

PROTECTED AREAS SUMMARY AND RESPONSE TO COMMENTS

90-10



NORTHWEST POWER PLANNING COUNCIL
August 8, 1990

NORTHWEST POWER PLANNING COUNCIL

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August 22, 1990

To Interested Parties:

At its July meeting, the Council adopted changes to the protected areas designations that are part of the Columbia River Basin Fish and Wildlife Program. Subsequently, at the August meeting, the Council completed its amendment process by adopting its response to those who had commented on the protected areas rulemaking.

Enclosed is a list of the project-related changes (paper 90-10) considered by the Council, along with the Council's decision on each proposed change. The exceptions are certain Idaho projects for which decisions were deferred. These are noted in the enclosure.

Also included is the transition language adopted by the Council that addresses projects begun prior to a protected areas amendment process. The Council exempts such projects in the event that the area is later designated protected. The language clarifies the stage the projects must be in to receive exemption.

This enclosure does not list those changes that did not affect pending hydroelectric projects. That information is available on request from the Council's public involvement division.

Sincerely,



Dulcy Mahar, Director
Public Involvement Division

enclosure

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BACKGROUND

Statutory authority: The Northwest Power Act directs 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" See 16 U.S.C. section 839b(h)(1)(A). The Act also directs the Council to develop "a general scheme for implementing conservation measures and developing resources pursuant to section 6 of the Act to reduce or meet the Administrator's obligations with due consideration by the Council for (A) environmental quality, (B) compatibility with the existing regional power system, (C) protection, mitigation and enhancement of fish and wildlife and related spawning grounds and habitat, including sufficient quantity and quality of flows for successful migration, survival and propagation of anadromous fish, and (D) other criteria which may be set forth in the plan." See 16 U.S.C. section 839b(e)(2).

1988 protected areas rule: In August of 1988, the Council amended its fish and wildlife program and power plan to designate approximately 44,000 miles of Northwest streams as "protected areas." Protected areas are river reaches which contain important habitat for certain valued species of fish and wildlife. Reaches are identified as protected for anadromous fish or resident fish or wildlife or some combination of these categories. The data base lists the specific species of concern on each reach.

Protected areas designations basically apply to new hydroelectric projects only. Dams in existence or licensed as of August 10, 1988 are not covered by the protected areas rule. In addition, the protected areas rule provides that developers may seek exemption from the Council for a project with "exceptional fish and wildlife benefits."

Provisions for amendments: The protected areas rule recognizes that amendments to the protected areas designations will be needed from time to time. The rule commits the Council to taking up proposed amendments "on a regular schedule" and also allows amendments to be considered on an expedited basis when there is a need to do so.

1989 expedited amendment process: At its March 1989 meeting, the Council entered an expedited rulemaking on a small number of changes,

including some from petitioners who had requested early consideration. The Council made a final decision on most of the petitions at its April meeting, and concluded the rulemaking at its May 1989 meeting.

1989-1990 regular amendment process: In July 1989, Council staff met with representatives of the affected state agencies. The agencies recommended a schedule for considering the changes and agreed to designate a protected areas coordinator for each state.

A standard form and a set of instructions for protected areas changes was developed. In August, the opportunity to submit proposed changes was widely announced, not only in the Council's newsletter Update! but also in other publications likely to reach hydro developers and other interested parties. Following the agreed upon schedule, proposed changes were submitted to the state coordinators for review on October 1. The state agencies completed their review and submitted each of the proposed changes, with a recommendation, to the Council in November.

Most of the proposed revisions were a result of continued study of protected areas by the state agencies, both on their own initiative and as part of Bonneville's Northwest Environmental Data Base studies. It has been about two years since the current protected areas designations were prepared. The state agencies now have better information about the resources present on river reaches. They proposed various changes to the protected areas designations, including both deletions and additions, to reflect this new information. The changes proposed by the agencies included about 560 river miles of additional protected areas and about 560 river miles of reaches which would be removed from protected status.

In addition to the changes proposed by the agencies, a number of developers specifically requested that the Council consider removal of particular project areas from protected status. About two dozen such requests were received.

Rulemaking process: At its February 14, 1990 meeting, the Council voted to enter rulemaking for purposes of amending the protected areas portion of the fish and wildlife program and power plan. Notice of the rulemaking was published in the Federal Register and was mailed to those organizations and individuals on the Council's fish and wildlife consultation list and its protected areas mailing list. These lists include all affected state and federal agencies and tribes, as well as major utility and environmental groups. The rulemaking called for a 60-day comment period ending on April 16, 1990. During this period public hearings were held at the following locations:

Missoula, Montana	March 14, 1990
Boise, Idaho	March 20, 1990
Seattle, Washington	March 21, 1990
Twin Falls, Idaho	March 22, 1990
Eugene, Oregon	April 12, 1990

Thirty-five individuals presented testimony at the public hearings, and approximately 200 written comments were received.

