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**Jeffery C. Allen**  
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Idaho

**Ed Schriever**  
Idaho

**Doug Grob**  
Montana

**Mike Milburn**  
Montana



## Northwest **Power** and **Conservation** Council

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Oregon

October 1, 2024

**TO: Council Members**

**FROM: Patty O'Toole, Fish and Wildlife Division Director**  
**John Shurts, General Counsel**

**SUBJECT: Briefing on Northwest Power Act framework for a Fish and Wildlife Program amendment process (Part 2): Broader context for the Council's work, including ESA requirements and the impact of long-term implementation agreements**

In September staff provided a detailed briefing on the framework and requirements in the Northwest Power Act for a Fish and Wildlife Program amendment process. In October staff will bring the second part of that briefing. We will discuss the broader policy and legal context for the Council's work on the program, including how to understand and integrate ESA requirements and decisions, such as Biological Opinions; long-term implementation agreements, such as the Columbia Basin Fish Accords; and non-program production obligations and activities, such as in the Mitchell Act and the Lower Snake River Compensation Plan.

Similar to last month we would like to make this as interactive and informal as possible. So please come prepared with questions and comments, and ask them freely during the conversation, and also feel free to take the conversation in whatever direction you find useful during the time.

What follows is a detailed outline of the discussion we will have regarding the broader context for the Council's work on the Program.

We will present the information via slides during the meeting. The slide presentation will follow the same organization and content as the outline.

**Outline for briefing on Northwest Power Act framework for a Fish and Wildlife Program amendment process (Part 2): Broader context for the Council's work, including ESA requirements and the impact of long-term implementation agreements**

1. Reminder: Northwest Power Act/Fish and Wildlife Program legal framework
  - a. Council and the Columbia River Basin Fish and Wildlife Program
  - b. Bonneville and other federal agencies' responsibilities, authority and relationship to the Council's Fish and Wildlife Program under the Northwest Power Act
2. Pre-Power Act mitigation obligations and related matters – how integrated into Power Act/Program context – mostly involving Columbia River Basin artificial production
  - a. Pre-Power Act mitigation obligations
  - b. Implications for Power Act/Fish and Wildlife Program
  - c. *US v Oregon*: Columbia River Fish Management Plan
  - d. Artificial production generally and the program over time
3. Endangered Species Act listings and actions and how handled and integrated in the Fish and Wildlife Program
  - a. Listings
  - b. General concept
  - c. Biological Opinions and system operations and dam modifications
  - d. Biological Opinions and offsite mitigation, especially tributary and estuary habitat improvements
  - e. Biological Opinions generally
  - f. Recovery planning/recovery plans
4. Columbia Basin Fish Accords and other multi-year implementation commitments
  - a. Multi-year implementation commitments in general
  - b. Columbia Basin Fish Accords
  - c. Other long-term implementation agreements
  - d. 2023 implementation agreements
5. Federal Energy Regulatory Commission, the Federal Power Act, and the licensing of non-federal dams
6. Project purposes and operational requirements

## 1. Reminder: Northwest Power Act/Fish and Wildlife Program legal framework

### a. Council and the Columbia River Basin Fish and Wildlife Program

- Develop a program to protect, mitigate and enhance fish and wildlife affected by development and operation of the Columbia hydroelectric facilities (Section 4h)
- All fish and wildlife affected by the hydrosystem, not just listed species, but including listed species.
- All hydroelectric facilities in the Columbia basin, not just federal.
- Program to address only the *impacts of the hydrosystem* on fish and wildlife, not all human impacts. BUT, Act allows program to include offsite mitigation measures – such as tributary enhancements - reducing the impacts of other human activities in order to compensate for survival impacts of hydrosystem. Nexus is the impacts to the target species by the hydrosystem.
- Northwest Power Act's goal is “protection” and “mitigation” and “enhancement” —not fully defined but not synonymous with goals in other laws, such as ESA (avoid jeopardy; delist; recovery)
- Not a regulatory program -- a protection and mitigation program to be implemented using the funds and authorities of federal agencies

### b. Bonneville and other federal agencies' responsibilities, authority and relationship to the Council's Fish and Wildlife Program under the Northwest Power Act

- Bonneville's obligation and authority with regard to fish and wildlife is also in the Northwest Power Act, in Section 4(h)(10)(A): Bonneville is to use its fund and other authorities to protect, mitigate and enhance fish and wildlife affected by hydrosystem “in a manner consistent with” the Council's Fish and Wildlife Program
- Council's program is thus a program of substantive objectives and measures that Bonneville has to act consistent with as it implements its obligation and authority under the Northwest Power Act to spend money and do good things for fish and wildlife.
- Per Section 4(h)(11)(A)(ii), all federal agencies responsible for managing, operating, or regulating federal or non-Federal hydroelectric facilities (Corps of Engineers, Bureau of Reclamation, and FERC), as well as Bonneville) are to “exercise such responsibilities, taking into account at each relevant stage of decisionmaking processes to the fullest

extent practicable, the program adopted by the Council.” Given that Bonneville has the separate “consistency” obligation in Section 4(h)(10), this provision has the most meaning for the other three agencies. Not a new grant of authority – a responsibility to take the program into account as exercise existing authorities. The Council’s Program is to be a serious consideration for these federal agencies as they consider and decide how to exercise the authorities found in other laws that relate to these Columbia hydroprojects. This includes project authorizations to the Corps and Bureau to operate projects for multiple purposes (hydropower, flood control, navigation, irrigation, recreation, fish and wildlife), FERC’s authority to license non-federal projects under the Federal Power Act, and then also the existing authorities and obligations of these agencies to take actions to address the effects of those projects on fish and wildlife.

- These same federal agencies have a separate obligation in Section 4h(11)(A)(i) to exercise their responsibilities in a way that provides “equitable treatment” for fish and wildlife along with other responsibilities such as power generation, navigation, flood control, irrigation. Ninth Circuit has said that one aspect of such equitable treatment is to implement the Council’s Fish and Wildlife Program.

## **2. Pre-Power Act mitigation obligations and related matters – how integrated into Power Act/Program context – mostly involving Columbia basin artificial production**

### **a. Pre-Power Act mitigation obligations**

- Mitchell Act. Originally passed in 1938 to advance the conservation of salmon and steelhead resources in the basin. Ongoing congressional appropriations. Mostly hatcheries – significant percentage of basin production – also some screening and passage improvements. NOAA administers; much of it ODFW/WDFW operated, mostly but not only in lower part of basin. No costs reimbursed by Bonneville.
- Hatcheries linked as mitigation to specific dams. E.g., Spring Creek hatchery in Bonneville pool as mitigation for John Day dam impacts. Again, mostly lower river, but also Leavenworth Hatchery in Washington as mitigation for Grand Coulee. Originally funded through Corps (or Bureau); operated mostly by FWS in cooperation with states and tribes; federal managers; Bonneville “reimburses” o&m (direct funded now).
- Lower Snake River Compensation Plan. Cooperative hatchery program authorized by Congress in 1970s as mitigation for Snake River dams. Corps funding for construction; program and facilities largely managed by FWS, with state and tribal active operation and cooperation. Operating costs “reimbursed” (now direct funded) by Bonneville.

