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April 1, 2018

**TO:** Council Members

**FROM:** John Shurts; Patty O'Toole

**SUBJECT:** Briefing on legal framework for Fish and Wildlife Program amendment process

At the April Council meeting we will provide a briefing on the legal framework for the Fish and Wildlife Program amendment process. In particular we will walk through the steps in the amendment process as structured by Section 4(h) of the Northwest Power Act, with commentary on how the Council has understood and implemented these provisions in the past and on what guidance we have from the Act's legislative history and from the Ninth Circuit, primarily through the 1994 *NRIC* decision.

We would like to make this as interactive and informal as possible. So please come prepared with questions and comments, and ask them freely during the conversation, and also feel free to take the conversation in whatever direction you find useful during the time.

What follows here is an outline or summary of the steps and procedures in the amendment process in Section 4(h), as well as the substantive criteria for making decisions. We will use this outline to guide the discussion. This is followed by a verbatim excerpt from Sections 2 (purposes) and 4(h) of the Northwest Power Act.

851 S.W. Sixth Avenue, Suite 1100  
Portland, Oregon 97204-1348  
[www.nwcouncil.org](http://www.nwcouncil.org)

**Steve Crow**  
Executive Director

503-222-5161  
800-452-5161  
Fax: 503-820-2370

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Portland, Oregon 97204-1348  
[www.nwcouncil.org](http://www.nwcouncil.org)

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503-222-5161  
800-452-5161  
Fax: 503-820-2370

# **Amending the Council's Fish and Wildlife Program under the Northwest Power Act**

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## **Amending the Council’s Fish and Wildlife Program under the Northwest Power Act**

### **A. Basic substantive obligation - from Sections 4(h)(1), 4(h)(5)**

*Adopt a program to protect, mitigate and enhance fish and wildlife + assure an adequate, efficient, economical and reliable power supply.* Section 4(h)(1) requires the Council to develop “a program to protect, mitigate and enhance fish and wildlife, including related spawning grounds and habitat, on the Columbia River and its tributaries.” Section 4(h)(5) repeats this directive with the added limitation that the Program is protect, mitigate and enhance the fish and wildlife “affected by the development, operation, and management” of the hydroelectric facilities on the Columbia River or its tributaries; and to do so “while assuring the region an adequate, efficient, economical, and reliable power supply.”

*Deal with the river as a system.* Section 4(h)(1) adds that the Council shall design the F&W Program to the greatest extent possible “to deal with the river and its tributaries as a system.” Do so “because of the unique history, problems, and opportunities presented by the development and operation of hydroelectric facilities on the Columbia River and its tributaries.” This has implications for how the Council assembles a system-wide program out of disparate recommendations.

*Role of the “Purposes” of the Northwest Power Act, in Section 2.* Section 2 details the purposes Congress intended to accomplish with the Northwest Power Act, and that the states signed onto in agreeing to the interstate compact to form the Council. The Purposes are not a source of procedural requirements or decisionmaking criteria for the Fish and Wildlife Program -- those come in Section 4(h). But the Purposes in Section 2 help guide how the Council understands and applies the active provisions of the Act. All of the Purposes all relevant in some way in this effort. Three of the Purposes are particularly important in the context of the Fish and Wildlife Program, and may be summarized as:

- “to protect, mitigate and enhance the fish and wildlife, including related spawning grounds and habitat, of the Columbia River and its tributaries, particularly anadromous fish which are of significant importance to the social and economic well-being of the Northwest and the Nation and which are dependent on suitable environmental conditions substantially obtainable from the management and operation of federal power system and other power generating facilities on the Columbia River and tributaries” (2(6))
- to assure the region an adequate, efficient, economical, and reliable power supply (2(2))
- to provide for wide public participation in developing the Fish and Wildlife Program and facilitating the orderly planning of the region’s power system (2(3))

## Implications:

- F&W Program is to be concerned with all fish and wildlife affected by the hydrosystem, not just anadromous fish -- *but*, anadromous fish have special significance.
- Obligation relates to the effects of all hydrofacilities on the Columbia and tributaries, not just federal hydrosystem.
- F&W Program extends beyond the mainstem and hydrosystem passage to tributaries and to spawning and other habitat matters.
- Council's obligation is both to protect, mitigate, and enhance fish and wildlife affected by hydrosystem and to assure the Northwest an adequate, reliable and etc. power system. Do both, not trade or balance one off the other. Assumption or hypothesis is that it is possible to do both. Power Plan is the vehicle to make both happen.
- Embedded as well is the assumption or hypothesis that "suitable environmental conditions" are in fact "substantially obtainable" from the management and operation of federal and other power generating facilities -- that we can preserve the system and most of its benefits and still achieve the needed improvements in the river's fish and wildlife.
- System-wide and long-term planning perspective.

