

Comments on the Draft 6th Power Plan, September 3, 2009

Submitted to: Northwest Power and Conservation Council

Submitted by: Ed Chaney, Northwest Resource Information Center, Inc., November 5, 2009

Summary

The draft Sixth Power Plan continues the Council's three-decades-long egregious betrayal of the public trust by seeking to subvert the intent of Congress and the letter of the Pacific Northwest Power Planning and Conservation Act of 1980. The draft plan also seeks to evade the findings and direction of the Ninth Circuit Court of Appeals in *Northwest Resource Information Center, Inc. v. Northwest Power Planning Council*, 35 F.3d 1371 (9th Cir. 1994), cert. Denied, 116 S.Ct. 50 (1995).

In response to what the Congress called an "emergency," the Act charged the Council to "promptly" produce a salmon restoration plan that would mitigate the effects of the Federal Columbia River Power System on salmon and the people who depend on them. The region's fishery agencies were given only 90 days to submit recommendations for such a plan. The Council was given one year to adopt said plan. This salmon restoration plan was to, in turn, drive development of a power plan to mitigate the effect of required changes in the FCRPS necessary to achieve salmon restoration.

Three decades later the Council has not adopted a fish and wildlife program that would meet the Act's salmon restoration intent. Indeed, in its current Fish and Wildlife Program the Council baldly abdicates its duty to do so by simply deferring to whatever the federal agencies propose to do to comport with the Endangered Species Act—actually, uncertain *proposed* actions being hotly contested in federal court—which those agencies emphatically assert are designed only to prevent extinction of listed salmon, and necessarily equally emphatically assert are actions definitely not intended to achieve salmon restoration as required by the Power Act.

The Council's obdurate refusal to develop a salmon restoration plan (and subsequent complementary power plan) resulted in all Snake River salmon (and others) being listed as threatened or endangered under the ESA. In its recently adopted fish and wildlife program, and in the draft power plan, the Council acts as if the extinction prevention requirements of the ESA trump the much greater salmon restoration requirements of the Northwest Power Act; as a matter of law this the Council cannot do.

Lacking the required plan to restore salmon adversely impacted by operations of the FCRPS as a legal foundation, it is impossible to satisfy the intent and letter of the Act requiring the Council adopt a power plan to mitigate the effects of a salmon *restoration* plan on the output of the FCRPS.

The Council's draft power plan acknowledges the legally-required nexus between its fish and wildlife program and draft power plan, i.e., "The Act requires the Council to update its fish and wildlife program before revising the power plan, and the amended fish and wildlife program is to become part of the power plan." However, the Council's plan only gives contorted lip service to that required nexus and ignores the intent and letter of the Act.

Recommendations

—The Council should acquaint itself with the intent and letter of the Northwest Power Act.

—Prior to adopting a power plan, by law the Council must:

1] Reopen its current Fish and Wildlife Program, and three decades after the Act became law, produce a draft and ultimately adopt a salmon restoration plan that will ensure achievement of the salmon restoration intent of the Act; and

2] Based upon the resulting adopted salmon restoration plan in 1], develop a revised draft power plan designed to achieve the Act's goal of maintaining an efficient, economical and reliable power supply.

—In determining the effect of salmon restoration on maintenance of an adequate, efficient, economical and reliable power supply, salmon restoration cost must as a matter of law be based on the "least cost" approach, i.e., the cost of acquiring conservation resources beginning on the date of the Act being signed into law, and must comport with the Ninth Circuit Court of Appeals ruling holding that the Act prevents "power losses and economic costs . . . from precluding biologically sound restoration of anadromous fish in the Columbia River Basin . . . so long as an adequate, efficient, economical, and reliable power supply is assured."¹

¹ The Council may not as a matter of law refuse to do its job for three decades, then use *current* replacement cost of power as the basis for determining if restoring Snake River salmon would jeopardize an efficient, economical and reliable power supply.

Comments and Recommendations

The following comments focus on the salmon resources of the Snake River Basin. The devastating effect of the Corps' improperly designed lower Snake River dams on salmon and dependent economies was the crisis that provided the impetus for the fish and wildlife restoration and power plan provisions of the Northwest Power Act of 1980.