### **b. Implications for Power Act/Program**

- Northwest Power Act/Fish and Wildlife Program is intended to be comprehensive protection and mitigation program for hydrosystem development and operations, that is to be *additive* to existing mitigation programs. Not take over, not supplant, not replace (in lieu provision). Program is also to involve operations and habitat improvements, not just production, although production also part of mitigation. Adds a new explicit comprehensive mitigation obligation to Bonneville’s statutory responsibilities too; for other dam agencies, provides direction on how to use existing authorities.
- Implications. Recognition of preexisting mitigation obligation and activities. Conceptual addition of mitigation in a comprehensive fashion. Some integration of activities while also maintaining separation – Mitchell Act; LSRCF.

### **c. *US v Oregon*: Columbia River Fish Management Plan**

- Treaty fishing rights on the Columbia ongoing litigation. Pre-Power Act working through the federal/state/tribal relationship on especially harvest management.

- Not long after the Power Act, in late 1980s, negotiated and agreed to the Columbia River Fish Management Plan. First in a series. Cooperative management of harvest, but also commitments to bring production upstream, above Bonneville Dam. Commitments, but no money – existing programs (Mitchell Act/LSRCP/etc.) became a source, but so did the Council’s Fish and Wildlife Program, in a big way. Most of the salmon production programs/projects in the Council’s Fish and Wildlife Program share this origin, as recommendations to the Council in a program amendment process. Might have come anyway independently of this context, but the context focuses the commitments and needs.

**d. Artificial production generally and the program over time**

- 30+ year effort to see Columbia production in a collective or coordinated or integrated light, while also maintaining legal distinctions. Just gets even more complicated with ESA.
- Council has often been asked to help look at production in the basin in a more comprehensive way than just program hatcheries. E.g., direction of Congress in late 1990s for a comprehensive look at artificial production in Columbia basin, became the Artificial Production Review report in 1999, and the APRE evaluation efforts in 2000s. E.g., the Congressional direction to use the science panel to look at Bonneville’s reimbursable programs, including the LSRCP. E.g., Council support for the Hatchery Scientific Review Group (HSRG)’s work in 2000/2010s. Program’s provisions on artificial propagation are largely an outgrowth of the combination of these overarching review efforts and the particular recommendations of the states and tribes for production in their management areas.

### **3. Endangered Species Act listings and actions and how handled and integrated in the Fish and Wildlife Program**

#### **a. Listings**

- First salmon listings in Snake in early 1990s. By end of 1990s, most of the salmon and steelhead listings had occurred, although lower Columbia coho in 2000s.
- Important populations *not* listed: middle Columbia spring chinook; Columbia upriver fall chinook (Hanford Reach); upper Columbia summer chinook; upper Columbia sockeye
- Kootenai River white sturgeon also listed (but not sturgeon in lower and upper Columbia and in Snake) as well as bull trout
- With listings come section 7 consultations for federal actions and associated Biological Opinions; ESA permit reviews for non-federal actions; recovery planning and recovery plans; species reviews

#### **b. General concept**

- Regulatory overlay over existing authorities. ESA is *not* a separate source of authority to take actions to benefit listed fish and wildlife. Instead, ESA is a regulatory overlay directing agencies how to use their existing authorities in the event their actions under those authorities might or will affect listed species. Via Section 7 consultation process; avoid jeopardizing the continued existence of listed species, recovery plan implementation, etc.
- It is precisely the explicit authority and obligations the federal agencies have (especially Bonneville) under the Northwest Power Act and their other existing authorities to protect and mitigate fish and wildlife affected by the dams that form the basis for an integrated program intended to be consistent with the Northwest Power Act as well as meet ESA requirements. ESA thus is in essence a regulatory overlay over the implementation of the Council's F&W Program under the Northwest Power Act.
- Bonneville. Starting with Bonneville -- as noted above, Section 4(h)(10)(A) of the Northwest Power Act directs Bonneville to use its fund and other authorities to protect, mitigate and enhance fish and wildlife. Other provisions in the Bonneville Project Act, Transmission System Act, Northwest Power Act, etc., direct Bonneville how to do other things, such as sell power, transmit power, acquire resources, contract, etc. ESA is a regulatory overlay on how Bonneville is to use those authorities when Bonneville's actions under those authorities might affect listed species, guiding or directing

Bonneville how to use those authorities to avoid jeopardizing and promote recovery of listed species.

- Thus, when Bonneville spends money on an action to protect, mitigate or enhance listed fish and wildlife affected by the hydrosystem, this is an event under Section 4(h)(10)(A) of the Northwest Power Act. But Bonneville must also take that action in a way that is consistent with ESA requirements (from ESA) *and* “in a manner consistent with” the Council’s Fish and Wildlife Program (directly from Section 4(h)(10)(A)).
- Comply with both laws; integrated. Neither law or obligation is superior over the other -  
- Bonneville is to comply with all the laws that apply to how it uses its fund and authorities when it uses its fund and authorities.
- Non-listed species. For the other fish and wildlife species and population segments that are adversely affected by the hydrosystem -- including those that are sufficiently robust not to be listed and those that were important but have been completely eliminated from large portions of their range by development of the hydrosystem (i.e., in the blocked areas) -- the Council includes in the program protection, mitigation and enhancement measures and objectives to address those effects. As required by Section 4(h)(10)(A), Bonneville is to use its fund and other authorities to address those effects in a manner consistent with the Program. Even with regard to the listed species, Bonneville has the responsibility to protect and mitigate listed species *beyond* the requirements of the ESA *if and when* the Program identifies such protection and mitigation measures and objectives.
- In practice. What does all this mean in practice? Bonneville is acting under Section 4(h)(10)(A) to implement an “integrated” program, integrated in the sense that it satisfies Bonneville’s obligations under the Northwest Power Act to protect, mitigate and enhance fish and wildlife in a manner consistent with the Council’s Fish and Wildlife Program while also satisfying the regulatory requirements of the ESA.
- Compliance with ESA not the Council’s mission, but.... Compliance with ESA is not a direct legal obligation of the Council in crafting the Fish and Wildlife Program, and the Council does not analyze Program measures as to whether they satisfy the ESA nor adopt the conclusions of others about ESA sufficiency. But the Council develops its program with an awareness that compliance with ESA is a legal obligation of Bonneville and the other federal agencies. And so it behooves the Council to develop the program in recognition of the ESA requirements and help the agencies satisfy those ESA needs. The Council’s regional protection and mitigation program (consisting of both mainstem and off-site protection and mitigation measures) is and has been the primary source of measures to be analyzed, shaped, and re-sized through the ESA analysis to also comply



with ESA. The BiOps and recovery plans for Columbia fish and wildlife affected by the hydrosystem is built are the 30+-year foundation of mainstem and off-site protection and mitigation measures developed through the Council's program.