## **B. Relationship of the F&W Program to the Power Plan - Sections 4(d), 4(e), 4(h)(2)**

*Timing and procedure.* In Section 4(d)(1), the Council is to “review” the Power Plan at least every five years, and follow certain notice and hearing procedures (e.g., a public hearing in every state). Section 4(h)(2) then provides that *prior to* any review or major revision of Power Plan, the Council is to call for and review recommendations for amending Fish and Wildlife Program.

*Substantive.* The Fish and Wildlife Program is part of the Power Plan (Section 4(e)(3)(F)). The Council also has an obligation to develop the Power Plan’s generating and conservation resource plan “with due consideration” for “protection, mitigation, and enhancement of fish and wildlife and related spawning grounds and habitat, including sufficient quantities and qualities of flows for successful migration, survival, and propagation of anadromous fish.” What this primarily means, and how the Council has implemented this over 30+ years, is that the Council must amend the Fish and Wildlife Program first to determine the non-power constraints on the hydrosystem to benefit fish and wildlife, and then use the Power Plan process to make sure an adequate amount of cost-effective conservation and generating resources have been identified for acquisition to make up for any resulting generation deficiencies and assure that Bonneville and the other federal agencies may implement the operations for fish and wildlife with sufficient certainty and reliability and similarly meet load demands. (See Section 4(d)(2), 6(a)(2).

## **C. Steps, procedures and substantive criteria for a Fish and Wildlife Program amendment process - Sections 4(h)(2) through 4(h)(8)**

### **Step 1: Call for F&W Program amendment recommendations (Sections 4(h)(2) and (3))**

- Fish and Wildlife Program amendment process begins when Council requests in writing from state and federal fish and wildlife agencies and Indian tribes recommendations for:
  - measures which can be expected to be implemented by the Administrator and other federal agencies to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by the development and operation of any hydroelectric project on the river;
  - objectives for the development and operation of the hydroprojects to protect, mitigate, and enhance fish and wildlife; and
  - fish and wildlife management coordination, research and development (including funding) which will assist protection, mitigation, and enhancement of anadromous fish at and between the hydroelectric dams.
- Agencies and tribes have at least 90 days to submit recommendations. Council can extend time.
- Others (federal and regional water management agencies; region's electric power producing agencies; Bonneville customers; public) can submit recommendations as well.
- All recommendations shall be accompanied by detailed information and data in support. Legislative history adds, however, that lack of supporting info is not by itself to be a ground for rejection; this is also implied by other provisions, including Section 4(h)(7).
- Per Section 4(h)(9) the Council shall adopt F&W Program amendments within one year after the time set for the submission of recommendations. This is the only other time period specified in the Act.
- Key points:
  - recommendations of others begin and drive process, becoming the raw material out of which Council shapes F&W Program.
  - beginning of substantial role of agencies and tribes.
  - “measures” and “objectives” not defined. Meaning derived from common-sense understandings and from nature of recommendations.

- measures which can “be expected to be implemented by the Administrator and other federal agencies”

## **Step 2: Public review of and comment on recommendations (Section 4(h)(4))**

- The Power Act then requires that the Council give notice of the recommendations and make the recommendations and supporting information available for review by Bonneville, fish and wildlife agencies and tribes, the other federal agencies managing, operating or regulating the hydrosystem, Bonneville customers, electric utilities owning or operating hydrofacilities, and the public.
- The Council is to provide opportunities for “public participation and comment,” both oral and written” on the recommendations and supporting documents.
- No time period specified other than the “within such reasonable time as the Council deems appropriate.” Usual time period has been 60 days.
- One of the implications of the language in the next section (4(h)(5)) is the Council can and should engage in not just a general public review and comment period but also in directed consultations with the various agencies, tribes, and Bonneville customers about the recommendations. The Council often does that at this point, but also on a set of draft amendments (see next step).

