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March 8, 2005

## MEMORANDUM

**TO:** Council Members

**FROM:** John Ogan and John Shurts

**SUBJECT:** Proposed resolution for "broad process issues" related to subbasin planning

**ACTION REQUESTED:** We ask that the Council review and approve the draft letter that the staff proposes be broadly distributed to those interested in subbasin planning outlining how the Council has decided to resolve the "broad process issues" outlined in an October 2004 issue paper.

### Background/Analysis

Last October the Council released an issue paper outlining a set of process and planning related issues that had been presented by the public in connection with subbasin plan recommendation comments. These issues did not address subbasin plans directly, but were more broadly oriented towards future planning or process in which subbasin plans may be used. The Council took written Comment through January, and the staff participated in numerous discussions with interested entities.

The purpose of this letter is to provide notice to the public of how the Council intends to resolve these broad issues -- both in terms of substance, and in what formal document the matter will be addressed. The proposals in the draft letter are consistent with the staff recommendations for how to resolve these matters that was discussed with the Council at its February meeting.

Please note that this is only a notice letter telling the public generally how the Council will resolve the issue, and in what document that will be done. The final writing or Council statement *is not* made in this letter -- rather, although it should be consistent with what it says in this letter, the Council will review and approve the *final official* language on how to treat these issues later, as it approves additional program language, formal findings, and Response to Comments documents.

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## **DRAFT**

Dear Interested Parties:

On October 22, 2004, the Council released a paper seeking public comment on a set of five broad process and planning topics that had developed in the course of its fish and wildlife program subbasin plan amendment process. The Council took written comment on that issue paper for thirty days, and continued discussions with interested persons and entities through February 2005.

The purpose of this letter is to update interested parties on how, after consideration of the written comments provided and the discussions had, the Council understands and defines these broader planning and process issues. More importantly, this letter will provide notice to the public as to how the Council intends to address or treat these matters.

### **Background and Context for the Release of the October 22nd Issue Paper and Invitation for Comment**

By May 28, 2004, fifty-nine subbasin plan documents were submitted to the Council as recommended amendments to the fish and wildlife program. The Council made these recommendations available for public review and comment and began to seek the views and information on the subbasin plan recommendations from regional interests. As the amendment record developed through the middle of October 2004, comments submitted were in two categories -- comments related directly to the adequacy of particular proposed subbasin plans, and comments about the subbasin planning and fish and wildlife program amendment processes generally. Although collateral to the question of whether or not the subbasin plans that had been recommended met the standards for adoption into the program, the Council considered that second group of broad process related comments to be raising important matters pertaining to future or additional fish and wildlife program development and implementation that was worthy of further exploration and consideration.

The Council sought comment on five broader topics that had developed out of the comments provided: A.) subbasin plan level of specificity; B.) subbasin "roll-up" as related to basinwide fish and wildlife objectives; C.) project selection/prioritization; D.) recovery planning under the federal Endangered Species Act; and E.) adopting and then updating the management plan components of subbasin plans into the program. The Council initiated a regional dialogue on

these issues as part of this fish and wildlife program amendment process by releasing and issue paper on October 22, 2004.

The Council received considerable written comment and its staff engaged in numerous discussions on these topics with interested parties. In the subsequent comment processes attending this amendment exercise, two additional issues have been identified: the relationship of subbasin plans adopted into the program to private entities, and Bonneville's "responsibility" to fund activities identified in the adopted plans. These two issues are discussed in the memo below, at sections F. and G. respectively. All of these broader issues have been discussed at recent Council meetings, and the Council is prepared now to advise interested parties as to how it will address these matters.

### **Format of this Letter**

The section below, titled "Issues Presented for Comment" contains five subparts, items A through E. The title, discussion, and proposed alternative options (where they were presented) in this section are presented just as it appeared in the October 22, 2004 issue paper. Following each subsection A through E, in shaded text box the reader will find the new discussion, which may include modifications to how the Council now understands the issue, what advice it received in the comment period, and importantly, the proposed treatment for the matter.

### **Issues Presented for Comment**

**A. Level of specificity in the subbasin plans -- some comments encourage the addition of more specific implementation plans or more specific implementation actions to the subbasin plans.** This is an issue about the level of specificity of the actions included in the subbasin plans and the program. Several of the comments couch the issue in a legal position about the definition of the term "measures" as used in section 4(h) of the Power Act. The term "measures" is not specifically defined by the Act or the adopted fish and wildlife program. Some comments question if the objectives, strategies and other provisions currently included in the subbasin plans are adequate to serve as the "measures" for the fish and wildlife program as envisioned in the act.