A final decision on the proposed amendments to protected areas was approved by the Council at its July 11 meeting.

Because of the large number of comments, the summaries of comments which appear below do not list all of the commentors on each of the proposed changes. However, each comment received by the Council was taken into consideration and has been included in the record of this rulemaking.

GENERAL COMMENTS

Comments: Several commentors, including the Pacific Northwest Utilities Conference Committee and the Northwest Public Power Association, commented generally about the region's growing need for additional resources, and urged the Council to consider revising its protected areas standards and designations to assure that the protected areas designations do not become impediments to the development of good hydropower projects.

The Wilderness Society, Washington State Region, stated that it opposed all changes from protected to unprotected status.

Response: The Council is aware of the region's growing need for additional resources and has taken this into consideration in its decisions on the amendments under consideration in this rulemaking.

CHANGES NOT AFFECTING SPECIFIC PROJECTS

Comments: Very few comments were received on the proposed revisions to the protected areas designations which do not affect pending hydroelectric projects. Two groups opposed the reclassification of Ruby Creek (a stream in the Skagit basin in Washington) from protected for resident fish and wildlife to already protected under existing federal law. They believe that the Council's protected areas provides greater protection.

Response: No commentors presented evidence demonstrating that the state agencies failed to apply the guidelines used in making the original protected areas recommendations in proposing additions or deletions to protected areas. In the case of Ruby Creek, recognizing that the reach is already protected under federal law and thus does not require designation under the Council's protected areas is consistent with the way in which similar reaches have been designated, and will not result in a lower level of protection for the reach. The Council therefore adopted the changes as proposed.

A listing of all reaches affected by the changes adopted in this rulemaking is available upon request from the Council. Changes relating to specific projects are set forth in the following section.

PROJECT-RELATED CHANGES

The Council received a number of petitions seeking exemption of specific hydroelectric projects from protected areas. The proposed changes are listed by state. No changes were proposed for reaches in Montana.

Oregon

Whiskey Creek Project on Clackamas River, FERC No. 10475, Reach No. 1709001100501, I.D. No. 938, Clackamas River in Clackamas County. The reach is currently classified as "already protected by federal or state action;" the proposed change would list the reach as protected by the Council for "anadromous fish." Petition from Oregon Department of Fish and Wildlife.

Comments: The developer of the proposed Whiskey Creek project sought a clarification of the effect, if any, of the change on the Whiskey Creek project. The diversion for that project is located on an unprotected reach (Whiskey Creek) but the powerhouse will be located near the North Fork Reservoir on the Clackamas River, and will discharge water into the reservoir.

Response: Under the 1988 protected areas rule, the North Fork Reservoir, as part of an existing Portland General Electric hydro project, was already exempt from the protected areas designation. The Council approved the agency request to reclassify that portion of the reach above the reservoir as a protected area. The reclassification will not affect the Whiskey Creek project, since the powerhouse will be located on the reservoir and below the protected area.

Walker Creek, I.D. No. 21488, Reach No. 1710020320900.00, tributary to Nestucca River in Tillamook County. The reach is classified as "unprotected;" the proposed change would list the reach as "protected for anadromous fish." The "unprotected" designation is a result of a data entry error by Council staff; the reach was proposed for protected designation in 1988. The change is supported by the Oregon Department of Fish and Wildlife.

Comments: The Oregon Department of Fish and Wildlife commented in favor of the change.

Response: The Council approved the proposed change. No projects are currently pending on Walker Creek, but the Walker Creek reclassification has been previously opposed by the City of McMinnville, which has indicated some interest in a municipal water supply project in the area. The protected areas designation would not preclude the municipal water supply project but would be a barrier to installing hydroelectric generators as part of the initial project.

Idaho

Bear River Narrows, FERC No. 9215, Reach No. 1601020201702.00, I.D. No. 27822, tributary to Great Salt Lake in Franklin County. Reach would not be reclassified, but exception for project would be granted. Petition based on showing that project will substantially improve existing habitat. Sorenson petition. Idaho Department of Fish and Game supported as exceptional benefits project.

Comments: In its initial comments to the Council, Idaho Department of Fish and Game supported this change on the basis that it would provide substantial benefits to fish and wildlife by stabilizing fluctuating flows in the stream and by providing additional wetlands. IDFG has also made a similar statement the FERC. At the time of the Council's decision, the developer and the Department had not yet reached a final agreement on the conditions of development, but were reported to be close to such agreement.

It should be noted that this project has had widespread support among sports fishing and other environmental groups because of its potential to enhance the fishery in this stretch of river. The U.S. Fish and Wildlife Service indicated that it did not oppose the proposed change in status.