## **Step 3: Council review of the recommendations and comments; prepare draft or proposed amendments to the Fish and Wildlife Program**

- Following the period of comment on the recommendations, Section 4h then moves next to having the Council adopting program amendments. The Council has always layered in the additional step of developing draft program amendments based on the recommendations and comments and other material properly in the administrative record, and then releasing these draft amendments for further public review and comment.
- We do this as a practical necessity and to be consistent with the rulemaking procedures of the federal Administrative Procedures Act, which we have reason to believe applies to the Council’s actions, at least to a certain extent.
- It often takes the Council two to three months after receiving the comments on the recommendations to develop and approve draft amendments for release to the public.

#### **Step 4: Public review and comment and consultations on draft F&W Program amendments**

- Again, a step added by the Council consistent with the APA and for reasons of practicality. Public review of the draft includes taking in written comments on the draft; taking oral comments at public hearings and at Council and Committee meetings; oral comments in less formal conversations with individual or small groups of staff or members; and directed consultations with agencies, tribes, Bonneville customers, and others.
- No specific time for this step is specified in the Power Act or the APA. The Council usually allows for a comment period on the draft amendments of around 60 days, sometimes more, to allow for a meaningful opportunity for public review and comment.
- The Council uses this time to hold at least one (and usually more than one) public hearing in each of the four states on the recommendations and draft amendments. This is a requirement in the Section 4d(1) for Power Plan amendments, and the Council has concluded it should apply to the fish and wildlife program amendments as well.

#### **Step 5: Develop and adopt final amendments to the F&W Program, Sections 4(h)(5-8)**

##### **Step 5 - Process:**

- Per Section 4(h)(5), the Council is develop the fish and wildlife program “on the basis of [the] recommendations, supporting documents, and views and information obtained through public comment and participation, and consultation with the agencies, tribes, and customers.” Remembering the draft amendment step we layer in, the Council adds to the administrative record for consideration in adopting the F&W Program the draft amendments and the comments on the draft amendments.
- The Council reviews all the material in the administrative record and, during the public Council meetings, adopts final F&W Program amendments based on that review, guided by the substantive standards of the Act. This usually takes another two months or so, if not more for controversial or extensive amendments.
- At the very end of this deliberative period, we enter into what is known as the “ex parte” period (not a very good name for it), during which the members and staff can no longer talk with anyone outside the Council about the developing Fish and Wildlife Program and all deliberations must be on the basis of the administrative record.

**Step 5 - Substance** - substantive standards and procedural requirements in Section 4(h)(5-8) guiding the Council's decisions on what to adopt into the F&W Program:

- **Foundation standard in Section 4(h)(5):**

"The program shall consist of measures to protect, mitigate, and enhance fish and wildlife affected by the development, operation, and management of such facilities while assuring the Pacific Northwest an adequate, efficient, economical, and reliable power supply."

- "Protect" and "mitigate" are not defined in the Act. Use common sense meanings. "Enhance" is defined in Section 4(h)(5) and (8)(A) to mean offsite protection and mitigation.
- AEERPS standard ("adequate, efficient, economical and reliable power supply"): discussion of meaning, process, and substantive conclusions, and relationship to power plan

- **Additional standards in section 4(h)(6):**

"The Council shall include in the program measures which it determines, on the basis set forth in paragraph (5), will--

"(A) complement the existing and future activities of the Federal and the region's State fish and wildlife agencies and appropriate Indian tribes;

"(B) be based on, and supported by, the best available scientific knowledge;

"(C) utilize, where equally effective alternative means of achieving the same sound biological objective exist, the alternative with the minimum economic cost;

"(D) be consistent with the legal rights of appropriate Indian tribes in the region; and

"(E) in the case of anadromous fish--

"(i) provide for improved survival of such fish at hydroelectric facilities located on the Columbia River system; and

"(ii) provide flows of sufficient quality and quantity between such facilities to improve production, migration, and survival of such fish as necessary to meet sound biological objectives."

