

**Phil Rockefeller**  
Chair  
Washington

**Tom Karier**  
Washington

**Henry Lorenzen**  
Oregon

**Bill Bradbury**  
Oregon



## Northwest Power and Conservation Council

**W. Bill Booth**  
Vice Chair  
Idaho

**James Yost**  
Idaho

**Pat Smith**  
Montana

**Jennifer Anders**  
Montana

December 8, 2015

### **MEMORANDUM**

**TO: Council members**

**FROM: Tom Eckman, Power Division Director, John Shurts, General Counsel  
Chad Madron, Project Analyst**

**SUBJECT: Review of the Schedule and Process for the Seventh Plan**

### **BACKGROUND:**

**Presenter:** Tom Eckman, Chad Madron, John Shurts

**Summary:** Staff will report on the anticipated schedule for finalizing the Council's Seventh Regional Power Plan. Under this schedule the final plan will be adopted at the February 2016 Council Meeting. This schedule will require additional Council meeting time. These sessions have been scheduled and email notifications sent out. They are also summarized below.

The Council also will consider some decisions on dates related to the public process and public input timeframe – please see the attached memo outlining this issue from John Shurts.

**Relevance:** Development of a Regional Conservation and Power Plan is one of the primary responsibilities of the Council under the Northwest Power Planning and Conservation Act.

**Workplan:** 1.D. Development of the Seventh Power Plan and Maintenance of Analytical Capabilities

Background: The Act requires that Council review its Regional Plans at not more than five year intervals. Since the Sixth Plan was adopted in 2010, analysis is proceeding on the development of Seventh Plan.

More Info: See below and also **attached memo** from John Shurts.

## **Updated Council Meeting Schedule for January and February 2016**

(All times listed are Pacific)

### **January 2016 Council Meeting in Portland:**

- 1/11/16, 2:30pm – 4:30pm, Council Meeting Focused on Seventh Power Plan
- 1/12/16, Morning, Fish and Wildlife Committee meets, no Power Committee
- 1/12/16, Afternoon, Council Meeting Focused on Fish and Wildlife Issues
- 1/13/16, Morning, Council Meeting Focused on Seventh Power Plan

### **Confirmed Council Webinar:**

- 2/03/16, Wed, 9:30am – 11:30am – Council Webinar on Seventh Power Plan

### ***Tentative Webinars:***

We'd request you hold two additional times open for webinars on February 3 and 4, 2016 in case members decide additional discussion time is needed:

- 2/3/16 – 1:30pm – 3:30pm
- 2/4/16 – 9:30am – 11:30am

### **February Council Meeting in Portland:**

- 2/08/16, 2:30pm – 4:30pm, Council Meeting Focused on Seventh Power Plan
- 2/09/16, Morning, Fish and Wildlife Committee meets, no Power Committee
- 2/09/16, Afternoon, Council Meeting Focused on Fish and Wildlife issues
- 2/10/16, Morning, Council Meeting Focused on Seventh Power Plan
  - Possible Vote on Final Plan

## High Level List of Dates and Tasks

<b>Task</b>	<b>Target Completion Date</b>
Identify Data and Analysis Updates Needed and Make Changes (Discussed at 12/2015 and 1/2016 Council Meetings)	12/30/15
Staff Provides Summary of Comments and Proposed Responses to Members	1/7/16
Rerun Regional Portfolio Model Scenarios As Needed Based on Public Comment and Data Updates (Discussed at 12/2015 and 1/2016 Council Meetings)	1/15/16
Council Members Send any Specific Proposed Changes to Staff	1/18/16
Propose Which Chapters/Appendices Need Substantive Changes and Update Council members	1/11/16 – Initial Discussion 1/21/16 - Finalized
Update Chapters/Appendices and Send to Council Members	1/27/16 - 2/01/16
Discussion of Updated Chapter/Appendix Text (Council Webinars)	2/03/16
Finalize Changes based on Council Feedback and Resend to Members	2/05/16
Final Review of Changes/Updates (Council Meeting in Portland)	2/08/16
Vote on Final Version of Plan (Council Meeting in Portland)	2/10/16
Final Plan Chapters and Appendices Published Online	2/19/16
Statement of Basis and Purpose with Responses to Comments Completed and Approved (April Council Meeting)	4/13/16
Notice of Final Seventh Power Plan Published in Federal Register	End of April