Response: The Council exempted this project, as proposed by the developer, from protected areas on the basis of "exceptional benefits", provided that the developer reaches by September 1990 a signed agreement with the Idaho Department of Fish and Game specifying the conditions of development and submits a copy of the agreement to the Council. Although there is not a signed agreement with IDFG at this time, IDFG has stated in writing both to the Council and FERC that the project will provide exceptional benefits to fish and should be exempted.

Goose Creek, FERC No. 8800, Reach No. 170602100200.00, I.D. No. 7761, tributary to Little Salmon River in Adams County. Portion of reach below Goose Creek Falls would be reclassified from "protected for anadromous fish and resident fish or wildlife" to "protected for anadromous fish;" portion of reach above Goose Creek Falls would be reclassified from "protected for anadromous fish and resident fish or wildlife" to "unprotected." Department petition.

Comments: The Idaho Department of Fish and Game supported the change because the project is above the natural barrier to anadromous fish (Goose Creek Falls) and the resident fish resources above falls do not meet protected areas standards. The U.S. Fish and Wildlife Service stated that it did not have any objection to the proposed change in status.

Numerous comments were received from both individuals and environmental groups opposing the removal of Goose Creek from protected areas. The comments emphasized the scenic beauty and recreational values of the reach, including the falls, and described possible archaeological sites in the area. Several comments also urged the Council to protect the portion of the reach above the falls for resident fish and wildlife.

Response: The Council's protected area designations are based on the fish and wildlife resources present on the reaches. None of the commentators

opposing the change in designation showed that this stream reach would meet the criteria for protected status. The Council accepted the recommendation of the IDFG and removed the reach above Goose Creek Falls from protected status. Although there is a great deal of evidence suggesting that the area is exceptional from a scenic standpoint, there is nothing in the record indicating it meets the criteria for protection based on its fish and wildlife values.

Trout Creek, FERC No. 10610, Reach No. 1601020202600.00, I.D. No. 27763, tributary to Bear River in Caribou County. Portion of reach from Bear River to barrier below county road approximately 3 miles upstream from Bear River would remain "protected for resident fish;" portion of reach above barrier would be reclassified from "protected for resident fish" to "unprotected." Petition from Idaho Department of Fish and Game.

Comments: The Idaho Department of Fish and Game proposed this change because the intent of the protected status given to Trout Creek was to protect spawning trout from Bear River. The barrier approximately three miles above the mouth of Trout Creek prevents the spawning trout from using the upper portion of the reach. The U.S. Fish and Wildlife Service stated that it had no objection to the proposed change. No comments opposing this change were received.

Response: The Council removed the portion of Trout Creek above the spawning barrier from protected status.

Sixmile Creek, FERC No. 9952, Reach No. 1706021002500.00, I.D. No. 7759, tributary to Little Salmon River in Adams County. Entire reach would be reclassified from "protected for resident fish" to "unprotected." Idaho Department of Fish and Game petition.

Comment: The Department supported the reclassification because the resident fish resources present on the reach do not meet protected areas criteria. The U.S. Fish and Wildlife Service stated that it did not oppose the change, and that, if mitigation proceeds as recommended, the project could actually enhance resident and future anadromous fish habitat by restoring riparian habitat in the lower portion of Sixmile Creek.

Response: The Council reclassified the reach in question as "unprotected."

Box Canyon, FERC No. 6543, Reach No. 1070402108901.00, I.D. No. 11017, tributary to Snake River in Gooding County. Hardy/Consulting Services, Inc. petition.

Comments: Earl Hardy, the owner and developer of the Box Canyon site, sought an exemption for his project based on a pre-protected areas agreement between Hardy and the State of Idaho. Mr. Hardy's interpretation of the agreement is that the State of Idaho has given him permission to pursue development of his project. Idaho Fish and Game opposes the project and disagrees with Hardy's interpretation. There is apparently no disagreement about the fact that Box Canyon contains exceptional habitat. Mr. Hardy, the Idaho Department of Fish and Game, and others are

currently in litigation about various issues relating to the project and an associated commercial trout farm. The exemption is opposed by the U.S. Fish and Wildlife Service, various environmental groups, and a number of local residents.

Response: This rulemaking is not the proper place to determine the validity and meaning of Mr. Hardy's agreement with Idaho. Protected area designation for this site appears to be biologically justified. In the event that Mr. Hardy prevails in court or otherwise clearly establishes that he has a pre-existing right to pursue development of the project, the Council should be prepared to consider exempting the project from protected area status. However, it is premature for the Council to take action on the request at this time.

Twentymile Creek, FERC No. 10030, Reach No. 1706030502800.00, I.D. No. 6709, tributary to Clearwater River, south fork in Idaho County. Petition seeks reclassification of 1.8 miles of reach from "protected for resident fish and wildlife" to "unprotected." Warnick petition.