- as criteria for judicial review? -- legislative history
- additional ties to agencies and tribes in (A) and (D)
  - o Implications of "legal rights of tribes."
- implication of "best available scientific knowledge" standard -- action forcing
- least-cost provision:
  - o meaning and implications
  - o other than "economical" power supply, costs not a criteria
  - o certainly not a cost-benefit test -- see 1994 *NRIC* (Tang) opinion

- flows and passage emphasis
- **Criteria for relating recommendations to program amendment decisions, Section 4(h)(7):**
  - Essentially, the Council is to adopt recommendation or explain why not, based on a strict set of criteria for rejection and guidance for resolving conflicts.
  - Again, the Council is to develop the fish and wildlife program on the basis of the recommendations, supporting documents, views and information obtained through public comment and participation, and consultation with the agencies, tribes, and customers (Section 4(h)(5)). And then Section 4(h)(7) begins by telling Council to determine whether each recommendation received is consistent with the purposes of this Act.
  - If recommendations are inconsistent with each other, the Council is to resolve inconsistencies “giving *due weight* to the recommendations, expertise, and legal rights and responsibilities of the Federal and the region's State fish and wildlife agencies and appropriate Indian tribes” -- another tie to the agencies and tribes.
  - If the Council does not adopt a recommendation, it shall explain in writing, as *part of the program*, findings that the adoption of such recommendation would be--
    - (A) inconsistent with paragraph (5) [the basic power balancing standard];
    - (B) inconsistent with paragraph (6) [the list of additional standards]; or
    - (C) less effective *than the adopted recommendations* for the protection, mitigation, and enhancement of fish and wildlife.

**Step 6: Develop and adopt findings regarding the treatment of recommendations and a response to comments, per Section 4(h)(7).**

- As noted above, the Council must include an explanation in writing -- as part of the F&W Program -- for any decisions not to adopt a recommendation.
- We tend to write a response for each recommendation, not just for those officially rejected, for a number of reasons. And at the same time the Council adopts a statement of “basis and purpose” for the decision, which includes written responses to comments on the draft amendments, consistent with the federal APA.
- We could do all of this as part of the final decision on the F&W Program amendment language, but it is more usual and practical to do it after the Council makes its final decisions, usually a month or two after. The program amendment

process is not officially concluded under the Power Act until the Council adopts these written findings.

- Once the F&W Program *and* the findings are adopted, the process is over and the Council publishes notice in the Federal Register. This begins a 60-day clock for filing petitions for judicial review with the Ninth Circuit. Section 9(e)(5).

## D. Relevant court decisions

### ***NRIC v. Council* (Ninth Circuit 1994) (“Tang opinion”)**

- Ninth Circuit remanded Council’s early 1990s “Strategy for Salmon” program amendments as inconsistent with the Northwest Power Act requirements in Section 4(h)
- Main holding was that Council failed to write proper findings *as part of the F&W Program* under Section 4(h)(7) explaining why the Council had rejected agency and tribal recommendations -- discussion on what the Council had done and why
- Court then provided a dozen pages of guidance on how the Council is to understand and implement Section 4(h), especially differentiating between Council’s role in developing the power plan and its role in developing the fish and wildlife program, where the Council’s role is closely circumscribed and structured; tied closely to the recommendations of others; and owes substantial deference especially to the recommendations, management authority and expertise to the fish and wildlife agencies and tribes (Court used the term “high deference”)
  - opinion ends with what looks like a second clear holding: The Council also “failed to evaluate proposed program measures against sound biological objectives.” When you look at the details, this is essentially another version of the same holding: The Council did not deal seriously with the recommendations; in this case, flow objective recommendations from agencies and tribes
- Cost-benefit issue (see above).

### ***NRIC v. Council* (Ninth Circuit 2017) (challenge to 2014 Fish and Wildlife Program)**

- challenge to 2014 F&W Program, focused especially on arguments that (a) Council has an obligation to go beyond recommendations to develop objectives and push for changes in system to reduce impacts on fish that can be accommodated by power system developments and (2) that Council had surrendered decisionmaking under the Power Act to determinations in ESA world
- complete affirmance of Council’s program in memorandum opinion
- main takeaway is that Council program development since 1994 *NRIC* decision, which has tried to focus heavily on recommendations and especially on recommendations of agencies and tribes, is consistent with Power Act

***NEDC v Bonneville* (Ninth Circuit 2007) (Fish Passage Center case)** - concerns implementation by Bonneville, not program development; see next section