The Council is not inviting a legal debate over the definition of the term "measures." However, it is clear that the issue is raised out of a desire to ensure that subbasin plans well serve their fundamental function of guiding the allocation of Bonneville resources to the most biologically and cost-effective activities, and it is right to focus more attention on these matters.

At this point in time, and with careful consideration as to how the next project review and recommendation process will be structured, the Council believes that adopted subbasin plans have sufficiently detailed provisions (primarily their "strategies") to guide a 4(h)(10)(D) project selection process. That is, a 4(h)(10)(D) process would call for proposals for particular projects that are demonstrably linked to the objectives and strategies in a subbasin plan.

The public is invited to comment on whether the strategies in draft subbasin plan amendments are sufficiently specific to guide the development of project proposals and then the review and selection of projects for Bonneville funding. If a reviewer forms the opinion that the plans cannot guide a project development and review process, the commenter should also suggest the

appropriate process to employ to obtain this greater level of specificity for the plans. There are a number of process alternatives that the Council or others have noted as options, including but not limited to:

- After the subbasin plans are adopted into the program, calling for more specific implementation plans *outside* of a statutory program amendment process, but prior to or as part of the 4(h)(10)(D) project review process;
- Using the period of review of draft subbasin plan amendments in this *current amendment process* to receive lists of more specific actions or implementation plans from interested parties that the Council would add to the subbasin plans before their final adoption into the program;
- Adopting a decision-making structure or management framework and the subbasin plans as “reference documents” and explaining how the plans will be used, and prescribe a process and schedule for adding specificity to the subbasin plans (outside of an amendment process) over the next few years;
- Having the Council follow the current subbasin plan amendment process with *another program amendment* process specifically calling for recommendations for program amendments to add specific implementation plans to the program that are consistent with the adopted subbasin plans.

The staff recommendation with regard to the substance of this issue is that the Council conclude that the subbasin plan program amendment process is consistent with the requirements of the Power Act, and that the subbasin plans contain “measures” for the Program that are fully consistent with the requirements of the Act and with the long history of how Council has understood and adopted measures into the program. As for *how* the Council will address this issue with finality, the staff recommends that it be addressed in the way the Council adopts the subbasin plans and in what the Council chooses to do and not do next, and that is, in this case, *not* to undertake a subsequent program amendment process to add more specific project-type details to the measures already in the subbasin plans. Finally, the staff proposes that the complete explanation for how the Council decides this issue be in the Findings/Response to Comments document adopted with the final subbasin plan amendments.

The adopted subbasin plans contain the “measures” that the Act says will constitute the Program. “Measure” is not defined in the Act. The common definition is “a step planned or taken as a means to an end.” That is what the strategies in the subbasin plans are -- the actions or steps or “measures” proposed for implementation as means to protect, mitigate and enhance fish and wildlife, consistent with the provisions of the Act and program and with the goals and objectives in the subbasin plan. The subbasin plan strategies are similar to, if even more elaborate and specific than, the measures the Council’s program has *always* contained for this purpose.

Thus the Council’s 2000 Program amendments envisioned that the mainstem plan and the subbasin plan amendments would contain the more specific objectives and measures for the revised program. Consistent with that guidance, the Council’s May 2002 call for recommendations stated clearly that the Council was requesting recommendations in the form

of subbasin plans, and that these plans were to contain the specific objectives and *measures* for the tributary subbasins.

If that plain meaning of the term “measure” needs elaboration, it can only be in light of the fundamental function of the Council’s adopted fish and wildlife program. The function of the adopted program (a composite of “measures”) is to guide the actions and expenditures by Bonneville as it endeavors to meet its own legal obligation to protect, mitigate, and enhance fish and wildlife affected by the development and operation of the hydrosystem, in a manner consistent with the Council’s program. Most of the commentators conclude, and the Council agrees, that the subbasin plans that have been adopted can and should direct Bonneville spending in furtherance of the Act’s fish and wildlife mandate without more detail or specificity being required. The subbasin plan management plans that have been adopted--particularly in the “strategies” they present--provide more detail about *what* should be done, *where* it should be done, and to what *ends* it is done than any previously adopted program.