Comment: The preliminary permit for this project has expired. However, the developer, C.C. Warnick, has indicated that he will be refile for another preliminary permit. The developer seeks the reclassification on the grounds that the lower portion of the reach has a steep gradient and supports very few fish.

The Idaho Department of Fish and Game opposes this petition on the grounds that the reach in question fully meets the protected areas criteria. The U.S. Fish and Wildlife Service opposes this petition on the grounds that the proposed project would significantly degrade fish and wildlife habitat values.

Response: The Council did not grant the request for exemption because there was not an adequate showing that the project could be developed without significant risk of injury to resident fish and wildlife.

Boulder Rapids, FERC No. 10772, Reach No. 1704021202000.00, I.D. No. 11037, on Snake River at Boulder Rapids in Twin Falls County. Petition seeks exception based on fish and wildlife benefits. Myers Engineering petition.

Comment: The developer has consulted with the Idaho Department of Fish and Game but no agreement has been reached, and the department does not support an exemption at this time. The U.S. Fish and Wildlife Service and a number of environmental groups also oppose exempting this project.

Response: Because there was not sufficient information in the record regarding the exceptional benefits for fish and wildlife which the developer believes would be provided by this project, the Council deferred action on this petition. IDFG has indicated that it will continue to consult with the applicant, and if an agreement can be reached, the project may be submitted to the Council for review at some future date.

Shelley Project, FERC No. 5090, Reach No. 1704020804300.00, I.D. No. 11368, on Snake River in Bingham County. Petition seeks reclassification of project area only (approximately a 4 mile portion of the reach) from "protected for wildlife" to "unprotected" or an exception for wildlife benefits. City of Idaho Falls petition.

Comment: At the time of the petition, the city had not held a consultation with the Idaho Department of Fish and Game and provided no information on why the project would provide exceptional benefits to wildlife. The first consultation was held in late March after rulemaking had commenced. Following the consultation, the city formally asked the Council to delay action on its petition under the current rulemaking. The city stated that it will continue to work with Idaho Fish and Game and will likely petition the Council for an amendment at a future date.

The proposed change in status was opposed by the U.S. Fish and Wildlife Service, and by numerous environmental groups and local residents.

Response: Based on the City of Idaho Falls' request, the Council deferred action on this petition until the city and the Idaho Department of Fish and Game conclude their consultation process.

Auger Falls, FERC No. 4797, Reach No. 1704021203400.00, I.D. No. 11057, on Snake River in Twin Falls County. Petition seeks exception based on fish and wildlife benefits. J-U-B Engineers, Inc. petition.

Comment: The proposed change is opposed by the U.S. Fish and Wildlife Service on the grounds that white sturgeon, resident fish, and riparian values will be subjected to multiple project cumulative impacts. The proposed change is supported by the Idaho Department of Fish and Game, subject to certain conditions.

The applicant and IDFG have been working closely to finalize an agreement on this project. At this time the agreement has not been finalized but the parties expect to complete it within a few weeks.

Response: The Council approved the exemption of this project provided that a final agreement on conditions of development is presented to the Council by September 1990.

Upper Teton, FERC No. 10613, Reach No. 1704020402300.00, I.D. No. 11459, tributary to Henrys Fork of Snake River in Teton County. Petition seeks exception based on fish and wildlife benefits. Arkoosh/Lower Patterson petition.

Comments: Consultations between the applicant and IDFG have been held and are continuing but no agreement has been reached. IDFG's current position is that the project as designed will not provide exceptional benefits either to fish or wildlife. The granting of an exemption also has been opposed by the U.S. Fish and Wildlife Service and the Bureau of Land Management, both of whom commented to the Council. The exemption also

has been opposed by numerous individuals and environmental and sports fishing groups.

Response: The Council deferred a decision on the petition. The record from this proceeding does not provide sufficient evidence as to what measures the applicant would take to provide benefits to fish or wildlife. The applicant and the Idaho Department of Fish and Game are continuing to consult and the Department and the applicant have agreed that the Council should delay this decision until consultations are completed.

Deep Creek, FERC No. 10180, Reach No. 1706010100900.00, I.D. No. 8841, tributary to Snake River in Adams County. Petition seeks reclassification of portion of reach outside wilderness area from "unprotected" to "protected for anadromous fish, resident fish, and wildlife." This portion of the reach was omitted from the original protected area designations because the reach mapping system did not show which portions, if any, of the reach were outside the federally-protected wilderness area. Idaho Department of Fish and Game petition.

Comments: No opposing comments were received. The U.S. Fish and Wildlife Service supported the proposed change. Further research on this project has shown that the preliminary permit was canceled on June 2, 1989.

Response: The Council granted the Department petition and approved the change.

Elk Creek, FERC No. 6524, Reach No. 1706030807300.00, I.D. No. 6522, tributary to Dworshak Reservoir in Clearwater County. Petition seeks reclassification of reach from "unprotected" to "protected for wildlife." The reach, which includes Elk Creek Falls, contains the largest known remaining population of the Coeur d'Alene salamander, a state species of special concern. Petitions received from Department and others.