## E. Implementation of the Fish and Wildlife Program - Sections 4(h)(10), (11)

- After the Council adopts its fish and wildlife program, Bonneville has an obligation under Section 4(h)(10)(A) to use its fund and other authorities to protect, mitigate and enhance fish and wildlife “in a manner consistent with” the Council’s fish and wildlife program and power plan.
  - See 2007 *NEDC* (Fish Passage Center) opinion: Bonneville’s obligation to protect, mitigate, etc., in a manner consistent with the Council’s program is a substantive obligation - basically a default implementation requirement; Bonneville decision not to implement requires explanation in writing that is reasonable and not arbitrary or capricious
    - footnote indicates that what Bonneville owes to the Program is a level of deference in implementation similar to the level of deference the Council owes to the recommendations of the agencies and tribes in creating the Program.
  - relationship of project review under Section 4h(10)(D) of the Act added in 1996 to program development and program implementation by Bonneville
- All federal agencies operating or regulating Columbia River hydrofacilities have a separate obligation under Section 4(h)(11) to exercise their authorities taking into account the Council’s fish and wildlife program to the “fullest extent practicable.”
- Council’s fish and wildlife program subsequently become part of the Council’s Power Plan. Bonneville has the separate obligation under Sections 4(d) and 6 of the Act to acquire sufficient resources consistent with the Council’s Power Plan not only to meet load but also to assist in meeting the fish and wildlife protection and mitigation requirements that emerge from the Council’s fish and wildlife program.

## **F. History of Program Amendments**

Eighteen significant Fish and Wildlife Program amendment processes since the enactment of the Northwest Power Act. Grouped into seven categories. The discussion will include a brief history of these amendment processes and important regional developments part of the context for each amendment process.

### **1982 Program**

- 1982 Program – first F&W Program (1)
- 1984 Amendments to 1982 F&W Program (2)

### **1987 Program**

- 1987 Program – comprehensive amendments to the F&W Program, including anadromous fish loss assessments (3)
- 1988 Protected Areas - amendments to the 1987 Program (4)
- 1989 Wildlife Mitigation - amendments to the 1987 Program, including wildlife loss assessments (5)

### **1991- early 1994 comprehensive revision of the F&W Program, in 4 phases:**

(follows first ESA listings of Snake River chinook and sockeye)

- 1991 Phase 1 - high priority anadromous fish habitat/production amendments (6)
- 1991 Phase 2 - anadromous fish mainstem passage and flows (7)
- 1992 Phase 3 - additional anadromous fish provisions, in the mainstem and (mostly) habitat and production measures (8)  
[The sum result of Phases 2 and 3 was called the Strategy for Salmon]
- 1993/Jan 1994 Phase 4 - non-anadromous fish measures (9)

### **1994-95 comprehensive revision of the F&W Program, in two steps:**

- 1994 amendments - anadromous fish and program-wide elements of the program (10)
- 1995 amendments - resident fish and wildlife amendments, and some reconciliation amendments (11)

### **2000-05 comprehensive revision of the F&W Program, in three steps:**

- 2000 F&W Program -- beginning of comprehensive revision of F&W Program; developed new program framework; basinwide provisions (12)
- 2003 Mainstem amendments - specific objectives/measures for mainstem (13)
- 2004-05 Subbasin Plan amendments (14)

### **2009 program:**

- 2009 F&W Program - all parts of program except subbasin plans; integration of decade of planning at Council and NOAA (15)
- 2010 - added Bitterroot subbasin plan (16)
- 2011 - added Blackfoot subbasin plan (17)

**2014 F&W Program:** all provisions open to revision; comprehensive reorganization; basic substance remains the same; no changes to subbasin plans (18)

## **Northwest Power Act of 1980**

### **Sections 2 (Purposes) and 4(h) (Fish and Wildlife Program)**

**Section 2** The **purposes** of this Act, together with the provisions of other laws applicable to the Federal Columbia River Power System, are all intended to be construed in a consistent manner. Such purposes are also intended to be construed in a manner consistent with applicable environmental laws. Such purposes are:

**2(1)** to encourage, through the unique opportunity provided by the Federal Columbia River Power System--

- 2(1)(A) conservation and efficiency in the use of electric power, and
- 2(1)(B) the development of renewable resources within the Pacific Northwest;

**2(2)** to assure the Pacific Northwest of an adequate, efficient, economical, and reliable power supply;

**2(3)** to provide for the participation and consultation of the Pacific Northwest States, local governments, consumers, customers, users of the Columbia River System (including Federal and State fish and wildlife agencies and appropriate Indian tribes), and the public at large within the region in--

2(3)(A) the development of regional plans and programs related to energy conservation, renewable resources, other resources, and protecting, mitigating, and enhancing fish and wildlife resources,

2(3)(B) facilitating the orderly planning of the region's power system, and

2(3)(C) providing environmental quality;

