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September 4, 2024

**TO: Council Members**

**FROM: Patty O'Toole, Fish and Wildlife Division Director  
John Shurts, General Counsel**

**SUBJECT: Briefing on Northwest Power Act framework for Fish and Wildlife  
Program amendment process**

At the September Council meeting In Astoria, we will provide a detailed briefing on the framework and requirements in the Northwest Power Act for a 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.

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 is a detailed outline of the steps and procedures in the amendment process in Section 4(h) and the substantive criteria for making decisions. At the end are the relevant excerpts from the Act - Sections 2 and 4(h).

We will present the information via slides during the meeting. The slide presentation will follow the same organization and content as the outline.

# **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

## 1. Basic substantive obligation - from Sections 4(h)(1), 4(h)(5) – and premises/implications

*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.”

- “Protect” and “mitigate” are not defined. Use common sense meaning.
- “Enhance” is defined as offsite mitigation in compensation for hydrosystem losses (4(h)(5), 4(h)(8)(A)).

*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))

*Premises/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 flow and passage matters to the tributaries (and estuary), to spawning and other habitat matters, and to offsite mitigation in general.
- 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.
- Ratepayers, not the general taxpayers, are to be responsible for the cost of measures designed to deal with the adverse impacts caused by the development and operation of electric power facilities [Section 4(h)(8)(B)].
- Another major implication or premise of the Power Act's fish and wildlife provisions is the importance of the recommendations, activities, perspectives, legal rights and more of the state and federal fish and wildlife agencies and region's Indian tribes – see below.
- Council's role in particular is to bring to the fish and wildlife program a system-wide perspective, a long-term planning perspective, and a power planning perspective.

## **2. 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
  - 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
- Note on timing and procedure:– linked to power planning requirements:
  - 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(d)(1))
  - Prior to any review or “major revision” of the power plan, the Council is to call for and review recommendations for amending the fish and wildlife program. (Section 4(h)(2))
  - Fish and Wildlife Program will then become an element in the subsequent power plan. (Section 4(e)(3)(F))
- 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 from outside the Council begin and drive process, have legal meaning, and become 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” are the actions to take to protect or mitigate or enhance fish and wildlife
    - issues others have raised over time with the concept of “measures” – especially about level of specificity
    - “measures *which can be expected to be implemented* by the Administrator, using authorities under this Act and other laws, and other Federal agencies”
  - “Objectives” are what trying to achieve with measures
    - “objectives *for the development and operation of such [hydroelectric] projects on the Columbia River and its tributaries in a manner designed to protect, mitigate, and enhance fish and wildlife*” – example from legislative history

## **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). Emphasizes the duality of the Council's public engagement responsibilities – general public and specific categories of entities.

- Another implication of this section in the Northwest Power Act is that it would be via comment on the recommendations that Council would get most of the feedback. Reality is Council receives much less comment at this stage than on draft program amendments, although that comment can be important. And underscores again the importance of recommendations.

### **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 adopt 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. This is the bulk of the administrative record for the decision.
- 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.
- Requires a super-majority vote. Can be by a bare majority, if that majority includes votes from members of each state. Otherwise, requires at least six votes. (Section 4(c)(2))
- At the very end of this deliberative period, we enter into a short period 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:**

- **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.”

- **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.”

– Implications:

○ as criteria for judicial review? -- legislative history

○ additional ties to agencies and tribes in (A) and (D)/implications of “legal rights of tribes”

○ “best available scientific knowledge” standard -- action forcing

○ least-cost provision:

▪ meaning and implications

▪ other than “economical” power supply, costs not a criteria

▪ certainly not a cost-benefit test -- see 1994 *NRIC* (Tang) opinion

○ flows and passage emphasis in (e)

• **Additional criteria for relating recommendations to program amendment decisions in Section 4(h)(7):**

– The Council “shall determine whether each recommendation received is consistent with the purposes of this Act.” 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.
- The Council can decide not to adopt a recommendation, but only on the basis that the Council find that such recommendation would be—
  - (A) inconsistent with paragraph (5) [basic mission and administrative record
  - (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.

I.e., specified, relatively narrow grounds for rejection of a recommendation.

