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June 2, 2014

### DECISION MEMORANDUM

**TO:** Council Members

**FROM:** John Shurts

**SUBJECT:** Sixth Power Plan: Ninth Circuit remand:  
inclusion of the Bonneville estimate of the costs to implement the Fish and  
Wildlife Program

### Introduction

This is the second of two decision memoranda related to the Sixth Power Plan litigation and Ninth Circuit remand. This memorandum concerns *only the second remand issue* before the Council -- reconsidering the inclusion in the Sixth Power Plan of Bonneville's estimate of the costs of the 2009 Fish and Wildlife Program.

To remind the Council, in September a panel of the Ninth Circuit remanded the Sixth Power Plan decision to the Council "for the limited purposes of (1) allowing public notice and comment on the proposed methodology for determining quantifiable environmental costs and benefits, and (2) *reconsidering the inclusion in the Plan of the BPA's estimate of the 2009 Program's cost to hydrosystem operations.*" See previous confidential memoranda for summaries of the opinion and analyses of the issues. The Court issued its final mandate on November 14, 2013.

### Recommendation

Our recommendation is to have the Council adopt a supplemental statement to the Sixth Power Plan that would simply excise from the Sixth Power Plan the information on how Bonneville estimates the costs of implementing the Fish and Wildlife Program. The statement we propose to have the Council adopt is attached to this memorandum, and includes a brief explanation as to why.

In our view the Council can decide to adopt this statement without further public process, if it so chooses. This is because what we are recommending would be a non-substantive, purely editorial change to the text of the Sixth Power Plan, removing language that is irrelevant to the statutory requirements of the power plan and that played no role in the analyses or decisions on the plan's resource strategy or other required elements. A public comment period is not necessary for a purely editorial change to the Sixth Power Plan that has no substantive meaning for the plan. See Section 4(d)(1) of the Northwest Power Act, which describes process requirements for "substantial, non-technical amendments to the plan" only.

This decision memorandum would become part of the administrative record and serve as further explanation for the Council's decision on remand.

## **Further explanation**

### **The Court's decision**

The Ninth Circuit remanded the Sixth Power Plan to the Council for the "limited purpose" of "reconsidering the inclusion in the Plan of the BPA's estimate of the 2009 Program's cost to hydrosystem operations." *Northwest Resource Information Center, Inc. v. Northwest Power and Conservation Council*, No. 10-72104, at 23-28 (9th Cir, Sept 18, 2013). Including Bonneville's fish and wildlife cost estimate in the Council's power plan led the Court to conclude, erroneously, that the information must have played a part -- inadequately explained -- in the Council's decisions on the Sixth Power Plan. In that light the Court found that the Council did not provide a satisfactory explanation in the plan documents itself for why the information on fish and wildlife costs borne by the existing hydrosystem was in the final plan and how that information was used, especially when coupled with the change from the draft power plan, which included a broader discussion of fish and wildlife costs in the draft Appendix M.

"...The Council's contention that the BPA cost estimate had 'no bearing' on the Plan as a whole thus rings hollow when in fact the Council incorporated the estimate multiple times into both the Plan's body and Appendix M.

"Because the Council has provided no basis for adopting the BPA's cost estimate throughout the Plan, and because '[w]e may not supply a reasoned basis for the agency's action that the agency itself has not given,' *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983), the Council's unsupported decision was arbitrary. NRIC, moreover, has borne its relatively light burden of showing that the Council's arbitrary decision was harmful. *See Shineski*, 556 U.S. at 410. This conclusion, however, does not require setting aside the entire Plan. On remand, the Council must reconsider the parts of the Plan that contain the BPA's cost estimate. The Council is not foreclosed from including that estimate in the Plan, but it must develop a reasoned basis for doing so. Nor is the Council required to include the resource-replacement cost estimate developed in the draft of Appendix M, but the decision to include or exclude that estimate must be grounded in

reasoning reflected in a record that this court may review.” *Northwest Resource Information Center, Inc. v. Northwest Power and Conservation Council* at 26-27.

The Council understands the Court’s concerns about the adequacy of the explanation in the Sixth Plan documents regarding the inclusion of the fish and wildlife cost information in the plan. At the same time, the information included in the plan on how Bonneville reported the costs of the 2009 Fish and Wildlife Program played no role in, and was not relevant to, the Council’s decisions on the substantive elements of the Sixth Power Plan that are required by the power plan provisions of the Northwest Power Act. Nothing in the Court’s analysis or decision alters that fact, or can alter it. The Council included the information on fish and wildlife costs in the power plan for informational and editorial purposes only. Removing that information on remand would occur in the same context -- as an editorial revision without substance -- as explained in the supplemental statement and in this decision memorandum.