**2(4)** to provide that the customers of the Bonneville Power Administration and their consumers continue to pay all costs necessary to produce, transmit, and conserve resources to meet the region's electric power requirements, including the amortization on a current basis of the Federal investment in the Federal Columbia River Power System;

**2(5)** to insure, subject to the provisions of this Act--

2(5)(A) that the authorities and responsibilities of State and local governments, electric utility systems, water management agencies, and other non-Federal entities for the regulation, planning, conservation, supply, distribution, and use of electric power shall be construed to be maintained, and

2(5)(B) that Congress intends that this Act not be construed to limit or restrict the ability of customers to take actions in accordance with other applicable provisions of Federal or State law, including, but not limited to, actions to plan, develop, and operate resources and to achieve conservation, without regard to this Act; and

**2(6)** to protect, mitigate and enhance the fish and wildlife, including related spawning grounds and habitat, of the Columbia River and its tributaries, particularly anadromous fish which are of significant importance to the social and economic well-being of the Pacific Northwest and the Nation and which are dependent on suitable environmental conditions substantially obtainable from the management and operation of Federal Columbia River Power System and other power generating facilities on the Columbia River and its tributaries.

## **Section 4(h): Fish and Wildlife Program**

### **4(h)(1)**

4(h)(1)(A) The Council shall promptly develop and adopt, pursuant to this subsection, a program to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, on the Columbia River and its tributaries. Because of the unique history, problems, and opportunities presented by the development and operation of hydroelectric facilities on the Columbia River and its tributaries, the program, to the greatest extent possible, shall be designed to deal with that river and its tributaries as a system.

4(h)(1)(B) This subsection shall be applicable solely to fish and wildlife, including related spawning grounds and habitat, located on the Columbia River and its tributaries. Nothing in this subsection shall alter, modify, or affect in any way the laws applicable to rivers or river systems, including electric power facilities related thereto, other than the Columbia River and its tributaries, or affect the rights and obligations of any agency, entity, or person under such laws.

**4(h)(2)** The Council shall request, in writing, promptly after the Council is established under either section 4(a) or 4(b) of this Act and prior to the development or review of the plan, or any major revision thereto, from the Federal and the region's State fish and wildlife agencies and from the region's appropriate Indian tribes, recommendations for--

4(h)(2)(A) measures which can be expected to be implemented by the Administrator, using authorities under this Act and other laws, and other Federal agencies to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by the development and operation of any hydroelectric project on the Columbia River and its tributaries;

4(h)(2)(B) establishing objectives for the development and operation of such projects on the Columbia River and its tributaries in a manner designed to protect, mitigate, and enhance fish and wildlife; and

4(h)(2)(C) fish and wildlife management coordination and research and development (including funding) which, among other things, will assist protection, mitigation, and enhancement of anadromous fish at, and between, the region's hydroelectric dams.

**4(h)(3)** Such agencies and tribes shall have 90 days to respond to such request, unless the Council extends the time for making such recommendations. The Federal and the region's water management agencies, and the region's electric power producing agencies, customers, and public may submit recommendations of the type referred to in paragraph (2) of this subsection. All recommendations shall be accompanied by detailed information and data in support of the recommendations.

### **4(h)(4)**

4(h)(4)(A) The Council shall give notice of all recommendations and shall make the recommendations and supporting documents available to the Administrator, to the Federal and the region's State fish and wildlife agencies, to the appropriate Indian tribes, to Federal agencies responsible for managing, operating, or regulating hydroelectric facilities located on the Columbia River or its tributaries, and to any customer or other electric utility which owns or operates any such facility. Notice shall also be given to the public. Copies of such recommendations and supporting documents shall be made available for review at the offices of the Council and shall be available for reproduction at reasonable cost.

4(h)(4)(B) The Council shall provide for public participation and comment regarding the recommendations and supporting documents, including an opportunity for written and oral comments, within such reasonable time as the Council deems appropriate.

**4(h)(5)** The Council shall develop a program on the basis of such recommendations, supporting documents, and views and information obtained through public comment and participation, and consultation with the agencies, tribes, and customers referred to in subparagraph (A) of paragraph (4). The program shall consist of measures to protect, mitigate, and enhance fish and wildlife affected by the development, operation, and management of such facilities while assuring the Pacific Northwest an adequate, efficient, economical, and reliable power supply. Enhancement measures shall be included in the program to the extent such measures are designed to achieve improved protection and mitigation.