#### **Step 5 - Substance: note on the AEERPS consideration**

- **AEERPS considerations and the program amendment process**

- Act requires the Council to adopt program measures to protect, mitigate and enhance fish and wildlife “while assuring the Pacific Northwest an adequate, efficient, economical, and reliable power supply” (AEERPS)
- Role in program decisionmaking:
  - o terms not defined
  - o method for showing not specified
  - o decisionmaking history (e.g., 1994 Program)
  - o method – analysis, statement in program, explanation
- Requires analytical assistance from power division
- Considerations include effects of operations on system generation and costs
- Necessarily a preliminary assessment prior to power plan – power plan resource strategy intended by Act as part of an overarching strategy to implement a fish and wildlife program that affects power supply

- **Relationship to Power Plan resource analysis and strategy**

- Besides the fact that fish and wildlife program becomes an element of the power plan, Act also requires the Council to develop its power plan resource strategy “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.” [Section 4(e)(2)]

- Implication? Sixth Power Plan litigation
- Council models existing hydrosystem generation (amounts and timing) taking into account required operations for fish and wildlife
- Council then uses power plan process to make sure an adequate amount of cost-effective conservation and generating resources have been identified for acquisition to reduce or meet Bonneville’s contractual sales obligations reliably and to assure that Bonneville and the other federal agencies may implement the operations for fish and wildlife with sufficient certainty and reliability. (See Sections 4(d)(2), 4(e), 6(a)(2))

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

- The Council must include an explanation in writing -- **as part of the F&W Program** -- for any decision not to adopt a recommendation:

“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) of this subsection;
  - (B) inconsistent with paragraph (6) of this subsection; or
  - (C) less effective *than the adopted recommendations* for the protection, mitigation, and enhancement of fish and wildlife
- We tend to write a response for each recommendation, not just for those officially rejected, for a number of reasons. At the same time the Council adopts a statement of “basis and purpose” for the decision, including 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 couple months later. 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).

## Program amendment steps (cont'd): Relevant decisions from the Ninth Circuit

### ***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
- Second issue: Second issue: cost-benefit analysis of measures is not required by Act.

### ***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 (b) that Council had surrendered decisionmaking under the Power Act to determinations in ESA world
- Ninth Circuit affirmed Council’s program decision in memorandum opinion
- main takeaway is that the way in which the Council develops the program following the 1994 *NRIC* decision - which has tried to focus heavily on the recommendations and especially on the recommendations of agencies and tribes - is consistent with Power Act

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

#### **4h10(A) Bonneville**

- 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.
- “Consistency” – meaning; history
- Fish Passage Center decision: *NEDC v Bonneville* (Ninth Circuit 2007). Challenge to a decision by Bonneville to deobligate the contract for the Fish Passage Center, a measure in the Council’s Program. Case as argued on 4(h)(10)(A) grounds. Court found Bonneville did not properly explain why it made a decision on its face inconsistent with the Program. Main takeaway: 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, not just procedural or guidance. A 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.

#### **4h11 Bonneville and other federal agencies (Corps, Reclamation, FERC)**

- Bonneville and “other Federal agencies responsible for managing, 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.”
- meaning?
- NWF FERC case in 1980s
- Montana reservoir litigation
- Council as amicus has made it an issue in RDC litigation
- note the separate “equitable treatment” obligation in 4h11

## 4. History of Program Amendments

Twenty 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)

**2020 Addendum: addendum added to 2014 F&W Program**

- adopted 2020 Addendum Part II first on program implementation (19)
- adopted Part I after that, a revised statement of the program's goals, objectives and performance standards (20)

**Fish & Wildlife Program – general statement on content:** While the program includes many hundreds if not thousands of measures, the concepts of the Northwest Power Act divide the measures into two big categories:

- Protection measures at the mainstem storage and run-of-the-river dams – water management, flows, and passage
- Offsite mitigation measures in tributaries, estuary and mainstem - habitat improvements, habitat protection, artificial production

## 5. Basic approach to the work

The recommendations for amending the Council's Fish and Wildlife Program are expected<sup>1</sup> to be due around mid-April 2025. This is immediately followed by a 60 day comment period on the recommendations (the Program is amended based on both the recommendations and comments on the recommendations). Starting in April 2025 the Council will have a considerable amount of work to do to amend the Fish and Wildlife Program, including working through the recommendations, the comments on the recommendations and drafting an amended Program. This document lays out the staff recommendation for how to complete this work. This approach is consistent with how the Council has accomplished amending the Fish and Wildlife Program in the past and has generally worked well.

