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October 7, 2003

MEMORANDUM

TO: Fish and Wildlife Committee

FROM: John Ogan

SUBJECT: Council review of subbasin plans

I Background and Context for Understanding the Council's Review of Subbasin Plans

In trying to understand the Council's review process for subbasin plans, it helpful to momentarily put aside the subbasin planning *process* as we deal with it from day-to-day, and focus on what a subbasin plan *document* is from a Power Act perspective. To the Power Act, a "subbasin plan" document is simply an *internally consistent and consensus* package of "recommendations" (proposed amendments) to the Fish and Wildlife Program.

In most prior fish and wildlife program amendment proceedings, the Council simply opened its entire fish and wildlife program for amendment, and provided notice that it would receive "recommendations" for anything and everything that someone may want to see included in the fish and wildlife program. Recommendations would pour in from all corners of the basin without the Council trying to shape them in any way. The Council and its staff waited silently until the recommendation deadline passed, and then would internally sort and reconcile the very disparate recommendations that had been submitted. This Council sorting and reconciling of the various recommendations was much more than a ministerial paper shuffle. Rather, this has been a key step where the Council balanced differing scientific opinions, varied policy objectives, and took into account the economic and legal considerations embodied within the recommendations. The result of that Council reconciliation was a draft proposed program amendment reflecting the Council's preliminary decisions. The Council adopted draft would be released for public review and comment, and later shaped into the final amendments adopted by the Council.

Beginning with the 2000 amendment process, the Council changed to a different amendment model to affect a complete overhaul of the fish and wildlife program in a series of steps. To make this happen, the Council was relatively prescriptive in defining the type of recommendations it wanted submitted. In the first step, the Council asked specifically for support for a new basin/province/subbasin organizing framework, and, presuming there would be support

for the framework, for detailed proposals for a vision, objectives and strategies for the basin-level of that framework. This new approach was accepted by the region, and was successfully concluded with the adoption of the 2000 program. That 2000 program also described a future subbasin planning exercise to fill out the subbasin-scale layer of the new program framework, and it outlined the form and content of desired subbasin scale amendments as “subbasin plans”¹.

The success of the approach used to develop the 2000 program enabled a key paradigm shift. That is, by adopting a basin/province/subbasin framework, detailing what a subbasin plan be, and then calling for a subbasin planning initiative to fill in the details of the subbasin level of the new framework, it became possible for local and state/tribal subbasin planning groups to largely replace the Council as the initial organizers and arbiters of disconnected ideas, objectives, and interests reflected typically reflected in amendment recommendations.

This is where we find ourselves now. We currently have broadly representational subbasin planning groups collecting and deliberating on the many ideas and goals of the varied interests in each subbasin, and seeking to reconcile them in a “subbasin plan” amendment format provided by the Council “template”. These groups, rather than the Council and its staff, are making the first cut and reconciling science, policy and economics at a subbasin level.

To sum up, it is important to recognize that the Power Act sees a subbasin plan simply as an organized and internally consistent set of consensus amendment recommendations. Further, understanding how the subbasin planning *process* and local planners are essentially filling what has been a Council recommendation reconciliation step in past amendment proceedings should be helpful in understanding how the overall Council review process works. It remains, however, a Council responsibility to ensure that fish and wildlife programs meet legal standards. We will use the Act’s amendment steps to guide the Council through that review. The remainder of this memorandum outlines the requirements set by the Act for program amendment, and after discussing those requirements, and discusses some ways that the Council can use those review steps.

II What the Act Requires of the Council in an Amendment Proceeding

The Power Act prescribes the general procedural steps that the Council must take to review and approve or reject proposed amendments to the Program.² In addition, the Act also prescribes general substantive standards that any proposed amendment (subbasin plan) must meet³. The basic review steps required by the Act are generally described in lay-terms as follows:

Step 1. The Council is to provide notice that it is seeking “recommendations” for amendments to the Program, and provide at least 90 days for people to submit them. *This step has been completed.*

Step 2. The Council must make the “recommendations” it receives publicly available for review and comment (no specific comment period mandated).

¹ The 2000 program’s outline of subbasin plan form and content was subsequently refined in guidance documents such as the *Technical Guide for Subbasin Planners*

² See Act sections 4(h)(2) through 4(h)(7).

