UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 10-72104

NORTHWEST RESOURCE INFORMATION CENTER,

Petitioner,

v.

NORTHWEST POWER AND CONSERVATION COUNCIL,

Respondent,

and

NORTHWEST RIVERPARTNERS, PUBLIC POWER COUNCIL and BONNEVILLE POWER ADMINISTRATION,

Respondent-Intervenors.

PETITIONER'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Petitioner, Northwest Resource Information Center has no parent companies, subsidiaries, or affiliates that have issued shares to the public in the United States or abroad.

Respectfully submitted this 21st day of September, 2012.

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STATEMENT OF JURISDICTION

This Court has original jurisdiction over this petition for review under 16 U.S.C. § 839f(e)(5). Northwest Resource Information Center ("NRIC") seeks review of the Sixth Power Plan issued pursuant to the Pacific Northwest Electric Power Planning and Conservation Act (the "Power Act"), 16 U.S.C. §§ 839-839h. Adoption of the Plan is a final action subject to judicial review. 16 U.S.C. § 839f(e)(1)(A). The Northwest Power and Conservation Council ("the Council") published notice of adoption of the Plan on May 4, 2010. 75 Fed. Reg. 23,823 (May 4, 2010). NRIC timely filed its petition on July 2, 2010 (docketed July 6, 2010), within 60 days after publication of notice of adoption of the Plan. 16 U.S.C. § 839f(e)(5).[1]

ISSUES PRESENTED

1. Whether the Council failed to comply with the Power Act's requirement that it give "due consideration" to protection, mitigation, and enhancement of fish and wildlife because it failed to independently consider any measures or resources for the protection of anadromous fish in the Sixth Power

[1] The Declaration of James Edward Chaney, filed concurrently with this brief, demonstrates NRIC's standing. As detailed in that declaration, Mr. Chaney uses, enjoys, and otherwise depends on salmon and steelhead throughout the Columbia River Basin, has been harmed by the Council's failure to comply with the Power Act in the Sixth Power Plan, and these harms would be redressed by a Court order requiring the Council to comply with the law. This Court has previously determined that NRIC has standing under the Power Act. N.W. Envtl. Def. Ctr. v. Bonneville Power Ass'n, 117 F.3d 1520, 1529-30 (9th Cir. 1997) ("NEDC").

Plan?

2. Whether the Council violated the Power Act's requirement that the Plan contain "a methodology for determining quantifiable environmental costs and benefits" where it failed to include a methodology in the Sixth Power Plan, failed to explain or demonstrate how it applied a methodology, and failed to adequately capture environmental costs and benefits of various resources to meet power demand in the Northwest?

3. Whether the Council's discussion of the economic effects of fish and wildlife measures in Appendix M of the Plan was arbitrary and capricious because the Council failed to articulate a rational connection between the facts in the record and the Council's decision to adopt the Bonneville Power Administration's ("BPA") cost estimates associated with fish mitigation measures?

STATEMENT OF THE CASE

I. THE DECLINE OF SALMON AND STEELHEAD IN THE SNAKE AND COLUMBIA RIVERS.

This Court has issued at least three decisions that contain extensive discussions of the biology of salmon and steelhead in the Columbia Basin, as well as explanations of the major role that federal dams and dam operations have played in the decline and near extinction of these fish. See Nw. Res. Info. Ctr., Inc. v. Nw. Power Planning Council, 35 F.3d 1371, 1375-77 (9th Cir. 1994) ("NRIC") ("[I]t is generally accepted that the Basin's hydropower system is a major factor in

the decline of some salmon and steelhead runs to a point of near extinction.") (internal quotations omitted); NEDC, 117 F.3d at 1524-26; Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 524 F.3d 917, 922-27 (9th Cir. 2008). Two of these opinions also contain extensive discussions of the history, purposes, and requirements of the Power Act. See NRIC, 35 F.3d at 1377-79; NEDC, 117 F.3d at 1528-32.

In summary, the large multi-purpose dams on the Columbia and Snake Rivers built and operated by the U.S. Army Corps of Engineers ("Corps") and Bureau of Reclamation are primary causes of the drastic decline in populations of salmon and steelhead that once inhabited the Columbia River Basin. See NRIC, 35 F.3d at 1376 (approximately 80% of salmon and steelhead mortality is attributable to hydropower development and operation) (citing 56 Fed. Reg. 14,055, 14,058 (Apr. 5, 1991)). Several large storage dams, like Grand Coulee Dam in Washington, cut off all access to thousands of miles of salmon habitat. The other federal dams below those projects harm adult fish migrating upstream to their spawning grounds, but are most devastating to juvenile salmon migrating to the ocean. Young salmon are killed and injured as they pass through power turbines or are shunted through a complex series of "bypass" pipes at each successive dam, and by a slow passage through up to eight warm, slackwater reservoirs filled with predators. Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries

Serv., 422 F.3d 782, 788-89 (9th Cir. 2005) (summarizing effects of dams and finding juvenile salmon mortality "as high as 92%" for some runs). Efforts to date to address the "tremendous, detrimental impact of dams on fish runs" have failed to stem or reverse this decline. NRIC, 35 F.3d at 1377. These efforts have generally focused on small changes to dam operations in an attempt to reduce mortality to migrating juvenile fish while minimizing reductions in power generation. Despite nearly thirty years of trying to tweak dam operations or the dams themselves, these adjustments have fallen far short because they rely on "relatively small steps, minor improvements and adjustments—when the system literally cries out for a major overhaul." See Idaho Dep't. of Fish and Game v. Nat'l Marine Fisheries Serv., 850 F. Supp. 886, 900 (D. Or. 1994), vacated as moot, 56 F.3d 1071 (9th Cir. 1995).[2]

II. THE NORTHWEST POWER ACT REQUIRES RESTORATION OF SALMON AND STEELHEAD.

Congress passed the Power Act in 1980 in partial response to the continued

[2] Though insufficient by itself to meet the fish restoration promise of the Power Act, one of the more effective actions, has been practice of "spilling" water past the dams, i.e., allowing water to pass over the dams' spillways, which provides a safer path for juvenile salmon than traveling through the dams' turbines or bypass pipes. Nat'l Wildlife Fed'n, 524 F.3d at 927. See also Nat'l Wildlife Fed'n, 422 F.3d at 796-800 (upholding injunction to require more spill); Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv., 839 F. Supp. 2d 1117, 1130-32 (D. Or. 2011) (enjoining dam operators to continue providing additional spill). However, even this limited and inadequate measure is vigorously opposed by Bonneville Power Administration and its customers because water that passes over the dams' spillways does not produce electricity.

decimation by dams of anadromous fish in the Columbia Basin.[3] The alarming decline of salmon and steelhead that followed completion of the last of four federal dams on the Snake River in 1975 led Congress to determine that "'conservation and enhancement of the great migratory fish ... [are] a matter of urgent priority,'" NRIC, 35 F.3d at 1377, n.10 (citing legislative history), and to include strong fish protection measures in the Act. See also id. at 1379 (Council must take prompt action to address these harms).

The Act that emerged contained two main purposes: to "assure the Pacific Northwest of an adequate, efficient, economical, and reliable power supply," 16 U.S.C. § 839(2) and:

> 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 the Federal Columbia River Power System and other power generating facilities on the Columbia River and its tributaries.

Id. at 839(6).

To achieve these dual purposes, the Act required the Council to first

[3] "Anadromous" species are those that are born and spend some portion of their early lives in fresh water, migrate to the ocean to feed and grow, and then return to freshwater to spawn and die. The term is used in this brief to refer primarily to salmon and steelhead, but other native anadromous species returning to the Columbia and Snake Rivers—including Pacific lamprey, coastal cutthroat trout, and Pacific eulachon smelt—are similarly impacted by dam operations.

promptly prepare and adopt a fish and wildlife program "to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, on the Columbia River and its tributaries." 16 U.S.C. § 839b(h)(1)(A). See also id. § 839b(h)(2) (requiring the development of the fish and wildlife program "prior to the development or review of the plan"). The Council must incorporate recommendations for measures and objectives from state, tribal, and other federal fishery managers in the program. Id. The program must include, among other things, measures that complement ongoing efforts of the fishery managers, are based upon the best available scientific knowledge, are consistent with the tribes' legal rights, "provide improved survival of [anadromous] fish at hydroelectric facilities," and that "provide flows of sufficient quality and quantity between such facilities to improve production, migration, and survival of [anadromous] fish…." Id. §§ 839b(h)(6)(A)-(E). The Council must ensure that the program's measures will "protect, mitigate, and enhance fish and wildlife affected by the … [FCRPS] while assuring the Pacific Northwest an adequate, efficient, economical, and reliable power supply." Id. § 839b(h)(5). The Act requires the program to then be included in the subsequently developed power plan. Id. § 839b(h)(9).

After developing the program, the Council must develop and adopt a regional electric power plan that "sets forth a general scheme for implementing conservation measures and developing resources," with "due consideration" of

several criteria, including the "protection, mitigation, and enhancement of fish and wildlife and related spawning grounds and habitat." Id. § 839b(e)(2). The plan must also include the fish and wildlife program, an energy conservation program, a 20-year power demand forecast, recommendations for research and development, and a methodology for determining quantifiable environmental costs and benefits. Id. §§ 839b(e)(3)(A)-(F) (outlining "elements" of plan). The Act provides that this plan "may be amended from time to time," but must be reviewed at least once every five years. Id. § 839(d)(1).

Congress intended these two planning exercises to work together to deliver the end result that the Power Act requires: the protection, mitigation, and enhancement of the once-great anadromous fish runs of the Snake and Columbia Rivers while ensuring the Northwest a continued reliable and economical power supply. This is accomplished in part by a two-step feedback loop between the fish and wildlife program and the power plan. First, the integration of the program and plan allows the Council to assess and ensure that the measures required to protect and enhance fish and wildlife in the program can be accomplished without jeopardizing a reliable and economic power supply. See 16 U.S.C. §§ 839(2) and 839b(e)(3)(D)(ii)-(iii) (requiring consideration of program impacts on current and future power resource needs). Second, before the Council adopts the plan, the Act specifically requires that it give separate "due consideration" to, among other

criteria, the "protection, mitigation, and enhancement of fish and wildlife … including sufficient quantities and qualities of flows for successful migration, survival, and propagation of anadromous fish…." 16 U.S.C. § 839b(e)(2). This requirement is designed to compel the Council to use what it learns during the power planning process to ensure that (1) the measures and resources adopted in the power plan do not cause further harm to fish, and (2) that sufficient power resources are used or developed in a way that enables the Council "to protect, mitigate, and enhance" anadromous fish and other fish and wildlife. In short, the Act requires that the Council produce and adopt a program and a plan that, once integrated together, will achieve the dual purposes of the Act.

III. THE COUNCIL'S THIRTY-YEAR FAILURE TO PROTECT, MITIGATE, AND ENHANCE SALMON AND STEELHEAD RUNS.

The past thirty years have demonstrated the Council's success in achieving the power goal of the Act, but the Sixth Power Plan unfortunately represents only the latest in a series of failures to ensure that salmon and steelhead in the Snake and Columbia Rivers benefit from the Act's ever-more-distant fish restoration goal. The systemic failure to achieve fish goals was first addressed by this Court eighteen years ago in NRIC. In rejecting a fish and wildlife program that failed to include biologically necessary measures recommended by the fishery managers, the Court emphasized that "a fish and wildlife measure cannot be rejected solely because it will result in power losses and economic costs." NRIC, 35 F.3d at

1394-95. The Court succinctly identified the root of the Council's overall failure to implement the fish restoration goals of the Act:

> The Council's approach seems largely to have been from the premise that only small steps are possible, in light of entrenched river user claims of economic hardship. Rather than asserting its role as a regional leader, the Council has assumed the role of a consensus builder, sometimes sacrificing the Act's fish and wildlife goals for what is, in essence, the lowest common denominator acceptable to power interests….

NRIC, 35 F.3d at 1395.