- To extent the actions funded and implemented for a listed species are sufficient to comply with the ESA and remove a species from the protection of ESA, the Council and Bonneville and other agencies still have that continued obligation to implement actions to protect and mitigate for the effects of the hydrosystem, along with other non-listed species
- Corps, Bureau and FERC. The actions of the Corps and Bureau and FERC are governed by similar concepts, in this way: These agencies take actions under their various governing authorities, and in doing so must exercise those existing authorities in a way that is both consistent with the requirements of the ESA and with the requirements of Section 4(h)(11) of the Northwest Power Act. The legal link of these decisions to the Council's Fish and Wildlife Program may be something less than the "consistency" requirement that applies to Bonneville under Section 4(h)(10)(A), but the standard is not insignificant legally. This requirement does not change just because the relevant species is listed and the agency also has ESA requirements to satisfy. The practical reality again has been the need to build a mainstem, estuary and tributary program that can be the source material or foundation for federal agencies to draw from to satisfy both the ESA and Northwest Power Act requirements, for listed and non-listed species. This has meant work by the federal agencies to harmonize actions that affect both listed and non-listed species as much as possible.

**c. Biological Opinions and system operations and dam modifications**

- In 1980s and 90s, Fish and Wildlife Program built up a significant foundation of operations and dam modifications to improve conditions for juvenile and adult migrants through the hydrosystem – flow requirements, reservoir releases, passage methods and improvements, passage objectives, etc.
- Section 7 consultations starting in 1990s swept these hydrosystem measures into the Biological Opinions, as actions analyzed and as reasonable and prudent alternatives. Categories were the same; amounts ratcheted up. Litigation eventually (by the mid 2000s) took one element – spill - and ratcheted up even further.
- Council, in 2003 mainstem amendments, faced the question of what to do with the fact that Biological Opinions included a robust set of system operations and passage modifications, actions recommended back to the Council as program measures. Council decided to just recognize and point to these actions as the baseline hydrosystem measures

for the program, and not write them all out again in the program. Same for hydrosystem “performance standards” in the BiOps that are also Fish and Wildlife Program objectives, such as passage survival standards and flow objectives. Same for operations for listed Kootenai white sturgeon at Libby, including the spring pulse flows.

- This did *not* mean the Council “adopted the BiOp,” nor accepted the ESA analysis of these and other measures – that was for the ESA agencies, and was a contested analysis now in front of the court. What the Council accepted was that these were just also measures and objectives that formed the baseline for protection measures under the NW Power Act, actions and objectives that came to the Council as recommendations in a program amendment process.
- The Council then focused on making sure the program also contained measures and objectives to address effects on important non-listed anadromous and resident fish species too. And to make sure to call out to the feds that these are of equal priority under the Northwest Power Act and the Council’s Fish and Wildlife Program to be implemented with the measures to address listed species. E.g., Vernita Bar flow requirements to protect spawning and rearing for Hanford reach spring chinook; operations and improved survival for middle Columbia spring chinook and Upper Columbia summer chinook and sockeye; integrated rules curve operations at Libby and Hungry Horse developed by upriver tribes and states. Story of the “Montana amendments” or “Montana operations.”
- Council has continued this approach ever since – in 2009, 2014, 2020. Again? Note that Ninth Circuit understood and affirmed the approach in the challenge to the 2014 Program. See 2014 Program, pp 2, 32, 61-62 and 62 n.5, 68, 108-12, 191-98, 232-33
- A story about dam passage modifications, the Council’s Program, the Corps of Engineers, ESA, the Columbia Juvenile Fish Mitigation Program, and WRDA authority: From 1980 to mid 1990s, much of the focus of the Fish and Wildlife program and the Council’s activity in fish and wildlife focused on the Corps, including a focus on both operations and investments in passage improvements. The Council’s work included incorporating passage improvement measures in the program, and then both leaning on the Corps to get authorities and appropriations for passage improvements, and also helping the Corps in that effort by trying to influence Congress. The ESA listings then help, as passage improvements of the type in the program become one of the measures to help avoid jeopardy. The NW Congressional delegation also gets on board, with additional authorities and appropriations. Including inserting useful provisions in the Water Resource Development Act of 1996 and especially Section 582 of WRDA 1999, authorizing the Corps to engage in accelerated research and development activities related to impacts from water resources projects and other impacts on salmon life

cycles; and juvenile and adult salmon passage. Forms the basis for the Corps' on going program of dam modifications to improve passage survival. And seen ever since by the Corps and others as an ESA-linked thing, even though it is also a perfect example of the Corps also exercising its responsibilities towards the Council's Fish and Wildlife Program under Section 4(h)(11) of the Power Act on matters that originated in the Council's program.

**d. Biological Opinions and offsite mitigation, especially tributary and estuary habitat improvements**

- Measures on habitat improvements and production initiatives always part of Fish and Wildlife Program – some notable work in 1980s - but Council's focus and funding/implementation began to particularly crank up by mid 1990s
- ESA analysis/biological opinions at first focused mostly on operations. By 2000 FCRPS BiOp and then especially 2008 FCRPS BiOp, federal actions now also include tributary and estuary habitat improvements and some "safety-net production." Building on existing authorities and programs, especially including Northwest Power Act and Council's program. Whole concept of offsite mitigation for hydrosystem impacts is being integrated into ESA analysis. Main effect was to ratchet up the amount of work and money devoted to the work, in tributaries and estuary.
- Implications for Council's program, especially in 2009 Program. Similar to operations – these BiOp actions are implementation commitments reflecting habitat measures in the program as directed at listed species, and then recognized in program as baseline habitat measures too. And then the Program emphasized need to maintain robust habitat work to address important non-listed species too.
- Most of the habitat work under the Program is funded and implemented by Bonneville. But both the Corps (in the estuary) and Reclamation (in the tributaries) fund important habitat work as well. For example, Reclamation Bureau implements water conservation and habitat restoration work in the Yakama, John Day, Grand Ronde, Salmon and Upper Columbia basins, work coordinated and integrated with other habitat improvement efforts in the these basins, implemented either as offsite mitigation by Bonneville or implemented as local watershed efforts. Reclamation's work is often seen now as taking place within the ESA regulatory framework (see <https://www.usbr.gov/pn/fcrps/habitat/index.html> ). But much of it originated in the 1980s and 90s in close connection with the Council's Fish and Wildlife Program, in which Reclamation personnel used program measures as leverage to take Reclamation funding available generally to address dam impacts to fishery resources and bring it to bear in Columbia tributaries.

