

Northwest Power and Conservation Council

The relationship between: Northwest Power Act/Council/Columbia River Basin Fish and Wildlife Program and

The various other laws, actions and decisions that relate to the Columbia River and fish and wildlife, including the Endangered Species Act and its Biological Opinions and Recovery Plans, the Columbia Basin Fish Accords, the CRSO EIS effort under NEPA, the Columbia River Fish Management Plan (*US v Oregon*), and similar matters

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1. Reminder: Northwest Power Act/Fish and Wildlife Program legal framework

a. Council and the Columbia River Basin Fish and Wildlife Program

- Develop a program to protect, mitigate and enhance fish and wildlife affected by development and operation of the Columbia hydroelectric facilities (Section 4h)
- All fish and wildlife affected by the hydrosystem, not just listed species, but including listed species
- All hydroelectric facilities in the Columbia basin, not just federal
- Northwest Power Act's goal is "protection" and "mitigation" -- undefined but not synonymous with goals on other laws, such as ESA (avoid jeopardy; delist)
- Not a regulatory program -- a protection and mitigation program to be implemented using the funds and authorities of federal agencies

b. Bonneville and other federal agencies' responsibilities, authority and relationship to the Council's Fish and Wildlife Program under the Northwest Power Act

- Bonneville's obligation and authority with regard to fish and wildlife is also in the Northwest Power Act, in Section 4(h)(10)(A): Bonneville is to use its fund and other authorities to protect, mitigate and enhance fish and wildlife affected by hydrosystem "in a manner consistent with" the Council's Fish and Wildlife Program
- Council's program is thus a program of substantive objectives and measures to guide how Bonneville implements its authority under the Northwest Power Act to spend money and do good things for fish and wildlife. *See Fish Passage Center* decision in 2007.
- Per Section 4(h)(11)(A)(ii), all federal agencies responsible for managing, operating, or regulating federal or non-Federal hydroelectric facilities (Corps of Engineers, Bureau of Reclamation, and FERC as well as Bonneville) are to "exercise such responsibilities, taking into account at each relevant stage of decisionmaking processes to the fullest extent practicable, the program adopted by the Council." Given that Bonneville has the separate "consistency" obligation in Section 4(h)(10)(A), this provision has the most meaning for the other three agencies. The Council's Program is to be a serious consideration for these federal agencies as they consider and decide how to exercise the authorities found in other laws that relate to these Columbia hydroprojects. This includes project authorizations to the Corps and Bureau to operate projects for multiple purposes (hydropower, flood control, navigation, irrigation, recreation, fish and wildlife), and FERC's authority to license non-federal projects under the Federal Power Act.
- These same federal agencies have a separate obligation in Section 4h(11)(A)(i) to exercise their responsibilities in a way that provides "equitable treatment" for fish and wildlife along with other responsibilities such as power generation, navigation, flood control, irrigation. Ninth Circuit has said that one aspect of such equitable treatment is to implement the Council's Fish and Wildlife Program. *NEDC v Bonneville* (1997).

2. Federal agency decisions under the Endangered Species Act and the relationship of those ESA actions to authorities and decisions under the Northwest Power Act

- ESA is *not* a separate source of authority to take actions to benefit listed fish and wildlife. Instead, ESA is a regulatory overlay directing agencies how to use their existing authorities in the event their actions under those authorities might or will affect listed species. Section 7 consultation process; avoid jeopardizing the continued existence of listed species, etc.
- It is precisely the explicit authority and obligations the agencies have (especially Bonneville) under the Northwest Power Act to protect and mitigate fish and wildlife affected by the dams that forms the basis for an integrated program intended to be consistent with the Northwest Power Act as well as meet ESA requirements. ESA is in essence a regulatory overlay over the implementation of the Council's F&W Program under the Northwest Power Act.
- Starting with Bonneville -- as noted above, Section 4(h)(10)(A) of the Northwest Power Act directs Bonneville to use its fund and other authorities to protect, mitigate and enhance fish and wildlife. Other provisions in the Bonneville Project Act, Transmission System Act, Northwest Power Act, etc., direct Bonneville how to do other things, such as sell power, transmit power, acquire resources, contract, etc. ESA is a regulatory overlay on how Bonneville is to use those authorities when Bonneville's actions under those authorities might affect listed species, guiding or directing Bonneville how to use those authorities to avoid jeopardizing and promote recovery of listed species.
- Thus, when Bonneville spends money on an action to protect, mitigate or enhance listed fish and wildlife affected by the hydrosystem, this is an event under Section 4(h)(10)(A) of the Northwest Power Act. Bonneville must take that action in a way that is consistent with ESA requirements (from ESA) *and* "in a manner consistent with" the Council's Fish and Wildlife Program (directly from Section 4(h)(10)(A)).
- Neither law or obligation is superior over the other -- Bonneville is to comply with all the laws that apply to how it uses its fund and authorities when it uses its fund and authorities.
- If there is ever an apparent or potential difference between what might be required of Bonneville under the ESA and what the Council's Fish and Wildlife Program would have Bonneville do, Bonneville has an obligation to try to resolve the conflict so that it can be consistent with what is needed to satisfy ESA while also acting in a manner consistent with the Council's Program as required by Section 4(h)(10)(A). With that said, because of the precise nature of the tie to the Council's Fish and Wildlife Program under the Northwest Power Act, if after trying to resolve a difference an actual conflict remains, Bonneville would and should do what is required under ESA, and in doing so, and in documenting in a reasonable way the reason for the deviation from the Program in such an instance, the courts would likely understand Bonneville still to be complying with the