The staff recommends that the Council members dedicate a portion of Council meetings to program amendment tasks. Depending on the task, this may require a few hours, or it may require one or more full days of meeting time for members and staff. These special sessions of Council meetings are often referred to as *work sessions*. This will affect the Council meetings from May 2025 through to the adoption of the amended Fish and Wildlife Program, which is planned for spring of 2026.

Basic approach:

- The *purpose* of each work session on the program amendments is for the Council and staff to sit together and work systematically through the recommendations received, the comments on the recommendations, and other issues, as well as considering draft amendments to the program language.
- These work sessions will be informed through work products such as *staff summaries* of the recommendations and comments received, *topic issue papers* of various program components, and *draft Program language*. Staff work products will be provided to the Council members in advance of work sessions. Members will then work with the staff in working sessions to discuss, debate and revise the language at the direction of the Council.
- Prior to the release of the draft program the Council may opt to share all, a portion of, or none of the *staff work products* and developing draft language with the public. Sharing this information is not required. Staff will inquire as to the Council's wishes about this at the appropriate time.
- The *duration* of each work session will depend on the needs at each stage of the process. This may be from a couple of hours to a full day or more.
- Council members may attempt to reach *informal decisions* on the issues presented during these work sessions at the appropriate times. These decisions can be a simple head nod or indication of agreement on each section of the program as it is

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<sup>1</sup> Based on plan to call for recommendation mid-January, 2025.

drafted. If informal agreement cannot be reached, or if more discussion is necessary on a particular topic, the Council chair may: call a break to allow for member and staff caucus, table the issue for reconsideration at a later date, or opt to send the topic to the Fish and Wildlife Committee or to a delegated set of members, for additional consideration and recommendation back to the full Council.

- Staff recommends that *formal voting* be reserved for the decision to release the draft program for public review and the decision to adopt the final program.
- Much of the discussion and agreement will take place during the Council work sessions at the regular Council meetings. *Additional, specially scheduled meetings*, either in person or webinar will be held in order to stay on schedule.
- The staff suggests that a portion of each meeting be reserved for receiving *feedback from the public*. This could be accomplished through formal public comment to the full Council at the end of the work session or through informal discussions between Council members and interested public at the conclusion of the day's work.
- Once the Program amendment recommendation period closes all Program related communications and documents relevant to amending the program need to be circulated to all Council members and staff and need to be inserted into the *administrative record*. More details about this will be provided by staff at a later Council meeting.

## **6. References: excerpts from the Northwest Power Act (Section 2 Purposes and Section 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--

- (A) conservation and efficiency in the use of electric power, and
- (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--

- (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,
- (B) facilitating the orderly planning of the region's power system, and
- (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.