Since this decision, the Council has made little progress in accomplishing the Act's salmon restoration provisions.[4] Rather than implement the measures required to protect and enhance fish populations, the Council eventually defaulted and deferred to a biological opinion ("BiOp") under the Endangered Species Act, 16 U.S.C. § 1536(a)(2) ("ESA"), prepared in 2000 by the same federal agencies who created the salmon crisis the Council was tasked with solving. In a series of decisions spanning the last decade in Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv. ("NWF v. NMFS"), this BiOp and its two successors have each been found arbitrary and capricious and in violation of Section 7 of the ESA, 16 U.S.C. § 1536(a)(2), for failing to ensure that dam operations will avoid

[4] See generally Michael C. Blumm, et al., Practiced at the Art of Deception: The Failure of Columbia Basin Salmon Recovery Under the Endangered Species Act, 36 Envtl. L. 709, 809 (2006) (summarizing that NRIC "seemed to be a path-breaking opinion" but "proved to be an isolated one, however, and the ESA listings soon dominated salmon restoration efforts.").

jeopardizing eight of the thirteen populations of imperiled Snake and Columbia River salmon. See NWF v. NMFS, 254 F. Supp. 2d 1196 (D. Or. 2003) (rejecting 2000 BiOp); NWF v. NMFS, 524 F.3d 917 (upholding district court's rejection of 2004 BiOp); NWF v. NMFS, 839 F. Supp. 2d at 1125, 1130 (2011) (rejecting 2008/2010 BiOps and noting that previous 2004 BiOp "was a cynical and transparent attempt to avoid responsibility for the decline of listed Columbia and Snake River salmon and steelhead.").

As a result, the Council's measures to protect anadromous fish from dam operations are now indistinguishable from those designed—but legally and biologically failing—to prevent extinction under the ESA. But see NRIC, 35 F.3d at 1393 (rejecting Council's heavy reliance on inadequate measures contained in previous biological opinion to satisfy the Act's anadromous fish protection, mitigation, and enhancement requirements). To the continued detriment of the very fish the Act was intended to help, and continued injury to those in the region who depend upon them, the Council followed this now well-worn path in the development of the Sixth Power Plan.

IV. THE SIXTH POWER PLAN.

The Council began its latest review of the fish and wildlife program and power plan in December 2007. In February 2009, the Council adopted revised Fish and Wildlife Program Amendments (the "2009 Program"), and in June 2009 it

adopted written findings explaining its disposition of the fishery managers' recommendations, as required by 16 U.S.C. § 839b(h)(7), along with responses to comments. 74 Fed. Reg. 30,645 (Jun. 26, 2009). As in the past, the 2009 Program includes measures for operating the mainstem Federal Columbia River Power System ("FCRPS") dams that are drawn wholesale from the measures in NMFS's 2008/2010 BiOp. In its explanation of why the 2009 Program adopts the BiOp measures instead of establishing its own provisions for sufficient flows and bypass spills at the FCRPS dams, the Council admitted that:

> [a]t 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 … [that are] "described and reviewed largely in biological opinions ….

ER:278 (2009 Program). See also ER:300 (Responses to Comments on 2009 Program explaining Council's decision "to accept as specific measures and objectives in the program the specific actions … in the biological opinions"). The 2009 Program's default to a biological opinion that is not intended to comply with the restoration goals of the Act—and in any event was subsequently declared arbitrary and capricious and in violation of the ESA's jeopardy standard—does not comply with the Power Act's distinct legal mandate that the Council act to "protect, mitigate and enhance the fish and wildlife ... particularly anadromous fish." 16 U.S.C. § 839(6); NWF v. NMFS, 839 F. Supp. 2d at 1125. Regardless of

these shortcomings, the Council carried the 2009 Program forward into the Sixth Power Plan without questioning or reassessing its requirements.

In September 2009, the Council released the Draft Northwest Sixth Electric Power and Conservation Plan for public review and comment. 75 Fed. Reg. 23,823 (May 4, 2010). On February 10, 2010, the Council voted to adopt the Sixth Power Plan and subsequently published the required notice of its adoption of the Sixth Power Plan in the Federal Register. Id.

The Sixth Power Plan "includes" the 2009 Program adopted by the Council by cross-referencing it. 16 U.S.C. § 839b(e)(3)(F). The Plan purports to consider the effect of the 2009 Program's measures on the Council's duty to "assure the Pacific Northwest of an adequate, efficient, economical, and reliable power supply," id. § 839(2). See ER:153-171, id. at 172-190.

Other than concluding that the 2009 Program would not impact the Northwest's "adequate, efficient, economical, and reliable power supply," the Council in the Sixth Plan gave no independent consideration to whether other fish and wildlife measures were necessary or to how the Plan's conclusions and forecasts of power generation, conservation, or efficiency would meet the Power Act's requirement to "protect, mitigate and enhance ... anadromous fish." Instead, even after finding that the Northwest could readily and economically meet or exceed its future power needs largely through conservation, efficiency, and

renewable energy development, the Council gave no further consideration to how those conclusions could facilitate achieving the fish restoration requirement of the Act by, for example, reducing reliance on hydropower and embracing additional renewable power generation, conservation, and efficiency to include additional fish protection measures necessary to meet the fish restoration objective of the Act.

Moreover, the Council's analysis does not contain and is not based on a methodology to quantify the environmental costs and benefits of power from the FCRPS and other resources or measures. Rather, even in its limited analysis of the 2009 Program's impacts on power reliability and cost, the Council reported a cost allocation methodology that arbitrarily and artificially inflated the perceived "costs" of measures for anadromous fish protection, mitigation, and enhancement while failing to account for the benefits of such measures and the environmental costs of the Plan's portfolio of power resources.

The net result of these errors is a Sixth Power Plan that fails to consider what must be done to meet the Act's dual fish and power goals, ignores the benefits provided by protecting, mitigating, and enhancing anadromous fish, overstates the costs of measures that would accomplish that goal, and ignores the costs of continuing the status quo. The Council's ongoing failure "to protect, mitigate and enhance … anadromous fish" lies at the heart of this case. 16 U.S.C. § 839(6). The Council through the Sixth Power Plan and the included 2009 Program has

continued to act as a facilitator for stop-gap and inadequate measures that federal dam operators have proposed to mitigate damage to salmon and steelhead. As the continued decline and imperiled state of those fish runs demonstrates, the Council's failure to lead and produce the integrated result that the Power Act requires means that the Northwest will spend millions of dollars on a Plan that, thirty years after Congress made salmon protection an "urgent priority," fails to meet the dual purposes of the Act and perpetuates the harm the Act was passed to prevent. See Chaney Decl. at ¶¶ 27-32 (summarizing harm caused by failure to comply with the Act).

SUMMARY OF ARGUMENT

Nearly two decades ago, this Court directed the Council to address the fish restoration purpose of the Act, but the Council in its Sixth Power Plan has still failed to achieve—let alone adopt a path to accomplish—that goal.

First, despite the plain language of the Power Act, the Council did not provide independent "due consideration" to the protection, mitigation, and enhancement of anadromous fish in the Sixth Power Plan. Instead, the Council merely incorporated its (inadequate) 2009 Program as required by a different provision of the Act. The Act requires the Council to separately assess whether additional fish measures and/or changes to the power system are required to ensure that the power plan will achieve both the fish protection and power supply

purposes of the Act. The Council's failure to engage in that independent assessment in the Sixth Plan violates the Power Act, 16 U.S.C. § 839b(e)(2).

Second, the Council did not describe or apply a methodology for evaluating the environmental costs and benefits of power resources or measures. Instead, the Council outlined a post-hoc and flawed methodology in an Appendix during finalization of the Plan. That methodology, however, fails to account for the costs of utilizing power resources that fail to protect anadromous fish and fails to account for the benefits of measures that meet the Act's fish restoration goal, in violation of the Power Act, 16 U.S.C. § 839b(e)(3).

Third, the Council included in the Plan a methodology that overstated the costs of fish protection measures based on irrelevant calculations of forgone hydropower generation. The Council arbitrarily included that methodology in the Sixth Plan despite its earlier recognition that calculations of "forgone" power were irrelevant and confusing, without explaining why it abandoned more valid methods to calculate that figure even if it were relevant, and without considering the chilling effect that inaccurate and inflated cost estimates would have on measures necessary to achieve to the fish protection goal of the Act.

The Court should find these aspects of the Sixth Plan arbitrary and capricious and issue a tailored remand that requires the Council to promptly comply with the Power Act.

STANDARD OF REVIEW

The Council's adoption of the Sixth Power Plan is reviewed under the arbitrary and capricious standard of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. 16 U.S.C. § 839f(e)(2). Seattle Master Builders Ass'n v. Pacific Nw. Electric Power and Conservation Planning Council, 786 F.2d 1359, 1366 (9th Cir. 1986). Under this standard, the challenged portions of the Plan will be set aside if arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Id.; 5 U.S.C. § 706(2)(A). The Court's core inquiry under this standard is whether the Council has both: (1) correctly applied the law, and (2) considered the relevant factors and articulated "a rational connection between the facts found and the choices made … and whether it has committed a clear error of judgment." Oregon Natural Res. Council v. Allen, 476 F.3d 1031, 1036 (9th Cir. 2007); see also Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv., 265 F.3d 1028, 1034 (9th Cir. 2001).

In making this latter inquiry, the Court must perform a "thorough, probing, in-depth review," Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971), even though the Court does not "substitute its judgment for that of the agency," id. at 416. Accordingly, although review is deferential, the Court "need not forgive a clear error of judgment." Ctr. for Biological Diversity v. U.S. Dep't of the Interior, 623 F.3d 633, 641 (9th Cir. 2010) (quotations omitted). Even

where an agency with "technical expertise" acts "within its area of competence," a reviewing court "need not defer to the agency when the agency's decision is without substantial basis in fact." Ariz. Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160, 1163 (9th Cir. 2010). This Court has "insisted that agencies support and explain their conclusions with evidence and reasoned analysis." Ctr. for Biological Diversity, 623 F.3d at 648 (citing Lands Council v. McNair, 537 F.3d 981, 994, 998 (9th Cir. 2008) (en banc)); see also id. at 650 ("[W]e are compelled not to defer—when an agency has acted arbitrarily and capriciously.").

Questions concerning construction of the Power Act are reviewed de novo as questions of law, NEDC, 117 F.3d at 1530, and the Court "must reject those constructions that are contrary to clear congressional intent or frustrate the policy that Congress sought to implement," Brower v. Evans, 257 F.3d 1058, 1065 (9th Cir. 2001). See also Partridge v. Reich, 141 F.3d 920, 923 (9th Cir. 1998). Interpretation of the Power Act begins with the statute's plain language and context. Jimenez v. Quarterman, 555 U.S. 113, 118 (2009); U.S. v. Williams, 659 F.3d 1223, 1225 (9th Cir. 2011) (requiring examination of "the structure of the statute as a whole, including its object and policy."). Words and phrases must not be read in isolation, but with an eye toward the "purpose and context of the [whole] statute." Dolan v. U.S. Postal Serv., 546 U.S. 481, 486 (2006). Moreover, the Power Act itself is "intended to be construed in a consistent matter." 16 U.S.C.

§ 839. See also NRIC, 35 F.3d at 1378 (noting that Power Act requires "textual consistency," meaning that "its provisions, together with other applicable laws, specifically including environmental laws, be construed in a consistent manner.").

ARGUMENT

I. THE COUNCIL FAILED TO GIVE DUE CONSIDERATION TO PROTECTION, MITIGATION, AND ENHANCEMENT OF FISH AND WILDLIFE IN ITS SIXTH POWER PLAN.

Nearly two decades ago, this Court directed the Council to promptly address both the anadromous fish restoration and power purposes of the Act. NRIC, 35 F.3d at 1395. While in the context of a different statutory provision, the Council's failure to accomplish that mandate is again at issue in this case. The Act requires the Council to give "due consideration" to specific environmental and fish and wildlife criteria as it develops the Power Plan. 16 U.S.C. § 839b(e)(2). The phrase "due consideration" is used only once in the Act, and it requires the Council to provide in-depth consideration to, among other criteria, the protection, mitigation, and enhancement of fish and wildlife, particularly to ensuring water quality and quantity sufficient for successful migration, survival, and reproduction of anadromous fish. 16 U.S.C. § 839b(e)(2)(C).