The Council did not invite the public to submit as amendment recommendations what have been considered *projects*. Over the 20+-year history of the Council’s program, a project has meant a particular activity proposed for Bonneville funding *to implement a measure in the program*, with a defined sponsor, budget, tasks, technical details, and short-term timeline. If the parties recommending the subbasin plans had chosen to include details of that sort along with the subbasin plan measures, the Act would not be violated by including those in the program, although these details would have no practical effect. But there is no support in the Act for the position that a “measure” means a “project” or requires “project” details of this type, and especially no support for the point of view that *only* a project of this type *could* be a “measure.” Rather, the history of program implementation is that projects are defined and proposed for funding *after* the adoption of program amendments. Congress recognized this fact and made it law when it added section 4(h)(10)(D) of the Act in 1996, making clear that projects are developed and evaluated after the Program measures are in place. The Council will continue to use a process that meets the requirements of 4(h)(10)(D) to invite entities to propose projects for Bonneville funding that are consistent with the adopted Program -- and for most habitat and production projects that means the adopted subbasin plans.

**B. “Roll-Up” -- The relationship of subbasin plans to province or ESU objectives, to the basinwide biological objectives in the Council’s program, and to related matters of prioritization/allocation between subbasin plans.** Comments and consultations generally acknowledge that if each of the 59 subbasin plans is independently sound they will certainly improve our ability to guide actions -- particularly habitat related actions -- within each subbasin. However, commentators are asking two questions about the plans as a collective body of work: 1) do the plans “add up” to meet the objectives established at the basin level in the 2000 Fish and Wildlife Program, and/or 2) because there are always limited resources, can the plans inform decisions about dedicating resources to one subbasin or type of strategy over another?

With regard to the first question, the Council believes that the administrative record supports a finding that the proposed subbasin plans are generally consistent with the 2000 Program basin level objectives. Comments submitted by independent scientists and a significant number of others, including fish and wildlife managers, support this.

With regard to the second question, the Council thinks that there may be general trends or patterns emerging from the subbasin plans that could inform resource allocation across subbasins, but the trends would require additional study and regional discussion before they would significantly influence allocation choices across subbasins or alternative strategies. The Council believes that while subbasin plans at this time can provide a sound basis for allocating resources to priority areas *within* a subbasin, they do not give us a compelling basis to prioritize work in one subbasin over another.

Notwithstanding the current positions stated above, the Council acknowledges that working with subbasin plans as a collective body of work -- a “roll-up”-- may strengthen the relationship of the plans to broader fish and wildlife program objectives and help inform resource allocation issues. Therefore, the public is invited to offer views and information on the best way to accomplish a “roll up” of the subbasin plans. In providing advice, it would be important to carefully explain what purpose or purposes this exercise would serve. The Council is interested in hearing perspectives on the following: 1) what is the preferred process vehicle -- should it be initiated as a Power Act amendment process; 2) is there technical or scoping work that should be undertaken before a formal amendment process is started; and 3) should subbasin “roll-up” precede adding more specifics (Issue A above) to subbasin plans that have been developed?

The issue of “roll-up”-- generally described as an evaluation of the subbasin plans as a collective body of work and the setting of objectives at a collected scale -- drew far more interest and input than any of the other matters in the October issue paper. A large majority of the commentors were pleased with the subbasin planning process, but urged that a next step in the development of the Program is critical and must be completed soon -- the review of the subbasin plans as a collective body of work to establish larger-scale objectives. This is consistent with the Council’s 2000 Program, which calls for the development of Province scale objectives once the subbasin plans are adopted.

The 2000 Program and the commentors generally agree that the province objectives will function to:

- Provide benchmarks for measuring fish and wildlife program performance;
- Provide a framework for a more efficient monitoring and evaluation program;
- Provide insights and context to resource allocation decisions.

In addition to completing the fish and wildlife program revision started in 2000, this province-level amendment process may allow the Council and interested parties to address two of the issues that were not satisfactorily treated in the subbasin planning: (1) the integration of habitat plans and artificial production activities, and; (2) the design and conduct of monitoring and evaluation. Every reviewer in the subbasin planning amendment process found most of the subbasin plans had deficiencies in these two areas. The province level amendment process would be designed to address these issues, and if not completely treat them, to make as much progress as possible.