**e. Biological Opinions generally**

- People often focus just on NOAA's FCRPS (now, CRS) salmon and steelhead Biological Opinion, which also covers southern resident killer whales and green sturgeon. But other relevant biological opinions from NOAA cover Reclamation's Upper Snake projects and the Corps' Willamette projects. The U.S. Fish and Wildlife Service has issued biological opinions covering the effects of Libby Dam operations on the Kootenai River white sturgeon and bull trout (2006); the effects on bull trout and other listed species from Federal Columbia River Power System operations more broadly (2000 and then 2020); and the effects of the Willamette projects on Oregon chub (since delisted) and bull trout (2008). *E.g.*, see footnote 5 on page 62 of the Council's 2014 Program for the full list with the full titles as of that date.

**f. Recovery planning/recovery plans**

- Similar analysis. To a significant extent the recovery planning and recovery plans took the subbasin planning effort developed for the Council's Program as a foundation, and then through further planning with regard to the listed species component identified ESA population objectives for recovery and a fleshed-out set of actions that might yield those objectives. Recovery plans are not self-implementing – they are sets of actions to be implemented under existing authorities and funding.
- The Council did not adopt the recovery plans into the 2014 Program, nor the conclusions as to the meaning of the recovery plans for the ESA requirements. Again, what the Council did was recognize the recovery plans as a suite of actions that represent Program measures to draw from in implementation to benefit the listed species. Nor did the Council adopt delisting criteria or other objectives that are in or relate to the recovery plans, as these represent what it required by the ESA to achieve recovery and not necessarily what is required to achieve protection and mitigation under the Northwest Power Act. But the Council did recognize these ESA objectives as something the federal agencies are trying to achieve through the implementation of Program measures, and therefore achieving those objectives is relevant to overarching Program implementation and success. See 2014 Fish and Wildlife Program at pp 2, 32 n 4, 68, 96, 97, 108-12, 191-98, 232-33

#### **4. Columbia Basin Fish Accords and other multi-year implementation commitments**

##### **a. Multi-year implementation commitments in general**

- Program has transitioned over time from year-to-year individual implementation commitments, to multi-year and multi-action commitments. Biological Opinions themselves are a form of this; umbrella projects and multi-year project review recommendations are another form.

##### **b. 2008 Columbia Basin Fish Accords**

- 2008 Columbia Basin Fish Accords represented a particular development along these lines. 10-year funding and implementation agreements between Bonneville and the other federal agencies on the one hand, and states or tribes on the other. The Accords included a suite of both operations and off-site mitigation habitat and productions and corresponding funding/implementation commitment intended to benefit both listed and important non-listed species and population segments. The Accords were built on a 30+ year foundation of mainstem and off-site mitigation planning, measures and objectives in the Council's Fish and Wildlife Program under the Northwest Power Act – very little in the Accords was new, and the parts that were new tied into existing Program measures. When Bonneville committed to the Accords, and when it takes an action to implement an Accord, this is Bonneville acting pursuant to Section 4(h)(10)(A) to protect, mitigate and enhance fish and wildlife in a manner consistent with the Council's Program -- in essence, implementation of the Program.
- This is precisely how the Council understood and explained the Accords in the 2009 and 2014 Programs -- the Council recognized these as implementation commitments to suites of Program measures. Both the Accords and the Program recognize that the Accords must be consistent with and cannot override the law, and that it is consistent with the Northwest Power Act for Bonneville to sign multi-year implementation commitments, so long as activities remain subject to long-term planning under Program amendment processes under Section 4(h) and project review process under Section 4(h)(10)(D), among all other requirements of law. And the Program made clear that these kinds of multi-year commitments to broad sets of Program protection and mitigation measures makes sense across the Program, not just for those willing to sign Accords as litigation-based agreements. See 2014 Program, at 31-32 and 32 n 4, 41, 61-62, 110-12, 191-98, 261-62.

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**c. Other long-term implementation agreements**

- Other aspects of the program are subject to long-term implementation agreements, even if not labelled an “Accord.” Most notable example is the habitat and white sturgeon production measures and projects for the Kootenai Tribe of Idaho. Same analysis.

**d. 2023 implementation agreements**

- 2023 saw four new but similar agreements; all yield to similar analysis:
  - Two are new expanded commitments to a broader suite of protection and mitigation actions for the Spokane and Coeur d’Alene Tribes, akin the Accords, and directly responsive to Program language.
  - A third is the agreement between the federal agencies and three tribes to support the Phase 2 Implementation Plan (P2IP) to study the feasibility of reintroducing anadromous fish above Grand Coulee dam, to be funded by Bonneville in the amount of \$200 million over 20 years, again responsive to Program language. From the Council perspective this is again Bonneville acting pursuant to Section 4(h)(10)(A) to protect, mitigate and enhance fish and wildlife in a manner consistent with the Council’s Program -- in essence, implementation of the Program. No different than the Accords. We will carry that perspective into the next program amendment process.
  - Finally, there is the Bonneville commitment in Dec 2023 with two states and four tribes (as part of the larger package of commitments) to provide an additional \$100 million available over 10 years to benefit salmon, steelhead and other native species. We do not yet know what precisely those funds will be used for, but the likelihood of these entities spending money for that purpose in the Columbia on activities that would not be consistent with program habitat and production measures seems nil. And again the Council will enter into the next program amendment process with the perspective that this is an implementation commitment by Bonneville pursuant to Section 4(h)(10)(A) to protect, mitigate and enhance fish and wildlife in a manner consistent with the Council’s Program -- in essence, implementation of the Program. No different than the Accords.