The Act's requirement that the Council give due consideration to the needs of anadromous fish as part of the power planning process is integral to the iterative process Congress designed to ensure the Council produces two simultaneous

results: restored salmon runs and an economical and reliable regional power supply. Just as the Act requires the fish and wildlife program to inform the power plan, it requires the power plan's strategy for implementing conservation measures and developing energy resources to complement and further efforts to protect, mitigate, and enhance anadromous fish. Over the course of the past thirty years and culminating in the Sixth Power Plan, however, the Council's due consideration of anadromous fish needs in the power planning process has contracted to such an extent that in the Sixth Power Plan, the Council fails to give any consideration whatsoever to this criterion. Three decades after the Act was signed into law, the Plan does not achieve the objectives mandated by the Power Act: protection, mitigation, and enhancement of the once-great anadromous fish runs of the Snake and Columbia Rivers while providing a reliable and economical regional power supply.

A. The Plain Language and Purposes of the Power Act Require Significant, Independent Consideration of Protection, Mitigation, and Enhancement of Anadromous Fish in the Power Plan.

Congress set forth specific requirements for the development of a power plan. 16 U.S.C. § 839b(d). To meet power generation needs, the Act first requires that the plan give "priority" to developing and utilizing resources that the Council determines to be cost effective, and specifically dictates that first "[p]riority shall be given" to conservation and renewable resources. Id. at § 839b(d)(e)(1).

Second, the Act directs the Council to prepare a regional energy plan that contains:

> a general scheme for implementing conservation measures and developing resources ... with due consideration by the Council for (A) environmental quality, (B) compatibility with the existing regional power system, (C) protection, mitigation, and enhancement of fish and wildlife and related spawning grounds and habitat, including sufficient quantities and qualities of flows for successful migration, survival, and propagation of anadromous fish, and (D) other criteria which may be set forth in the plan.

16 U.S.C. § 839b(e)(2). See also Seattle Master Builders Ass'n, 786 F.2d at 1362 (same).

The phrase "due consideration" is not defined in the Act. See 16 U.S.C. § 839a ("Definitions"). However, it is a fundamental principle of statutory construction that the meaning of words or phrases is interpreted in the context of the Act as a whole. See In re Rufener Constr., Inc., 53 F.3d 1064, 1067 (9th Cir. 1995) ("When we look to the plain language of a statute in order to interpret its meaning, we do more than view words or sub-sections in isolation. We derive meaning from context, and this requires reading the relevant statutory provisions as a whole.") (citations omitted). As other courts have found, "[t]o give due consideration to a particular factor necessarily means to give such weight or significance to it as under the circumstances it seems to merit ...." U.S. ex rel. Maine Potato Growers & Shippers Ass'n v. Interstate Comm. Comm'n, 88 F.2d 780, 783 (D.C. Cir. 1936) (interpreting the Interstate Commerce Act). See also Mobley v. Continental Cas. Co., 383 F. Supp. 2d 80, 87 (D.D.C. 2005) (noting that

"[o]f course, the definition of a word in the abstract is rarely helpful, and instead the term must be read, and thereby defined, within the context that it is used.").

Reading Section 839b(e)(2), the context of the Act as a whole, its purposes, and its legislative history makes clear that the Council must independently consider—and give significant weight to—the needs of anadromous fish in its scheme for implementing conservation measures and developing resources in the plan. 16 U.S.C. § 839b(e)(2).

1. Due consideration is essential to achieving the fish protection goals of the Act.

The Council's duty to give due consideration to the "protection, mitigation, and enhancement of fish and wildlife and related spawning grounds and habitat," 16 U.S.C. § 839b(e)(2), reiterates one of the Act's two primary purposes: 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 ...." 16 U.S.C. § 839(6) (emphasis added).[5] Congress further specified the factors the Council must include

[5] The phrase "protect, mitigate, and enhance" was deliberately not defined in order to further the broad protective mandate of the Act. As the House Committee Report stated:

> It has been suggested that the terms "protect, mitigate, and enhance" should be defined. The Committee did not choose to do so in recognition of the fact that these terms are not new to those concerned with this resource, and

in its due consideration analysis, "including sufficient quantities and qualities of flows for successful migration, survival, and propagation of anadromous fish." 16 U.S.C. § 839b(e)(2)(C). This language mirrors elements that the Council must include in the fish and wildlife program. See 16 U.S.C. § 839b(h)(6)(E)(ii) (requiring the program to include measures that "provide flows of sufficient quality and quantity between such facilities to improve production, migration, and survival of such fish"). Congress' decision to require specific consideration of these same factors again in the power planning process and its decision to tie this requirement directly to the Act's purposes underscores the priority Congress assigned to the Council's duty to give "due consideration" to the needs of anadromous fish in the power planning process.[6]

As these provisions highlight, the due consideration duty is an integral part of the two-step feedback loop Congress established between the fish and wildlife program and the power plan. Just as the Council must consider the impacts of fish measures on the reliability of the power system when developing the program, see 16 U.S.C. § 839b(h)(5), the Council is also required in the plan to consider whether

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because such a definition might later prove more limiting than anticipated. NRIC, 35 F.3d at 1388 (citing H.R. Rep. No. 96-976, pt. I, 96th Cong., 2d Sess., at 57).

[6] A Senate Report describing § 839b(e) reinforces the significance of considering the needs of anadromous fish, noting that this and other criteria in § 839b(e)(2) "should guide the development of the plan." Senate Report No. 96-272, 96th Congress 1st Session at 24.

it is meeting the anadromous fish restoration goals of the Act, id. at § 839b(e)(2)(C).

If, for example, the Council determined in the power plan that the measures adopted in the fish and wildlife program to protect, mitigate, and enhance anadromous fish populations threatened a reliable and economic power supply, it is not difficult to imagine that the Council would promptly seek to revisit those fish protection measures to eliminate that threat. 16 U.S.C. § 839(2). The converse must also be true. If, for example, the Council learns through the power plan that there is capacity provided by existing or future power resources, efficiency, or conservation to take further actions necessary for fish protection, the mandate to give "due consideration" to anadromous fish requires the Council to revisit whether additional measures to "protect, mitigate, and enhance … anadromous fish" are available. The Council must take what it has learned in the power planning process and consider whether the Plan (and its included 2009 Program) can achieve salmon restoration and a reliable power supply, or if there is need for additional salmon restoration measures—and the power resources and conservation measures needed to accommodate them.[7]

[7] Whether the Council would ultimately choose to adopt the necessary measures as part of the power plan or whether it would reopen its fish and wildlife program is a procedural question that does not bear on its duty to perform this analysis in the power planning process. It is clear, however, that the Council has a duty to amend the program or plan as necessary. 16 U.S.C. § 839b(d)(1) (Council required to

2. Due consideration requires significant attention to protection of anadromous fish.

The context of the due consideration requirement in the statute emphasizes the importance of Congress assigned to this analysis in the power plan. Congress only used the phrase "due consideration" once in the Act. See 16 U.S.C. § 839b(e)(2). In contrast, Congress used the word "consideration" and the phrase "taking into consideration" throughout the Act. See, e.g., 16 U.S.C. § 839b(e)(4) (requiring the Council to undertake studies of conservation measures "taking into consideration" its principal duties to implement the power plan and fish and wildlife program); § 839b(h)(10)(D)(vi) (requiring final recommendations for project funding to be based on "consideration of the recommendations" of independent reviewers); § 839d(*l*)(2) (requiring the Council to "take into consideration" interregional power exchanges in the plan). That Congress chose to require the Council to do more than "consider" the enumerated § 839b(e)(2) criteria reflects the special emphasis on those criteria.

In NRIC, this Court similarly concluded that the word "due" denoted special significance. NRIC, 35 F.3d at 1384 (analyzing 16 U.S.C. § 839b(h)(7)'s requirement to give "due weight" to the expertise and recommendations from tribal

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amend the "adopted plan, or any portion thereof from time to time….") (emphasis added); § 839b(h)(9) (Council shall adopt a program "or amendments thereto" within a year after receipt of recommendations); § 839f(e)(5) (permitting challenges to "the plan or programs or amendments thereto").

and state fishery managers in resolving any inconsistencies in the fish and wildlife program). See also id. at 1386. The Court determined that this language, when read in the context of the fish restoration purposes of the Act, meant that the Council should '"rely heavily'" on the fishery managers. NRIC, 35 F.3d at 1388 (citing legislative history). Reading the phrase "due consideration" in that same context demonstrates similar Congressional intent that the Council "heavily" consider the criteria listed in § 839b(e)(2) as it develops a general scheme to implement conservation measures and develop resources necessary to deliver the Act's requirements for salmon restoration and a reliable power supply.

In sum, the Act makes clear that due consideration is a critical independent tool to ensure that the Council achieves what the Power Act requires: the protection, mitigation, and enhancement of anadromous fish runs while providing a reliable and economical power supply. The Council has not utilized that tool, nor produced that result, in the Sixth Power Plan.

B. The Council Failed to Give Due Consideration to Fish and Wildlife in the Sixth Power Plan.

Although the statute makes clear that due consideration is a separate, significant, and independent duty, the Sixth Power Plan and the administrative record demonstrate that the Council has failed to give *any* independent due consideration to protection of anadromous fish or other fish and wildlife. To the contrary, the only discussion of fish and wildlife in the Plan is limited to including

and incorporating the Council's 2009 Program, an action already required by a separate provision of the Power Act, 16 U.S.C. § 839b(e)(3)(F).[8]

1. Incorporation of the 2009 Program does not satisfy the Council's independent obligation to provide due consideration.

In each of the few instances in the Plan itself where the Council discusses fish and wildlife, its discussion is limited to those measures already adopted in the 2009 Program or required by other laws. For example, in the introduction to the Plan, the Council acknowledges that its mission is "to assure the region of an adequate, efficient, economical, and reliable power supply, while also protecting, mitigating and enhancing fish and wildlife affected by the Columbia River Basin hydroelectric system." ER:16. Although the Council notes that the Plan's attributes include: "[a] hydroelectric system whose capability is preserved and improved in order to provide low-cost power for the region, providing … improved

[8] The Program, by itself—especially when it simply relies on a BiOp that has been overturned by a federal court—cannot be characterized as sufficient to "protect, mitigate, and enhance" salmon and steelhead affected by the FCRPS. See ER:300 (Council's Findings on Recommendations and Responses to Comments on the 2009 Program noting that "[t]he Council decided to accept as specific measures and objectives in the program the specific actions and hydrosystem performance standards … analyzed in the biological opinions"). Nor can the Program's measures be fairly described as including all of those that are "substantially obtainable from the management and operation of the" FCRPS. 16 U.S.C. § 839(6). The Council rejected recommendations from the Oregon Department of Fish and Wildlife that the Council adopt spill, flow, and other mainstream passage operations that were more protective than the operations specified in the BiOp, ER:301, and ignored other more aggressive measures that the Council itself considered in previous fish and wildlife programs.

conditions for salmon and steelhead," ER:17,[9] there is no specific recognition of any additional responsibility to consider fish and wildlife in general, nor the § 839b(e)(2) criteria in particular in this discussion.

Similarly, in Chapter Six, the Council states that "[t]he plan then sets forth 'a general scheme for implementing conservation measures and developing resources' with 'due consideration' for, among other things, '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.'" ER:35 (citing 16 U.S.C. §§ 839b(e)(2) & (3)(F); 839b(h)(2)(A)). This is the only acknowledgement in the Plan of the Council's obligation to give due consideration to specific fish and wildlife concerns, and the only citation to § 839b(e)(2). But that statement is not followed by any discussion of how that "due consideration" obligation is fulfilled in the Plan; there is no discussion of what factors the Council considered, nor what decisions it made, nor whether the Plan achieves the dual purposes of the Act. Instead, the chapter focuses on the "average cost" of fish and wildlife operations in terms of reduced opportunity to generate power—i.e., not a "cost" at all—and the

[9] As this Court previously explained, the Council's task is not to focus solely on the hydrosystem; rather, "the statute assures a 'power supply' not a 'hydropower supply.' This highlights, again, conservation and the development of other resources as purposes of the [Act]." NRIC, 35 F.3d at 1379 n.14.