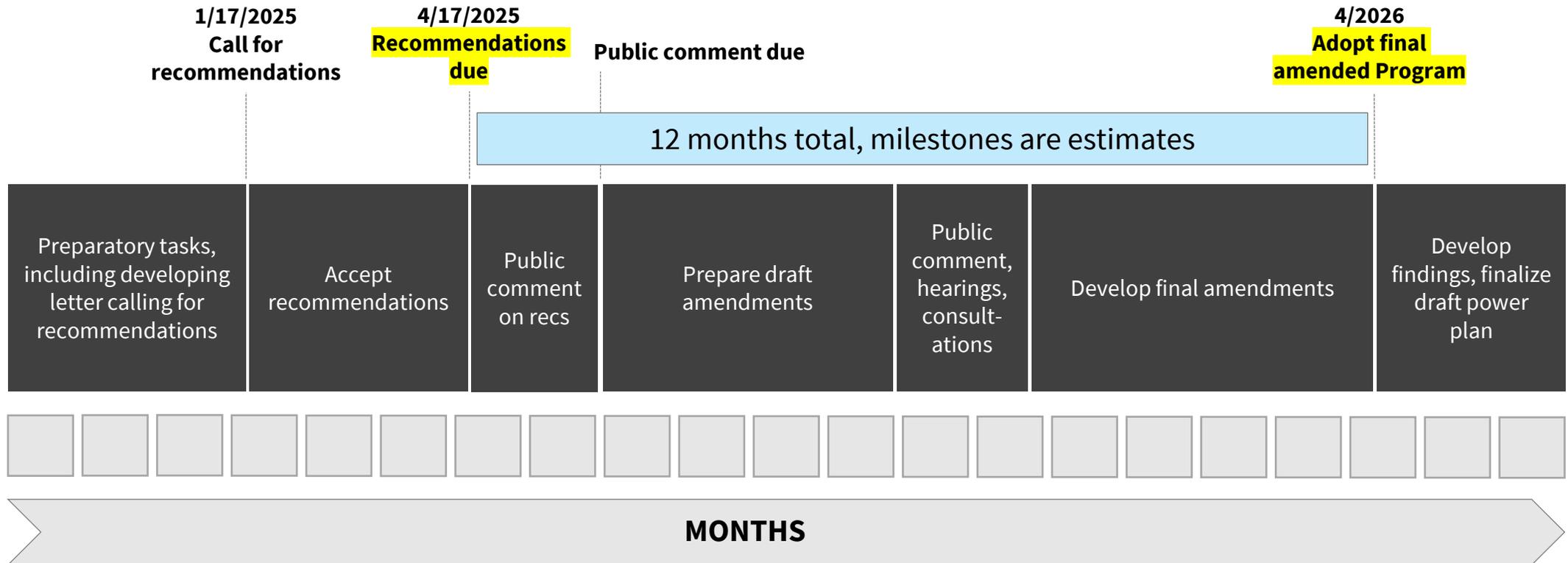
# **Amending the Columbia River Basin Fish and Wildlife Program under the Northwest Power Act**

**Patty O'Toole  
John Shurts  
September 2024**



**Northwest Power and  
Conservation Council**

# Estimated timeline for Fish and Wildlife Program Amendment Process

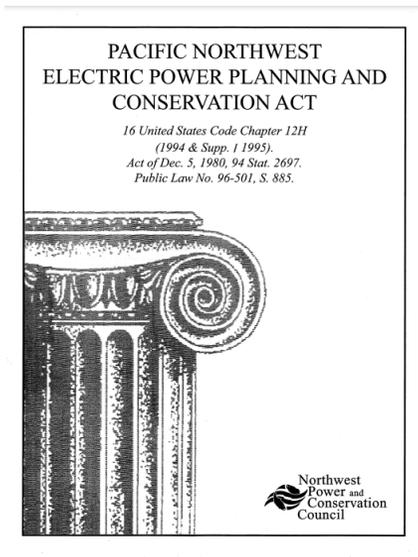


# 3 Road Map:

- 1. Overarching mission – primarily from Sections 4(h)(1) and 4(h)(5) – and basic premises**
- 2. Steps, procedures and substantive criteria for a Fish and Wildlife Program amendment process - Sections 4(h)(1) through 4(h)(8)**
- 3. Implementation of the Fish and Wildlife Program - Sections 4(h)(10), (11)**
- 4. History of Program amendments**
- 5. So how do we do this work?**



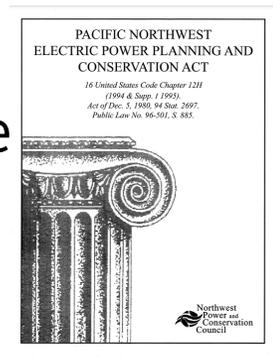
# 1. Overarching mission – primarily from Sections 4(h)(1) and 4(h)(5) – and basic premises



# Substantive primary responsibility: mainly from Sections 4(h)(1) and 4(h)(5)

**Protect, mitigate and enhance.** Develop and periodically amend a **program** to **protect, mitigate and enhance fish and wildlife** affected by the development, operation, and management of the hydroelectric facilities on the Columbia River and its tributaries, including related spawning grounds and habitat - and to do so while assuring the region an **adequate, efficient, economical, and reliable power supply.** [mash up of 4(h)(1) and 4(h)(5)]

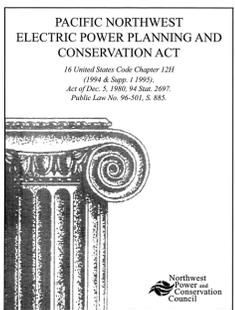
- “Protect” and “mitigate” are not defined. Common sense meaning.
- Enhance is defined as offsite mitigation in compensation for hydrosyste losses [4(h)(5), 4(h)(8)(A)]