Congress authorized and appropriated funds for four federal dams constructed by the U.S. Army Corps of Engineers on the lower Snake River in southeastern Washington with the clear intent that Snake River salmon and dependent economies would be substantially protected.

The Corps' design for the dams included fish ladders to allow adult fish to migrate upstream. However, despite repeated warnings from fish experts long before the dams were built, the Corps' design negligently failed to make any provision whatsoever for juvenile fish to migrate downstream through the reservoirs and past the dams.² Disaster happened.

The COE spent hundreds of millions of dollars retrofitting the dams in an effort to reduce their deadly effect on salmon. It was like pasting butterfly wings on pyramids in hopes of making them fly.

By the early-1970s Snake River salmon were in serious trouble and being reviewed for possible listing under the Endangered Species Act.

Congress responded by calling the situation an "emergency" and enacted strong, unambiguous, salmon protection/restoration measures within what is commonly called the Northwest Power Act of 1980. Ironically, much of the support for the act came from interests desperate to avoid the ESA coming into play, including Bonneville Power Administration and its customers. The Act set the goal of restoring to formerly productive levels salmon throughout the Columbia River Basin adversely impacted by the Federal Columbia River Power System.

In the spirit of federalism—devolving federal duties to the states—the Act provided for a regional Council of members appointed by governors of the states of Oregon, Washington, Idaho and Montana. It gave the Council the mandate to "promptly" develop and adopt a salmon restoration plan,³ and based on the salmon restoration plan, to develop a compatible regional energy plan to mitigate for the anticipated reduction in power generation by the federal dams as necessary to ensure an adequate, efficient and reliable power supply.

² The Corps inadvertently publicly admitted this for the first time in 1999. "Juvenile bypass facilities were installed at each of the four lower Snake River dams shortly after they were constructed." *Draft Lower Snake River Juvenile Salmon Migration Feasibility Report/Environmental Impact Statement*, U.S. Army Corps of Engineers, December 1999, p. 2-6. [Emphasis supplied.]

³ 839b(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. [Northwest Power Act, §4(h)(1)(A), 94 Stat. 2708.]

Congress was emphatic that due to the emergency nature of the problem, there was no time for further study. The salmon restoration plan was to be based on best available knowledge and on the recommendations of the region's state, federal and tribal fisheries managers which were given only 90 days to respond to the Council's request for recommendations.⁴ The Council was given only one year to adopt a salmon restoration plan based on those recommendations.⁵

The salmon restoration plan was to improve survival of salmon at federal hydroelectric facilities by, among other things, providing “. . . flows of sufficient quality and quantity between such facilities. . .”⁶

Bonneville Power Administration, which markets the energy produced by the Corps of Engineers' dams, was directed to pay the cost of restoring the salmon out of revenue from power sales. Bonneville was given new authority to acquire new resources as necessary to mitigate for the expected reduced power generation and maintain an adequate, efficient, economical and reliable power supply.

Congress was explicit that salmon were not to be sacrificed merely to save money. It specifically rejected limiting fish restoration efforts to actions with minimum economic cost and minimum adverse impact on electric power production. Instead, Congress only required use of the least-cost means of achieving the same sound biological objective,⁷ while maintaining an adequate, efficient, and reliable power supply.

The Act specified that energy conservation was to be considered a “resource” and was to be given

839b(h)(2). The Council shall request, in writing, promptly after the Council is established under either subsection (a) or (b) of this section 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 . . .[salmon restoration].

⁴ 839b(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. [Northwest Power Act, §4(h)(3), 94 Stat. 2708.]

⁵ 839b(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) of this section. [Northwest Power Act, §4(h)(9), 94 Stat. 2710.]

⁶ 839b(h)(6)(E)(i). provide for improved survival of such fish at hydroelectric facilities located on the Columbia River system; and [Northwest Power Act, §4(h)(6)(E)(i), 94Stat. 2709.]

839b(h)(6)(E)(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. [Northwest Power Act, §4(h)(6)(E)(ii), 94 Stat. 2709.]

