

Bill Bradbury
Chair
Oregon

Henry Lorenzen
Oregon

W. Bill Booth
Idaho

James A. Yost
Idaho



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

Jennifer Anders
Vice Chair
Montana

Pat Smith
Montana

Tom Karier
Washington

Phil Rockefeller
Washington

June 3, 2014

MEMORANDUM

TO: Council Members

FROM: Council staff

SUBJECT: Update on Fish and Wildlife Program Amendments

At the June Council meeting the staff will provide a brief update to the Council regarding the fish and wildlife program amendment process. The staff will discuss 1) process requirements and considerations for the remainder of the program amendment process, and 2) a brief update on public hearings on the draft program.

Two attachments are provided with this memo. The first is a staff memo detailing some considerations for the remainder of the amendment process, with staff recommendations on how to proceed. The second is a schedule for the public hearings. At the time of this discussion we will have held four hearings to date.

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June 2, 2014

MEMORANDUM

TO: Council Members

FROM: John Shurts

SUBJECT: Fish and Wildlife Program amendment process: public process *after* July 9

The Council is now taking written and oral comment on its draft fish and wildlife program, an official comment period that ends July 9, 2014. The point of this memorandum is to discuss what happens *after* July 9 with respect to public process and public input.

Public input and consultations need not cease after July 9. Instead, the Council has to decide how much, if any, additional input to allow after July 9, and under what rules and limitations. The reason for setting an endpoint for the official comment period is practical -- to set a date after which the Council can begin its work of developing a final program based on the comments and other information in the record. The July 9 date does *not* have a legal meaning beyond that, and it does not mean that all input to the Council has to cease *unless* the Council decides that it wants the date to have that meaning.

Our **recommendation** is to follow the past practice of the Council. That is, the Council would continue to allow oral input from the public and from directed consultations past July 9, all of which have to be documented for the record. And then the Council would cut off communications from outside the Council at a point in the last month before final decision. Details on this recommendation are below.

Process requirements and considerations

The procedure that the Council follows in developing the fish and wildlife program is a combination of the explicit but few procedures specified in the Northwest Power Act and general consistency with the procedures for agency rulemaking in the federal

Administrative Procedures Act (APA).¹ Informal notice-and-comment rulemaking under the APA involves providing notice of a proposed rule (akin to the Council providing notice of the draft program), allowing for oral and written comment within a specific period, the building of an administrative record on the input received and other information, and then a decision on a final rule (final program) with a statement that explains the decision in light of the recommendations, comments and other information.

The APA does not require an agency to shut off all communication from outside the agency on a proposed rule after the close of a specified comment period, or even put explicit limits on such input or its use. The federal courts, however, have been skeptical of agency practices that allow for unbridled off-the-record communications between an agency and entities outside the agency right up to the point of decision on a rule. For that reason all federal agencies have established or follow guidelines to govern these matters, although the procedures vary widely.

Council's past practice

The Council's past practice has been this:

(1) The Council continues to allow public input on the draft program (or draft power plan) for a period of time after the close of the official comment period. In the past, the Council has allowed comments generally up to a month preceding a decision on the final program. The kinds of input the Council has allowed, and the limits on input, include:

- Oral communications on the draft program to one or more Council members from someone outside the agency. These communications must be summarized in a note, circulated to the rest of the Council, and placed in the administrative record. It is important that the Council members be fair and transparent in allowing for such opportunities
- Comment at regularly scheduled Council meetings, either as an open public comment opportunity or at the request of or for the purpose of hearing from certain entities on certain topics. It is important here as well that the Council be fair and transparent in allowing for such opportunities.
- Directed consultations with important participants, usually around specific topics. Notes are taken and placed in the administrative record. Again, it is

¹ Note that nothing in the Power Act requires the Council to follow the rulemaking procedures in the APA. The Power Act does apply other provisions of the APA to the Council's decision -- primarily the judicial review and administrative record provisions of the APA. The Council has chosen to be guided in a general sense by the rulemaking procedures in the APA because we need to have some regular procedure for building a record and making decisions; the APA provides a simple and useful guide to how to conduct notice-and-comment decisionmaking; and the federal courts are familiar with these procedures. Another reason is that is possible a federal court might look at the Power Act provisions and decide that the rulemaking procedures of the APA apply to the Council in some fashion, even if implicit and imperfectly expressed.

important that the Council be fair in accepting or seeking consultation requests, although it is also appropriate under the Power Act to emphasize consultation with those entities named in the Act as explicit consultation partners -- state and federal fish and wildlife agencies, tribes and Bonneville customers.