**The power plan provisions of the Northwest Power Act -- the Council does not and cannot consider the estimated cost of implementing the Council’s fish and wildlife program when deciding what new resources the region should develop over the next twenty years.**

The Northwest Power Act directs the Council to adopt a “regional conservation and electric power plan” (Section 4(d)(1)), defined further as a “general scheme for implementing conservation measures and developing resources pursuant to section 6 of this Act to reduce or meet the [Bonneville] Administrator’s obligations.” Section 4(e)(2). Energy resource cost information is critically important to any power plan under the Act’s provisions, and so was critically important to the Sixth Power Plan, *but only* the estimated costs of the *new* generation and conservation resources that the Council considered for inclusion in plan’s scheme for “implementing conservation measures and developing generation resources.” The new resource cost estimates in the plan are necessary to the Council’s effort under the Power Act to decide which new resources should be the most cost-effective to add to the system. Sections 3(4), 4(d)(1), 4(e)(1-3).

The same is not true of the costs borne by the existing system to implement the fish and wildlife program. The *physical* effects on hydropower generation that result from implementation of fish and wildlife program measures are relevant to the power plan analysis, as part of estimating the amount and timing of the region’s existing power supply. But the *financial* effects or costs of implementing the fish and wildlife program are not called for or relevant (under the statute) and were not considered by the Council in the Sixth Power Plan, in the plan’s new resource cost estimates, in the plan’s new resource strategy, or in the Council’s decisions on any other substantive element of the power plan called for by the Power Act.

The Council does *not* decide in the power plan on what fish and wildlife measures should be borne by the existing hydrosystem -- it does that in a separate and preceding fish and wildlife program amendment process called for in Section 4(h) of the Power Act. And so the Council does not, and has no authority or reason to, consider the costs of implementing the fish and wildlife measures as the Council decides what new resources to add to the system under the power plan provisions of the Act. This is true

of the Sixth Power Plan -- the statute did not require or allow, and the Council did not use, the information on fish and wildlife costs in making any decision in the Sixth Power Plan regarding the substance of the resource strategy or the other elements of the power plan called for in the Northwest Power Act.

**The purpose for including the information on fish and wildlife costs in the power plan, and for the recommendation to excise that information on remand**

The Council always includes in the power plan a great deal of information about the region's power system. This is because one of the principle statutory obligations of the Council is to inform the region about all aspects of the regional power system. See Northwest Power Act, Sections 2(3) and 4(g). Among many other bits of information, people are always interested in -- and even contest -- how Bonneville reports the costs of what the power system bears in implementing the fish and wildlife program. And so the Council included such information in the Sixth Power Plan for information purposes, even though it had no specific statutory obligation to, and had no statutory authority to use or consider that information in making decisions on the elements of the power plan. And (as discussed above) nowhere in the Sixth Power Plan did the Council consider that information in making a decision on the power plan's new resource strategy or any other substantive element of the plan.

Including Bonneville's fish and wildlife cost estimate in the final Sixth Power Plan was thus an informational and editorial decision, not a decision of substance relevant to or affecting the Sixth Power Plan's provisions required by the statute. And this is just as true of the informational and editorial decision the Council made to reduce the more lengthy discussion of various approaches to assessing fish and wildlife costs in the draft power plan appendix to, in the final plan, just the references to how Bonneville reports those costs. The discussion in the draft plan about the different approaches that might be used to estimate the costs of implementing the fish and wildlife program was never intended to serve as a decision point for the Council on the substantive elements of the power plan, nor did it ever become a factor for the Council members to consider in developing the Sixth Plan resource strategy. Rather, the discussion in the draft was intended, again, just to provide information for the region on a topic that has been and continues to be a source of differing opinions and ongoing discussion. The change from the draft to the final was simply another way of presenting information of interest and contest, but not of substantive relevance to the power plan.

In that light, *deleting* completely these informational references (as recommended here), or even retaining one or more references plus adding an explanation of this same nature, affects *nothing* about what is required of the Council by the Northwest Power Act to have a legally valid Sixth Power Plan. The Court was concerned, erroneously, that the inclusion of this information must have meant that the Council used it in some way, however inadequately explained, in making the substantive decisions required of the power plan. Excising the information should be conclusive proof to the contrary -- nothing changes about the substance of the Sixth Power Plan. Excising the information is also the easiest course to implement without major distraction from the work of the current Fish and Wildlife Program amendment process and from the Council's work of getting ready for the Seventh Power Plan.