"total financial obligation for the fish and wildlife program." ER:35 (emphasis added).

The most extensive discussion of fish and wildlife in the Plan is relegated to Appendix M of the Plan. ER:172-190.[10] Like the rest of the Plan, however, Appendix M discusses only "actions specified to benefit fish and wildlife," in the 2009 Program, NMFS's BiOp, and litigation-related fish measures—i.e., measures already developed or imposed from outside the Plan, not measures based on any further analysis in the Plan. See ER:174 (describing adoption of fish measures in 2009 Program); ER:175 (describing 2009 Program's flow and passage operations); ER:176 (discussing reservoir operations and flows in 2008/2010 BiOp and 2009 Program).

The Council's distinct duty to provide due consideration to anadromous fish is not satisfied merely by including the 2009 Program in the power plan as already required by 16 U.S.C. § 839b(e)(3)(F). Rather, Congress separately listed the program as an "element" of the requisite features of the Power Plan in § 839b(e)(3)(F) and then specified additional criteria in § 839b(e)(2) that the

[10] The fact that this discussion is contained in an appendix to the Plan reflects that it was less integral to the substance of the Plan and the public process of preparing it. According to the Council, the appendices are read by a "[l]imited number" of people, are "only published on [the] website," largely "describe data files containing information," and "[p]rovide links to usable data files." ER:383. Nor are the appendices something that Council members "go[] through with a fine-toothed comb." ER:477.

Council must consider in the Plan. Incorporating or referring to the 2009 Program cannot satisfy both obligations. See Kenaitze Indian Tribe v. State of Alaska, 860 F.2d 312, 317-18 (9th Cir. 1988) ("We cannot adopt a statutory interpretation that renders one portion of the statute redundant when there is another interpretation that avoids such redundancy.").

Moreover, even though Congress required the fish and wildlife program to include measures that "provide flows of sufficient quality and quantity between such facilities to improve production, migration, and survival" of anadromous fish, 16 U.S.C. § 839b(h)(6)(E)(ii), it explicitly required the Council to revisit and consider those same factors in the Plan, id. at § 839b(e)(2)(C) (requiring due consideration of "sufficient quantities and qualities of flows for successful migration, survival, and propagation of anadromous fish"). If Congress intended for the Council to satisfy its due consideration obligation by referencing the fish and wildlife program, the language in § 839b(e)(2)(c) requiring specific consideration of these same factors during the development and adoption of the power plan would be superfluous and unnecessary. See United States v. Hoflin, 880 F.2d 1033, 1038 (9th Cir. 1989) (reaffirming "the fundamental principle of statutory construction that interpretative constructions of statutes which would render some words surplusage are to be avoided"). Instead, Congress included this similar language in two different sections to emphasize the Council's independent

and iterative responsibility to use the power planning process to "protect, mitigate, and enhance … anadromous fish" in the Snake and Columbia Rivers.

The Council's summary of its "recurring two step-planning process" in Appendix M reflects the fundamental flaw in its approach:

> The first step is to develop or amend the fish and wildlife program; the second is to include the fish and wildlife program in the power plan, developing the coordinated resource plan … that accommodates the fish and wildlife requirements while meeting the changing electricity demands of the region. This is the Council's central fish and wildlife/power "integration" function under the Power Act.

ER:173-174. But the due consideration mandate makes clear that "integration" of the Council's central tasks is not the one-way street the Council envisions. The Act requires that the Council separately give additional due consideration in the Plan to protection, mitigation, and enhancement of anadromous fish.[11] 16 U.S.C. § 839b(e)(2) (requiring that "[t]he plan shall set forth" consideration of these criteria) (emphasis added). See supra at 23-24 (discussing iterative nature of program and plan).

Communications between Council staff and Council members in the

[11] In discussing the Program's impacts, the Council correctly notes that historically, "[t]he regional power supply has reliably provided actions specified to benefit fish and wildlife (and absorbed the costs of those actions) while maintaining an adequate, efficient, economic and reliable energy supply." ER:172. In the context of the Council's due consideration duties, however, the problem with this statement is that it is limited in scope and time to the past. The Council does not take the next step required by the Act and ask whether this Plan demonstrates that additional measures to protect, mitigate, and enhance anadromous fish are possible.

administrative record reveal that—like the body of the Plan itself—discussion of fish and wildlife was limited to the measures already in the 2009 Program.[12] See, e.g., ER:354 (presentation noting that "[m]ajor [i]ssues" to be considered in the plan include "[i]ntegration with fish and wildlife program."); see also ER:460 (presentation slide noting that plan should consider "[c]ost of [fish & wildlife] program implementation."). Other communications are notable for the lack of any mention or analysis of the Council's responsibility to provide due consideration. See, e.g., ER:428 (presentation of the "Key Findings" in Chapter 6 stating that "[t]he plan must provide an adequate and reliable power supply and must reliably execute fish operations," but tellingly omitting any discussion of its independent duty to give additional due consideration to anadromous fish or whether the Plan achieves the dual purposes of the Act).

The Council's duty to give due consideration to anadromous fish requires the Council to consider, based on what it has learned while developing the Plan, whether and how the power system could accommodate additional fish measures

[12] The plain language of § 839b(e)(2) requires that "[t]he plan shall set forth a general resource scheme" with due consideration to anadromous fish; not the administrative record. See § 839b(e)(2)) (emphasis added). In NRIC, this Court similarly found that § 839b(h)(7), which requires the Council to "explain in writing, as part of the program" its basis for rejecting recommendations of fishery managers, could not be satisfied by citations to the administrative record. NRIC, 35 F.3d at 1384-85. As in NRIC, the Court should find that the Council failed to meet its § 839b(e)(2) obligations in the Plan itself.

and still supply reliable and economical power. Determining that the 2009 Program measures will provide an adequate power supply does not end the Council's inquiry.

2. Other aspects of the Plan similarly fail to satisfy the obligation to provide due consideration.

A review of the Plan as a whole further reveals the Council's failure to meet its due consideration responsibilities to fish and wildlife. Although it acknowledged "the need to better identify and analyze long-term uncertainties that affect all elements of fish and power operations," ER:35, the Council proposes only future procedural actions, such as creation of "a public forum," to discuss these uncertainties. Id. But this future proposal cannot satisfy the Council's duty to provide independent due consideration to fish and wildlife concerns in this Plan. Moreover, merely facilitating such future discussion is not the Council's job. As this Court found, the Council's attempt to "assume[] the role of a consensus builder, sometimes sacrificing the Act's fish and wildlife goals for what is, in essence, the lowest common denominator" is the root cause of its thirty-year failure to implement and achieve the goals of the Act. NRIC, 35 F.3d at 1395. The Council cannot again abdicate its responsibility to produce a program and a plan that together meet the dual purposes of the Act.

Indeed, in a past fish and wildlife program, the Council explained that other suggested "hydrosystem operations, system configuration changes and energy

resource actions … needed for fish" were to be evaluated in the power plan where the Council would consider whether the power system could accommodate those actions. 2003 Program Amendments at 67.[13] The Council reasoned that

> [o]ne of the central tasks faced by the Council in the revision of the power plan is to help ensure both of these goals in the long run. Deferring full consideration of this matter to the power plan is appropriate, given the conclusions of the Council in the analysis of the region's power supply and the effects of the fish and wildlife measures on that power supply, which showed resources to be adequate in the near term.

Id. (2003 Program Amendments at 67) (emphasis added). By again sidestepping its responsibility in the Sixth Plan, the Council demonstrates that in this shell game, there is no pea.

The Council's lack of any "due consideration" in the Sixth Plan stands in stark contrast to the Council's analysis in the First Power Plan in 1983. See generally First Power Plan, Chapter 9.[14] That plan correctly acknowledged that "[t]he requirement of due consideration for fish and wildlife is in addition to the Act's mandate that the council adopt a Columbia River Basin Fish and Wildlife Program." Id. at 9-6 (emphasis added). Further, it contains explicit discussion of some of the § 839b(e)(2)(C) criteria that are specific to anadromous fish, including

[13] The 2003 Program Amendments are available at http://www.nwcouncil.org/library/2003/2003-11b.pdf (last visited Sept. 17, 2012).

[14] The First Power Plan is available on the Council's website at http://www.nwcouncil.org/library/1983/PowerPlan.htm (last visited Aug. 22, 2012).

enhancing habitat and spawning grounds, and providing sufficient flows for migration, survival, and propagation. See, e.g., First Power Plan at 9-6 (discussing providing adequate flows for migrating anadromous fish); id. at 9-7 (discussing mitigation for hydropower and efforts to designate streams and wildlife habitat for protection from future hydropower development). That Plan then explicitly describes the "[d]ue [c]onsideration [p]rocess" that the Council undertook. Id.[15] The Council's passing references to fish and wildlife in the Sixth Plan fall far short of that analysis.

To be sure, the Plan does model two resource strategy scenarios that could have implications for fish and wildlife: (1) a scenario that "explores the cost and carbon impacts that would occur if the four lower Snake River dams were no longer available to meet regional power needs," and (2) a "Coal Retirement" scenario that presupposes reduced dependence on coal. See ER:91. The Council explained that it performed the dam removal scenario:

[15] The Council began that process "by performing studies to identify the potential environmental and fish and wildlife effects on resources," which were then subjected to public review and comment and which "guided the Council as it drafted its resource portfolio." First Power Plan at 9-7. Further, the Council held a public meeting specifically to discuss its consideration of fish and wildlife concerns. Id. Views and data presented at that meeting "assisted the Council in furthering its consideration of environmental quality and fish and wildlife concerns." Id.

> to illustrate the value of the system…. This example is provided to illustrate the significant economic and carbon-emission changes that resulted from the scenario.

ER:99. The one-sided nature of this discussion, however, is emblematic of the Council's failure to consider the needs of anadromous fish through the lens of its due consideration obligations. For example, rather than asking whether and how power from the Snake River could be replaced by renewable energy, efficiency, and/or conservation, the Council simply assumed that fossil-fuel generation would replace the dams. Moreover, the Council's actual analysis demonstrated that removal of the four Lower Snake River dams would not jeopardize an adequate, efficient, economical, and reliable power supply. See ER:115-118. Indeed, the analysis showed that while the cost-per-unit rate of power would increase with dam removal (as with many other modeled scenarios), customers' actual bills would decrease from today's levels. See ER:198-199 (Tables O-3 to O-4) (showing overall and year-to-year reductions from 2010 bills even with dam removal); ER:118 (Figure 10-19) (same). This is due to the proper—and commendably strong—emphasis that the Plan places on energy efficiency and conservation to meet the region's power needs. See 16 U.S.C. § 839b(e)(1) (setting out plan priorities and giving priority to conservation and renewable resources).[16]

[16] As NRIC notes elsewhere, it fully supports these aspects of the Plan and seeks a

The larger problem for the Council is that after it performed this analysis showing that the power system could affordably and reliably accommodate this measure, it did nothing with the information. It did not analyze the regional power system's ability to accommodate dam removal without increasing carbon emissions. The Council did not consider or discuss whether the regional power system could accommodate increased flow rates, reservoir drawdowns, or any other additional measures for fish and wildlife. Nor did it propose any such measures, or even hint at its authority to amend its program to require such actions. In short, the Council not only failed to give "due consideration," it gave no consideration.

To the contrary, the Council took the position that it has "no legal authority to reconsider the Fish and Wildlife Program in the Power Planning Process." ER:239 (Statement of Basis). This statement is flatly inconsistent with the due consideration mandate and other requirements of the Power Act. The Council can and must amend its fish and wildlife program to accommodate new information or new actions if it determines in the Plan (or at any other time) that such actions are necessary. See supra at 24, n.7 (describing Council's broad authority to amend program and plan). The Council also has the duty in the Plan to consider whether

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remand that addresses only the Council's duty in the Power Plan to ensure that salmon are restored while maintaining a reliable and economical power supply. See Petition for Review (Doc. 1) at Prayer for Relief (D); infra at § IV.

the Plan achieves the fish and power goals of the Act, and if not, to consider additional fish and wildlife measures, and the extent to which resources or conservation measures were necessary to reliably accommodate those fish measures. In the past, it has described the Plan as the forum for doing just that. See supra at 33 (describing 2003 Program Amendments).