³ See Act sections 4(h)(5) and 4(h)(6)(a) through (e).

Step 3. The Council must seek the views and input of a broad range of interests, and conduct hearings to gather input on recommendations it has received.

Step 4. The Council develops a draft Program amendment out of the recommendations it received, and seeks comment on the draft amendment (no specific comment period mandated).

Step 5. The Council *adopts* a final amendment, and in doing so must find that the new provisions meet the Act's *substantive standards*, which state that the adopted measures must:

- Protect, mitigate and enhance fish and wildlife while assuring an adequate, efficient, economic, and reliable power supply;
- Complement the activities of the region's fish and wildlife managers;
- Be based on the best available scientific knowledge;
- Meet sound biological objectives with least-cost option when equally effective alternatives exist;
- Be consistent with the legal rights of Indian tribes;
- Give "due weight" to the recommendations of fish and wildlife managers where inconsistent recommendations are provided.
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III "Hitting the Marks" Established By the Act for Program Amendments -- Who Does What?

While the new amendment approach allows subbasin planners to make the "first cut" at reconciling recommendations and issues at a local level, the Council is ultimately responsible for making sure that the Act's amendment processes is followed, and that the subbasin plans meet the Act's substantive standards. The following lays out a way to "hit the marks" established by the Act, and tries to explain how the various players -- the Council, ISRP, and subbasin planners, work together to do that.

A. "Pre-formal submission phase" -- A way to test for broader public support and to evaluate the plans for the Act standards pertaining to sound science and consistency with fish and wildlife manager and tribal interests.

In order to help ensure that proposed subbasin level amendments are ready to be subjected to the full public review step required by the Northwest Power Act, both the Level II groups and the ISRP may do a review of the subbasin plan documents *before* they are formally submitted to the Council as "recommendations" for program amendments. This "pre-submission" step is not required by the Act.

There are two basic reasons for including a "pre-submission" review. First, the "pre-formal submission" phase could be used to test the level of support for the plan outside of the subbasin. Second, it could allow for a more iterative interaction between subbasin plan sponsors and the ISRP without having to coordinate the ISRP review with public reviews and consultations required by the Act.

Possible Level II review

The states and tribes are taking different approaches to a Level II review in the various states. Some of the things we have heard from Level II coordinators that may be considered at the Level II groups are:

- Level of support by the fish and wildlife managers;
- Ensure that the proposed amendments were developed with opportunity for participation from all interested entities and public as described in Council guidance document;
- Verify that the proposed amendments contain all elements of a “subbasin plan” (an assessment, inventory, and management plan) consistent with the guidance documents (particularly the Overview and Technical Guidelines) provided by the Council.

Optional preliminary ISRP review of subbasin plans.⁴

The 2000 program calls for the review of subbasin plans by independent scientists. We believe that the ISRP group is the right group, given their extensive knowledge of projects and subbasin attained in the provincial review process.

We have previously discussed the ability for planning groups to get an ISRP review in a “pre-formal submission phase.” This would allow the review take place outside of the one-year window the Act establishes for acting on recommendations for amendments, and before the full blown required public comment and consultations begin. We think this would allow for a more deliberate and iterative ISRP review of proposed plans. If planners have budgeted funding for this opportunity, they will be able to work under existing contract on a response to the ISRP report prior to May 28th.

When the Council staff has discussed the possibility of a preliminary ISRP review in the past, it tried to make clear that this early review opportunity is not a requirement or a new imposition -- it was simply an offering of the ISRP’s services if people want them. Therefore, if subbasin planners do expect that they will want to make adjustments in light of comments that the ISRP preliminary review provides, **they need to take that into account and budget for that when workplan proposals are developed.**

B. Formally submit the subbasin plan as recommendations for an amendment to the fish and wildlife program -- The phase that begins May 29th

Once subbasin plans are formally submitted to the Council as recommendations for subbasin-level program amendments, the procedural and substantive standards of the Northwest Power Act and Administrative Procedures Act drive the review steps. The Council will take some immediate process management steps:

⁴ The criteria that will be used for the review were characterized in the 2000 Program, and further refined and noticed in the Call for Recommendations for Subbasin Plan document. The staff SRP coordinator has developed a proposed subbasin plan review packet for the ISRP that lists those criteria and highlights associated or related provisions of the 2000 Program. This document is available separately.