Northwest Power Act. See *NEDC v. Bonneville* in 2007 (concerning the Fish Passage Center).

- For the other fish and wildlife species and population segments that are adversely affected by the hydrosystem -- including those that are sufficiently robust not to be listed and those that were important but have been completely eliminated from large portions of their range by development of the hydrosystem (i.e., in the blocked areas) -- the Council includes in the program protection, mitigation and enhancement measures and objectives to address those effects. As required by Section 4(h)(10)(A), Bonneville is to use its fund and other authorities to address those effects in a manner consistent with the Program. Even with regard to the listed species, Bonneville has the responsibility to protect and mitigate listed species *beyond* the requirements of the ESA *if and when* the Council identifies such protection and mitigation measures and objectives.
- What does all this mean in practice? Bonneville is acting under Section 4(h)(10)(A) to implement an “integrated” program, integrated in the sense that it satisfies Bonneville’s obligations under the Northwest Power Act to protect, mitigate and enhance fish and wildlife in a manner consistent with the Council’s Fish and Wildlife Program while also satisfying the regulatory requirements of the ESA.
- Compliance with ESA is not a direct legal obligation of the Council in crafting the Fish and Wildlife Program, and the Council does not analyze Program measures as to whether they satisfy the ESA nor adopt the conclusions of others about ESA sufficiency. But the Council develops its program with an awareness that compliance with ESA is a legal obligation of Bonneville and the other federal agencies. And so it behooves the Council to develop the program in recognition of the ESA requirements and help the agencies satisfy those ESA needs. The Council’s regional protection and mitigation program (consisting of both mainstem and off-site protection and mitigation measures) is and has been the primary source of measures to be analyzed, shaped, and re-sized through the ESA analysis to also comply with ESA. The BiOps and recovery plans for Columbia fish and wildlife affected by the hydrosystem is built are the 30+-year foundation of mainstem and off-site protection and mitigation measures developed through the Council’s program.
- To extent the actions funded and implemented for a listed species are sufficient to comply with the ESA and remove a species from the protection of ESA, the Council and Bonneville and other agencies still have that continued obligation to implement actions to protect and mitigate for the effects of the hydrosystem, along with other non-listed species
- The actions of the Corps and Bureau and FERC are governed by similar concepts, in this way: These agencies take actions under their various governing authorities, and in doing so must exercise those existing authorities in a way that is both consistent with the requirements of the ESA and with the requirements of Section 4(h)(11) of the Northwest Power Act. The legal link of these decisions to the Council’s Fish and Wildlife Program may be something less than the “consistency” requirement that applies to Bonneville under

Section 4(h)(10)(A), but the standard is not insignificant legally. This requirement does not change just because the relevant species is listed and the agency also has ESA requirements to satisfy. The practical reality again has been the need to build a mainstem, estuary and tributary program that can be the source material or foundation for federal agencies to draw from to satisfy both the ESA and Northwest Power Act requirements, for listed and non-listed species. This has meant work by the federal agencies to harmonize actions that affect both listed and non-listed species as much as possible. [Examples concerning reservoir operations from the 2003 Mainstem Amendments; Vernita Bar operations; Grand Coulee operations for resident fish; Bureau tributary work.]

a. Meaning of FCRPS Biological Opinions in this context, and how the Council has understood and addressed Biological Opinions in the Fish and Wildlife Program