Because the Council has failed to meet its due consideration obligations under § 839(b)(e)(2) in the Plan, aspects of the Plan relating to fish and wildlife are arbitrary, capricious, and contrary to law. This Court should vacate those portions of the Sixth Power Plan and partially remand the Sixth Power Plan for further consideration pursuant to the schedule and process outlined in Section IV, below.

II. THE SIXTH POWER PLAN DOES NOT ARTICULATE A RATIONAL METHODOLOGY FOR DETERMINING QUANTIFIABLE ENVIRONMENTAL COSTS AND BENEFITS.

The Power Act requires that the Plan contain "a methodology for determining quantifiable environmental costs and benefits under section 839a(4) of this title." 16 U.S.C. § 839b(e)(3)(C). Section 839a(4) describes the cost-effectiveness of conservation measures or power resources in terms of the "system costs" of those resources or measures. Id. § 839a(4)(A)-(B). The "system costs" of a measure or resource over its effective life includes such elements as fuel costs, waste disposal, end-of-cycle costs, and "such quantifiable environmental costs and benefits as the Administrator determines, on the basis of a methodology developed

by the Council as part of the plan." Id. § 839a(4)(B). The Council failed to satisfy this requirement in at least two ways.

A. The Council Did Not Include a Methodology in the Power Plan Itself.

As a threshold matter, the Power Act requires the methodology for evaluating environmental costs and benefits to be detailed and applied within the Plan itself. 16 U.S.C. § 839b(e)(3) (listing required elements of Plan). The Council, however, acknowledged that it failed to include this methodology in its draft Plan, and instead relegated it to a short appendix of the final Plan that was added only after the close of the comment period.[17] ER:237 (Statement of Basis admitting that "nowhere in the draft plan did the Council state that methodology explicitly."). While the Council maintains that "the draft plan applied a methodology for determining quantifiable costs and benefits," the record belies that assertion. Id. (emphasis in original). The methodology was not explicitly mentioned or specifically discussed by the Council in considering the draft of the final plan, nor is it evident in the Council's considerations of costs or reliability. The Council's failure to articulate and apply a specific methodology in developing the Plan is itself contrary to the Power Act and is arbitrary and capricious.

[17] As a presentation after the close of the comment period summarizes, "[c]omments have pointed out that this required part of the power plan is missing," and notes that "[a] draft of this new appendix has been added" to the final plan. ER:526. But see ER:477 (Council member noting that "[t]he appendices aren't something the Power Committee goes through with a fine-toothed comb").

B. The Described Methodology Does Not Adequately Capture Environmental Costs and Benefits.

Most significantly, the methodology the Council finally described in Appendix P—even if it were applied in the Plan—fails to provide a rational method for calculating environmental costs and benefits of resources or measures necessary to meet the goals of the Act. The methodology largely relies on "[a]n entire regulatory structure [] in place at the national, state, and local levels to address environmental effects of various economic activities." ER:204 (Appendix P). The Act requires the Council to develop and apply a methodology for determining quantifiable environmental costs and benefits for considering power resources or conservation measures needed to ensure a reliable and cost-effective power supply. As the Council elsewhere acknowledges, it "has a responsibility to consider the quantifiable environmental costs and benefits of different resources as it decides what is within its planning authority; what are the most cost-effective resources to add to the existing system over time to meet forecast load growth and potential changes to the existing system." ER:230. Merely referencing, or bootstrapping to existing law does not accomplish this more specific and substantial duty to capture the true costs and benefits of resources or measures that would accommodate load growth and changes to the existing system necessary to achieve the Act's dual salmon restoration and power supply goals.

Indeed, the Council's treatment of environmental costs and benefits in the

Plan suffers from this lack of a defined methodology and leads to a one-sided discussion of costs. As discussed in more detail below, while the Council considered fish protection and "hydro operations consistent with the Council's Fish and Wildlife Program" as an energy-related "cost of policy choices that have already been made," it does not discuss or set forth a methodology for determining the environmental costs of its continued reliance on hydropower resources or its failure to include in the Plan the resources or measures necessary to reduce the impacts of the hydrosystem on salmon.[18] ER:205. The environmental and net social costs of continuing to rely on (and attempting to mitigate) existing hydropower resources that may lead to the extinction of salmon runs exceed the costs of replacing power over time. See Michael C. Blumm et. al., Saving Snake River Water and Salmon Simultaneously: The Biological, Economic, and Legal Case for Breaching the Lower Snake River Dams, Lowering John Day Reservoir, and Restoring Natural River Flows, 28 Envtl. L. 997, 1028 (1998). But none of these environmental costs are captured in the Council's analysis. Accordingly, the

[18] The broad language of 16 U.S.C. §§ 839b(e)(3)(C) and 839a(4)(B) does not contain any temporal limitations that constrict the inquiry to only future resources or conservation measures. To the contrary, because quantification of environmental costs and benefits of a potential future resource or conservation measure is in part necessarily gauged by reference to existing generating resources and conservation measures, the methodology must provide for consideration of the costs and benefits of those existing resources that the Council decides to carry forward.

Council also failed to consider any "potential changes to the existing system" in light of these costs.

Nor does the Plan quantify or consider the environmental benefits of hydrosystem operations or other resources that protect, mitigate, and enhance salmon and steelhead stocks (i.e., benefits to local economies from increased commercial and recreational fishing, or the value to ecosystems and other fish and wildlife from increased salmon and steelhead populations). While the Council acknowledges that some power resource decisions may have ancillary benefits to the environment, see ER:206 (noting that "high efficiency clothes washers not only save energy, they also reduce water and detergent use"), the Council fails to apply that concept to resources or conservation measures in the Plan. It does not, for example, identify or discuss conservation measures, efficiencies, or other resource acquisitions that reduce reliance on hydropower and have ancillary, but significant, environmental benefits to anadromous fish and net social and economic benefits to communities that rely upon them. Indeed, the Council's methodology contains no mention whatsoever of the tremendous economic and environmental value of anadromous fish resources—quantifiable benefits that should be included in a consideration of the costs associated with resource decisions in the Power Plan.

The controversy over the alleged "cost" of fish passage spill illustrates one consequence of the Council's failure to identify and apply any methodology in the

Plan. See infra at Section III. While in Appendix M, the Council retained BPA's improper and inflated estimates of the "costs" of forgone hydropower production, the Council did not consider the environmental costs of the hydrosystem resources carried forward in the Plan's resource portfolio, let alone the environmental benefits of increased spill. The Council's failure to adopt a methodology that would capture and weigh the environmental benefits of spill against the environmental costs of existing hydropower operations that fail to meet the salmon restoration mandate of the Act ensures that the ledger remains impermissibly tilted.

A proper and balanced methodology for considering benefits of resources and measures would attempt to quantify these and other environmental costs and benefits, so the Council and the Administrator could take those benefits (and the corresponding costs) into consideration when making resource decisions, including decisions whether to carry forward the existing resource portfolio. Such a methodology would allow a comparison between the existing system and the costs and benefits of other potential configurations of resources and conservation measures.

The Plan does not outline (or apply) a methodology to quantify or consider the environmental costs and benefits of any of existing or future generating resources and conservation measures. The Council's failure to develop, include, or apply this methodology in the Sixth Plan violates the Power Act's mandate and is

arbitrary and capricious.

III. THE COUNCIL'S DISCUSSION OF COSTS IN APPENDIX M IS ARBITRARY AND CAPRICIOUS.

Closely related to the Council's overarching failure to adopt or apply a methodology for environmental costs and benefits, the Council's reporting of the "costs" of the 2009 Program in Appendix M reflects an inaccurate and inflated estimate of the true cost of that program's fish protection measures. The Council's adoption of these cost figures both exacerbates and illustrates the problem with the Council's failure to develop an approach that objectively and comprehensively evaluates the environmental costs and benefits of different power resources and measures.

The Council's discussion of costs of fish and wildlife operations in Appendix M of the Sixth Power Plan is arbitrary and capricious because: (1) the Council included economically irrelevant forgone revenue "costs" of activities necessary to comply with the law; (2) the Council failed to adequately explain its rationale for abandoning a more complete and accurate discussion of various cost methodologies, and (3) the Council failed to consider a relevant factor in its decision to eliminate these costs—namely, the chilling effect that inaccurate and inflated cost estimates can have on fish and wildlife measures necessary to achieve the fish protection goal of the Power Act. The consequences of the Council's *de facto* adoption of BPA's methodologies infects the Plan, the Program, and the

general approach to fish protection in the region.

A. The Council Failed to Rationally Explain Its Decision to Adopt BPA's Cost Estimates and Abandon Other Methodologies.

Appendix M of the final Sixth Power Plan correctly explains that in the past, "[t]he regional power supply has reliably provided actions specified to benefit fish and wildlife (and absorbed the cost of those actions) while maintaining an adequate, efficient, economic and reliable energy supply ... even though the hydroelectric operations specified for fish and wildlife have a sizeable impact on power generation." ER:172. After considering whether that continues to be the case for the (limited and inadequate) measures included in the 2009 Program, the Council concluded that "the regional power supply can reliably provide the actions specified to benefit fish and wildlife (and absorb their cost), respond to other challenges to the reliability and adequacy of the regional system … and maintain an adequate, efficient, economic, and reliable energy supply." ER:185-186. But the Council based this finding on BPA's estimation that the "costs" of the fish and wildlife measures range between $750-900 million per year "combining ordinary and capital expenditures, power purchases, and foregone revenues associated with operations to benefit fish and wildlife (when compared to a scenario with no such operations)." ER:172-173 (emphasis added).

There are several reasons why consideration and reliance on these figures is arbitrary. First, it is improper to account for fish protection as a "forgone revenue"

where the Power Act specifically mandates "sufficient quantities and qualities of flows" for successful salmon migration and other fish protection measures. 16 U.S.C. § 839b(e)(2); see also id. at § 839b(h)(6)(E)(ii) (same); id. at § 839b(h)(11)(A)(i) (requiring BPA and other federal agencies to exercise their responsibilities "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"). As the Council correctly summarized in the draft Appendix M, operating dams without regard to fish protection fish is simply "not a real opportunity under the current understandings of law and policy." ER:325. Without "real opportunity," there can be no real opportunity cost. Any calculation of the "forgone revenue" from fish protection measures must necessarily be based on the legally bankrupt assumption that BPA is entitled to all of the water in the river for power production. As the Council candidly (and correctly) acknowledged in the draft Appendix M, "the cost of the difference between current fish operations and no fish operations is irrelevant to current decision making." ER:325.

Indeed, Congress has already determined that the Council must identify measures that protect, mitigate, and enhance fish and wildlife without regard to the cost of those measures "so long as an adequate, efficient, economical, and reliable power supply is assured." NRIC, 35 F.3d at 1394. In NRIC, this Court reviewed

the legislative history of the Act and concluded that "Congress expected increased costs and lost profits to the hydropower system to the extent the system was responsible for damaging fish and wildlife," id. at 1395. The Act illustrated this Congressional expectation by "emphasiz[ing] the achievement of predetermined biological objectives in a least-cost manner," but otherwise "prevent[ing] cost considerations from precluding the biologically sound restoration of anadromous fish." Id. at 1394 (summarizing and citing legislative history). The Council's task in the power plan is not to determine, parse, or allocate the cost of any given fish and wildlife protection measures, but rather to simply ensure that the power supply remains adequate, reliable, economical, and efficient in light of all of the measures. The Council's sanction of a legally and economically fatally-flawed cost allocation methodology for fish and wildlife measures advocated by power interests is not only outside the authority conveyed by the Power Act, it violates the Act's mandate to provide salmon the river flows necessary to achieve the fish restoration intent of the Act. 16 U.S.C. §§ 839b(e)(2); 839b(h)(6)(E)(ii).