## 5. Federal Energy Regulatory Commission, the Federal Power Act, and the licensing of non-federal dams

- Fish and wildlife provisions of the Northwest Power Act apply to all hydroelectric projects in the basin, federal and non-federal
- Federal Energy Regulatory Commission (FERC) licenses and relicenses non-federal projects under the Federal Power Act
- FERC is one of the federal agencies that “regulate” hydroelectric facilities, and so has responsibilities to take into account the Council’s Program “to the maximum extent practicable” under Section 4(h)(11) of the NW Power Act.
- FERC also has obligations to consider fish and wildlife and related issues under the Federal Power Act’s hydro licensing provisions. It also has an obligation under the same act “to consider the extent to which a project is consistent with Federal or state comprehensive plans for improving, developing, or conserving a waterway or waterways affected by the project.” The Council’s Fish and Wildlife Program and its Power Plan are recognized by FERC as “comprehensive plans for the waterways” of the four states. Whenever we revise the Power Plan or Fish and Wildlife Program, we notify FERC and update FERC’s comprehensive plan data base.
- Program has always contained a set of development standards for protecting fish and wildlife that we ask FERC to consider whenever licensing a new project or relicensing an existing project – both substantive standards and process considerations, especially emphasizing the need for FERC and the project licensees or potential licensees to work with the state and federal fish and wildlife agencies and the tribes. Much of what we have in the program is now mirrored in the Federal Power Act licensing standards and procedures.
- As the program developed passage and flow operations for the Columbia in 1980s and 90s, program included more focused provisions relevant to existing non-federal projects, such as juvenile and adult passage improvements at mid-C dams; provisions calling on non-federal dams in Columbia and Snake basins to participate in making sure water is moved through and released from the projects for fish protection (e.g., Vernita Bar agreement); and more. Subbasin plans also include measures relevant to effects of projects in tributaries on fish and wildlife habitat.
- With regard to new hydro development, most notably, in the late 1980s, the Council oversaw the northwest rivers studies and the addition of the Protected Areas to the program *and* as part of the power plan’s consideration of the environmental and fish and

wildlife impacts and costs of new resources. The footprint of the Protected Areas is not just the Columbia River Basin, but the entire northwest – the footprint of the power plan. The Protected Areas are river reaches with documented value for anadromous fish, resident fish, and/or wildlife and currently undammed/unimpounded. The Protected Areas provisions call on FERC not to license a new hydroelectric project in a protected area. FERC has not licensed a new hydroelectric project in a protected area since the passage of the Protected Areas.



## **6. Project purposes and operational requirements**

- Obvious but worth saying that the Council's Fish and Wildlife Program and its effects has to take into account all the purposes and laws and requirements for how individual dams and the system as a whole are operated. The Northwest Power Act was intended to change the balance, and bring equitability to fish and wildlife with the other project and system purposes. But not to supplant. And the Council's mission is to deal with the effects of the impacts of the development and operation of the hydroelectric facilities, and to deal with these facilities as a system – when the dams and the system have multiple purposes. The Council has had to deal with this in a myriad of ways. Two examples will suffice:
- Flood control. Storage dams in US – under project and system authorizations – are operated in part to provide for flood control space. That has effects on fish and wildlife, mostly adverse. The Northwest Power Act and the fish and wildlife program (and power plan) have to take into account the operations required for flood control and their impacts. Flood control and its impacts are not our responsibility. But even so, when looking into the effects of the dams as a system, the Council's Fish and Wildlife Program can and has called upon the Corps and Bureau to take a hard look at flood control operations at times, and to find ways to provide the needed protections yet moderate the impacts. Past program provisions and implementation of VARQ flood control operations as part of the integrated rules curves at Libby and Hungry Horse are an example. See e.g., 2003 Mainstem Amendments, at 23-24.
- The same is true for Columbia River Treaty operations. The Council has no role in Treaty implementation. But it has called in the past for the federal agencies to work with their counterparts in British Columbia to find ways to use the flexibility in the Treaty to reallocate the use of stored water to benefit migrating salmon and other fish and environmental needs. See, e.g., 1994 Program, Section 5.4D.6.

# Briefing on Northwest Power Act framework for a Fish and Wildlife Program amendment process

## Part 2: Broader context for the Council's work, including ESA requirements and the impact of long-term implementation agreements

October 9, 2024

John Shurts

Patty O'Toole



Northwest **Power** and  
**Conservation** Council

# *Estimated* dates for the Fish and Wildlife Program Amendment Process

- Call for recommendations: Mid-January 2025
- Recommendations due: Mid-April 2025
- Adopt final Program: April 2026

# Today's agenda/talking points

1. Northwest Power Act/Fish and Wildlife Program legal framework
2. Pre-power Act mitigation obligations and related topics
3. Endangered Species Act listings and actions
4. Columbia River Fish Accords and other multi-year implementation agreements
5. Federal Energy Regulatory Commission, the Federal Power Act, and licensing
6. Project purposes and operational requirements





# 1. Northwest Power Act/Fish and Wildlife Program legal framework

- a. Council and the *Columbia River Basin Fish and Wildlife Program*
- b. Bonneville and other federal agencies responsibilities, authority and relationship to the Fish and Wildlife Program under the Northwest Power Act.



**Kootenai River White Sturgeon**

## 2. Pre-Power Act Mitigation Authorities and Obligations

- a. Pre-Power Act mitigation obligations- including Mitchell Act, LSRCF, other hatchery facilitates mitigating for specific dams.
- b. Implications for Power Act/Program
- c. US v Oregon: Columbia River Fish Management Plan
- d. Artificial production generally and the Fish and Wildlife Program over time



Willard National Fish Hatchery is one of 20 facilities funded through the Mitchell Act. (Photo: USFWS)

# 3. Endangered Species Act listings and actions

- a. ESA listings
- b. General concept
- c. Biological Opinions and system operations and dam modifications
- d. Biological Opinions and offsite mitigation, especially tributary and estuary habitat improvements
- e. Biological Opinions generally
- f. Recovery planning/recovery plans



Upper Columbia Spring Chinook



## a. ESA Listings

- First salmon and steelhead listings in Snake in early 1990s. By end of 1990s, most listings had occurred; lower Columbia coho in 2000s
- Important populations *not* listed: middle Columbia spring chinook; Columbia upriver fall chinook (Hanford Reach); upper Columbia summer chinook; upper Columbia sockeye
- Kootenai River white sturgeon also listed, bull trout
- Section 7 consultations for federal actions and associated Biological Opinions; ESA permit reviews; incidental take statements; recovery plans; species reviews



Kootenai White Sturgeon



## b. General concept

ESA is *not* a separate source of authority to take actions; it is regulatory *overlay* on how an agency uses its existing authorities.

- Federal dam operating and regulatory agencies – Corps, Bureau, Bonneville, FERC - have legal obligations to operate (or regulate) the Columbia dams that affect listed fish – triggering ESA review. These agencies also have authorities and obligations to consider and address the impacts of these dams on fish, providing explicit opportunities to take actions to benefit fish that can be part of the ESA analysis.
- It is precisely the explicit authority and obligations the federal agencies have under the Northwest Power Act and their other existing authorities to protect, mitigate and enhance fish and wildlife affected by the dams that forms the basis for an integrated program intended to be consistent with the Northwest Power Act as well as meet ESA requirements. ESA thus is in essence a regulatory overlay over the implementation of the Council's F&W Program under the Northwest Power Act.

## b. General concept (cont'd)

Neither law or obligation is superior over the other – the agencies are to comply with and use all the laws and responsibilities that apply.

