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Northwest Power and Conservation Council

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May 6, 2025

MEMORANDUM

TO: Council Members

FROM: Patty O'Toole, Fish and Wildlife Division Director

SUBJECT: Council Work Session: Fish and Wildlife Program Amendment

BACKGROUND:

Presenter: Fish and wildlife division, power division and legal division staff

Summary: Council staff will provide a brief amendment process check-in, review of the procedures and protocols for the amendment administrative record, discuss program mitigation strategies and what specific fish and wildlife species benefit, and, finally, discuss some of the ways the fish and wildlife program and power plan intersect on hydro operations.

Relevance: The Council [called for recommendations](#) to amend its Columbia River Basin Fish and Wildlife Program in January 2025. The recommendations are due to the Council on **May 19, 2025**.

Workplan: Program planning and coordination, Columbia River Basin Fish and Wildlife Program amendment process.

Background: At the May Council meeting, the staff will discuss several topics with the Council.

1. Amendment process and the development of the administrative record

First, staff will review the Columbia River Basin Fish and Wildlife Program amendment current and next steps and quickly move into a discussion of

requirements for developing the administrative record that the Council will use to make its amendment decisions. Please refer to the attached separate briefing memo.

2. Untangling the strategies guiding mitigation for fish and wildlife

Over the last seven months, staff have reviewed major assessments of Program implementation (called the Categorical Assessments), progress toward goals and objectives, and the comprehensive set of strategies that comprise the Fish and Wildlife Program. Some of these strategies are brief or do not fully characterize all the ways mitigation is occurring, including the species or life stages that are meant to benefit from mitigation. As a result, it can be difficult to understand how different species benefit from mitigation throughout the basin.

In this work session, the staff will review at a high level some foundational areas of the Act and Program as they relate to the targets for mitigation. Next, staff will provide examples of mitigation actions implemented to broadly benefit multiple species of fish and wildlife affected by the hydrosystem, regardless of ESA listing status (i.e., listed and non-listed) or origin (i.e., natural- and hatchery-origin). In doing so, the staff will also describe how these actions are organized by strategies and where these different strategies intersect or overlap, along with a brief discussion of why the Program looks the way it does today.

3. The intersection of the Fish and Wildlife Program and Power Plan on hydro operations

Fish and wildlife, power, and legal division staff will jointly present on the intersection of hydrosystem operations with regards to the Fish and Wildlife Program amendment process and power planning efforts. Staff will discuss with the Council how we might identify, analyze, and assess possible changes in hydrosystem operations. These possible changes could come from a variety of sources, including: the Program amendment process; the Council's consideration of ongoing changes in the power system and their potential impact on operations; concerns identified in the categorical assessments; and more. This initial presentation in May will be a discussion of methods and an analytical framework. It will be followed by part two in June when staff will begin to summarize and discuss with the Council any recommendations received for changes in operations, as well as other possible changes identified for analysis.

This presentation follows previous briefings, discussions and materials on hydrosystem operations that summarized the sources of operations in various decisions including Fish and Wildlife Program measures and assessed the actual implementation of these described operations. These briefings include:

- An [October 2023 presentation](#) on the implementation of hydrosystem
- The [September 2024 presentation](#) on the hydrosystem categorical assessment
- The [January 2025 documentation](#) for the “Fish and Wildlife Program Performance Assessment, 1980-2022: Hydrosystem Category”
- A [January 2025 presentation](#) on hydrosystem operations with a focus on the sources for operations in decisions on Program measures and elsewhere
- The [March 2025 primer](#) from the power staff on the “needs assessment” for the Power Plan, which will be a primary focus when analyzing the impacts of possible changes in hydrosystem operations on the region’s power supply

More info: [Fish and Wildlife Program Amendment Process](#)
[Columbia River Basin Fish and Wildlife Program](#)

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MEMORANDUM

TO: Council Members

FROM: John Shurts, General Counsel

SUBJECT: Fish and Wildlife Program amendment process – administrative record and handling comment from outside the Council

Recommendations to amend the Council's Fish and Wildlife Program are due by May 19. Requesting and receiving the recommendations is the first step in the Program amendment process scripted in Section 4h of the Northwest Power Act. The recommendations are the main raw material the Council must use in deciding on the content for the amended program, and thus the call for recommendations and the recommendations themselves are the first main entries into the administrative record for the decision the Council will ultimately make.