Comments: The FERC recently denied the pending application for a project at Elk Creek Falls, so the proposed change will not affect a project. The proposed change was supported by a number of commentors.

Response: The Council granted the petitions and reclassified the reach to protected status. The petitions appear to be well justified based on the unique wildlife populations found on the reach.

The following six projects, all within the Salmon River Basin in Idaho, are discussed together below:

Lower Squaw Creek and Upper Squaw Creek Projects, FERC Nos. 7299 and 7301, Reach No. 1706021003300.00, I.D. No. 7723 in Idaho County. Reach is protected for anadromous fish plus resident fish or wildlife.

Allison Creek, FERC No. 7383, Reach No. 1706020904100.00, I.D. No. 7776, in Idaho County. Reach is protected for anadromous fish plus resident fish or wildlife.

Partridge Creek, FERC No. 7380, Reach No. 1706020904000.00, I.D. No. 7780, in Idaho County. Reach is protected for anadromous fish plus resident fish and wildlife.

Elkhorn Creek, FERC No. 7378, Reach No. 1706020901800.00, I.D. No. 7782, in Idaho County. Reach is protected for anadromous fish plus resident fish and wildlife.

Trapper Creek, FERC No. 6435, Reach No. 1706020804900.00, I.D. No. 7884, in Valley County. Reach is protected for anadromous fish plus resident fish or wildlife.

Comments: The Idaho Department of Fish and Game recommended changes at these projects that would add or delete reasons for protection but would not change the classification of the reaches on which the projects were located. All the reaches are currently protected. Idaho commented that the proposed changes were based on the results of subbasin planning data, and since the Council had decided not to entertain changes in protected areas based on this data until the subbasin plans are completed, it is withdrawing its request at this time. This result is also consistent with the comments of the Federal Energy Regulatory Commission, which suggested that the reasons for the proposed changes should be better explained before the Council takes action on them.

Response: The Council deferred action on these proposed changes until the subbasin plans are completed.

Washington

Martin Creek, FERC No. 10212, Reach No. 1711000909600.00, I.D. No. 25178, Tye River in King County. Petition seeks change from "protected for wildlife" (excellent/extensive deer winter range) to "unprotected" for the project area only based on studies showing that snow depths in project area preclude use as winter range. EBASCO petition.

Comments: EBASCO has pointed out that this project was incorrectly identified as FERC No. 10142 in their petition and in the Council's rulemaking notice. This has been noted and corrected. The Washington Department of Wildlife supports the change to unprotected status for the immediate area of this project only. No comments opposing this viewpoint were received.

Response: The Council approved the change to unprotected status for the project area only.

Dead Horse Creek, FERC No. 4282, Reach No. 1711000404800.00, I.D. No. 25803, tributary to Nooksack River, north fork in Whatcom County. Petition seeks change from "protected for anadromous fish" to "unprotected" for upper portion of reach based on information showing upper portion inaccessible to anadromous fish. Glacier Energy petition.

Comments: Both the Washington Department of Fisheries and Department of Wildlife agreed to reclassification of the reach from "protected for anadromous fish" to "protected for anadromous fish up to natural barrier at approximately river mile 0.2, unprotected above river mile 0.2." The proposed change will apparently allow the project to proceed. The Lummi Indian Tribe does not support the change; however, it has testified it has no plans to oppose the project as outlined. No other comments in opposition to this project were received.

Response: The Council redesignated the portion of Dead Horse Creek above the anadromous fish barrier as unprotected.

Canyon Creek, FERC No. 4312, Reach No. 1711000405400.00, I.D. No. 25783, tributary to Nooksack River, north fork in Whatcom County. Petition seeks change from "protected for anadromous fish, resident fish, and wildlife" to "unprotected" for project area on grounds that "project can be constructed and operated to avoid adversely impacting these resources." Glacier Energy petition.

Comments: The Glacier Energy Corporation has petitioned the Council to change the status of this reach from "protected for anadromous fish, resident fish and wildlife" to "unprotected" for the project area only on the grounds that "the project can be constructed and operated to avoid adversely impacting these resources."

The National Marine Fisheries Service opposed the change as requested in the petition. The Washington Department of Wildlife and other interested parties are apparently in agreement that anadromous fish presently cannot get above River Mile 4.6, due to woody debris and boulders in the stream.

However, the Forest Service, the Washington Department of Wildlife, the Washington Department of Fisheries and the Nooksack Tribe are engaged in a cooperative management project to remove or reduce the barriers, and restore anadromous fish access to the upper seven miles of the reach which are now inaccessible. Woody debris has already been removed from several points, and removal of the remaining barriers is scheduled when low water occurs this fall. The Forest Service reports that the barriers are relatively recent and that there are reports of steelhead being caught in the upper portions of the reach as recently as the 1950s.

