evaluation Council Memorandum of the Dept. of Ecology. (Jan. 8, 1982); see also prefiled testimony of Eugene Wallace.

51. See Wash. DOE 4(h) Recommendations, note 43 above, at 8, 10-11.

52. For an argument that the Washington program is enforceable against federally-owned and federally-licensed water projects, despite project operators' claims of federal preemption, see "Hydropower vs. Salmon," note 2 above, at 290-95.

53. For example, DOE makes no attempt to estimate the fisheries effects of its proposed (con't.)

be deferred until after the Regional Council adopts its 4(h) program, particularly since DOE earlier indicated that would delay implementation of its program until the Council acted.<sup>56</sup> It should be recalled that whatever the jurisdictional limitations on the Instream Flow Program regarding dam operations may be, the state program offers an essential complement to the 4(h) program through its regulation over out-of-stream diversions -- authority which the Regional Council lacks.<sup>57</sup> Those wishing to comment on the proposed changes should immediately write: Department of Ecology, Mail Stop PV-11, Olympia, Washington 98504, Attn: Jim Bucknell.

### Oregon Considers Mainstem Columbia Program

On September 16, the Oregon Water Policy Review held a hearing on a proposed administrative rule that would establish state policies for the use, control, and development on the mainstem Columbia River. Projecting a 400% increase in the state's population by the year 2070, to nearly 9 million, the Board estimates that nearly 30 million acre-feet (MAF) of direct diversions from the mainstem will be necessary to satisfy Oregon's long-range requirements.<sup>58</sup> As a result, the draft program statement would claim 30 MAF annually of mainstem flows for specified consumptive uses<sup>59</sup> in the state and would attempt to prohibit out-of-state appropriations.<sup>60</sup> Although the draft findings acknowledge the regional, national and international importance of the Columbia's anadromous fish runs,<sup>61</sup> and the draft program

The department does acknowledge, and is concerned that, cumulatively, the projected future diversions may, under certain circumstances, have a detrimental effect on instream values.

56. See Wash. DOE 4(h) Recommendations, note 43 above, at 12.

57. See § 10(h) of the Power and Conservation Act.

58. Oregon Water Policy Review Board, Draft Findings For Columbia River Program #11, 15 (no date).

59. I.e., domestic, livestock, municipal, industrial, agricultural use, recreation, irrigation, and fish life. State Water Resources Control Board, Draft Columbia River Program Statement, §§ A and B. Apparently, "fish life" does not include instream flows, just diversions for hatcheries, etc.

60. Id. at § E. The constitutionality of this provision is highly suspect in the wake of the Supreme Court's recent decision in *Sporhase v. Nebraska*, 102 S. Ct. 3456 (1982) [Nebraska groundwater statute requiring reciprocity agreements with other states before allowing groundwater diversions for out-of-state uses declared to be an impermissible burden on interstate commerce].

61. Draft Findings, note 58 above, #28-30.

statement declares peak power operations at hydropower facilities causing reservoir fluctuation that interfere with other beneficial uses of water to be "prejudicial to the public interest,"<sup>62</sup> the proposed program would not establish instream fish flows.<sup>63</sup> However, two alternatives under consideration would establish minimum flow requirements at The Dalles Dam. The second of these alternatives parallels the recommendations of the region's fish and wildlife agencies to the Regional Council;<sup>64</sup> the first alternative suggests lower flows during the period July 16-October 1.<sup>65</sup> No explanation or justification of the relationship of the proposal or the alternatives to the recommendations under consideration by the Council is supplied by the Board.

The draft program once again underscores the need for the cooperation of the region's states if the goals of the 4(h) program are to be achieved. Only the states have the authority to protect streamflows from out-of-stream diversions. Fish and wildlife advocates should support Alternative 2, which is consistent with the position of the Oregon Department of Fish and Wildlife before the Regional Council.<sup>66</sup> Those wishing to comment on the proposed program should contact the Oregon Water Resources Department, 555 13th St., N.E., Salem, Oregon 97310 (800-452-7813).

62. Draft Program Statement, note 59 above, at § D.

63. Id. § C [stating only that "maintenance of instream flows of the Columbia River sufficient to support aquatic life, navigation, and recreation are declared to be in the public interest"].

64. Compare Alternative 2, § C with Fishery Agency 4(h) Recommendations, reprinted in Northwest Power Planning Council Recommendations for Fish and Wildlife Program Under the Pacific Northwest Power Planning and Conservation Act, vol. I, at 180 (Nov. 1981). This alternative would claim only 24.4 MAF, not 30 MAF, annually for consumptive uses. Id. § B.

65. Alternative 1, § C. Summer and fall chinook migration may suffer under these suggested flows.

66. Actually, since Alternative 2 suggests "perennial" flows, it may be more protective than the average weekly flows recommended to the Regional Council.