The purpose of this memorandum is to provide guidelines for Council members and staff as to what goes into the administrative record, how we compile the record, and in particular how we are to capture input received by the Council from outside the agency. **The key point is that all communications and documents relevant to the amendment process or to the issues in the amendment process need to make their way into the administrative record.**

The topics covered in this memorandum:

- A brief background discussion of the sources for the administrative record and public comment procedures and requirements
- Administrative record contents
- What comments need to be captured for the administrative record and how:

Background/sources

Many of the administrative record requirements come from Section 4h of the Northwest Power Act. Most importantly, Section 4h(5) describes what constitutes the administrative record on which the Council will base its program decision: “The Council shall develop a program on the basis of such [program amendment] recommendations, supporting documents, and views and information obtained through public comment and participation, and consultation with the agencies, tribes, and customers referred to in [section 4h(4)].”

The Council also layers in additional elements from the process for informal notice and comment rulemaking in the federal Administrative Procedures Act (APA). The Northwest Power Act does not explicitly tell the Council to follow the notice and comment procedures of the APA, but the Power Act does apply the APA standards for judicial review to Council decisions. So it makes sense to track the underlying APA notice-and-comment procedures as much as we can, even though they may technically be more useful guidelines than binding rules.

For example, preparing and releasing a draft amended Fish and Wildlife Program for public review and comment is not explicitly called for in the Northwest Power Act – the Power Act has the Council move from comments on the recommendations to a final Program decision. But including a draft Program step – and allowing for notice and comment on that draft - makes sense in the context of what the Council is doing in crafting a final program out of recommendations and comments on recommendations, and further our general public engagement mission. And doing so is also the functional equivalent of issuing a proposed rule under the notice and comment rulemaking procedures of the APA.

Administrative record contents

As noted above, Section 4h(5) describes the administrative record on which the Council will make its decision on the revised Fish and Wildlife Program: Program amendment recommendations; supporting documents; and views and information obtained through public comment and participation, and through consultation with the agencies, tribes, and customers. In more detail, the administrative record will include:

- Council’s letter requesting recommendations, and any related documents (such as the requests for extensions and the decisions on the extension)
- Recommendations for Program amendments, and any supporting documents that come with the recommendations
- Comments on the recommendations, written and oral
- Draft fish and wildlife program
- Comments on the draft program, whether written or oral
- Written and oral comments received by the Council on the amendment process or on issues in the process, even if not connected to the formal comment periods
- Final Fish and Wildlife Program and all of its associated documents

- Staff drafts, staff memos and other staff communications and documents that actually go to the Council throughout the process that are relevant to the program amendment process or to the issues in that process
- Council members' communications with other Council members, to staff, and to outside people and entities about the program amendment process or about issues in the process
- Agendas, recordings, minutes and other documents produced for Council meetings throughout the amendment process that are relevant to the amendment process or issues in the process
- Documents, reports, studies, etc., relevant to the Program amendment process or to the issues in the process that come before or are used by the Council or Council members (an example is the ISAB's review of the 2014 Program)

What comments need to be captured for the administrative record and how

List of types of comments to capture

The Council receives communications about the amendment process, about documents in the amendment process, and about the issues in the process in a number of different ways and times. **We need to capture, share, and maintain all of these- and this is the most important part of this memorandum:**

- The original Program amendment recommendations, which come in writing
- Formal written comments at formal comment steps in the process - on the recommendations and on the draft Program
- Informal written comments and communications -- such as an email comment directed to one or more members -- relevant to the recommendations or to the draft Program or to the issues in the amendment process, even if not explicit referring to the recommendations or draft Program and even if coming to the Council outside of the formal comment periods (more on this below)
- Written comments lodged on the Council's website or social media posts relevant to the amendment process or issues in the process
- Public testimony at official public hearings - we use various methods to capture these comments, and produce transcripts for circulation to all Council members and for the record
- Public testimony and comments made at Council meetings - captured in recording, notes, minutes, sometimes transcripts
- Comments made during "consultations" with the Council - someone on the Council staff will be designated to take notes of these consultations for the record
- Informal oral comments made by phone or in person on the process or documents or issues in the amendment process – summarized in a short note by the recipient of the comment (see more below)

Procedures for capturing, collecting, sharing and keeping the comments

All comments and other documents that are part of the administrative record are not only collected and compiled for the record, we also make sure they are circulated to all the Council members and key staff. That is what ultimately makes a document part of the administrative record - information about the process or its issues in the process that comes before the Council members and thus is part of the basis or considerations on which the Council makes its decisions.