Second, despite acknowledging this overarching problem with forgone revenues, the Council proceeded in the Draft Appendix M to estimate those costs using two methods and discussing the issues surrounding each. ER:322 ("discuss[ing] the costs of the fish/power integration [] from a number of different viewpoints."). See also ER:322-334. The Council began this discussion by

finding that the cost estimate methodology that BPA and the Council employed in the past involves "comparing whatever are the current operations for fish and wildlife to a hydrosystem operation without fish and wildlife constraints, estimating the difference in generation per month, pricing that difference at whatever is the current market price for electricity, and summing the differences." ER:322. This method is not based on the rates that BPA actually charges its customers for power (which are based on the average costs of all the resources available to BPA), ER:323, but instead uses wholesale market rates to calculate the value of the energy that could have been, but for the operation necessary to protect salmon, generated by the FCRPS. Id. Using BPA's methodology, the Council concluded that "average *power system operations* cost of the fish and wildlife program is about $450 million" per year. ER:331 (emphasis in original).

Noting that "others, inside and outside the Council, have objected to that practice, for a number of reasons," ER:322, the Council concluded that this "traditional 'market price' calculation … is essentially irrelevant to the power plan's resource development efforts, and the Power Act's provision for accommodating the fish and wildlife program through resource planning and additions." ER:323. Draft Appendix M then lays out a second "Replacement Resource Cost" methodology for determining the costs of the fish and wildlife program using average resource replacement costs. ER:324. This method prices

power based on the average rates that BPA actually charges its customers for power (which are based on the average costs of all the resources available to BPA). Id. Using that methodology, "[t]he average annual cost of the fish and wildlife program is approximated to be in the range of $300 million." Id. See also id. at Figure M-15 (showing average annual cost of $274 million).

While in the Draft Appendix M, the Council acknowledged both that estimating the forgone revenue costs in general was irrelevant to the power planning process, and that BPA methods for doing so were problematic, the Council dropped all discussion of other methodologies (and the lower costs they produce) from the final plan, but retained the estimate of the fish and wildlife costs using BPA's "market rate method." ER:172-173. Under that method, BPA estimates its fish and wildlife costs at $750-900 million per year. According to the Council's previous analysis, an average of $450 million of this total is attributable to the forgone revenue and other "power system operations cost." ER:331. The Council's Final Statement of Basis and Purpose, which contained a response to comments submitted on the Draft Sixth Power Plan, provided the only explanation for retaining BPA's estimate. See ER:208-239 (Statement of Basis). That explanation simply noted that "[t]he Council eliminated the lengthy discussion of fish and wildlife costs that appeared in the draft plan's Appendix M," but retained and reported BPA's cost estimates even though the Council maintained that "the

costs of the fish and wildlife program have no direct bearing on the development of the power plan's resource strategy." ER:238.

While the administrative record reflects that Appendix M was subject to some debate among Council members and staff, the record does not explain the decision to retain BPA's cost estimates or to exclude other methodologies for estimating costs. For example, a presentation prepared for the Council notes that "[i]n response to comments, the section on calculation for the cost of [fish and wildlife] operations on the power system was modified substantially, only costs shown are as calculated by BPA." ER:522. That slide also suggests "[a]dd[ing] clarification that this calculation of cost does not affect the power plan itself, only the operations matter." Id. To the extent the Council believed that the reporting of fish and wildlife costs was irrelevant to the Plan, the Council failed to explain why it chose to retain *any* estimate of costs, nor did the Council explain why it chose to retain BPA's legally and economically flawed estimate in particular.

Similarly, while several Council members raised questions about reporting BPA's costs, those questions are not addressed in the Plan or by the Council's Statement of Basis. For example, one Council member noted that "she liked the language without those numbers and noted that foregone revenue is a very controversial issue," and correctly cautioned that "[p]eople might think that putting in a dollar amount could equate to meeting the needs of the Power Act when it

doesn't." ER:477 (minutes of August 11-12, 2009 meeting). These concerns are not addressed in the Plan. The Council discussed Appendix M at other meetings, but those discussions do not explain why BPA's costs are retained. See, e.g., ER:536-537. See ER:546-547 and ER:549 (meeting minutes from adoption of Sixth Plan reflecting general discussion of Appendix M, but no explanation of why BPA's cost estimates were retained).

The Council's decision to retain BPA's cost estimate despite finding "that the costs of the fish and wildlife program have no direct bearing on the development of the power plan's resource strategy," and rejecting other cost accounting methodologies without adequate explanation, is arbitrary and capricious. The Council did not rationally explain why it chose to rely only on BPA's market rate cost allocation methodology, why it abandoned discussion of the average cost methodology it included in its Draft Sixth Power Plan, nor did it address the consequences of the choice between methods. The Council has failed to adequately "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

B. The Council Failed to Consider the Effects of Cost Estimates on Fish Measures.

The Council's legal errors are not without consequence. As the Council

recognized (but failed to address), the issue of forgone revenue "costs" in general and BPA's calculation of those costs in particular are a matter of substantial controversy. The Council's choices to report forgone revenue "costs" at all, and to rely only on BPA's market cost method to do so, arbitrarily exaggerates the energy-related costs of necessary modifications to the hydrosystem. This has a chilling effect not only on consideration of additional measures for fish protection in the Plan itself, but also infects future amendments to the fish and wildlife program, and even decisions or actions taken pursuant to other laws.

For example, as discussed above, the Council's independent duty to give due consideration to whether the Plan (including the 2009 Program) provides river flows of adequate quantity and quality for fish migration requires the Council to assess whether there are additional measures to aid fish migration, and whether the power system can accommodate those measures without undermining the reliability, efficiency, or economy of the power supply. As a practical matter, inflating the supposed costs of such fish protection measures interferes with the Council's incentive and ability to consider additional protections in the Plan and could affect its evaluation of maintaining a reliable and economical power supply.

The same is true for future fish and wildlife program amendments. Although it develops the program before the plan, the Council does so with an eye towards what it believes the power system can accommodate. See 16 U.S.C.

§ 839b(h)(5) (requiring Council to develop fish and wildlife program "while assuring" an adequate, reliable, economical power supply). Inflated notions of the costs or "expenditures" under the current program has a chilling effect on the fish managers' or the general public's recommendations. For example, a proposal to implement 50% more mitigation to protect fish and wildlife resources might appear to impose costs that would conflict with maintaining an economical power system using BPA's market cost methodology. But if costs are calculated without regard to forgone revenue altogether, or by employing the average cost method the Council detailed in Draft Appendix M instead, the same additional mitigation would appear far more economical, especially when considering the Act's requirement for "sufficient quantities and qualities of flows" and the net social benefits of restored fish populations.

As these examples demonstrate, the Council's sanction of BPA's methodology has practical impacts in the real world that were not considered or discussed in its decision to retain BPA's cost allocation methodologies in the Plan. In light of the Council's (correct) determination that BPA's methodology for calculating fish "costs" was irrelevant to the Plan, and in any event reflected only part of the picture, its decision to nevertheless retain that figure fails to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made," Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43.

This Court should vacate and remand this portion of the Sixth Power Plan.

IV. THE COURT SHOULD PARTIALLY REMAND THE PLAN TO THE COUNCIL TO COMPLY WITH THE POWER ACT.

While NRIC agrees with and supports the Council's conclusion in the Sixth Plan that the Northwest can readily maintain and even expand its efficient, economical, and reliable power supply largely through conservation and renewable energy, the Council—for all the reasons detailed above—has failed in the Plan to address its responsibilities for fish and wildlife protection.

NRIC respectfully requests that this Court declare that the Plan fails to achieve the protection, mitigation, and enhancement of anadromous fish in the Snake and Columbia Rivers while ensuring a reliable and economical regional power supply, fails to provide due consideration to the needs of anadromous fish, fails to adopt or apply a methodology for environmental costs and benefits of power resources that fully or fairly captures and balances the benefits of salmon and steelhead restoration in the Snake and Columbia Rivers, and arbitrarily adopts a methodology that inflates the perceived economic impacts of fish protection measures.

The Court should issue a tailored remand of the Plan to the Council to address all aspects of the Sixth Power Plan necessary to correct these legal errors within 180 days of this Court's decision. To facilitate a timely remand that addresses the Council's responsibilities, the Court should direct the Council to

specifically:

(1) consider the specific measures necessary to achieve the anadromous fish protection goals of the Act—especially for Snake River salmon and steelhead jeopardized by the FCRPS—including but not limited to provision of flows of adequate quantity and quality to provide safe migration conditions and any changes to the power system necessary to accomplish these measures;

(2) recognize that fish and wildlife measures "cannot be rejected solely because [they] will result in power losses and economic costs," NRIC, 35 F.3d at 1394, and to document how such measures can be implemented and any necessary conservation or resources can be added, without interfering with providing a reliable and economical power supply; and

(3) consider the timeline necessary to accomplish these measures.

This specifically tailored relief is justified by several factors. First, the Council has the authority to reexamine and amend the Sixth Plan. The Act specifically provides that the Council may amend the "adopted plan, or any portion thereof from time to time…." 16 U.S.C. § 839b(d)(1); see also id. at § 839a(15) (defining "Plan" to include "any amendments thereto"). An amendment that considers and includes the measures necessary to protect, mitigate, and enhance anadromous fish need not consume the time ordinarily committed to adoption of

the full Plan, especially where the Council's task is clear. Second, this Court has the authority to tailor a remand with deadlines and conditions to achieve compliance with the law. See, e.g., Nat'l Org. of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs, 260 F.3d 1365, 1381 (Fed. Cir. 2001) (requiring agency rulemaking in 120 days); MCI Telecomm. Corp. v. FCC, 143 F.3d 606, 609 (D.C. Cir. 1998) (imposing six-month deadline). In addition to imposing a deadline, the Court "has broad latitude in fashioning equitable relief when necessary to remedy an established wrong." Alaska Ctr. for the Environment v. Browner, 20 F.3d 981, 986 (9th Cir. 1994); see also ASARCO, Inc. v. Occupational Safety and Health Admin., 647 F.2d 1, 2 (9th Cir. 1981). The Court may "direct[] … specific steps" necessary "to bring about any progress toward achieving the congressional objectives of the [statute]…." Alaska Ctr., 20 F.3d at 986. Such action is justified here in light of the Council's 30-year history of failing to achieve the dual goals of the Power Act. While requiring the Council to consider and explain its treatment of the specific factors above (all of which are nevertheless required by the Act in the first instance), the remand outlined above still properly leaves to the Council the ultimate "substance and manner of achieving … compliance" with the law. Id.

CONCLUSION

More than thirty years ago, Congress declared that

> conservation and enhancement of the great migratory fish and wildlife populations of the Pacific Northwest, something of great concern to the sportsmen and conservationists of this Nation, are for the first time, a matter of urgent priority under this legislation.

They are placed on a par with other purposes for Federal facilities in this area. If the fish populations of the Pacific Northwest are to be restored to the sportsmen, the Indians and the commercial fishermen, this is the mechanism which will do it." NRIC, 35 F.3d at 1377, n.10 (quoting remarks of Rep. Dingell). Nearly twenty years ago, this Court found that the Power Act "adopted fish and wildlife protection as a primary goal" and "placed a premium on prompt action …" NRIC, 35 F.3d 1395. The Court noted that the Council's approach until that time "seems largely to have been from the premise that only small steps are possible, in light of entrenched river user claims of economic hardship." Id. These same words remain unfortunately applicable to the Council's Sixth Power Plan.

For all of the foregoing reasons, this Court should reverse the Council's Sixth Power Plan and issue a tailored remand of the Power Plan to the Council to bring the Plan into compliance with the requirements of the Power Act.

Respectfully submitted this 21st day of September, 2012.

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STATEMENT OF RELATED CASES

The undersigned, counsel for petitioner, Northwest Resource Information Center, are not aware of any related cases.

Respectfully submitted this 21st day of September, 2012.

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CERTIFICATE OF COMPLIANCE

I certify that: (check appropriate option(s))

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Respectfully submitted this 21st day of September, 2012.

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CERTIFICATE OF SERVICE

I am a citizen of the United States and a resident of the State of Washington. I am over 18 years of age and not a party to this action. My business address is 705 Second Avenue, Suite 203, Seattle, Washington 98104.