- People often focus just on NOAA's FCRPS Salmon and Steelhead BiOp. But other relevant biological opinions from NOAA cover Reclamation's Upper Snake projects and the Corps' Willamette projects. The U.S. Fish and Wildlife Service has issued biological opinions covering the effects of Libby Dam operations on the Kootenai River white sturgeon and bull trout (2006); the effects on bull trout and other listed species from Federal Columbia River Power System operations more broadly (2000); and the effects of the Willamette projects on Oregon chub (since delisted) and bull trout (2008). *See* footnote 5 on page 62 of the Council's 2014 Program for the full list with the full titles.
- How to understand the role of the BiOps from the perspective of the Council's Fish and Wildlife Program and the Northwest Power Act? Begin with the above discussion. That is, Biological Opinions are an Endangered Species Act analysis, identifying and analyzing actions that can be implemented under existing authorities (either the original proposed actions or subsequent RPAs), and that if implemented avoid jeopardy, becoming essentially ESA requirements. That means the ESA analysis and the RPAs function as a regulatory overlay over the regional protection and mitigation program that the Council is part of developing and which is implemented by Bonneville under Section 4(h)(10)(A) and by the Corps and Bureau under their existing authorities while heedful of the obligations to the Council's Program via Section 4(h)(11)(A). The substantive nature of the mainstem water management and passage activities of the tributary and estuary off-site mitigation work does not change because it is also part of an ESA consultation. It cannot, as the ESA provides a way of assessing the exercise of existing authorities. What changes most are the specifics and the magnitude of implementation.
- And that is the best way to understand the role of the BiOps in the Council's Fish and Wildlife Program -- as a suite of proposed actions and standards to benefit listed species that also represent the measures and objectives of the Fish and Wildlife Program in implementation to benefit these species.
- This is in fact how the Council has dealt with the BiOps in recent programs, including the 2014 Fish and Wildlife Program. People often misunderstand, but the Council did *not* and does *not adopt* the BiOp(s). What the Council has done is recognize the *actions* analyzed

in the BiOp as also *measures* in the Program for implementation to protect and mitigate fish and wildlife affected by the hydrosystem. In the mainstem the Council also recognized the BiOp's *hydrosystem performance standards* (such as passage survival standards and flow objectives) as also Program *objectives*. For examples of discussions as to how the BiOps and other ESA decisions fit into the Program *see* 2014 Program at 41 (habitat strategy); 61-65 (mainstem passage and flow strategy); 68 (estuary strategy); 108 (subbasin plans and recovery plans); 110-11 (implementation provisions – program measures); 156-59 (program objectives); 191-98 (program measures); 243, 259-66, 309-11, 317-20 (relevant sections of findings).

- The Council did this while also recognizing that there are other measures and objectives to address effects on the other anadromous fish, resident fish and wildlife species and population segments that need to be implemented, too, and are of equal priority under the Northwest Power Act and the Council's Fish and Wildlife Program with the measures to address listed species. The program also recognizes that there are objectives and may or will be measures that address even the listed fish that go beyond what is needed for ESA in order to satisfy protection and mitigation needs the Northwest Power Act.
- Note that the Council, in taking these actions, has recognized and tracked the on-going ESA litigation over the sufficiency of the FCRPS salmon and steelhead BiOp to meet ESA requirements. The litigation is essentially irrelevant in this context. As explained in the Program Findings, the Council has been careful not to adopt or incorporate the FCRPS BiOp or the jeopardy analysis or conclusions into the Council's program, deciding instead that it is the *actions* reviewed in the BiOp that are part of the baseline measures in the Council's program as well. (So too, in this sense, is the one-year spill measure ordered for 2018 by the federal court within the BiOp litigation context.) The Council has no reason to believe these measures will not continue to represent the basic core of the actions implemented by the federal action agencies in the near future for listed salmon and steelhead, even if the outcome of the litigation is that more actions or increased levels of implementation need to be drawn from the raw material of the Program and ESA planning and added to the implementation commitments.
- Note that how the Council handled the ESA actions and decisions in the 2014 Fish and Wildlife Program became the main issue litigated at the Ninth Circuit in the challenge to that program. The Ninth Circuit panel affirmed the Council's approach, fully understanding and agreeing that the Council acted consistent with the Northwest Power Act in how it recognized Program measures and objectives recommended to it by agencies and tribes and others that were in the ESA decisions. *NEDC v Council*, slip opinion 2-3 (mem opinion 2017).

b. Meaning of ESA recovery plans in this context, and how the Council has understood and addressed recovery plans in the Fish and Wildlife Program

- A similar analysis. To a significant extent the recovery plans took the subbasin plans developed for the Council's Program as a foundation, and then through further planning

with regard to the listed species component identified ESA population objectives for recovery and a fleshed-out set of actions that might yield those objectives.

