

Date: January 31, 2013

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Re: Comment on Draft Mid-term Assessment Report

I am responding to the request by the Northwest Power and Conservation Council for public comment on the document 2012-13, the Draft Mid-Term Assessment Report.¹ To facilitate consideration by Council members and staff, I've organized my comments in two sections.

The first comment addresses what I believe would be an appropriate use of the Mid-term Assessment once it is finalized, i.e., adjustment of the conclusions and recommendations in the Sixth Power Plan related to conservation and efficiency targets. In my opinion, this use may be particularly relevant in light of, for example, the requirement contained in Initiative 937 passed in 2006 by voters in the State of Washington, which, inter alia, requires utilities to undertake all cost-effective conservation measures.²

The second comment identifies what I believe is the single greatest deficiency in the draft report, i.e., the failure to address the likely impacts of the August 2, 2011, invalidation and remand of the 2008 and 2010 biological and supplemental opinions for the Federal Columbia River Power System in National Wildlife Federation, et al. v. National Marine Fisheries Service, et al.

1. Adjustments To Regional Conservation/Efficiency Targets

As you may recall, in his February 17, 2012 Memorandum to members of the Council's Power Committee, Terry Morlan, then-Director of the Council's Power

¹ Draft Midterm Assessment Report, document 2012-13 (Dec. 20, 2012), available at <http://www.nwcouncil.org/library/report.asp?docid=723>.

² See letter from Jack Speer to Bill Bradbury (Jan. 29, 2013), available at http://www.nwcouncil.org/energy/powerplan/6/midterm_pnucc.pdf.

Division, recognized that there existed some “confusion ... whether the Mid-term Assessment will change any of the conclusions or recommendations of the Sixth Power Plan.”³ He flatly stated, “it will not” and, continuing, Mr. Morlan wrote, “The Council’s power plan can only be amended through a specified public process with hearings in all four states.”⁴

Now, as Mr. Morlan noted, it would be unlawful for the Council to make *de facto* amendments in the Sixth Power Plan based on its final version of the Mid-term Assessment Report, or even to use the Mid-Term Assessment as a way of delimiting the range of amendments that might be considered under the requirements for public notice and involvement set forth in sections 839b(d)-(h) of the Pacific Northwest Electric Power Planning and Conservation Act, as amended, 16 U.S.C. 839, *et seq.*

Under the Sixth Power Plan there is, however, one area where it may be appropriate for the Council to adjust its conclusions and recommendations for the remainder of the period covered by the Action Plan, i.e., the Plan’s regional conservation target(s). More specifically CONS-1 of the Action plans calls for a “mid-term review of regional progress toward the regional conservation target” for the following purpose.

This will permit the Council to consider adjustments to its regional conservation target for the remainder of the period covered by the action plan. In addition, the mid-term review will assess the impact of the region’s progress on the acquisition of other resource development actions.⁵

Similarly, CONS-14 states that a mid-term report will review progress toward conservation milestones, including energy-efficiency technologies and practices, and planning objectives and CONS-17 references a “mid-term check-in” whereby Bonneville and small and/or rural utilities report back their findings regarding the unique circumstances and special barriers faced by these customers in developing and implementing conservation programs, as well as achieving conservation targets.⁶ Relevant language in CONS-16 states as follows:

The Council recognizes that the plan’s conservation targets are based on an “expected value” across a wide range of potential futures. The actual future the region experiences will differ in some regard from

³ Mr. Morlan’s memorandum of Feb. 17, 2012, is available online at <http://www.nwcouncil.org/news/2012/03/p5.pdf>.

⁴ *Ibidem.*

⁵ Sixth Power Plan Action Plan at AP-2.

⁶ *Id.*, AP 6 - AP-7.

the plan's assumptions. Therefore, this [mid-term] report should identify whether the regional conservation acquisition plan (Cons-14), the implementation of that plan (CONS-15) and/or the Council's target (CONS-1), need to be modified to account for conditions or circumstances different than expected. These include slower- or faster-than-anticipated economic recovery, substantially different power market conditions, carbon control requirements, technology evolution, the success or failure of acquisition mechanisms and strategies, progress on research and development and the adoption of codes and standards.⁷

As the Council is aware, virtually all of the so-called "expected values" underlying the Sixth Power Plan need to be modified. Specifically, the anticipated economic recovery has not been "slower-than-anticipated." Rather, the latest estimates of the growth rate in real gross domestic product by the U.S. Bureau of Economic Analysis was surprisingly less than expected and, in large part, there is very little evidence that the economy has recovered much at all over the past three years.