- The Council usually does *not* allow, circulate and consider general written comments on the draft after the close of the comment period, at least not without specific approval from the Council. On the other hand, if something in writing does come in after the close of comment period and it does get read by members inadvertently, it needs to be circulated to all and placed in the record. Better to have something like that in the record than have it influence one or more members but not be in the administrative record.

(2) At a certain point before final decision, the Council closes off any further public input and proceeds to final decision based *only* on what is in the administrative record to that point.

- For some reason this is often called the “ex parte” period, although the term is not really accurate.
- Not all federal agencies follow this practice, but some do. Nor have the courts absolutely required it.
- After the Council enters into this period, the members are supposed to rebuff anyone outside the Council that wants to talk about or comment on the draft program. And anything in writing that comes to the Council or a member should neither be read nor circulated, and should instead be jettisoned or sent to the attorneys unread to be put into a special file.
- Past practice at the Council has varied as to when the Council enters into this period. But the usual practice has been in the last month before decision.

Recommendation for this amendment process

The Council is not required to follow its past practice, and can revise that practice as it sees most fitting. Even so, our recommendation is that the Council continue to follow past practice in the current program amendment process. That would mean:

- (1) continuing to allow for input from outside the Council after the close of the formal comment period on July 9;
- (2) allowing for the kinds of input as described above;
- (3) having a period just before final decisionmaking during which no further input is accepted and considered; and
- (4) an expectation that this end date for input will occur roughly in the month before final decisionmaking.

Public Hearing Schedule
Columbia River Basin Fish and Wildlife Program
Northwest Power and Conservation Council

Thursday, May 29

Astoria, OR

530-630pm

[Liberty Theater](#)

1203 Commercial St

Astoria, OR 97103

503.325.5922

Tuesday, June 3

Olympia, WA

5-630pm

[Tumwater Timberland Library](#)

Meeting Room

7023 New Market St SW

Tumwater, WA 98501

360.943.7790

Monday, June 9

Kalispell, MT

430-6pm

[Red Lion Hotel](#)

Ballroom A

20 N Main St #150

Kalispell, MT 59901

406.751.5050

Tuesday, June 10

Missoula, MT

430-6pm

[Double Tree Edgewater](#)

Blackfoot Room

100 Madison St.

Missoula, MT 59802

406.728.3100

Monday, June 16

Spokane, WA

5-6pm

[Red Lion River Inn](#)

Shoreline B Room

700 N Division

Spokane, WA 99202

509.326.5577

Tuesday, June 17

Yakima, WA

5-6pm

[Hilton Garden Inn](#)

401 E Yakima Avenue

Yakima, WA 98901

509.454.1111

Wednesday, June 18

Pendleton, OR

430-6pm

[Red Lion Hotel Pendleton](#)

Cayuse Conference Room

304 SE Nye Ave.

Pendleton, OR 97801

541.276.6111

Wednesday, June 25

Boise, ID

5-630pm

[Idaho Fish and Game Headquarters](#)

Trophy Room

600 S Walnut

Boise, ID 83712

208.334.3700

Thursday, June 26

Lewiston, ID

5-630pm

[Idaho Fish and Game Regional Office](#)

Clearwater Room

3316 16th St

Lewiston, ID 83501

208.799.5010

Tuesday, July 8

Portland, OR

430-6pm

[Council Central Office](#)

851 SW 6th Ave Suite 1100

Portland, OR 97204

503.222.5161