# Substantive obligation (cont'd): Role of the “purposes” of the Act in Section 2

**Fish and wildlife purpose:** “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 2(6)]

**Public engagement purpose:** “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 ... protecting, mitigating, and enhancing fish and wildlife resources.” [Section 2(3)]



# Substantive obligation (cont'd): premises and implications

- Council is to deal with the river as a system. “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)]
- 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 hydroelectric facilities on the Columbia and tributaries, not just federal hydrosystem.
- F&W Program extends beyond the mainstem and hydrosystem flow and passage matters to the tributaries (and estuary), to spawning and other habitat matters, and to offsite mitigation in general.
- Ratepayers, not the general taxpayers, are to be responsible for the cost of measures designed to deal with the adverse impacts caused by the development and operation of electric power facilities [Section 4(h)(8)(B)]



# Substantive obligation (cont'd): premises and implications

- 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.
- Another major implication or premise of the Power Act's fish and wildlife provisions is the importance of the recommendations, activities, perspectives, legal rights and more of the state and federal fish and wildlife agencies and region's Indian tribes – see below
- Council's role in particular is to bring to the fish and wildlife program a system-wide perspective, a long-term planning perspective, and a power planning perspective.

## 2. Steps, procedures and substantive criteria for a Fish and Wildlife Program amendment process - Sections 4(h)(1) through 4(h)(8)



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

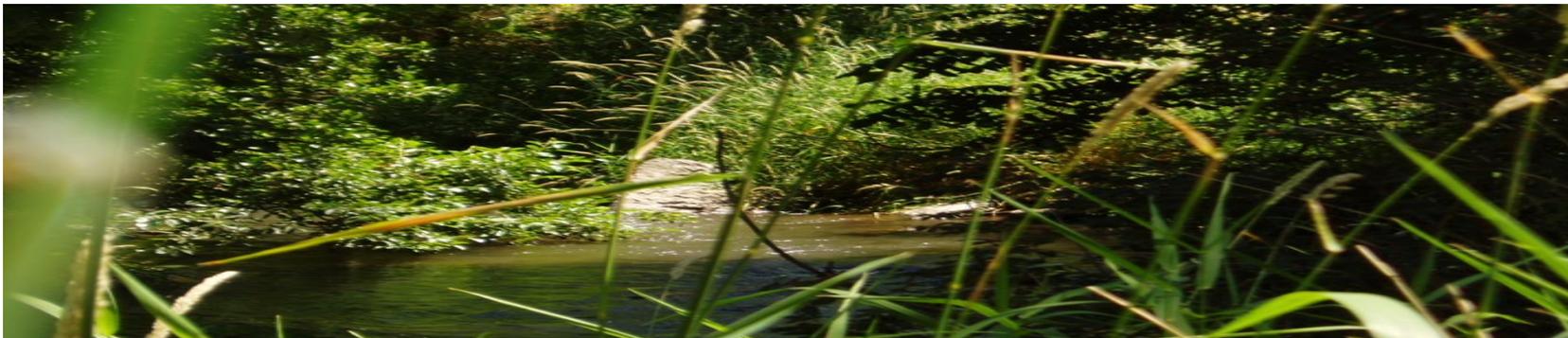
- Request in writing from federal and state fish and wildlife agencies and tribes
- For “measures” and “objectives” (and coordination and research) (see next slide)
- Everyone else, too (federal and regional water management agencies; region’s electric power producing agencies; Bonneville customers; public)
- At least 90 days
- Recommendations are to accompanied by detailed information and data in support
- Implications:
  - “recommendations” from outside the Council begin and drive process, have legal meaning, and become the raw material out of which Council shapes F&W Program
  - beginning of substantial role of agencies and tribes

## Step 1 (cont'd): timing and procedure related to power plan

- 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(d)(1)]
- Prior to any review or “major revision” of the power plan, the Council is to call for and review recommendations for amending the fish and wildlife program. [Section 4(h)(2)]
- Fish and Wildlife Program will then become an element in the subsequent power plan. [Section 4(e)(3)(F)]