⁷ 839b(h)(6)(C). utilize, where equally effective alternative means of achieving the same sound biological objective exist, the alternative with the minimum economic cost; [Northwest Power Act, §4(h)(6)(C), 94 Stat. 2709.]

priority as a means to mitigate the effect of the salmon restoration plan on energy production.⁸

That Act directed that, henceforth, salmon were to get “equitable treatment” with energy production and other uses of the federal hydrosystem.⁹

The Act directed that the Council adopt a salmon restoration plan that was consistent with the treaty-reserved rights of affected Native American Indian tribes.¹⁰

It didn’t happen. “It” being none of the above.

The Council obdurately refused to adopt a plan that would meet the salmon restoration intent of the Act.

The result: The plight of Snake River salmon and the tribal and non-tribal people who depended on them grew ever more dire. All salmon runs eventually were listed as threatened or endangered under the Endangered Species Act.

Finally, out of exasperation, in the mid 1990s NRIC filed suit in the Ninth Circuit Court of Appeals asking the court to order the Council to do its job. NRIC won.¹¹ So to speak.

The Council was embarrassed that it lost the lawsuit, not that it hadn't done its job. Nonetheless, in legal

⁸ Section 3.(4)(D) of the Act gives conservation a 10 percent advantage over conventional resources. Section 3.(19) defines a "resource," and includes conservation.

⁹ The Act confers on the Corps, Bonneville, National Marine Fisheries Service, and all other federal agencies, the duty— independent of the council's program— "to adequately protect, mitigate and enhance fish and wildlife, including related spawning grounds and habitat" affected by the dams "in a manner that provides equitable treatment" to anadromous fish. *Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. No 96-501, § 4(h)(11)(A)(I), 94 Stat. 2710 (1980).*

It is plain in the legislative history of the Act that this provision of law "is aimed at placing fish and wildlife on a par with . . . other purposes and providing a means by which [covered agencies] will act to protect, mitigate, and enhance fish and wildlife." *126 Cong. Rec. H10, 683 (daily ed. Nov. 17, 1980) (remarks of Rep. Dingell).*

The United States Court of Appeals, Ninth Circuit affirmed this independent duty in NRIC’s suit against Bonneville. In addition, the court ruled that each agency covered by this provision of the Act, which includes Bonneville, the Corps, and NMFS, must "develop a mechanism for fulfilling its obligation" under this provision of the Act, and "will be required to demonstrate, by means that allow for meaningful review, that it has treated fish and wildlife equitably." *1997 WL 359821 (9th Cir.)*

¹⁰ 839b(h)(6)(D). be consistent with the legal rights of appropriate Indian tribes in the region; and [Northwest Power Act, §4(h)(6)(D), 94 Stat. 2709.]

¹¹ *Northwest Resource Information Center, Inc. v. Northwest Power Planning Council, 35 F.3d 1371 (9th Cir. 1994), cert. Denied, 116 S.Ct. 50 (1995).*

self-defense, it amended its fish and wildlife program (scurrilously temporarily) and asked the COE to analyze what could be done at the four lower Snake River dams to restore the salmon.

After several years and 20 million dollars, the COE concluded the dams could not be fixed. In effect they are a salmon doomsday machine. Either the dams have to be breached—partially removed to recreate a free-flowing river, or the fish have to be removed from the river.¹² The dams won the toss. Only the most unsophisticated mind would be surprised at that outcome.

The Council (with the notable exception of the Oregon members) ducked and ran for cover, claiming in effect that the Council and the Northwest Power Act had been preempted by the ESA.

The Council knows what must be done to meet the salmon restoration intent of the Act—breach the four Corps of Engineers' dams on the lower Snake River in southeastern Washington. The Council knows deconstructing the four lower Snake River dams would produce positive national and regional economic benefits, including a major jobs program and badly needed economic stimulus in the area most victimized by the Corps' failure to design the dams to protect salmon as Congress intended in authorizing their construction.

The Council knows that by using conservation to replace the energy foregone (as envisioned in and mandated by the Act) by sequentially breaching the dams over 15-20 years, the impact on the price of electricity paid by Bonneville's customers would be imperceptible and the carbon impact would be nil.