- Bonneville uses it fund and authorities on actions to protect, mitigate or enhance listed fish and wildlife affected by the hydrosystem under Section 4(h)(10)(A) of the Northwest Power Act - in a manner consistent with the Council's program and in a way that is consistent and helpful with ESA requirements.
- The Corps and Bureau and FERC have (1) legal obligations to operate (or regulate) the dams; and (2) general existing authorities to consider and address impacts to fishery resources caused by the dams; and also (3) they have responsibilities under the Northwest Power Act to take into account the Council's Fish and Program in doing so, a directive that can help focus their authorities on measures to protect, mitigate and enhance Columbia fish and wildlife, including for listed species.



Columbia River estuary

## b. General concept (cont'd)

- The Council's regional protection and mitigation program has been a primary source of measures to be analyzed, shaped, and re-sized through the ESA analysis to also comply with ESA requirements. Biological Opinion and recovery plan actions for Columbia fish and wildlife affected by the hydrosystem are built on a 30+-year foundation of mainstem and off-site protection and mitigation measures and planning developed through the Program.
  - *How* the federal agencies are to comply with ESA is not a legal obligation of the Council; Council works with awareness of ESA requirements and helps the agencies satisfy those ESA needs.
- Also, Council's Program addresses *unlisted* fish and wildlife species and populations adversely affected by the hydrosystem and in areas blocked by hydropower dams.
- If a listed species were to be recovered to a point to remove it from the protection of ESA, the Council and Bonneville and other agencies still have a continued obligation to implement actions to protect and mitigate for the effects of the hydrosystem, along with the other non-listed species.

## c. Biological Opinions and system operations and dam modifications

- In 1980s and 90s, the Program built up a significant foundation of system operations and dam modifications to improve conditions for fish, especially for juvenile and adult salmon migrants through the hydrosystem.
- Section 7 consultations starting in 1990s swept these hydrosystem measures into the Biological Opinions, as actions analyzed and as reasonable and prudent alternatives. In simple terms, ESA analysis (and subsequent litigation) ratcheted up the amount of these actions – not new or different actions.



Libby Dam and Lake Koocanusa



## c. Biological Opinions and system operations and dam modifications

- Council, in 2003 mainstem amendments, decided to recognize and point to these actions as the baseline hydrosystem measures for the Program, and not write detail in the program.
- The Council did not “adopt” the BiOp or adopt the ESA analysis of these and other measures.
- The Council also focused on making sure the program also contained measures and objectives to address effects on important non-listed anadromous and resident fish species as well as upriver listed species. E.g., fall chinook and Vernita Bar flow requirements; Montana reservoir operations and integrated rule curves.



Hanford Reach

## c. Biological Opinions and system operations and dam modifications

- Council continued this approach in 2009, 2014, and 2020 Programs. Again?
- A story about the Corps of Engineers and dam modifications ...



The Dalles Dam



#### d. Biological Opinions and offsite mitigation, especially tributary and estuary habitat improvements

- Program has always contained measures for habitat improvements and production initiatives, focus increased in 1990s.
- ESA analysis/biological opinions at first focused on operations. By 2000 and especially 2008 BiOps, federal actions included more tributary and estuary habitat improvements and “safety-net” production.
- The Power Act and Council Program’s whole concept of offsite mitigation for hydrosystem impacts has been integrated into ESA analysis.

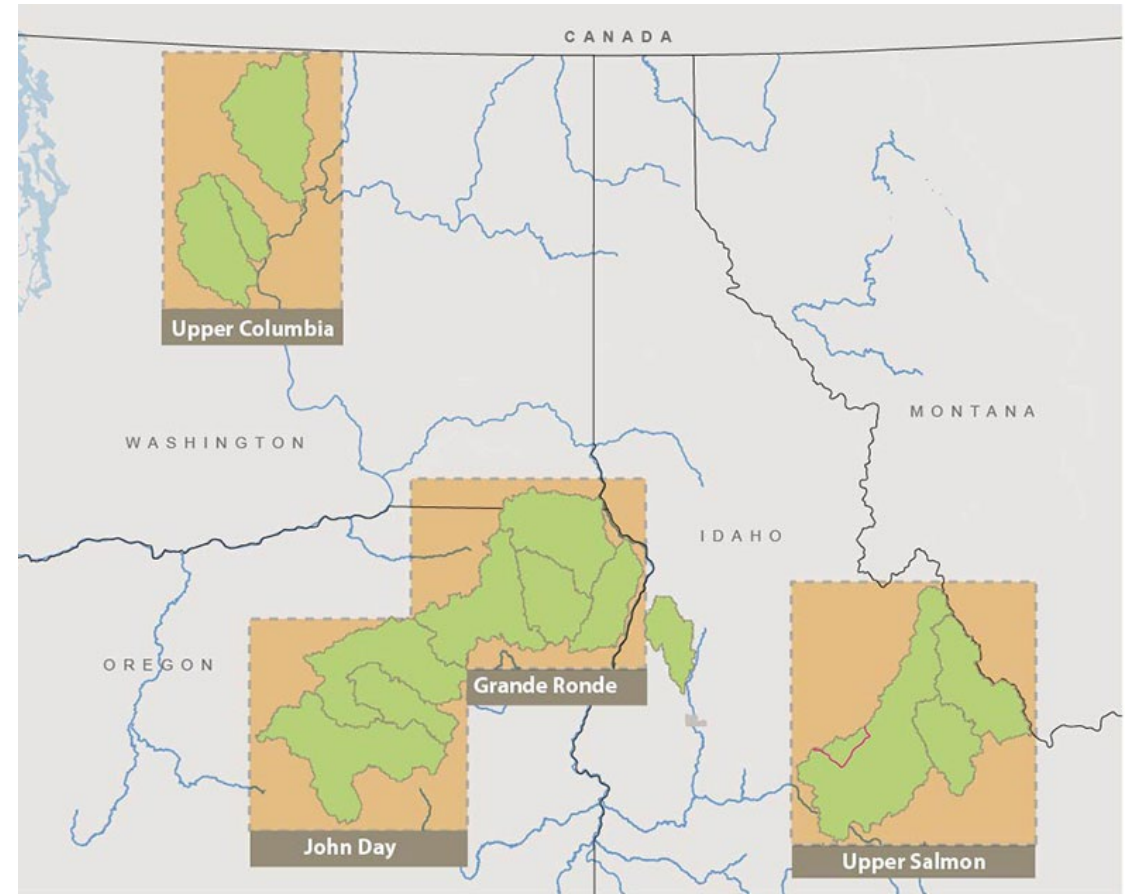


Steelhead

## d. Biological Opinions and offsite mitigation, especially tributary and estuary habitat improvements

A story about the Bureau of Reclamation and tributary habitat work...