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December 8, 2015

### MEMORANDUM

**TO:** Council Members

**FROM:** John Shurts, General Counsel

**SUBJECT:** Seventh Power Plan process: public process *after* December 18

The Council is now taking written and oral comment on the draft Seventh Power Plan, an official comment period that ends December 18, 2015. The point of this memorandum is to discuss what happens *after* December 18 with respect to public process and public input. The Council has some choices to make about what happens after that date.

The reason is this: The point of setting an endpoint for the official comment period is to be able to manage the comment flow and set a date after which the Council can begin its work of developing a final program based on the comments and other matters. The date does *not* mean that input to the Council has to cease at that point, unless the Council decides that it wants the date to have that meaning. The Council has to decide how much additional public input to allow, and under what rules and limitations, and the Council also has to decide when to cut off public input totally and proceed to its final decision based solely on what is in the administrative record to that date.

Our recommendation (as explained below) is that the Council follow its usual practice and allow a period of time following the close of formal public comment for (1) directed consultations and conversations with people outside the Council on issues raised in the comments, especially as needed to clarify and understand comments, and (2) in general, continued informal oral and email communications on the plan between Council members and staff and people outside the Council. All these communications must be summarized or recorded in some way, circulated to all members and placed in the administrative record. The Council then needs to set a date at which all communications about the Seventh Power Plan with people and entities outside the Council must cease. The staff recommends that the Council close off communications at the end of the day **January 8, 2016**.

## Explanation

The procedure that the Council follows in developing the power plan is a combination of the explicit but few procedures specified in the Power Act and general guidance and consistency with the procedures for agency rulemaking in the federal Administrative Procedures Act (APA). 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 of basis and purpose that explains the decision in light of the comments and other information.

The APA itself does not require an agency to shut off all communication from outside the agency on the proposed rule after the close of a specified comment period, or even put any 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 or people 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.

The Council's practice has been this:

(1) The Council continues to allow public input on the draft power plan for a period of time after the close of the formal comment period. The kinds of input allowed include:

- Informal oral and email communications on the draft program between one or more Council members and/or staff with someone outside the agency. These communications must be summarized in a note or forwarded, circulated to the rest of the Council, and placed in the administrative record. It is important to be open to such informal conversations with all interested people, and not favor one group or entity or type of entity.
- Council members, staff, or both often continue to have directed consultations with key participants -- agencies, customers, tribes, NGOs, etc. -- usually around specific topics or comments that the Council still needs to work on or clarify with the consultation partners. Notes are taken and placed in the administrative record. It is important that the Council be fair and balanced in this, although it is also appropriate under the Power Act to emphasize consultation with the entities named in the act as consultation partners.
- The Council often allows for further 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. That will not be relevant here if the Council agrees to the date recommended by staff for the close of all communications (Jan 8), as that would mean no Council meetings taking place within this period.

- The Council usually does not allow, circulate and consider general or formal 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 formal 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) Then at a certain point before final decision, the Council closes off any further public input and proceeds to final decision based *only* 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 to 45 days before decision.

Our recommendation is that the Council continue to follow this practice with the Seventh Power Plan process. This means continuing to allow for input from outside the Council after the close of the formal comment period on Dec 18; allowing for and limiting the kinds of input as described above; and setting a date before final decision-making during after which no further input is accepted and considered. And again, our staff recommendation is to close off any outside input at the close of business on January 8, 2016. Power staff estimates that this is sufficient time to engage in whatever dialogue they need to clarify and understand comments.

All elements of this practice are open for consideration by the Council. This includes both whether to allow any additional outside input after December 18 - the Council could choose to cut off outside communications on the program at that date -- and, conversely, when and whether to close off outside communications.