This is easiest to make happen for the recommendations, for the written comments that are submitted to the Council through the website during the formal comment periods, for the public hearing transcripts on the draft program, and for comments made at Council meetings.

It is more complicated with less formal written comments that come in to just one or a couple of members or staff, such as an email comment sent to just one or two members. These need to be forwarded to all Council members and key staff – or forwarded to those of us keeping the record and we will circulate to members and staff (see below). Informal oral comments made to just one or a couple members or staff are then the hardest to make sure we capture, circulate and store. If you are the recipient of such a comment, you need to write a short note documenting the person who made the comment and the subject of the comment and then forward that note to those keeping the administrative record for circulation and storage.

Kendra Coles in the Fish and Wildlife Division will be the official keeper of the administrative record, as well as the person in charge of making sure material is circulated appropriately, with assistance from me and from others on the staff. I will make decisions on what needs to go into the administrative record if there is a question.

Four points to emphasize and explain further

First, we know that the program amendment process includes *two formal comment periods* – for 45 days after the recommendations come in, and for 60 days after the draft program is released. BUT, the Council members are allowed to and encouraged to talk with people outside the Council throughout the process, even outside the formal comment periods. This continues throughout the amendment process until a short time before the Council's final decision when we close off all comment and make final decisions based only on what is in the record (more on that below, in the fourth point). Keeping open lines of communication and engagement throughout the process is consistent with our basic public engagement mission under the Power Act, and allowed under APA procedures as well.

There are two tradeoffs for having a constant open comment system throughout the process. One is the need to capture these key comments for the record and to make sure they are shared with all the members and key staff. It requires a disciplined approach to capturing, forwarding, circulating and keeping comments throughout. The other is a general obligation on members and

staff to make sure they are open and inviting to a broad range of parties to make such comments – this effort should not become a vehicle for talking to a narrow range of participants.

Second, because the Council members collectively are the decisionmaking body, what particularly matters for the administrative record are the documents and communications that eventually come *to the Council itself* and that are about the amendment process or documents or issues in the process. We do not include in the administrative record staff-to-staff communications, such as staff-to-staff email or early program drafts, if these never actually come before the Council or individual Council members. We also do not include minor outside communications about the process to and from staff that are not relevant to or intended for the Council members, discuss process and not substance, and never come to the members.

Two further considerations related to this point: One is to remember that comments that come to just one or a couple of Council members need to be forwarded to the record and shared with all the Council members, either by forwarding an email received or by writing a short note about an oral comment and forwarding that. The other is that outside comments sent to or made *to staff* that are important substantively to the process need to get into the record and be circulated to the Council members – again by forwarding written comments and summarizing in a short note about an oral comment and forwarding that. Comments made to the staff that do not get to the Council members are not part of the record, but that should not be used an excuse by staff not to pass important comments about the program on to the members.

Third, note that email communications and documents that come to and from the Council or to and from individual members that are relevant to issues in the amendment process are part of the administrative record and need to be forwarded to the record *even if* they are generated in or relevant to some other process. For example, many Council members participate in ESA-based implementation forums. Communications relevant to issues in that forum that are also relevant to issues in the Program amendment process need to be included in the Program amendment administrative record and circulated to all members.

Fourth, as noted above, there comes a point not long before the final decision that we do finally cut off taking comments from outside the Council, and the Council makes its decision on the basis of the record already compiled. There is no hard requirement in the Power Act or APA for doing so. But it is considered good practice, and we have always followed it. There is also no understood amount of time for the cut-off – largely because many agencies cut off comment at the end of the formal comment period on the proposed rule and so do not even face this issue. We have always followed the practice of keeping dialogue going as long as we can – as long as it is functionally open to any participant and comments are widely shared with all – and then closing it off about three weeks to a month ahead of the final decision. The Council will have to decide on that cut-off date later in the process.

If you are unsure whether something should be in the administrative record, assume that it is or might be, and send it along. I will make the call as to whether to include something in the administrative record.