# Step 1 (cont'd): “measures” and “objectives”

- “*Measures*” and “*objectives*” not defined – Council applies common sense meanings
- “Measures” are the actions to take to protect or mitigate or enhance fish and wildlife
  - issues others have raised over time with the concept of “measures” – especially about level of specificity
  - “measures *which can be expected to be implemented* by the Administrator, using authorities under this Act and other laws, and other Federal agencies” [Section 4(h)(2)(A)]
- “Objectives” are what we are trying to achieve
  - “objectives for the development and operation of such [hydroelectric] projects on the Columbia River and its tributaries in a manner designed to protect, mitigate, and enhance fish and wildlife” – example from legislative history

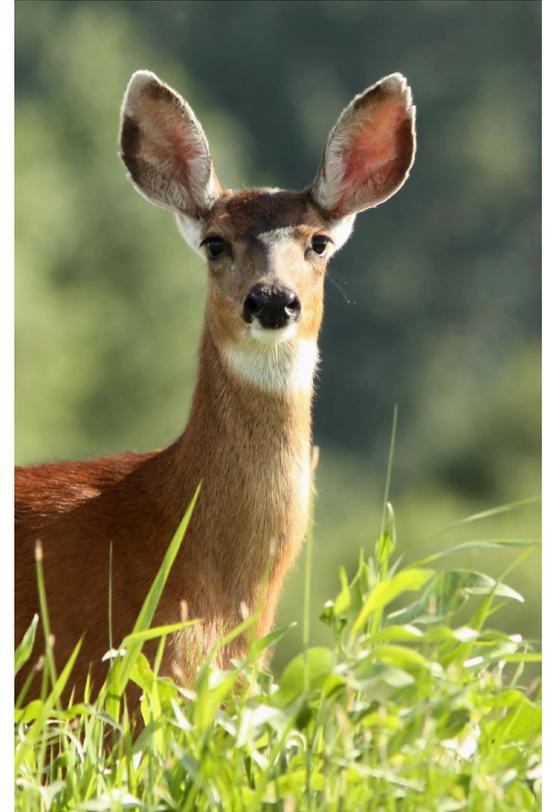


## Step 2: Review and comment on recommendations [Section 4(h)(4)]

- Provide notice of recommendations to Bonneville, state and federal 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 “consultation with the agencies, tribes, and customers” identified in subsection (4)
- No particular time specified – reasonable time; has been 45-60 days

## Step 2 (cont'd): implications

- Implication in Power Act is that it would be via comment on the recommendations that Council would get most of the feedback
  - reality is Council receives much less comment at this stage than on draft program amendments
  - yet, does underscore again the importance of recommendations
- Note the duality of the Council's public engagement responsibilities:
  - general public
  - specific categories of entities



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



- Producing a draft program for public review and comment is *not* specified in the Northwest Power Act; layered in for practical reasons and to act consistent with federal Admin Procedures Act (APA)
- Draft is to be based on recommendations, supporting information, and views and information obtained through public comment and consultation with the agencies, tribes, and customers
- Usually takes roughly three months

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

- Again, not a step specified in the 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
- In practice, primary source of input after recommendations

## Step 5: Prepare and adopt final amended Fish and Wildlife Program [Sections 4(h)(5) and 4(h)(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 - three more months
- Council must act on recommendations in 1 year
- Super-majority vote

## Step 5 (cont'd): criteria in Section 4(h)(6)

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.

## Step 5 (cont'd): further substantive guidance in Section 4(h)(7)

- The Council “shall determine whether each recommendation received is consistent with the purposes of this Act.”
- If recommendations are inconsistent with each other, the Council “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.”
- The Council can decide not to adopt a recommendation, but only on the basis that the Council find that such recommendation would be--
  - (A) inconsistent with 4(h)(5) [basic mission and administrative record]
  - (B) inconsistent with 4(h)(6) [substantive criteria]
  - (C) less effective than the adopted recommendations for the protection, mitigation, and enhancement of fish and wildlife.