- Most of the habitat work is funded by Bonneville.
- But, the Bureau of Reclamation (in certain tributaries) and the Corps (in the estuary) fund and implement important habitat work, too. Reclamation implements water conservation and habitat restoration work in the Yakama, John Day, Grand Ronde, Salmon and Upper Columbia. Originated in '80s and '90s in close coordination with the Program.





## e. Biological Opinions generally

- Not just NOAA's Federal Columbia River Power System (now, Columbia River System) salmon and steelhead Biological Opinion - which also covers southern resident killer whales and green sturgeon
- NOAA biological opinion on Reclamation's Upper Snake projects and the Corps' Willamette projects.
- The U.S. Fish and Wildlife Service biological opinions covering:
  - effects of Libby Dam operations on the Kootenai River white sturgeon and bull trout (2006)
  - effects on bull trout and other listed species from Federal Columbia River Power System operations more broadly (2000 and then 2020)
  - effects of the Willamette projects on Oregon chub (since delisted) and bull trout (2008)

*See footnote 5 on page 62 of the Council's 2014 Program for the full list with the full titles as of that date.*



Bull trout

## f. Recovery planning/recovery plans

- In a significant way, recovery planning and recovery plans took the subbasin planning effort (2003-2005) developed for the Council's Program as a foundation, and further developed the listed species objectives for recovery and set of actions that to address those objectives.
  - Recovery plans are not self-implementing – they are sets of actions to be implemented under existing authorities and funding.
- Council did not adopt recovery plans, objectives or conclusions, did recognize actions as Program measures, recognized ESA objectives are relevant to Program implementation and success.



# 4. Columbia Basin Fish Accords and other multi-year implementation commitments

- a. Multi-year implementation commitments in general
- b. Columbia Basin Fish Accords
- c. Other long-term implementation agreements
- d. 2023 implementation agreements





## a. Multi-year implementation commitments in general

- Program transitioned over time from year-to-year individual implementation commitments to multi-year and multi-action commitments.
  - Biological Opinion are an example similar; umbrella projects and multi-year project review recommendations are similar; wildlife mitigation agreements.



Pacific lamprey

## b. 2008 Columbia Basin Fish Accords

2008 Columbia Basin Fish Accords represented a particular development along these lines:

- 10-year funding and implementation agreements.
- Accords included both operations and off-site mitigation habitat and production actions, with funding commitments, targeted at both listed and important non-listed species and populations.
- Accords were built on a 30+ year foundation of mainstem and off-site mitigation planning, measures and objectives in the Council's Program.
- Very little in the Accords was new, and the parts that were new tied to existing Program measures.



Lower Granite Dam

## b. 2008 Columbia Basin Fish Accords (cont'd)

- Bonneville commitments to the Accords were actions under Section 4(h)(10)(A) to protect, mitigate and enhance fish and wildlife, and done so in a manner consistent with the Council's Program.
- Subject to subsequent long-term planning under Program amendment processes under Section 4(h) and project review process under Section 4(h)(10)(D), among all other requirements of law.





## **b. 2008 Columbia Basin Fish Accords (cont'd) + c. Other long-term implementation agreements**

- Starting in 2009 Fish and Wildlife Program, Council recognized the Accords as implementation commitments to suites of Program measures. Continued in 2014/2020 Program.
- Implementation of other parts of the Program are subject to long-term implementation agreements, even if not labelled an “Accord”.
  - Habitat and white sturgeon production measures and projects for the Kootenai Tribe of Idaho. Same construct.
- Program made clear that these kinds of multi-year commitments to broad sets of Program protection and mitigation measures makes sense under the Act across the Program, not just for those willing to sign Accords as litigation-based agreements.

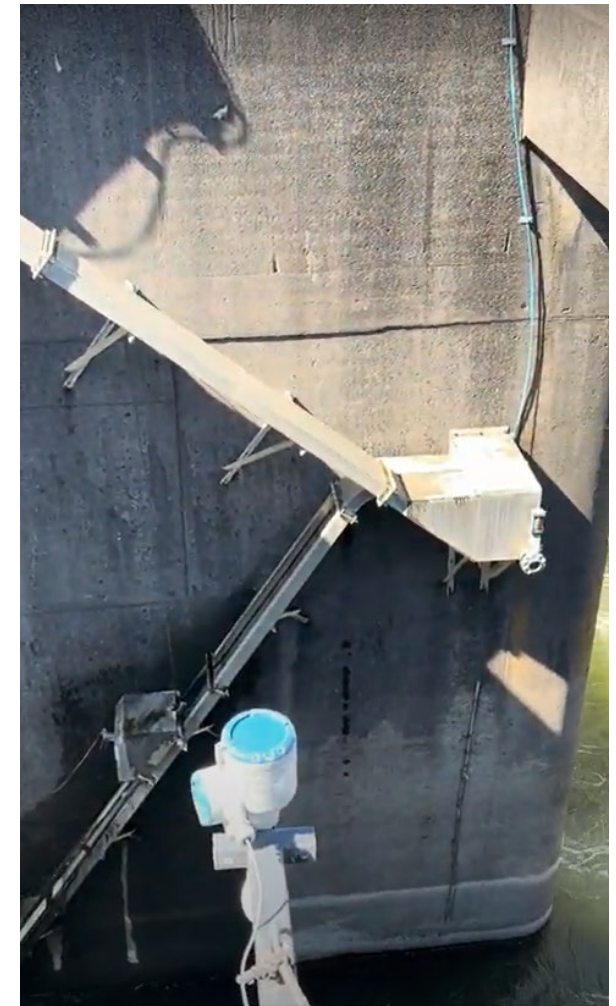


Kootenai River – meander reach

## d. 2023 implementation agreements

New but similar agreements in 2023; similar analysis:

- Expanded commitments to increase mitigation for the Spokane Tribe and Coeur d'Alene Tribe (functional accords), directly responsive to Program language.
- Agreement between the federal agencies and three upper Columbia tribes to support the Phase 2 Implementation Plan to study the feasibility of reintroducing anadromous fish above Grand Coulee dam, to be funded by Bonneville in the amount of \$200 million over 20 years, directly responsive to Program language, and an action by Bonneville matching its explicit authority in Section 4(h)(10)(A).
- Bonneville portion of the commitment with two states and four tribes (as part of the larger package of commitments) to provide an additional \$100 million available over 10 years to benefit salmon, steelhead and other native species. We do not know what those funds will be used for but expect these entities will be spending Bonneville funds on activities consistent with program habitat and production measures, similar to Accords.



Lamprey passage structure, Bonneville Dam.