Based on the measures currently underway to restore anadromous fish access to the upper portion of Canyon Creek, the Washington agencies, the Forest Service, and the Nooksack and Lummi Tribes oppose removing protected status from this reach.

Response: The Council did not grant the petition to change the protected status since it appears that within a few months, the entire reach will become accessible to anadromous fish.

Boulder Creek, FERC No. 4270, Reach No. 1711000407900.00, I.D. No. 25779, tributary to Nooksack River, north fork in Whatcom County. Petition seeks change from "protected for anadromous fish" to "unprotected" for

project area on grounds that "project can be constructed and operated to avoid adversely impacting, and can enhance anadromous fish." Glacier Energy petition.

Comments: The National Marine Fisheries Service opposed the change as requested in the petition on the grounds that the petitioner has not demonstrated that the project will enhance anadromous fish resources. The Washington Department of Fisheries and the Washington Department of Wildlife do not support the change as requested but do support reclassification to "protected for anadromous fish up to natural barrier at approximately river mile 0.5, unprotected above river mile 0.5." The Lummi Tribe does not support the requested change but does not dispute that there is a barrier at approximately river mile 0.5. According to the Washington Department of Fisheries, more than 1200 pink salmon were observed spawning in the lower 0.2 miles of Boulder Creek in September 1989.

Response: Based on the record in this proceeding, the Council redesignated the portion of Boulder Creek above the anadromous fish barrier at approximately river mile 0.5 as unprotected.

Racehorse Creek, FERC No. 4238, Reach No. 1711000403400.00, I.D. 25775, tributary to Nooksack River, north fork in Whatcom County. Petition seeks change from "protected for anadromous fish and resident fish or wildlife" to "unprotected" for project area on grounds that the reach in the project area "does not support a self propagating population of resident trout." Glacier Energy petition.

Comments: The Washington Department of Wildlife opposes removing protected status from the reach but supports reclassification to "protected for anadromous fish and wildlife up to natural barrier at approximately river mile 2.08, protected for wildlife (bald eagles) above river mile 2.08."

The Washington Department of Fisheries is in agreement. The Lummi Tribe maintains that the reach above the barrier does support resident cutthroat and brook trout, but it has not provided evidence that these are wild populations.

Response: The Council accepted the recommendation of the Washington Department of Wildlife and reclassified the stream in question as protected for anadromous fish and wildlife up to R.M. 1.2 and protected for wildlife above R.M. 1.2. Although the Lummi Tribe opposes reclassification, it has not presented evidence that the resident fish population is a wild self-sustaining population.

Rocky Creek, FERC No. 4376, Reach No. 17110006517700.00, I.D. No. 25513, tributary to Skagit River in Skagit County. Petition seeks change from "protected for anadromous fish" to "unprotected" above stream mile .3 based on information showing minimal anadromous fish use above stream mile .3 and no anadromous fish use above stream mile .4. Glacier Energy petition.

Comments: The National Marine Fisheries Service opposed the change as requested in the petition on the grounds that the petitioner has not shown

that anadromous fish are absent from the project area. The Washington Department of Fisheries, the Washington Department of Wildlife, and the Skagit System Cooperative (the fisheries management unit for the Swinomish, upper Skagit and Sauk-Suiattle Indian tribes) supports reclassification of this reach to "protected for anadromous fish up to the natural barrier at approximately R.M. 0.5, unprotected above R.M. 0.5."

Both the Friends of the Earth and The Northwest Conservation Act Coalition oppose changing the protected status of Rocky Creek above R.M. 0.5. These groups argue that this area contains exceptional wildlife habitat above the barrier that would be severely disturbed by the proposed project.

Response: The Council accepted the recommendation of the State of Washington and the Skagit System Cooperative and amended the protected areas designation for Rocky Creek. Up to the natural barrier at R.M. 0.5 the reach is designated as protected for anadromous fish and above R.M. 0.5 the reach is designated as unprotected. The Council did not find adequate evidence in the record to merit protecting the upper portion of the reach for wildlife.

Diobsud Creek, FERC No. 4437, Reach No. 1711000511200.00, I.D. No. 25549, tributary to Skagit River in Skagit County. Petition seeks change from "protected for anadromous fish and resident fish and wildlife" to "unprotected" for project area on information showing no anadromous fish use of project area and on grounds that project can be constructed and operated to avoid adversely impacting resident fish and wildlife. Glacier Energy petition.