This province level amendment process would benefit from the Council providing a guidance document that: (1) explains what functions the province objectives serve in the adopted program; (2) explains how the subbasin plan information should be being used to develop the province objectives; (3) establishes a common vocabulary for the amendment process; (4) describes what assumptions are made for habitat, hydro, harvest and hatchery interactions or

effects and how those are considered as objectives are set, and then; (5) sets out example objectives for anadromous and resident fish, wildlife and habitat. This guidance document would *not* be a set of draft or provisional objectives endorsed by the Council -- it would not be that formal. Rather, its purpose would be to describe a certain approach to developing the objectives, a suite of transparent assumptions about “the four H’s” and the relationships between habitat and biological performance; and, finally, the objectives that those assumptions yield. This would provide all interested parties a common point of reference as they develop recommendations for the formal amendment process.

Our recommendation is to begin the development of the guidance document as soon as possible, and initiate a formal amendment process no later than the fall of 2005. The findings/Response to Comments documents that will be adopted by the Council to finish the current subbasin level amendment process would outline the purposes and general schedule of this next fish and wildlife program amendment process.

**C. Project review and recommendation process.** Some commentors have asked questions and stated concerns about the design of future 4(h)(10)(D) project review processes. The questions have included: how will subbasin plans be used in project selection processes; what will be the timing and elements of that process; how will available resources be allocated among the provinces and subbasins; how will proposed projects be reviewed for consistency with subbasin plans and by whom; and will the planning groups or other subbasin level groups formed to develop and recommend subbasin plans also have a role in project selection? Some commentors make clear they are reluctant to support adoption and use of subbasin plans without more information on such questions.

Several of the fundamental project review particulars are clear and were set forth in the 2000 Program. For example, once adopted into the program, subbasin plans indeed will be the program’s cornerstone for project definition and review. That is, projects proposed for funding will be evaluated for consistency with the relevant subbasin plans, and not recommended for funding if inconsistent. The Council has made this information available to the region over the last few years in guidance and informational materials. Additionally, it should be recognized that the subbasin planning initiative did not, and cannot, change the Act itself. The provisions of Section 4(h)(10)(D) will continue to supply the basic legal requirements and procedures for project review; including independent scientific, public and Council review of projects proposed for funding.

While commentors may provide advice on how the Council should conduct the project review process to implement subbasin plans in response to this letter, it may be more appropriate and timely for interested parties to be involved in shaping these issues in other places such as the Regional Coordinating Group meeting scheduled for November 1, 2004.

As outlined in the October issue paper, the 2000 Program established the fundamental elements of the project selection design (*See* “Implementation Provisions”). That is, fish and wildlife needs to be addressed in subbasin areas would be determined from subbasin plans adopted by the Council, that the solicitation form and process would be designed to, among other things, draw out the detail of how proposals are consistent with subbasin plan objectives, strategies, and that local, Council, and independent science reviews would be conducted to shape a three-year implementation package that addresses the priorities for implementing the subbasin plans. The

basic design of the process would be like the last -- a provincial format -- to allow for in-depth reviews and multi-year recommendations. Finally, and as stated in the October paper, the procedural requirements and review standards of section 4(h)(10)(D) would be applied (ISRP review, Council recommendations and findings and explanations for recommendations where necessary). Most of the comment seemed to understand and support this basic description of how subbasin plans would be used in a project selection process. All commentators who spoke to the issue support the continuation of the province-based format for the process.

Where this issue was addressed, it was not to take issue with the use or utility of subbasin plans to guide subbasin project design and prioritization. Rather, some commentators sought to emphasize that while subbasin plans can be used for those purposes, but there are other program areas or issues that they cannot be used for, such as:

- Developing priorities for projects that are mainstem/systemwide (as opposed to subbasin) focused;
- Making decisions about artificial production activities;
- Allocating the annual direct fund budget among subbasins and other program areas such as the mainstem/systemwide projects group.

In response, first, the recommendation is to continue to use a province-based review process similar to the last in many ways. It would be launched in time to inform recommendations for Fiscal Year 2007 and beyond. Commentors generally supported waiting to initiate the province review so that additional program organization work, and perhaps some of the province planning discussed above, could be completed in calendar year 2005 and early 2006. We would explain in findings/Response to Comments documents, and in some introductory program text how subbasin plans will be used in a province-based project selection process that meets the Act's 4(h)(10)(D) requirements.