## 5. Federal Energy Regulatory Commission, the Federal Power Act, and the licensing of non-federal dams



## 5. Federal Energy Regulatory Commission, the Federal Power Act, and the licensing of non-federal dams

- Fish and wildlife provisions of the Northwest Power Act apply to all hydroelectric projects in the basin, federal and non-federal
- Federal Energy Regulatory Commission (FERC) licenses and relicenses non-federal projects under the Federal Power Act
- FERC is a federal agency that “regulates” hydroelectric facilities, and so has responsibilities to take into account the Council’s Program “to the maximum extent practicable” under Section 4(h)(11) of the NW Power Act.
- Federal Power Act also has standards for FERC to consider to protect fish and wildlife in licensing
  - Including an obligation under the Federal Power Act “to consider the extent to which a project is consistent with federal or state comprehensive plans for improving, developing, or conserving a waterway affect by the project.”
  - The Council’s Fish and Wildlife Program and its Power Plan are recognized by FERC as “comprehensive plans for the waterways” of the four states. Whenever we revise the Power Plan or Fish and Wildlife Program, we notify FERC and update FERC’s comprehensive plan data base.

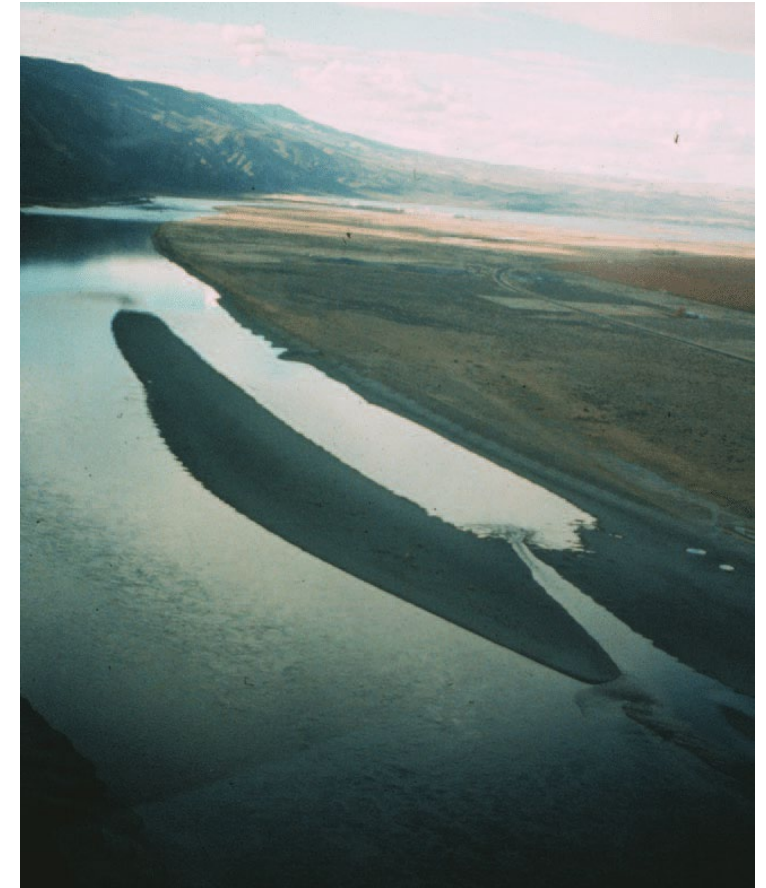


Hells Canyon Dam



## 5. Federal Energy Regulatory Commission, the Federal Power Act, and the licensing of non-federal dams

- Program has standards for protecting fish and wildlife that Council asks FERC to consider whenever licensing a new project or relicensing an existing project. emphasizing the need for FERC and the project licensees or potential licensees to work with the state and federal fish and wildlife agencies and the tribes. Much of what we have in the program is now mirrored in the Federal Power Act licensing standards and procedures.
- In the 1980s and 90s program incorporated more on existing non-federal projects measures, such as juvenile and adult passage improvements at mid-C dams; provisions calling on non-federal dams in Columbia and Snake basins to participate in making sure water is moved through and released from the projects for fish protection (e.g., Vernita Bar agreement); and more.



Vernita Bar, Pacific Northwest  
National Laboratory photo.

## 5. Federal Energy Regulatory Commission, the Federal Power Act, and the licensing of non-federal dams (cont'd)

- In the late 1980s, the Council oversaw the northwest rivers studies and the addition of the **Protected Areas** to the program *and* as part of the power plan's consideration of the environmental and fish and wildlife impacts and costs of new resources. The Protected Areas provisions call on FERC not to license a new hydroelectric project in a protected area. FERC has not licensed a new hydroelectric project in a protected area since the passage of the Protected Areas.



## 6. Project purposes and operational requirements based in law



Bonneville Dam



## 6. Project purposes and operational requirements based in law

- The Program and its effects must take into account the other purposes and requirements for how individual dams and system are operated. The Northwest Power Act was intended to change the balance and bring equity to fish and wildlife with other project and system purposes. But not supplant.
- Council's mission is to deal with the effects of the impacts of the development and operation of the hydroelectric facilities, and to deal with these facilities as a system – when the dams and the system have multiple purposes. Council has dealt with this situation in a number of ways:
- Two examples:
  - Flood control
  - Columbia River Treaty Operations



Grand Coulee Dam

# Calendar of topics by month (draft)

Month	Council meeting agenda items
July (Portland, OR)	<ul style="list-style-type: none"> <li>Overview, early discussion on the amendment process, schedule for 2024 tasks, rough timeline for 2025 &amp; 2026 (1.5 hrs) ✓</li> </ul>
August (Webinar)	<ul style="list-style-type: none"> <li>Update on Regional Coordination Meeting (July 11), other ✓</li> </ul>
September (Astoria, OR)	<ul style="list-style-type: none"> <li>Staff report on Program performance: implementation assessment of Program Hydro measures, related topics (2 hrs) ✓</li> <li>Discussion of the Northwest Power Act's legal decision framework and amendment procedures (Part I) (2 hrs) ✓</li> </ul>
October (Portland, OR)	<ul style="list-style-type: none"> <li>Discussion of the Northwest Power Act's legal decision framework and amendment procedures (Part II, External context for the Council's work on the program, including ESA listings and BiOps and Accords and other long-term implementation agreements) (1 hr) ✓</li> <li>Staff report on Program performance: implementation assessment of artificial production (hatchery) measures, related topics (1.5 hr) ✓</li> </ul>
November (Portland, OR)	<ul style="list-style-type: none"> <li>Staff report on Program performance: implementation assessment of Program habitat restoration and protection, wildlife, invasive species, predator management measures, related topics (3+ hrs)</li> <li>Discuss outline of letter calling for recommendations (60 min)</li> <li>ISAB report on review of 2020 Fish and Wildlife Program Addendum (30 min)</li> </ul>
December (Webinar)	<ul style="list-style-type: none"> <li>Staff report on Program goals and objectives and latest developments for the Program Tracker (2 hrs)</li> <li>Review draft letter calling for recommendations(30 min)</li> </ul>