On September 21, 2012, I served a true and correct copy of the following documents on the parties listed below:

1. Petitioner's Opening Brief; and
2. Declaration of James Edward Chaney in Support of Petitioner's Opening Brief.

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I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and correct. Executed this 21st day of September, 2012, at Seattle, Washington.

Catherine Hamborg

ADDENDUM

(C) any payment of principal of an old capital investment shall reduce the outstanding principal balance of the old capital investment in the amount of the payment at the time the payment is tendered; and

(D) any payment of interest on the unpaid balance of the new principal amount of an old capital investment shall be a credit against the appropriate interest account in the amount of the payment at the time the payment is tendered;

(2) apart from charges necessary to repay the new principal amount of an old capital investment as established under subsection (b) of this section and to pay the interest on the principal amount under subsection (c) of this section, no amount may be charged for return to the United States Treasury as repayment for or return on an old capital investment, whether by way of rate, rent, lease payment, assessment, user charge, or any other fee;

(3) amounts provided under section 1304 of title 31 shall be available to pay, and shall be the sole source for payment of, a judgment against or settlement by the Administrator or the United States on a claim for a breach of the contract provisions required by this Part;[1] and

(4) the contract provisions specified in this Part[1] do not—

(A) preclude the Administrator from recovering, through rates or other means, any tax that is generally imposed on electric utilities in the United States, or

(B) affect the Administrator's authority under applicable law, including section 839e(g) of this title, to—

(i) allocate costs and benefits, including but not limited to fish and wildlife costs, to rates or resources, or

(ii) design rates.

(j) Savings provisions

(1) Repayment

This section does not affect the obligation of the Administrator to repay the principal associated with each capital investment, and to pay interest on the principal, only from the ''Administrator's net proceeds,'' as defined in section 838k(b) of this title.

(2) Payment of capital investment

Except as provided in subsection (e) of this section, this section does not affect the authority of the Administrator to pay all or a portion of the principal amount associated with a capital investment before the repayment date for the principal amount.

(Pub. L. 104–134, title III, § 3201, Apr. 26, 1996, 110 Stat. 1321–350.)

CODIFICATION

Section was enacted as part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, and not as part of the Federal Columbia River Transmission System Act which comprises this chapter.

Section is comprised of section 3201 of Pub. L. 104–134. Subsec. (h) of section 3201 of Pub. L. 104–134 amended section 6 of Pub. L. 103–436, which is not classified to the Code.

[1] So in original. Probably should be ''section;'' or ''section''.

CHAPTER 12H—PACIFIC NORTHWEST ELECTRIC POWER PLANNING AND CONSERVATION

Sec.
839. Congressional declaration of purpose.
839a. Definitions.
839b. Regional planning and participation.
839c. Sale of power.
839d. Conservation and resource acquisition.
839d–1. Federal projects in Pacific Northwest.
839e. Rates.
839f. Administrative provisions.
839g. Savings provisions.
839h. Separability.

§ 839. Congressional declaration of purpose

The purposes of this chapter, 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:

(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) to assure the Pacific Northwest of an adequate, efficient, economical, and reliable power supply;

(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;

(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;

(5) to insure, subject to the provisions of this chapter—

(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

(B) that Congress intends that this chapter 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 lim-

ited to, actions to plan, develop, and operate resources and to achieve conservation, without regard to this chapter; and

(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 the Federal Columbia River Power System and other power generating facilities on the Columbia River and its tributaries.

(Pub. L. 96–501, § 2, Dec. 5, 1980, 94 Stat. 2697.)

REFERENCES IN TEXT

This chapter, referred to in provision preceding par. (1) and in par. (5), was in the original ''this Act'', meaning Pub. L. 96–501, Dec. 5, 1980, 94 Stat. 2697, known as the Pacific Northwest Electric Power Planning and Conservation Act, which enacted this chapter, amended sections 837, 838i, and 838k of this title, and enacted provisions set out as notes under this section. For complete classification of this Act to the Code, see Short Title note set out below and Tables.

EFFECTIVE DATE

Section 11 of Pub. L. 96–501 provided that: ''This Act [enacting this chapter, amending sections 837, 838i, and 838k of this title, and enacting provisions set out as notes under this section] shall be effective on the date of enactment [Dec. 5, 1980], or October 1, 1980, whichever is later. For purposes of this Act, the term 'date of the enactment of this Act' means such date of enactment [Dec. 5, 1980] or October 1, 1980, whichever is later.''

SHORT TITLE

Section 1 of Pub. L. 96–501 provided in part that: ''This Act [enacting this chapter, amending sections 837, 838i, and 838k of this title, and enacting provisions set out as notes under this section] may be cited as the 'Pacific Northwest Electric Power Planning and Conservation Act'.''

§ 839a. Definitions

As used in this chapter, the term—

(1) ''Acquire'' and ''acquisition'' shall not be construed as authorizing the Administrator to construct, or have ownership of, under this chapter or any other law, any electric generating facility.

(2) ''Administrator'' means the Administrator of the Bonneville Power Administration.

(3) ''Conservation'' means any reduction in electric power consumption as a result of increases in the efficiency of energy use, production, or distribution.

(4)(A) ''Cost-effective'', when applied to any measure or resource referred to in this chapter, means that such measure or resource must be forecast—

(i) to be reliable and available within the time it is needed, and

(ii) to meet or reduce the electric power demand, as determined by the Council or the Administrator, as appropriate, of the consumers of the customers at an estimated incremental system cost no greater than that of the least-cost similarly reliable and available alternative measure or resource, or any combination thereof.

(B) For purposes of this paragraph, the term ''system cost'' means an estimate of all direct costs of a measure or resource over its effective life, including, if applicable, the cost of distribution and transmission to the consumer and, among other factors, waste disposal costs, end-of-cycle costs, and fuel costs (including projected increases), and such quantifiable environmental costs and benefits as the Administrator determines, on the basis of a methodology developed by the Council as part of the plan, or in the absence of the plan by the Administrator, are directly attributable to such measure or resource.

(C) In determining the amount of power that a conservation measure or other resource may be expected to save or to produce, the Council or the Administrator, as the case may be, shall take into account projected realization factors and plant factors, including appropriate historical experience with similar measures or resources.

(D) For purposes of this paragraph, the ''estimated incremental system cost'' of any conservation measure or resource shall not be treated as greater than that of any nonconservation measure or resource unless the incremental system cost of such conservation measure or resource is in excess of 110 per centum of the incremental system cost of the nonconservation measure or resource.

(5) ''Consumer'' means any end user of electric power.

(6) ''Council'' means, unless otherwise specifically provided, the members appointed to the Pacific Northwest Electric Power and Conservation Planning Council established pursuant to section 839b of this title.

(7) ''Customer'' means anyone who contracts for the purchase of power from the Administrator pursuant to this chapter.

(8) ''Direct service industrial customer'' means an industrial customer that contracts for the purchase of power from the Administrator for direct consumption.

(9) ''Electric power'' means electric peaking capacity, or electric energy, or both.

(10) ''Federal base system resources'' means—

(A) the Federal Columbia River Power System hydroelectric projects;

(B) resources acquired by the Administrator under long-term contracts in force on December 5, 1980; and

(C) resources acquired by the Administrator in an amount necessary to replace reductions in capability of the resources referred to in subparagraphs (A) and (B) of this paragraph.

(11) ''Indian tribe'' means any Indian tribe or band which is located in whole or in part in the region and which has a governing body which is recognized by the Secretary of the Interior.

(12) ''Major resource'' means any resource that—

(A) has a planned capability greater than fifty average megawatts, and

(B) if acquired by the Administrator, is acquired for a period of more than five years.

Such term does not include any resource acquired pursuant to section 838i(b)(6) of this title.

(13) ''New large single load'' means any load associated with a new facility, an existing facility, or an expansion of an existing facility—

(A) which is not contracted for, or committed to, as determined by the Administrator, by a public body, cooperative, investor-owned utility, or Federal agency customer prior to September 1, 1979, and

(B) which will result in an increase in power requirements of such customer of ten average megawatts or more in any consecutive twelve-month period.

(14) ''Pacific Northwest'', ''region'', or ''regional'' means—

(A) the area consisting of the States of Oregon, Washington, and Idaho, the portion of the State of Montana west of the Continental Divide, and such portions of the States of Nevada, Utah, and Wyoming as are within the Columbia River drainage basin; and

(B) any contiguous areas, not in excess of seventy-five air miles from the area referred to in subparagraph (A), which are a part of the service area of a rural electric cooperative customer served by the Administrator on December 5, 1980, which has a distribution system from which it serves both within and without such region.

(15) ''Plan'' means the Regional Electric Power and Conservation plan (including any amendments thereto) adopted pursuant to this chapter and such plan shall apply to actions of the Administrator as specified in this chapter.

(16) ''Renewable resource'' means a resource which utilizes solar, wind, hydro, geothermal, biomass, or similar sources of energy and which either is used for electric power generation or will reduce the electric power requirements of a consumer, including by direct application.

(17) ''Reserves'' means the electric power needed to avert particular planning or operating shortages for the benefit of firm power customers of the Administrator and available to the Administrator (A) from resources or (B) from rights to interrupt, curtail, or otherwise withdraw, as provided by specific contract provisions, portions of the electric power supplied to customers.

(18) ''Residential use'' or ''residential load'' means all usual residential, apartment, seasonal dwelling and farm electrical loads or uses, but only the first four hundred horsepower during any monthly billing period of farm irrigation and pumping for any farm.

(19) ''Resource'' means—

(A) electric power, including the actual or planned electric power capability of generating facilities, or

(B) actual or planned load reduction resulting from direct application of a renewable energy resource by a consumer, or from a conservation measure.

(20) ''Secretary'' means the Secretary of Energy.

(Pub. L. 96–501, § 3, Dec. 5, 1980, 94 Stat. 2698.)

§ 839b. Regional planning and participation

(a) Pacific Northwest Electric Power and Conservation Planning Council; establishment and operation as regional agency

(1) The purposes of this section are to provide for the prompt establishment and effective operation of the Pacific Northwest Electric Power and Conservation Planning Council, to further the purposes of this chapter by the Council promptly preparing and adopting (A) a regional conservation and electric power plan and (B) a program to protect, mitigate, and enhance fish and wildlife, and to otherwise expeditiously and effectively carry out the Council's responsibilities and functions under this chapter.

(2) To achieve such purposes and facilitate cooperation among the States of Idaho, Montana, Oregon, and Washington, and with the Bonneville Power Administration, the consent of Congress is given for an agreement described in this paragraph and not in conflict with this chapter, pursuant to which—

(A) there shall be established a regional agency known as the ''Pacific Northwest Electric Power and Conservation Planning Council'' which (i) shall have its offices in the Pacific Northwest, (ii) shall carry out its functions and responsibilities in accordance with the provisions of this chapter, (iii) shall continue in force and effect in accordance with the provisions of this chapter, and (iv) except as otherwise provided in this chapter, shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law; and

(B) two persons from each State may be appointed, subject to the applicable laws of each such State, to undertake the functions and duties of members of the Council.

The State may fill any vacancy occurring prior to the expiration of the term of any member. The appointment of six initial members, subject to applicable State law, by June 30, 1981, by at least three of such States shall constitute an agreement by the States establishing the Council and such agreement is hereby consented to by the Congress. Upon request of the Governors of two of the States, the Secretary shall extend the June 30, 1981, date for six additional months to provide more time for the States to make such appointments.

(3) Except as otherwise provided by State law, each member appointed to the Council shall serve for a term of three years, except that, with respect to members initially appointed, each Governor shall designate one member to serve a term of two years and one member to serve a term of three years. The members of the Council shall select from among themselves a chairman. The members and officers and employees of the Council shall not be deemed to be officers or employees of the United States for any purpose. The Council shall appoint, fix compensation, assign and delegate duties to such executive and additional personnel as the Council deems nec-

essary to fulfill its functions under this chapter, taking into account such information and analyses as are, or are likely to be, available from other sources pursuant to provisions of this chapter. The compensation of the members shall be fixed by State law. The compensation of the members and the officers shall not exceed the rate prescribed for Federal officers and positions at step 1 of level GS–18 of the General Schedule.