Now turning to the points in the bullets above, taking them in turn, it is accurate that the subbasin plans cannot be used to establish priorities for projects that are mainstem/systemwide focused or do not have a direct subbasin specific implementation focus. This was anticipated in the 2000 Program, where it is explained that projects without a subbasin orientation would be considered in a separate part of the project review and selection review process. The Council staff has been working with Bonneville and others over the past year to identify those projects that do not have a subbasin specific orientation, organize them together, and calculate their costs. This is being done to position them for the same type of in-depth rigorous review that the subbasin specific projects will receive. There is some of the "organization" work that Council staff and many commentators believes should be done to position the program for the next province review process.

The second point, that the subbasin plans do not provide guidance for making decisions about artificial production activities, is a bit more difficult. The reason that *some* plans may not be as definitive as they need to be to guide project development and review is because although directed to cover this issue thoroughly in the plan, some simply did not do a very good job. More specifically, some plans did not explain well how artificial production activities combine with and relate to the habitat strategies in the plan to meet overall subbasin objectives for the target species. This deficiency in some plans however, does not mean that the adopted plans are not useful for guiding artificial production project funding. Nor does it mean that a separate process or product is needed to deal with artificial production projects funded by Bonneville.



Rather, just as is the case with all projects, those who propose Bonneville funding for artificial production activities will, as part of the proposal development and presentation steps, will have to explain how that work relates to the subbasin objectives and habitat activities. In a way, the project selection process will begin to remedy some of the shortcomings in some of the plans on this issue.

The last point has to do with allocating the annual Bonneville direct program budget among the subbasins and other program areas. It is entirely accurate that the subbasin plans, as they exist now, do not give rise to an obvious funding allocation. It is also right to acknowledge that subbasin plans and the planning process was not expected to yield an allocation scheme. At this point in time, the program's 70% anadromous fish, 15% resident fish, and 15% wildlife split is the only formal allocation of the fund. The last province review used historical funding patterns as an allocation scheme, and most found that reasonable, even if not acceptable for the long-term. There are ongoing regional discussions about how to make allocation decisions as we head towards a provincial review for Fiscal Year 2007 decisions. Any allocation scheme for the fund is going to have policy, legal, and scientific elements, and alternative perspectives and positions. The Council will facilitate the regional discussion about allocation publicly and openly, and with the policy, legal, and scientific elements of whatever approach is arrived at explicitly stated.

The Council shares the objective of many commentators to develop an equitable and cost-effective allocation scheme focused on fish and wildlife results. Some of the key goals in the province planning ("roll-up") amendment process described above are to provide objectives to measure performance against, and to review the subbasin plans as a larger body of work to distill insights or considerations about these funding allocation decisions.

**D. Relationship to recovery planning under the federal Endangered Species Act.** A concern expressed in some of the comments appears to stem from statements in Council documents and from NOAA that subbasin plans might be the "foundation" for recovery plans or "interim local recovery plans" under Section 4 of the ESA for listed salmon and steelhead ESUs. Commentors' level of concern about the subbasin plans would be high if the Council were in fact to offer plans in their current state as completed and fully adequate ESA recovery plans, or if NOAA Fisheries were to accept them as such.

The Council's position always has been that it is pursuing the development of subbasin plans to meet the statutory obligation under the Power Act to protect, mitigate and enhance fish and wildlife affected by the development and operation of the FCRPS hydrosystem. If those plans also prove useful in the effort to address the requirements of ESA for those same populations, all the better. The Council believes the technical and planning work represented by the subbasin plans is of such a caliber and at such a depth that NOAA Fisheries would be remiss not to make use of that work in developing recovery plans. The products of subbasin planning are realistic "foundations" to build upon by those working on ESA recovery plans. The point is, the Council has no legal obligation, nor does it have any sort of commitment from NOAA Fisheries, to automatically make subbasin plans final ESA recovery plans. Commentors should let the Council know if this point is not clear or if they see or seek a different relationship between the subbasin plans and recovery planning.

Some of the early comments -- those from August 2004 primarily -- sought clarification on how subbasin plans relate to ESA recovery planning that is the obligation of the U.S. Fish and Wildlife Service and NOAA Fisheries. The Council has endeavored to be clear and consistent on this point, and reiterated its perspective in the October issue paper. After this republication of in October, there was very little question or additional comment on this topic.