Comments: The Washington Departments of Fisheries, the Washington Department of Wildlife, and the Skagit System Cooperative do not support removing this reach from protected areas. However, they do support reclassification of the reach to "protected for anadromous fish, resident fish and wildlife up to a natural barrier at approximately R.M. 1.8 and protected for resident fish and wildlife above R.M. 1.8." The Sierra Club, Cascade Chapter, opposed the reclassification on the grounds that the reach has excellent trout fishing and wildlife habitat. The National Marine Fisheries Service opposed the change as requested by the petitioner on the grounds that the petitioner has not demonstrated the absence of anadromous fish in the project area and has not demonstrated that the project will not adversely affect anadromous fish.

Response: The Council reclassified the reach as protected for anadromous fish, resident fish and wildlife up to the natural barrier at R.M. 1.8 and protected for resident fish and wildlife above R.M. 1.8.

Jordan Creek and Upper Jordan Creek, FERC Nos. 9787 and 10166, Reach No. 1711000501100.00, I.D. No. 25518, tributary to Cascade River in Skagit County. A Washington Department of Wildlife petition seeks a change from "protected for anadromous fish" up to river mile 0.5 and "unprotected" above river mile 0.5 to "protected for anadromous fish" up to river mile 3.2 based on information showing anadromous fish use up to that river mile.

Comments: The Washington Department of Wildlife and the National Marine Fisheries Service supported the proposed change. No comments were received from the project developers.

Reclassification of this stream would probably affect the Jordan Creek project. The Council is unsure of the exact location of the Upper Jordan Creek project, and is thus unable to determine whether the proposed change would affect that project. As proposed, the Jordan Creek project would have a diversion dam above the anadromous fish barrier with its powerhouse just below the anadromous barrier. The reclassification would apparently place the entire project within a protected area.

Response: The Council reclassified the reach as protected for anadromous fish up to R.M. 3.2. However, under the transition language, the reclassification will not affect the status of the pending projects.

Snoqualmie River, north fork, Reach No. 1711001003001.00, I.D. No. 24980, tributary to Snohomish River in King County. Affects two pending projects, Hancock Creek (FERC No. 9025) and McLeod Ridge (FERC No. 10787). Washington Department of Wildlife petition seeks change from "unprotected" to "protected for resident fish and wildlife" based on information showing deer winter range and high value resident fish habitat.

Comments: The Washington Department of Wildlife petitioned to change the status of this area from "unprotected" to "protected for resident fish and wildlife" based on information indicating that inadvertently the reach had been incorrectly listed in the original protected areas data base. The department claims that in checking the data base, all values for the reach were listed as "0s" when, in fact, the reach is among the top 2% within the state for resident fish value. The Department's petition was supported by a number of other commentors, including the Friends of the Snoqualmie River, the Northwest Rivers Council, and the Issaquah Alps Trails Club .

The developer of the McCleod Ridge project, Pacific Hydro, commented that the project was pursued after the protected areas rule was adopted on the basis that the area in question was unprotected.

Response: The Council accepted the recommendation of the Washington Department of Wildlife and reclassified the reach as protected for resident fish and wildlife. However, under the transition language, the reclassification will not affect the status of the pending projects.

Pratt River, FERC No. 10356, Reach No. 1711001001300.00, I.D. No. 24962, tributary to Snoqualmie River, middle fork in King County. Petition would reclassify from "protected for wildlife" to "protected for resident fish and wildlife" based on information showing high abundance and quality of wild cutthroat trout. Washington Department of Wildlife petition.

Comments: This petition was supported by a number of environmental groups and individuals. No comments opposing the petition were received.

Response: The Council reclassified the reach as protected for resident fish and wildlife. This reclassification would not significantly affect the project applicant since the project currently is in an area that has been designated as protected.

Silver Creek. FERC No. 10292, Reach No. 1711000508600.00, I.D. No. 25654 in Whatcom County; Lime Creek. FERC No. 10630, Reach No. 1711000604600.00, I.D. No. 25417 in Snohomish County.

Comments: The Washington Department of Wildlife petitioned the Council to reclassify the reaches in question from "protected by Council action" to "protected by federal law." In essence, this would remove these areas from the Council's protected areas. Washington believes that federal designation of Lime Creek as a wild and scenic river and the transfer of Silver Creek to the federal government as a research natural area provides sufficient protection for these reaches.

Response: The Council removed these reaches from protected areas in reliance on the federal designations. This is consistent with the protected areas criteria which contemplate the use of federal protected status when it exists.

TRANSITION PROVISIONS

Background: In 1988, in making its initial protected areas designations, the Council chose to exempt all hydroelectric facilities which had been licensed prior to the protected areas designation and to recognize various factors which the Federal Energy Regulatory Commission should take into account in determining whether licenses should be granted to hydroelectric projects where the licensing process was underway but not yet completed. This "transition" provision states:

(5) The Council recognizes that there exist, as of August 10, 1988, applications for hydroelectric projects at various stages of completion before the Federal Energy Regulatory Commission. In many cases the applicants have made substantial investments and have completed, or nearly completed, agreements with all interested parties, including state fish and wildlife agencies. The Council recognizes that the Federal Energy Regulatory Commission may be obligated to complete its processes on these applications, but expects where possible that this measure will be taken into account to the fullest extent practicable.