**4(h)(6)** The Council shall include in the program measures which it determines, on the basis set forth in paragraph (5), will--

4(h)(6)(A) complement the existing and future activities of the Federal and the region's State fish and wildlife agencies and appropriate Indian tribes;

4(h)(6) (B) be based on, and supported by, the best available scientific knowledge;

4(h)(6) (C) utilize, where equally effective alternative means of achieving the same sound biological objective exist, the alternative with the minimum economic cost;

4(h)(6) (D) be consistent with the legal rights of appropriate Indian tribes in the region; and

4(h)(6) (E) in the case of anadromous fish--

- (i) provide for improved survival of such fish at hydroelectric facilities located on the Columbia River system; and
- (ii) provide flows of sufficient quality and quantity between such facilities to improve production, migration, and survival of such fish as necessary to meet sound biological objectives.

**4(h)(7)** The Council shall determine whether each recommendation received is consistent with the purposes of this Act. In the event such recommendations are inconsistent with each other, the Council, in consultation with appropriate entities, shall resolve such inconsistency in the program giving due weight to the recommendations, expertise, and legal rights and responsibilities of the Federal and the region's State fish and wildlife agencies and appropriate Indian tribes. If the Council does not adopt any recommendation of the fish and wildlife agencies and Indian tribes as part of the program or any other recommendation, it shall explain in writing, as part of the program, the basis for its finding that the adoption of such recommendation would be--

4(h)(7)(A) inconsistent with paragraph (5) of this subsection;

4(h)(7) (B) inconsistent with paragraph (6) of this subsection; or

4(h)(7) (C) less effective than the adopted recommendations for the protection, mitigation, and enhancement of fish and wildlife.

**4(h)(8)** The Council shall consider, in developing and adopting a program pursuant to this subsection, the following principles:

4(h)(8)(A) Enhancement measures may be used, in appropriate circumstances, as a means of achieving offsite protection and mitigation with respect to compensation for losses arising from the development and operation of the hydroelectric facilities of the Columbia River and its tributaries as a system.

4(h)(8) (B) Consumers of electric power shall bear the cost of measures designed to deal with adverse impacts caused by the development and operation of electric power facilities and programs only.

4(h)(8) (C) To the extent the program provides for coordination of its measures with additional measures (including additional enhancement measures to deal with impacts caused by factors other than the development and operation of electric power facilities and programs), such additional measures are to be implemented in accordance with agreements among the appropriate parties providing for the administration and funding of such additional measures.

4(h)(8) (D) Monetary costs and electric power losses resulting from the implementation of the program shall be allocated by the Administrator consistent with individual project impacts and system-wide objectives of this subsection.

**4(h)(9)** The Council shall adopt such program or amendments thereto within one year after the time provided for receipt of the recommendations. Such program shall also be included in the plan adopted by the Council under subsection (d).

**4(h)(10)**

4(h)(10)(A) The Administrator shall use the Bonneville Power Administration fund and the authorities available to the Administrator under this Act and other laws administered by the Administrator to protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries in a manner consistent with the plan, if in existence, the program adopted by the Council under this subsection, and the purposes of this Act. Expenditures of the Administrator pursuant to this paragraph shall be in addition to, not in lieu of, other expenditures authorized or required from other entities under other agreements or provisions of law.

4(h)(10)(B) The Administrator may make expenditures from such fund which shall be included in the annual or supplementary budgets submitted to the Congress pursuant to the Federal Columbia River Transmission System Act. Any amounts included in such budget for the construction of capital facilities with an estimated life of greater than 15 years and an estimated cost of at least \$1,000,000 shall be funded in the same manner and in accordance with the same procedures as major transmission facilities under the Federal Columbia River Transmission System Act.

4(h)(10)(C) The amounts expended by the Administrator for each activity pursuant to this subsection shall be allocated as appropriate by the Administrator, in consultation with the Corps of Engineers and the Water and Power Resources Service, among the various hydroelectric projects of the Federal Columbia River Power System. Amounts so allocated shall be allocated to the various project purposes in accordance with existing accounting procedures for the Federal Columbia River Power System.