The recommendation is to document in findings and/Response to Comments documents adopted by the Council essentially the following: That the Council believes that the Services ought to use the subbasin plans -- both the technical assessments and the management plans -- in recovery planning. Further, if the Services were to find its recovery plan documents coming to very different assessments and actions in the subbasins, the Council requests significant consultation before NOAA releases the draft recovery plans for public review. It would be made clear that the Council engaged in subbasin planning in order to provide the sufficient foundation in the Council's program for offsite mitigation under the Northwest Power Act, not to satisfy, in a legal sense, all requirements of the Endangered Species Act for recovery planning. In adopting the subbasin plans into the program, the Council is not making, and need not make a determination at the same time that the subbasin plans, singularly or collectively, constitute complete or final recovery plans under the ESA. This is a determination that the Services must make.

**E. Improving subbasin plans - the “living document.”** The Council proposes to adopt the management plan portions of subbasin plans into the fish and wildlife program, not the technical assessments or inventories. Part of the reason for this is simply to ease the burden of managing the program. But another part of the reason has been that the assessments are technical documents that underlie the objectives and measures. Moreover, the assessments ought to be in a posture that they can be modified relatively easily if and when new information arises.

There is some concern that management plans will be made permanent by adoption into the program, and not subject to modification or improvement even if partially flawed or easily improved, without a major program amendment process. Commentors have suggested that the Council may want to establish a mechanism or procedure (short of the full program amendment process) for considering and approving modifications to any portion of a subbasin plan when appropriate, including modifications to the management plan portions that have been adopted into the program. If commentors believe this proposal is important, thoughts on the following types of detail are encouraged:

- On what basis should the Council approve a proposed modification to a plan
- How can the Council assure that management plan modifications are still derived from and linked to the technical assessments
- Regarding procedure, should the Council consider and approve minor amendments to the program through a notice and comment procedure that does not require all of the procedures for major amendments in Section 4(h) of the Power Act
- Should the Council write into the program at the time of adoption of the subbasin plans an adaptive management process for considering and approving modifications to the management plan portions of the subbasin plans outside of any program amendment process?

The commentors that addressed this matter stayed at a very general level -- that some periodic

updating of plans should be done, and that the modification process should be as simple as possible while meeting legal requirements. None of the comments really addressed the bulleted questions from the October issue paper directly.

The recommended resolution of this issue is to include, as part of the adopted program (likely in an introductory or organizing preface statement) an explanation of an adaptive management process for considering and approving “minor” amendments to adopted subbasin plans that is more streamlined and expeditious than the fish and wildlife program amendment processes have typically been. The Council will be responsible for deciding what are “minor” modifications, and will make those decisions after consultation with affected entities, and possibly independent science advice.

#### **F. Relationship of subbasin plans to hydroproject relicensing.**

Comments received as the Council on the first set of plans released as draft program amendments generated another an issue--the relationship of adopted plans to relicensing non-federal hydroelectric projects -- that had not surfaced prior to the release of the October issue memo. The matter and comments surfaced in November and December, and were discussed with the Council at its December meeting. The following explanation about this relationship was included in written public materials released in December, and that explanation continues to be the recommended treatment of the matter.

[A few comments submitted] raise an issue about the relationship of the subbasin plans and the Council’s program to non-federal hydroprojects on the Columbia and its tributaries and especially to re-licensing proceedings for these projects pending before the Federal Energy Regulatory Commission. We are treating this an issue of general application, as so many of the subbasin with recommended subbasin plans include non-federal hydroprojects.

To the extent the comments state that the objectives and strategies in the subbasin plans do not or should not apply to the non-federal hydroprojects or to conditions for fish and wildlife affected by these hydroprojects, this is not correct as a matter of law. The Power Act calls on the Council to adopt a program to protect, mitigate and enhance fish and wildlife affected by the development and operation of any hydroelectric program on the Columbia and its tributaries, without distinguishing between federal and non-federal projects. And then Section 4(h)(11) of the Power Act provides that the federal agencies responsible for “managing, operating, *or regulating Federal or non-Federal* hydroelectric facilities” must exercise those responsibilities taking into account the Council’s program to the fullest extent practicable at each relevant stage of decision-making. This provision clearly applies to FERC licensing and re-licensing of non-federal hydroprojects. The Council’s program has always included measures to address the effects of non-federal hydroprojects, and FERC has faithfully taken into account the Council’s program as it exercises its responsibilities. The subbasin plans, once adopted into the program, will be no different. FERC will have an obligation to consider these plans as they apply to any project undergoing relicensing.