# Step 5 (cont'd): **AEERPS considerations and the program amendment process**

- Act requires the Council to adopt program measures to protect, mitigate and enhance fish and wildlife “while assuring the Pacific Northwest an adequate, efficient, economical, and reliable power supply” (AEERPS)
- Role in program decisionmaking:
  - terms not defined
  - method for showing not specified
  - decisionmaking history (e.g., 1994 Program)
  - method – analysis, statement in program, explanation
- Requires some analytical assistance from power division and conclusions by Council
- Considerations include effects of operations on system generation and costs
- Necessarily a preliminary assessment prior to power plan – power plan resource strategy intended by Act as part of an overarching strategy to implement a fish and wildlife program that affects power supply (see next slide)

# Step 5 (cont'd): Relationship to Power Plan resource analysis and strategy

- Besides the fact that fish and wildlife program becomes an element of the power plan, Act also requires the Council to develop its power plan resource strategy “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.” [Section 4(e)(2)]
- Implication? Sixth Power Plan litigation
- Council models existing hydrosystem generation (amounts and timing) taking into account required operations for fish and wildlife
- Council then uses power plan process to make sure an adequate amount of cost-effective conservation and generating resources have been identified for acquisition to reduce or meet Bonneville’s contractual sales obligations reliably *and* to assure that Bonneville and the other federal agencies may implement the operations for fish and wildlife with sufficient certainty and reliability. [See Sections 4(d)(2), 4(e), 6(a)(2)]

## 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:

“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—

- (A) inconsistent with paragraph (5) of this subsection;
- (B) inconsistent with paragraph (6) of this subsection; or
- (C) less effective than the adopted recommendations for the protection, mitigation, and enhancement of fish and wildlife.

- Specified, relatively narrow criteria for rejection

## Step 6 (cont'd): findings/response to comments

- 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 after Council adopts final program text
- F&W Program amendment process is not officially ended until the adoption of the findings



# Relevant Ninth Circuit Opinions: *NRIC v. Council* (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
- Court then provided 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; in the latter 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 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 consider seriously and write in response to the recommendations; in this case, the recommendations from agencies and tribes for flow objectives
- Second issue: cost-benefit analysis of measures is not required by Act

# Relevant Ninth Circuit Opinions: *NRIC v. Council* (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 measures for changes to hydrosystem operations and configuration to reduce impacts to anadromous fish that can be accommodated by power system developments and (2) that Council had surrendered decisionmaking under the Power Act to determinations by others in the ESA realm
- Ninth Circuit affirmed Council's program decision in memorandum opinion
- main takeaway is that the way in which the Council develops the program following the 1994 *NRIC* decision - which has tried to focus heavily on the recommendations and especially on the recommendations of agencies and tribes - is consistent with Power Act

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



# Fish & Wildlife Program – Program Implementation

- **4h10(A) Bonneville** is to “use its fund and authorities ... 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 [power plan, ... the program adopted by the Council..., and the purposes of this Act.
- “Consistency” – meaning; history
- “Fish Passage Center” decision from Ninth Circuit (2007)



# Fish & Wildlife Program – Program Implementation (cont'd)

- **4h11** Separately, **Corps, Reclamation, FERC (and Bonneville)** have the obligation to “exercise [their] responsibilities, taking into account at each relevant stage of decisionmaking processes to the fullest extent practicable, the program adopted by the Council (Section 4h11)
- meaning?
- NWF FERC case in 1980s
- Montana reservoir litigation
- Issue raised by the Council in RDC litigation
- note the separate “equitable treatment” obligation in 4h11