**4(h)(11)**

4(h)(11)(A) The Administrator and other Federal agencies responsible for managing, operating, or regulating Federal or non-Federal hydroelectric facilities located on the Columbia River or its tributaries shall--

- (i) exercise such responsibilities consistent with the purposes of this Act and other applicable laws, to adequately protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by such projects or facilities in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed and operated;
- (ii) exercise such responsibilities, taking into account at each relevant stage of decisionmaking processes to the fullest extent practicable, the program adopted by the Council under this subsection. If, and to the extent that, such other Federal agencies as a result of such consideration impose upon any non-Federal electric power project measures to protect, mitigate, and enhance fish and wildlife which are not attributable to the development and operation of such project, then the resulting monetary costs and power losses (if any) shall be borne by the Administrator in accordance with this subsection.

4(h)(11)(B) The Administrator and such Federal agencies shall consult with the Secretary of the Interior, the Administrator of the National Marine Fisheries Service, and the State fish and wildlife agencies of the region, appropriate Indian tribes, and affected project operators in carrying out the provisions of this paragraph and shall, to the greatest extent practicable, coordinate their actions.

**4(h)(12)**

4(h)(12)(A) Beginning on October 1 of the first fiscal year after all members to the Council are appointed initially, the Council shall submit annually a detailed report to the Committee on Energy and Natural Resources of the Senate and to the Committees on Interstate and Foreign Commerce and on Interior and Insular Affairs of the House of Representatives. The report shall describe the actions taken and to be taken by the Council under this Act, including this subsection, the effectiveness of the fish and wildlife program, and potential revisions or modifications to the program to be included in the plan when adopted. At least ninety days prior to its submission of such report, the Council shall make available to such fish and wildlife agencies, and tribes, the Administrator and the customers a draft of such report. The Council shall establish procedures for timely comments thereon. The Council shall include as an appendix to such report such comments or a summary thereof.

4(h)(12)(B) The Administrator shall keep such committees fully and currently informed of the actions taken and to be taken by the Administrator under this Act, including this subsection.

## Step 1: Call for F&W Program amendment recommendations (Sections 4(h)(2) and (3))

- Request in writing from federal and state fish and wildlife agencies and tribes
- For “measures” and “objectives” (and coordination and research)
- Everyone else, too (federal and regional water management agencies; region’s electric power producing agencies; Bonneville customers; public)
- At least 90 days
- Accompanied by detailed information and data in support

## Step 2: Review and comment on recommendations (Section 4(h)(4))

- Notice of recommendations to Bonneville, fish & wildlife agencies, tribes, other federal agencies managing, operating or regulating the hydrosystem, Bonneville customers, electric utilities owning or operating hydro-facilities, public.
- Oral and written public participation and comment
- Per 4(h)(5), also engage in directed consultations with various agencies, tribes, Bonneville customers
- No particular time specified – reasonable time; often 60 days

## Step 3: Prepare draft amendments to the Fish and Wildlife Program

- Not in the Northwest Power Act; layered in for practical reasons and to act consistent with federal Admin Procedures Act (APA)
- Based on recommendations, supporting information, and views and information obtained through public comment and consultation with the agencies, tribes, and customers
- Usually takes a couple of months

## Step 4: Review and comment on draft Fish and Wildlife Program amendments

- Again, not in Northwest Power Act
- Broad public notice, review and comment on draft amendments *and* on recommendations
- Formal written comments; public hearings in all four states; oral comments at Council meetings; other informal comments
- Engage in directed consultations with various agencies, tribes, Bonneville customers
- No particular time specified in law – reasonable time; often 60 days

## Step 5: Prepare and adopt final amended Fish and Wildlife Program (Section 4(h)(5) and (6-8))

- “Program to protect, mitigate and enhance” fish and wildlife affected by hydrosystem
- While also assuring the region an “adequate, efficient, economical and reliable power supply”
- “On the basis of” recommendations; supporting information; views and information from public comments and from consultation with agencies, tribes and customers
- Council adds to the administrative record draft amendments and comments on draft amendments
- Consistent with standards in 4(h)(5-8)
- Takes approx two more months
- Council must act on recommendations in 1 year
- Super-majority vote

## Step 6: Adopt findings on recommendations and response to comments (Section 4(h)(7))

- Council must include an explanation in writing -- **as part of the F&W Program** -- for any decision not to adopt a recommendation
- Specified, relatively narrow criteria for rejection
- Usually write a response for each recommendation, not just for those rejected
- Council also adopts a statement of “basis and purpose” for the decision, which includes written responses to comments on the draft amendments, consistent with the federal APA
- Usually takes another couple of months
- F&W Program amendment process is not officially ended until the adoption of the findings