One of the purposes of the protected areas designations is to guide proposed hydroelectric projects away from critical fish and wildlife habitat and thereby provide some measure of certainty to hydropower developers. A number of commentors in the 1988 rulemaking supported this goal. The Council stated in its Response to Comments:

The Council continues to believe that minimizing the social, environmental, and economic costs involved in hydropower development is an important goal. By doing so, the Council intends to foster the development of less costly power resources that are reliable, available, and environmentally sound.

After the Council made its initial protected areas designations, developers began to rely on those designations. Developers reviewed the protected areas, and most directed their efforts to projects located outside the protected areas.

In the present rulemaking, certain additional river reaches were proposed for protection. As a result, there may be some developers who have proceeded under the assumption that their project was acceptable since it was not in a protected area, but who now find the reach is now being considered for protection.

The list of projects which may be affected by changes from unprotected to protected status in the present rulemaking is a short one. All of the affected projects appear to be in the State of Washington. The list includes the Jordan Creek and Upper Jordan Creek projects (on Jordan Creek, a tributary to the Cascade River) and the Hancock Creek and McLeod Ridge projects (on the north fork of the Snoqualmie River). It is possible that not all of these projects will ultimately fit within the proposed transition language. Because the project information available to the Council does not always pinpoint the current location of projects, it was not feasible to determine with certainty the protected area status of each of these projects.

The Council mailed to interested parties a letter describing the transition problem and offering a draft transition provision for review. The comment period was reopened to allow for public comment on the issue.

Comments: A number of commentators offered thoughtful suggestions on how to deal with the issue of transition. The commentators generally supported reasonable transition provisions, subject to certain suggested improvements.

The Bonneville Power Administration noted that the transition issue would be present each time the Council revises its protected areas designations, and suggested that the transition provisions be made continuing, and not limited simply to one rulemaking. Bonneville, and the Idaho Department of Fish and Game, suggested simply modifying the existing transition language to give it continuing effect.

The Federal Energy Regulatory Commission pointed out that not all developers obtain a preliminary permit before filing for a license, and suggested that the Council include within the transition language "applications for licenses and exemptions".

The Montana Department of Fish and Game and the Washington Department of Wildlife expressed concern about the cutoff date for projects to be exempted by the transition provisions. The departments suggested that the cutoff date be the date on which the Council gives notice of its proposed

amendments, rather than the date on which the Council concludes rulemaking. The departments explained that once proposed changes have been announced, prospective developers ought to be on notice.

The City of Idaho Falls commented that the exemption proposed for projects affected by the current round of protected areas should be extended to projects which were underway and affected by the initial protected area designations in 1988.

The Idaho Department of Fish and Game and commentor Michael Rossotto stated that the Council should grant exemption only to projects where there has been substantial investment in reliance on the unprotected status of the project area.

Response: The Council adopted the transition provisions as stated below. As suggested, this provision is continuing in nature, and adopts as a cutoff date the date on which the Council entered rulemaking on the proposed changes. (In the case of this rulemaking, that date is February 15, 1990, the date on which the Council voted to initiate rulemaking.)

The transition provisions were expanded, as suggested by the FERC, to encompass applications for licenses and exemptions.

The Council did not choose to impose a requirement of substantial investment in order for a project to qualify for exemption. The Council's intention is that the protected areas designations should provide reasonable certainty to developers that a project begun outside protected areas will not be later restricted. Imposing an additional test of "substantial investment" reduces that certainty. By making the existing designations a reliable guide to project siting, the Council believes that developers will be further encouraged to site projects outside protected areas.

The Council is not persuaded that the transition language for projects affected by the 1988 protected areas rulemaking should be revised so that such projects are exempted in the same manner as projects affected by the current rulemaking. The purpose of the exemption is to protect those developers who rely on the Council's designations. Projects underway before 1988 were not undertaken in reliance on designations made by the Council.

The transition provisions are:

(5)(b) (For projects pending at the time that amendments are proposed to protected areas.) The Council recognizes that there may exist preliminary permits or applications for licenses or exemptions for hydroelectric projects at sites which were not previously within protected areas but which may be included within protected areas as a result of amendments approved by the Council. An important purpose of protected areas is to encourage developers to site projects outside protected areas. The Council therefore exempts from the effect of an amendment designating a previously unprotected area as protected

any project for which the developer had obtained a preliminary permit or filed an application for license or exemption prior to the date on which the Council entered rulemaking on the amendment. However, it is the Council's intention that the Federal Energy Regulatory Commission give full consideration to the protection of fish and wildlife resources located at these project sites and provide suitable protection and mitigation for such resources in the event that a license or exemption is approved.