### Recent Publications and Reports

1. Northwest Resource Information Center, Cogeneration of Electric Energy & Anadromous Salmon & Steelhead in the Upper Columbia Basin: An Economic Perspective on the Question of Balance (June, 1982). [An overview of the origins and implications of major economic issues underlying the present conflict between hydropower and anadromous fish; focuses on the effect of past decisionmaking and suggests past approaches must be discarded if the Northwest is to accurately evaluate and reap the economic benefits of both hydroelectricity and anadromous fish.] Available from Northwest Resource Information Center, Inc., P.O. Box 427, Eagle, Idaho 83616.
2. Biosystems Analysis, A Comparative Analysis of Anadromous Salmoid Stocks and Possible Cause for Their Population Decline in Selected Watersheds of the Eastern Pacific Coast (June 30, 1982). [Surveys chinook populations in Sacramento, Trinity, Klamath, Rogue, Columbia, Fraser, and Southeast Alaska River Basins; concludes that the upper Basin Columbia River chinook decline after 1953 was caused primarily by dams, and that the pre-1953 decline due to overfishing was probably reversible, with limitations placed on ocean harvest]. Available from Northwest Power Planning Council, Suite 200, 700 S.W. Taylor St., Portland, Oregon 97205.
3. Kramer, Chin, and Mayo, Evaluation of Cost of Implementation of Fish and Wildlife Recommendations (June 15, 1982) [Contractor's report to the Regional Council regarding the estimated costs of implementing the Fish and Wildlife Program mitigation measures; concludes that fish and wildlife agency 20-year estimates of \$637 million (\$546 million for anadromous fish; \$58 million for wildlife; \$22 million for resident fish) to be fairly accurate, except that hatchery construction, operation, and maintenance were underbudgeted by about \$80 million; average annual expenditures over 20 years would be in the neighborhood of \$35 million annually<sup>67</sup> (not including alleged hydropower losses). Available from Regional Council at above address.
4. Northwest Power Planning Council, Summary of Key Testimony Before the Northwest Power Planning Council on the Proposed Fish and Wildlife Program (May 7, 1982). Available from Regional Council at above address.
5. Northwest Power Planning Council, Second Annual Report of the Council to Congress (Draft) (July 1, 1982). [Describes Council activity, including that concerning the Fish and Wildlife Program, during the past year.] Available from the Council at the above address.
6. Nero and Associates, Proposed Stepwise Process and Recommended Quantification Methods for Methodology for Quantifying Environmental Costs and Benefits (Working Paper) (July 14, 1982). [Contractor's report to Regional Council to assist the Council in developing this methodology, an essential component of the definition of "cost effective," which is the principal test for resources acquisition under the Power and Conservation Act.] Available from the Council at the above address.
7. National Wildlife Federation, Statistics on Low Head Hydro Development (July 30, 1982) [statistics on FERC applications for licenses, permits and exemptions under the Federal Power Act during the first quarter of 1982]. Available from the National Wildlife Federation, 1412 Sixteenth St., N.W., Washington, D.C. 20036.
8. Bonneville Power Administration, Proposed Near-Term Resource Policy (July 13, 1982) [proposed policy to guide BPA resource acquisitions, including conservation programs, small-scale hydropower and other renewable resources, and other generating resources; would require programs and projects to have an average project-life cost of approximately 35 mills per kilowatt hour or less in 1982 dollars]. Available from BPA Public Involvement Office, P.O. Box 12999, Portland, OR 97212.
9. Bonneville Power Administration, Notice of Program Interest, Development of Conservation and Direct Application of Renewable Resource Technologies (no date) [establishing procedures and criteria for proposals from utilities and direct industrial service customers]. Available from BPA, Division of Materials and Procurement, P.O. Box 3621, Portland, OR 97208.

67. These costs amount to about 10% of the estimated fisheries costs of maintaining current operating practices. See Anadromous Fish Law Memo #18 (May, 1982) at 9.

10. Bonneville Power Administration, Proposed Billing Credits Policy and Environmental Assessment (June, 1982) and Staff Evaluation of the Official Record of the Proposed Billing Credits Policy (Aug. 1982) [program supplying subsidies for qualifying conservation programs, generating resources, and retail rate structures developed by BPA customers]. Available from BPA, Public Involvement Office, P.O. Box 12999, Portland, OR 97212.
11. Bonneville Power Administration, Environmental Assessment on Amendments to Power Sale Contracts (Aug. 1981) [assessment of impacts of changes to contracts necessary to settle lawsuits; concludes that there are no significant environmental impacts]. Available from BPA at the above address.
12. Puget Sound Council of Governments, King Subregional Council, Water Resources Committee, A Background Paper on Water Resources Issues in the Central Puget Sound Region (June 3, 1982). [Identifies numerous water supply policy questions affecting federal, state, and local water resources programs as well as specific water supply projects in the Central Puget Sound Region.] Available from Puget Sound Council of Governments, 216 First Ave. South, Seattle, Washington 98104.



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