The Council recognizes that as part of the FERC re-licensing process, a project license holder and FERC will have to assess the effects of the project on fish and wildlife, an assessment that will be one basis for the license holder to propose and FERC to decide on any mitigation

obligations. The commentors here are concerned of the implications if their assessments differ from the subbasin assessments, or the mitigation planning to address the project assessments reaches different conclusions on objectives and mitigation strategies than did the subbasin planners.

These comments raise a fair concern, but not an insurmountable problem. In preparing and evaluating any project assessment, and engaging in mitigation planning, FERC and the license holder will have to seriously consider the relevant subbasin assessment and management plan. But, the subbasin assessments and management plans are not binding on the agency. If differences emerge between the Council program's approach and the conclusions developing in the FERC process, involving either the assessments or the proposed strategies to address the assessments, FERC and the license holders logically should consult with the Council and the relevant participants in the subbasin plan to try to resolve these differences, as an obvious aspect of taking the Council's program into account to the fullest extent practicable. Ultimately, of course, FERC will have to reach its own independent conclusion, based on all the information before it and its multiple legal responsibilities.

The recommendation is that the Council include an explanation substantially similar to that above in its findings/Response to Comments documents that it adopts to conclude this amendment process.

#### **G. Bonneville's funding of activities in adopted subbasin plans**

Several comments received during the public review periods for plans released as drafts raised the issue of Bonneville's obligation to fund activities detailed in the subbasin plans. The particular perspective offered was that the Council should make clear that Bonneville has the responsibility to fund only those things that are directly tied to affects of the Federal hydrosystem. Bonneville itself commented that it desired that subbasin plans or their implementation need to more fully apportion responsibility for certain actions. The following is the proposed response to this line of comment, and is new material for the Council.

Bonneville's obligation is limited by the Power Act to mitigating for the impacts of the hydrosystem on fish and wildlife. Neither the Council nor the plans it has adopted claim otherwise. Such a claim, even if it were embedded undiscovered in an adopted subbasin plan or some other part of the program would be legally irrelevant. This can be made clear with a "savings provision" adopted as part of the program language in this amendment process. With that treatment option presented, the following additional discussion on this topic may be helpful:

At this time, the Council, Bonneville and others should not reach into the subbasin plans and declare some parts within the Bonneville mitigation obligation (or "responsibility") and some parts not. This is because the real issue is Bonneville *authority* to meet its statutory obligations, rather than black and white divisions of responsibility. That is, Bonneville has a legal obligation to mitigate for hydrosystem impacts under the Act. To meet that duty, Bonneville has the *authority* to fund both on-site protection and mitigation actions as well as offsite habitat and production actions--that offsite work now catalogued in subbasin plans. Therefore, as long as an offsite mitigation measure funded by Bonneville addresses a species identified as adversely affected by the hydrosystem that strategy/action is potentially within the authority of Bonneville to fund as part of its effort to satisfy its Power Act mitigation obligation. The Act precludes

Bonneville from funding this work if it were to replace or be “in lieu” of funding provided by another responsible party.

On this basis, subbasin planners sought to identify focal species that are adversely affected by the hydrosystem and use that subbasin during some part of their life cycle, identified factors in the subbasin that limit the survival or productivity of those species, and proposed corresponding strategies to address those limiting factors. All such strategies are within Bonneville's authority to fund as offsite mitigation to address Bonneville's mitigation obligation, whatever the immediate cause of the limiting factor in the subbasin. The Council did not ask the subbasin planners to determine at what aggregate point implementing the strategies in the subbasin plan would or could exceed Bonneville's mitigation obligation. This cannot be assessed at the subbasin level, at least not at first, as it is instead a programmatic matter in the hands of the Council and Bonneville.

Again, adopting savings provision that acknowledges that Bonneville's obligation vis-à-vis the subbasin plans is limited to funding actions within its Power Act mitigation obligation and authority would simply restate existing law, but doing so may be a useful reminder to interested parties.

The Council appreciates your interest and involvement, and your important contributions in helping it make the decisions outlined above on how to move forward on these matters. The documents mentioned above, whether they are the findings, Response to Comments, or program language that will be used to treat these matters will be developed over the next few months and available to the public as part of the regular Council process.