In short, it would be easy for the Council (and profitable for the region and the Nation) to produce the required plan to restore Snake River salmon and maintain an economical and reliable energy supply as required by the Act.

The Council's failure to do its duty is an epic failure of governance and of the rule of law. This failure has had epic disastrous ecological and economic consequences throughout the many thousand-mile freshwater and marine range of Snake River salmon.

The adverse ecological impacts range the gamut from depriving endangered bull trout and a multitude of other freshwater organisms of critical marine-derived nutrients nearly 1000 miles inland, to impoverishing killer whales by denying them a critical food resource.

The economic, social, and political impacts have been traumatic and widespread. Untold hundreds of millions of dollars have been lost to local, state, regional, and national economies; untold hundreds of millions more in future economic benefits are at risk.

The U.S. and Canada, states, Indian tribes, local communities, and neighbors have been pitted against each other in internecine conflict over drastically reduced supplies of fish.

Treaties with Northwest Indian tribes and Canada have in practical effect been abrogated. The intent of laws and social contracts with all people of the Northwest and the Nation has been thwarted.

¹² *Draft Lower Snake River Juvenile Salmon Migration Feasibility Report/Environmental Impact Statement*, U.S. Army Corps of Engineers, December 1999.

The region is wracked with legal and political turmoil that hemorrhages enormous amounts of human and economic capital and diverts attention from pragmatic solutions that would produce substantial national and Northwest economic benefits.

Governance has been egregiously corrupted at federal, regional, state, and tribal levels of government.

If limbo ethics were an Olympic event, Bonneville Administrator Steve Wright and the Council (with the notable exception of its Oregon members) would be a shoo-in for the gold.

Three decades after passage of the Act to address what the Congress called a salmon “emergency,” with no time for further study, the Council has not adopted a fish and wildlife program that would meet the Act’s salmon restoration intent. Indeed, in its current Fish and Wildlife Program the Council baldly abdicates its duty to do so by simply deferring to whatever the federal agencies propose to do to comport with the Endangered Species Act, actually, uncertain *proposed* actions being hotly contested in federal court, actions which those agencies emphatically assert are designed only to prevent extinction of listed salmon, and which the agencies necessarily equally emphatically assert are actions definitely not intended to achieve salmon restoration as required by the Power Act.

On February 10 the Council adopted amendments to its Fish and Wildlife Program.¹³ The relevant amendments are in Section VI. Mainstem Plan, pp. 63-110.

It gets right to the point at issue:

At one time the Council’s Fish and Wildlife Program included detailed hydrosystem operations for fish and wildlife. This is no longer necessary. The federal agencies that manage, operate, and regulate the federal dams on the Columbia and Snake rivers now have detailed plans for system operations and for each hydroelectric facility intended to improve conditions for fish and wildlife affected by the hydrosystem. These federal agency plans are described and reviewed largely in biological opinions issued by NOAA Fisheries (formerly the National Marine Fisheries Service) and the U.S. Fish and Wildlife Service for the operation of the Federal Columbia River Power System and the Bureau’s projects in the Upper Snake.[*Plan, paragraph 1, page 64.*]

On June 18 Council legal staff issued its “findings” on how the amendments comport with the Act.¹⁴ Beginning on page 5 the staff goes to great lengths in a strained effort to explain how the Council has defaulted to the federal agencies’ ESA Biological Opinion without actually doing so.

The quote on page 7 is particularly telling. It explains why the Council previously and in the current plan did not adopt main stem actions recommended by Oregon, i.e., the Council does not know how to deal with disagreement among the agencies “. . . *about what is needed to prevent extinction and recover listed salmon and steelhead. . .*” Preventing extinction is ESA business. Not the Council’s Power Act business.

¹³ <http://www.nwcouncil.org/library/2009/2009-02.pdf>

¹⁴ <http://www.nwcouncil.org/library/2009/2009-09/2009-09F.pdf>

The Council's obdurate refusal to develop a salmon restoration plan (and subsequent complementary power plan) resulted in all Snake River salmon (and others) being listed as threatened or endangered. In its recently adopted fish and wildlife program, and in the draft power plan, the Council acts as if the extinction prevention requirements of the ESA trump the much greater salmon restoration requirements of the Northwest Power Act; as a matter of law this the Council cannot do.