# Sixth Northwest Conservation and Electric Power Plan

## [Proposed] Supplemental Statement

### June 2014

In September 2013, the Ninth Circuit remanded the Sixth Power Plan to the Council for the “limited purpose” of “reconsidering the inclusion in the Plan of the BPA’s estimate of the 2009 Program’s cost to hydrosystem operations.” *Northwest Resource Information Center, Inc. v. Northwest Power and Conservation Council*, No. 10-72104, at 23-28 (9th Cir, Sept 18, 2013). The Council has reconsidered the inclusion of the information on fish and wildlife costs pursuant to the remand order and has decided to excise that information from the Sixth Power Plan.<sup>1</sup>

Thus by this statement, the Council removes from the Sixth Power Plan the references as to how Bonneville estimates and reports the costs of implementing the Council’s Fish and Wildlife Program. Specifically, the Council removes the four references to the information appearing in the Sixth Power Plan at the following locations:

- **Overview:** Fish and Wildlife Program and the Power Plan, second paragraph, at p 8.
- **Chapter 6: Generating Resources and Energy Storage Technologies:** Hydroelectric Power, Existing Hydropower System, Integrating Fish & Wildlife and Power Planning, second paragraph, last sentence, at p. 6-18.
- **Chapter 13: Bonneville’s Obligations:** Assessing Fish and Wildlife Costs and Accommodating Fish and Wildlife Operations, second through fourth paragraphs, at pp. 13-14/13-15.
- **Appendix M: Integrating Fish & Wildlife and Power Planning:** Summary of Key Findings, third paragraph, fourth sentence, at pp. M-1/M-2.

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<sup>1</sup> The Court also remanded the Sixth Power Plan decision to the Council for the other “limited purpose” of “allowing public notice and comment on the proposed methodology for determining quantifiable environmental costs and benefits.” The Council complied with that aspect of the Court’s remand order in a separate set of actions finalized in April 2014.

The Council originally included these references to how Bonneville reports the cost of implementing the Council's 2009 Fish and Wildlife Program for informational purposes only. The Council always includes in a power plan a great deal of information about the region's power system, well beyond the information directly relevant to the substantive elements and decisions of the power plan called for in the power plan provisions of the Act. This is because another of the principle statutory obligations of the Council is to inform the region about all aspects of the regional power system. See Northwest Power Act, Sections 2(3) and 4(g). Among many other pieces of information, people in the region are always interested in -- and even contest -- how Bonneville reports the costs of what the existing power system bears in implementing the fish and wildlife program. And so the Council included such fish and wildlife cost information in the Sixth Power Plan for information purposes only. The Council had no specific statutory obligation to include this information, and it had no statutory authority to use or consider that information in making decisions on the power plan's new resource strategy or other elements of the power plan. And nowhere in the Sixth Power Plan did the Council consider or use that fish and wildlife information in making a decision on the power plan's new resource strategy or any other substantive element of the plan.

Under the Northwest Power Act, the Sixth Power Plan was a decision by the Council as to what the Council recommends are the most cost-effective new conservation and generating resources that should be added to the region's power system. Northwest Power Act, Section 3(4), 4(d), 4(e)(2). Cost estimates for new conservation and generating resources did play a role in the Council's analysis and decisions for the Sixth Power Plan, as required by statute.

Not so for the information on the estimated costs of implementing the fish and wildlife program, a program with measures for fish and wildlife decided in a separate and preceding legal process under Section 4(h) of the Northwest Power Act. The Council did not, and cannot, decide in the power plan on what are the fish and wildlife measures to be borne by the existing hydrosystem, and so the costs of those measures is similarly not a relevant part of the power plan. Moreover, to reiterate, information on fish and wildlife costs borne by the existing hydrosystem system could not be, and was not, a factor in the new resource cost estimates before the Council, nor any factor in the Council's decisions on what new resources to recommend in a resource strategy as most cost-effective or the Council's decisions on the other elements of the power plan under the Act.

The Court had concerns that the fish and wildlife cost references may have meant that the information had some substantive effect or meaning for the power plan, however inadequately explained. It did not have such effect, nor could it under the Act. To make that point absolutely clear, given the remand from the Court, the Council is excising the references to the fish and wildlife costs from the Sixth Power Plan. Removing the references is a purely editorial action without substantive or technical effect on any aspect, analysis, element or conclusion in the Sixth Power Plan.