## 4. History of Program Amendments



# Fish & Wildlife Program – history

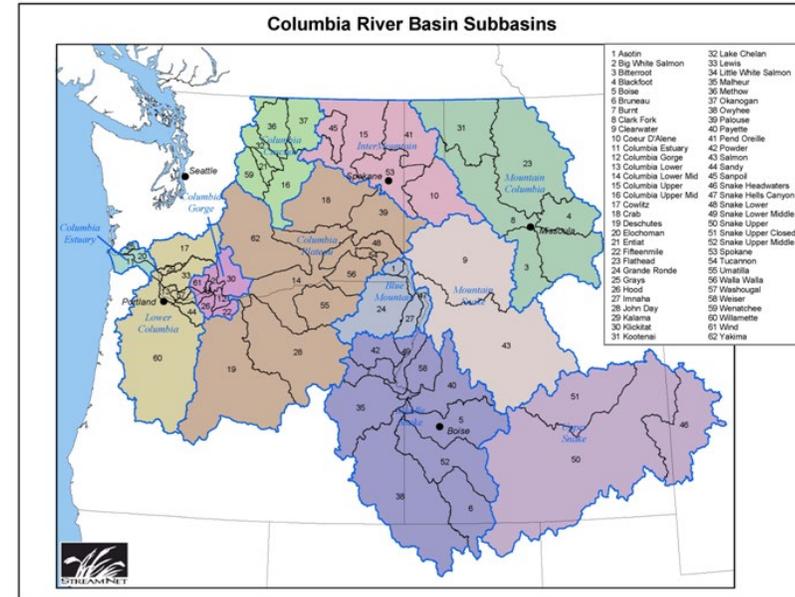
- First program adopted in 1982, amended at least every 5 years, with 20 total amendments
  - 1982 (1984)
  - 1987 (1988/1989)
  - 1991-1994 (4 phases)
  - 1994-95
  - 2000 (2003/2004-05)
  - 2009
  - 2014
  - 2020 Addendum



# Fish & Wildlife Program

## – content in general

- F&W Program has protection measures at the mainstem storage and run-of-the-river dams – water management, flows, and passage
- Program also includes offsite mitigation measures in tributaries, estuary and mainstem - habitat improvements, habitat protection, artificial production



## 5. So how do we do this work?



## Basic approach

- The *purpose* of each work session on the program amendments is for the Council and staff to sit together at the table and work.
- These work sessions will be informed through work products such as *staff summaries* of the recommendations and comments received, *topic issue papers* of various program components, and *draft Program language*.
- Prior to the release of the draft program the Council may opt to share all, a portion of, or none of the *staff work products* and developing draft language with the public.

## Basic approach - continued

- The *duration* of each work session will depend on the needs at each stage of the process. This may be from a couple of hours to a full day or more.
- Council members may attempt to reach *informal decisions* on the issues presented during these work sessions at the appropriate times.
- Staff recommends that *formal voting* be reserved for the decision to release the draft program for public review and the decision to adopt the final program.

## Basic approach - continued

- Much of the discussion and agreement will take place during the Council work sessions at the regular Council meetings. *Additional, specially scheduled meetings*, preferably in person or webinar if necessary, will be held in order to stay on schedule.
- The staff suggests that a portion of each meeting be reserved for receiving *feedback from the public*.
- Once the Program amendment recommendation period closes all Program related communications and documents relevant to amending the program need to be circulated to all Council members and staff and need to be inserted into the *administrative record*.

# Questions?

# Calendar of topics by month (draft)

Month	Council meeting agenda items
July (Portland, OR)	<ul style="list-style-type: none"> <li>• Overview, early discussion on the amendment process, schedule for 2024 tasks, rough timeline for 2025 &amp; 2026 (1.5 hrs) ✓</li> </ul>
August (Webinar)	<ul style="list-style-type: none"> <li>• Update on Regional Coordination Meeting (July 11), other ✓</li> </ul>
September (Astoria, OR)	<ul style="list-style-type: none"> <li>• Staff report on Program performance: implementation assessment of Program Hydro measures, related topics (2 hrs) ✓</li> <li>• Discussion of the Northwest Power Act's legal decision framework and amendment procedures (Part I) (2 hrs) ✓</li> </ul>
October (Portland, OR)	<ul style="list-style-type: none"> <li>• Discussion of the Northwest Power Act's legal decision framework and amendment procedures (Part II, External context for the Council's work on the program, including ESA listings and BiOps and Accords and other long-term implementation agreements) (1 hr)</li> <li>• Staff report on Program performance: implementation assessment of artificial production (hatchery) measures, related topics (1.5 hr)</li> </ul>
November (Portland, OR)	<ul style="list-style-type: none"> <li>• Staff report on Program performance: implementation assessment of Program habitat restoration and protection, wildlife, invasive species, predator management measures, related topics (2 hrs)</li> <li>• Discuss outline of letter calling for recommendations</li> <li>• ISAB report on review of 2020 Fish and Wildlife Program Addendum (30 min)</li> </ul>
December (Webinar)	<ul style="list-style-type: none"> <li>• Staff report on Program goals and objectives and latest developments for the Program Tracker</li> <li>• Review draft letter calling for recommendations</li> </ul>