Lacking the required plan to restore salmon adversely impacted by operations of the FCRPS as a legal foundation, it is impossible to satisfy the intent and letter of the Act requiring the Council adopt a power plan to mitigate the effects of a salmon *restoration* plan as necessary to ensure an adequate, efficient, economical and reliable power supply.

The Council's draft power plan acknowledges the legally-required nexus between its fish and wildlife program and draft power plan, i.e., "The Act requires the Council to update its fish and wildlife program before revising the power plan, and the amended fish and wildlife program is to become part of the power plan."¹⁵ However, the Council's plan only gives contorted lip service to that required nexus and ignores the intent and letter of the Act. As in its fish and wildlife program, the draft power plan pretends that federal agencies' proposed ESA salmon extinction prevention measures meet the salmon restoration intent of the Act. Additionally, the draft plan perpetuates the Council's preoccupation with egregiously exaggerating the overall cost of salmon restoration and particularly the effect on Bonneville power revenues.¹⁶

Recommendations

—The Council should acquaint itself with the intent and letter of the Northwest Power Act.

—Prior to adopting a power plan, by law the Council must:

- 1] Reopen its current Fish and Wildlife Program, and three decades after the Act became law, produce a draft and ultimately adopt a salmon restoration plan that will ensure achievement of the salmon restoration intent of the Act; and
- 2] Based upon the resulting adopted salmon restoration plan in 1], develop a revised draft power plan designed to achieve the Act's goal of maintaining an efficient, economical and reliable power supply.

—In determining the effect of salmon restoration on maintenance of an adequate, efficient, economical and reliable power supply, salmon restoration cost must as a matter of law be based on the "least cost" approach, i.e., the cost of acquiring conservation resources beginning on the date of the Act being signed into law, and must comport with the Ninth Circuit Court of Appeals ruling holding that the Act prevents "power losses and economic costs . . . from precluding biologically sound restoration of

¹⁵ Draft plan, pp 6-15 and 6-16.

¹⁶ The Council notoriously uses the cost of energy from gas-fired turbines to estimate the cost of energy foregone from breaching the four lower Snake River dams. And uses those gas-fired turbines to estimate the carbon impact of same. Thereby ignoring the Act's mandated priority on far cheaper and carbon-free conservation, of which the Council estimates the region has acquired >3600 average megawatts 1980-2007. This chronic and progressively aggressive anti-salmon restoration bias is the antithesis of the intent and the letter of the Act in establishing the Council.

anadromous fish in the Columbia River Basin . . . so long as an adequate, efficient, economical, and reliable power supply is assured.”¹⁷

These tasks are not discretionary for the Council. Nor do they impose a heavy burden on the Council.

Years before the Act was signed into law it was known that contrary to law, the Corps’ design for the four lower Snake River dams negligently failed to make any provision whatsoever for juvenile salmon to pass downstream through the reservoirs and past the dams. Three decades into the act it is incontrovertible the salmon *restoration* intent of the Act vis-à-vis Snake River salmon can only be met by breaching the four lower Snake River dams. This would result in the loss of approximately 1100 average megawatts of energy incrementally over perhaps 15 years or so required to sequentially breach the dams.

By the Council’s own accounting the region to date has acquired >3600 average megawatts of energy via conservation since passage of the act [Plan, page 6-16]. The Act gives salmon priority on that “least-cost” energy to mitigate the cost of salmon restoration which for the Snake River = breaching the four dams. That cost—probably less than \$0.03 per kilowatt hour for the early conservation acquisitions—has been included in Bonneville’s rates for decades. It is, therefore, incontrovertible that the energy replacement cost of breaching the four dams has not and will not jeopardize maintaining an economical and reliable energy supply. Indeed, it would have an indiscernible effect on future regional energy supply and on the rates paid for that energy.

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¹⁷ The Council may not as a matter of law refuse to do its job for three decades, then use *current* replacement cost of power as the basis for determining if restoring Snake River salmon would jeopardize an efficient, economical and reliable power supply.