- Notice of receipt of these “recommendations” will be made public, and they will be made available to the public for review and comment -- subbasin plan proposals are due by May 28, 2004 at the latest;
- The plans will immediately be given to the ISRP for review (first review if preliminary review was not used; second review if preliminary review was used and issues needing resolution were noted). ISRP will finish reports for all subbasin plan proposals by August 12th.
- The Council will provide an opportunity for public oral and written comment on subbasin plan recommendations through the end of September;
- The Council and its staff will receive, organize and focus the ISRP and public comments, particularly watching for comments that tend to confirm or call into question how the subbasin plan recommendations meet the standards for program measures found in section 4(h)(5) and 4(h)(6) of the Northwest Power Act. (The RCG and Council need to confront and resolve a workload issue for this element of the review).

As noted in the bullets above, both public comment and ISRP reviews are running concurrently during this phase of the review. After the ISRP reports are submitted on August 12th, the Council will consider the public comment received to date, and also define and focus issues raised by the ISRP report. In order to allow for public comment to take into account the ISRP reports, the Council would keep the comment period open through the end of September (tentative). This would allow a period of time in which the planning groups could review the ISRP reports and respond to anything in them in the form of official “comment” back to the Council. ***This official comment opportunity is one of the vehicles that can be used by planning groups to address issues raised by the directly with the Council.***

C. Council decides if it can adopt proposed subbasin plans as its own draft amendments and makes those available for public review and comment.

After considering all of the comments received, including those that the subbasin planning groups may offer as proposed solutions for items raised by the ISRP, the Council will decide if it will adopt the proposed subbasin recommendations as its ***own draft proposed amendment*** to the fish and wildlife program. This draft amendment step is one that the Council always takes with program amendments, and is informed by the Administrative Procedures Act.

Depending upon what the previous review steps have revealed, the Council has several options:

- it may accept the subbasin-level recommendations as presented by the lead entity/sponsors and include in its draft amendment;
- it may propose modifications or conditional language in the draft amendment that would permit it to adopt proposed plans. We would expect that Council conditions and/or modifications to proposed plans would be developed in consultation with the subbasin planners and/or the applicable Level II group. It is likely this Council/sponsor interaction will have been played out, at least in part, in the public comment period;

- the Council may adopt the subbasin plan as part of the draft amendment, while referring certain issues to future implementation actions (e.g. the review of the proposed plan shows that some important habitat data is not available, so the Council may adopt the plan but on the condition that a project proposal to secure this data is developed, reviewed, and approved in the next applicable project selection process).
- the Council may ask the ISRP to re-review a particular subbasin plan or element of a subbasin plan. This would be strictly on an as needed, case-by-case basis at the discretion of the Council;
- the Council may find a subbasin plan proposal that does not substantially conform to approval requirements and cannot be remedied in the near-term with any of the approaches above. The Council will need to make case-by-case decisions that put these on a different development and adoption track.

D. Council adoption of draft proposed amendment as part of the fish and wildlife program

The Council will consider the views, information, and comment on the recommendations and draft amendment secured throughout the review process, apply the standards of the Act related to fish and wildlife program amendments, and decide to adopt or reject the draft proposed amendments as part of the fish and wildlife program. If some or all of the recommendations have been rejected in the process, the Council will adopt findings consistent with the Act's requirements. The Council's master contract for subbasin planning calls for adoption of subbasin plans by December 31, 2004.

There is no question that the amount of time after the ISRP reports are finished, and the master contract adoption date leaves little time for formulating and adopting a Council draft amendment, taking comment on it, and adopting final plans. To make this schedule, we will have to have compressed comment periods and be working very closely with the Level II and subbasin level groups.

IV Implementing the subbasin plans

Once adopted into the program, the Council will begin a process for funding the strategies identified in the adopted plan. This implementation process is currently the "provincial review." We will need to determine if the provincial review model continues to be that which is best suited to implementing subbasin plans -- we need to do more thinking on as a region.

It is also important to recognize that there may be some subbasin plan deficiencies or gaps that were identified by the ISRP or public comment that could be addressed in this implementation phase. For example, if the ISRP noted that there were "gaps" in the information that was presented to support the selection of objectives and strategies, it is possible that a core project proposed for funding in the subbasin would focus on filling in the gap that was noted.