In addition, excess supplies in power markets due in significant part to abundant unprecedented low prices for natural gas has persisted and anticipated controls on carbon emissions by thermal-based generating plants have not yet been enacted.

Thus, in my opinion, it would be appropriate for the Council to make adjustments in the Action Plan's milestones, conservation and energy efficiency targets for the balance of the period covered by the Sixth Power Plan. This could be done in advance of the amendment process without violating the public notice, involvement and hearing process required under the Northwest Power Act.

2. Failure To Address Likely Impacts of Invalidation and Remand of Biological Opinions

The most serious deficiency in the Draft Mid-term Assessment Report is the Council's failure to consider the likely impacts of the August 2, 2011, decision in National Wildlife Federation, et al., v. National Marine Fisheries Service, et al. on the reliability, flexibility and firm generating capability of the Federal Columbia River Power System ("FCRPS"), as well as the ability of the hydrosystem to provide peaking capacity, load following, ancillary and other control services.

As the Council and staff must know, on August 2, 2011, Judge Redden, then presiding, opined that operation of the FCRPS results in irreparable harm to listed species and invalidated the 2008 and 2010 biological opinions, ordering the federal defendants—including NOAA Fisheries, the Fish and Wildlife Service, the U.S. Army Corps of Engineers and the Bureau of Reclamation, but not the Bonneville Power Administration—to consider more aggressive actions, including dam removal,

⁷ *Id.*

additional flow augmentation, and reservoir modifications, but leaving in place until no later than January 1, 2014, certain spill operations, which he had previously required, pending production of a new or supplementary biological opinion.⁸

For the Council's consideration, I believe that the following sections of Appendix M: Integrating Fish & Wildlife and Power Planning, should be revised and updated in order for the Draft Mid-term Assessment Report to provide an appropriate view of the major changes that have occurred in the legal status of the biological opinions for the FCRPS and the Council's 2009 Fish and Wildlife Program, which assumed that the biological opinions would survive legal challenges, and the Sixth Power Plan, which, without further consideration, incorporated the program.

New or revised fish and wildlife operations alter the amount of overall energy that the hydropower system can produce, but they also alter the peaking capability of the hydroelectric system in winter and reduce the flexibility of the system to follow load and balance other variable resources, which is a growing issue with the regional power system. The Sixth Power Plan is looking at regional resource needs in all these categories – energy, capacity, and flexibility. Changes in fish and wildlife operations can affect the power system in all three categories.

* * *

Fish and wildlife actions identified in the 2008 NOAA Fisheries FCRPS Biological Opinion have been recognized ... as the baseline for fish and wildlife operations in the near future. Current operations are actually a combination of flow and passage measures in the 2008 Biological Opinion and additional spill agreed to by the parties and ordered by the federal court in the Biological Opinion litigation in recent years.

* * *

These provisions have substantive effect with regard to the operation of the mainstem hydropower system in the Columbia and Snake River [and] consist of two major types of actions ... that ... affect the power supply: 1) storage reservoir operations to affect flows; and 2) bypass spill for fish passage.

* * *

The Fish and Wildlife Program and NOAA Fisheries Biological Opinion call for the eight federal dams on the lower Snake and Columbia

⁸ See Opinion and Order (Docket 1855), 2-3, 5-6, 10-11, 17, 20-22 and 24.

Rivers to divert part of their flows through fish bypass systems during spring and summer. [A]dditional spill has occurred in recent year [sic] as a result of a court-approved agreement among the parties to the Biological Opinion litigation. It is not clear whether such additional bypass spill will be required in future years, therefore it was not assumed in the analysis.

* * *

Bypass spill can affect the firm generating capability of the hydroelectric system, but in most years it translates into a loss of non-firm or surplus power available for sale on wholesale power markets. ... Under certain conditions, spill can also reduce reactive support for the transmission system, which leads to reduced transmission capability and could potentially reduce system reliability.⁹

⁹ Sixth Power Plan, Appendix M: Integrating Fish & Wildlife and Power Planning at M-5 – M-6 (footnotes omitted).