- The Council did not *adopt* the recovery plans into the 2014 Program, nor the conclusions as to the meaning of the recovery plans for the ESA requirements. Again, what the Council did was recognize the recovery plans as a suite of actions that represent Program measures to draw from in implementation to benefit the listed species. And, the Council did not *adopt* delisting criteria or other objectives that are in or relate to the recovery plans, as these represent what is required by the ESA to achieve recovery and not necessarily what is required to achieve protection and mitigation under the Northwest Power Act. But the Council did recognize these ESA objectives as something the federal agencies are trying to achieve through the implementation of Program measures, and therefore are relevant to Program implementation and success.

3. How the Columbia Basin Fish Accords fit into this context, and how the Council has understood and addressed the Accords in the Fish and Wildlife Program

- Again, a similar analysis. The Accords include a suite of actions and an implementation commitment intended to benefit both listed *and* important non-listed species and population segments. Again, they are built on a 30+ year foundation of mainstem and off-site mitigation planning, measures and objectives in the Council's Fish and Wildlife Program under the Northwest Power Act. When Bonneville committed to the Accords, and when it takes an action to implement an Accord, this is Bonneville acting pursuant to Section 4(h)(10)(A) to protect, mitigate and enhance fish and wildlife in a manner consistent with the Council's Program -- in essence, implementation of the Program.
- This is how the Council understood and explained the Accords in the 2009 and 2014 Programs -- the Council recognized these as implementation commitments to suites of Program measures. Both the Accords and the Program recognize that the Accords must be consistent with and cannot override the law, and that it is consistent with the Northwest Power Act for Bonneville to sign multi-year implementation commitments, so long as these activities remain subject to Program amendment processes under Section 4(h) and project review process under Section 4(h)(10)(D), among all other requirements of law.

4. How NEPA – and in particular the Columbia River System Operations Environmental Impact Statement effort - fits into the picture

- Again, NEPA is not a grant of additional or different authorities – it is a statute that instructs federal agencies how to analyze the possible environmental effects of proposed actions under their existing authorities. This can include in some cases examining alternatives for meeting the needs identified that might not be within the agencies'

existing authorities but which could be authorized by Congress (e.g., the Columbia/Snake mainstem dam breaching or removal scenarios).

- The current “Purpose and Need” statement for the Columbia River System Operations Environmental Impact Statement effort is an excellent example. http://www.crso.info/Library/Revised_Draft_Purpose_%20and_Need_12_6_2017.pdf. It describes the existing authorities of the Corps, Reclamation and Bonneville, who have to evaluate and make decisions on how to manage and operate the FCRPS projects “for the multiple purposes identified” and do so by also “evaluating measures to avoid, offset, or minimize impacts to resources affected by the management of the System in the context of new information and changed conditions in the Columbia River basin.” Relevant authorities noted include the project authorizations, ESA, Northwest Power Act, trust and treaty obligations, and more.
- Which then leads back to the above.... The point is that the NEPA review and EIS will evaluate options for decisions by the FCRPS agencies for how best to wield these existing authorities – including their Northwest Power act authorities and obligations. A preferred alternative that is inconsistent with and does not overlap with the Council’s Program would be weak from both a legal and a policy context.

5. The Columbia River Fish Management Plan (under *US v. Oregon*) and how it relates to the Northwest Power Act and Fish and Wildlife Program

- At its core *US v Oregon* has been about how harvest is to be managed and regulated by states, tribes, and federal agencies. The litigation led eventually to the execution by the parties of successive Columbia River Fish Management Plans. The Columbia River Fish Management Plans are mostly about harvest, but they also include some production commitments agreed to by all the parties, including the federal governments and the states, in order to add some hatchery production upriver to bolster the runs through the tribes’ fishing areas.
- The CRFMP may include commitments to production, but the agreement itself carries no funding. The agreement instead includes a commitment to seek funding to realize the agreed-to production. One avenue for that has been to turn these some of these production commitments into recommended measures for the Council’s Program. The Program this includes artificial production measures that in part originate in the Management Plan.

6. Some things that are a little different: e.g., Mitchell Act; Pacific Coastal Salmon Recovery Fund programs

- There are federally-funded activities to benefit fish and wildlife in the Columbia – especially salmon – that we treat as separate and distinct.

- Activities funded under the Mitchell Act (hatcheries, screens) and the Pacific Coastal Salmon Recovery Fund (funding mostly for state efforts to promote salmon recovery, especially habitat actions) are the two most prominent examples.
- These are programs that do not get reimbursed by Bonneville and that have no expectations for implementation by the Corps, Reclamation or FERC – the agencies with legal responsibilities to the Council’s Program under the Power Act. The Council and its Fish and Wildlife Program planning needs to and does recognize that these activities exist and affect the same fish we are trying to affect through the Program. Thus there should be coordination between the Council/Bonneville Program under the Power Act and these programs, and sometimes the two activities build on each other (e.g., Mitchell Act coho production lower in the river and Program coho production further upriver).