(4) For the purpose of providing a uniform system of laws, in addition to this chapter, applicable to the Council relating to the making of contracts, conflicts-of-interest, financial disclosure, open meetings of the Council, advisory committees, disclosure of information, judicial review of Council functions and actions under this chapter, and related matters, the Federal laws applicable to such matters in the case of the Bonneville Power Administration shall apply to the Council to the extent appropriate, except that with respect to open meetings, the Federal laws applicable to open meetings in the case of the Federal Energy Regulatory Commission shall apply to the Council to the extent appropriate. In applying the Federal laws applicable to financial disclosure under the preceding sentence, such laws shall be applied to members of the Council without regard to the duration of their service on the Council or the amount of compensation received for such service. No contract, obligation, or other action of the Council shall be construed as an obligation of the United States or an obligation secured by the full faith and credit of the United States. For the purpose of judicial review of any action of the Council or challenging any provision of this chapter relating to functions and responsibilities of the Council, notwithstanding any other provision of law, the courts of the United States shall have exclusive jurisdiction of any such review.

(b) Alternative establishment of Council as Federal agency

(1) If the Council is not established and its members are not timely appointed in accordance with subsection (a) of this section, or if, at any time after such Council is established and its members are appointed in accordance with subsection (a) of this section—

(A) any provision of this chapter relating to the establishment of the Council or to any substantial function or responsibility of the Council (including any function or responsibility under subsection (d) or (h) of this section or under section 839d(c) of this title) is held to be unlawful by a final determination of any Federal court, or

(B) the plan or any program adopted by such Council under this section is held by a final determination of such a court to be ineffective by reason of subsection (a)(2)(B) of this section,

the Secretary shall establish the Council pursuant to this subsection as a Federal agency. The Secretary shall promptly publish a notice thereof in the Federal Register and notify the Governors of each of the States referred to in subsection (a) of this section.

(2) As soon as practicable, but not more than thirty days after the publication of the notice referred to in paragraph (1) of this subsection, and thereafter within forty-five days after a vacancy occurs, the Governors of the States of Washington, Oregon, Idaho, and Montana may each (under applicable State laws, if any) provide to the Secretary a list of nominations from such State for each of the State's positions to be selected for such Council. The Secretary may extend this time an additional thirty days. The list shall include at least two persons for each such position. The list shall include such information about such nominees as the Secretary may request. The Secretary shall appoint the Council members from each Governor's list of nominations for each State's positions, except that the Secretary may decline to appoint for any reason any of a Governor's nominees for a position and shall so notify the Governor. The Governor may thereafter make successive nominations within forty-five days of receipt of such notice until nominees acceptable to the Secretary are appointed for each position. In the event the Governor of any such State fails to make the required nominations for any State position on such Council within the time specified for such nominations, the Secretary shall select from such State and appoint the Council member or members for such position. The members of the Council shall select from among themselves one member of the Council as Chairman.

(3) The members of the Council established by this subsection who are not employed by the United States or a State shall receive compensation at a rate equal to the rate prescribed for offices and positions at level GS–18 of the General Schedule for each day such members are engaged in the actual performance of duties as members of such Council, except that no such member may be paid more in any calendar year than an officer or employee at step 1 of level GS–18 is paid during such year. Members of such Council shall be considered officers or employees of the United States for purposes of title II of the Ethics in Government Act of 1978 (5 U.S.C. app.)[1] and shall also be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in Government service are allowed expenses under section 5703 of title 5. Such Council may appoint, and assign duties to, an executive director who shall serve at the pleasure of such Council and who shall be compensated at the rate established for GS–18 of the General Schedule. The executive director shall exercise the powers and duties delegated to such director by such Council, including the power to appoint and fix compensation of additional personnel in accordance with applicable Federal law to carry out the functions and responsibilities of such Council.

(4) When a Council is established under this subsection after a Council was established pursuant to subsection (a) of this section, the Secretary shall provide, to the greatest extent feasible, for the transfer to the Council established by this subsection of all funds, books, papers, documents, equipment, and other matters in order to facilitate the Council's capability to

[1] See References in Text note below.

achieve the requirements of subsections (d) and (h) of this section. In order to carry out its functions and responsibilities under this chapter expeditiously, the Council shall take into consideration any actions of the Council under subsection (a) of this section and may review, modify, or confirm such actions without further proceedings.

(5)(A) At any time beginning one year after the plan referred to in such subsection (d) of this section and the program referred to in such subsection (h) of this section are both finally adopted in accordance with this chapter, the Council established pursuant to this subsection shall be terminated by the Secretary 90 days after the Governors of three of the States referred to in this subsection jointly provide for any reason to the Secretary a written request for such termination. Except as provided in subparagraph (B), upon such termination all functions and responsibilities of the Council under this chapter shall also terminate.

(B) Upon such termination of the Council, the functions and responsibilities of the Council set forth in subsection (h) of this section shall be transferred to, and continue to be funded and carried out, jointly, by the Administrator, the Secretary of the Interior, and the Administrator of the National Marine Fisheries Service, in the same manner and to the same extent as required by such subsection and in cooperation with the Federal and the region's State fish and wildlife agencies and Indian tribes referred to in subsection (h) of this section and the Secretary shall provide for the transfer to them of all records, books, documents, funds, and personnel of such Council that relate to subsection (h) matters. In order to carry out such functions and responsibilities expeditiously, the Administrator, the Secretary of the Interior, and the Administrator of the National Marine Fisheries Service shall take into consideration any actions of the Council under this subsection, and may review, modify, or confirm such actions without further proceedings. In the event the Council is terminated pursuant to this paragraph, whenever any action of the Administrator requires any approval or other action by the Council, the Administrator may take such action without such approval or action, except that the Administrator may not implement any proposal to acquire a major generating resource or to grant billing credits involving a major generating resource until the expenditure of funds for that purpose is specifically authorized by Act of Congress enacted after such termination.

(c) Organization and operation of Council

(1) The provisions of this subsection shall, except as specifically provided in this subsection, apply to the Council established pursuant to either subsection (a) or (b) of this section.

(2) A majority of the members of the Council shall constitute a quorum. Except as otherwise provided specifically in this chapter, all actions and decisions of the Council shall be by majority vote of the members present and voting. The plan or any part thereof and any amendment thereto shall not be approved unless such plan or amendment receives the votes of—

(A) a majority of the members appointed to the Council, including the vote of at least one member from each State with members on the Council; or

(B) at least six members of the Council.

(3) The Council shall meet at the call of the Chairman or upon the request of any three members of the Council. If any member of the Council disagrees with respect to any matter transmitted to any Federal or State official or any other person or wishes to express additional views concerning such matter, such member may submit a statement to accompany such matter setting forth the reasons for such disagreement or views.

(4) The Council shall determine its organization and prescribe its practices and procedures for carrying out its functions and responsibilities under this chapter. The Council shall make available to the public a statement of its organization, practices, and procedures, and make available to the public its annual work program budget at the time the President submits his annual budget to Congress.

(5) Upon request of the Council established pursuant to subsection (b) of this section, the head of any Federal agency is authorized to detail or assign to the Council, on a reimbursable basis, any of the personnel of such agency to assist the Council in the performance of its functions under this chapter.

(6) At the Council's request the Administrator of the General Services Administration shall furnish the Council established pursuant to subsection (b) of this section with such offices, equipment, supplies, and services in the same manner and to the same extent as such Administrator is authorized to furnish to any other Federal agency or instrumentality such offices, supplies, equipment, and services.

(7) Upon the request of the Congress or any committee thereof, the Council shall promptly provide to the Congress, or to such committee, any record, report, document, material, and other information which is in the possession of the Council.

(8) To obtain such information and advice as the Council determines to be necessary or appropriate to carry out its functions and responsibilities pursuant to this chapter, the Council shall, to the greatest extent practicable, solicit engineering, economic, social, environmental, and other technical studies from customers of the Administrator and from other bodies or organizations in the region with particular expertise.

(9) The Administrator and other Federal agencies, to the extent authorized by other provisions of law, shall furnish the Council all information requested by the Council as necessary for performance of its functions, subject to such requirements of law concerning trade secrets and proprietary data as may be applicable.

(10)(A) At the request of the Council, the Administrator shall pay from funds available to the Administrator the compensation and other expenses of the Council as are authorized by this chapter, including the reimbursement of those States with members on the Council for services and personnel to assist in preparing a plan pursuant to subsection (d) of this section and a program pursuant to subsection (h) of this section, as the Council determines are necessary or appropriate for the performance of its functions

and responsibilities. Such payments shall be included by the Administrator in his annual budgets submitted to Congress pursuant to the Federal Columbia River Transmission System Act [16 U.S.C. 838 et seq.] and shall be subject to the requirements of that Act, including the audit requirements of section 11(d) of such Act [16 U.S.C. 838i(d)]. The records, reports, and other documents of the Council shall be available to the Comptroller General for review in connection with such audit or other review and examination by the Comptroller General pursuant to other provisions of law applicable to the Comptroller General. Funds provided by the Administrator for such payments shall not exceed annually an amount equal to 0.02 mill multiplied by the kilowatt hours of firm power forecast to be sold by the Administrator during the year to be funded. In order to assist the Council's initial organization, the Administrator after December 5, 1980, shall promptly prepare and propose an amended annual budget to expedite payment for Council activities.

(B) Notwithstanding the limitation contained in the fourth sentence of subparagraph (A) of this paragraph, upon an annual showing by the Council that such limitation will not permit the Council to carry out its functions and responsibilities under this chapter the Administrator may raise such limit up to any amount not in excess of 0.10 mill multiplied by the kilowatt hours of firm power forecast to be sold by the Administrator during the year to be funded.

(11) The Council shall establish a voluntary scientific and statistical advisory committee to assist in the development, collection, and evaluation of such statistical, biological, economic, social, environmental, and other scientific information as is relevant to the Council's development and amendment of a regional conservation and electric power plan.

(12) The Council may establish such other voluntary advisory committees as it determines are necessary or appropriate to assist it in carrying out its functions and responsibilities under this chapter.

(13) The Council shall ensure that the membership for any advisory committee established or formed pursuant to this section shall, to the extent feasible, include representatives of, and seek the advice of, the Federal, and the various regional, State, local, and Indian Tribal Governments, consumer groups, and customers.

(d) Regional conservation and electric power plan

(1) Within two years after the Council is established and the members are appointed pursuant to subsection (a) or (b) of this section, the Council shall prepare, adopt, and promptly transmit to the Administrator a regional conservation and electric power plan. The adopted plan, or any portion thereof, may be amended from time to time, and shall be reviewed by the Council not less frequently than once every five years. Prior to such adoption, public hearings shall be held in each Council member's State on the plan or substantial, nontechnical amendments to the plan proposed by the Council for adoption. A public hearing shall also be held in any other State of the region on the plan or amendments thereto, if the Council determines that the plan or amendments would likely have a substantial impact on that State in terms of major resources which may be developed in that State and which the Administrator may seek to acquire. Action of the Council under this subsection concerning such hearings shall be subject to section 553 of title 5 and such procedure as the Council shall adopt.

(2) Following adoption of the plan and any amendment thereto, all actions of the Administrator pursuant to section 839d of this title shall be consistent with the plan and any amendment thereto, except as otherwise specifically provided in this chapter.

(e) Plan priorities and requisite features; studies

(1) The plan shall, as provided in this paragraph, give priority to resources which the Council determines to be cost-effective. Priority shall be given: first, to conservation; second, to renewable resources; third, to generating resources utilizing waste heat or generating resources of high fuel conversion efficiency; and fourth, to all other resources.

(2) The plan shall set forth a general scheme for implementing conservation measures and developing resources pursuant to section 839d of this title to reduce or meet the Administrator's obligations with due consideration by the Council for (A) environmental quality, (B) compatibility with the existing regional power system, (C) protection, mitigation, and enhancement of fish and wildlife and related spawning grounds and habitat, including sufficient quantities and qualities of flows for successful migration, survival, and propagation of anadromous fish, and (D) other criteria which may be set forth in the plan.

(3) To accomplish the priorities established by this subsection, the plan shall include the following elements which shall be set forth in such detail as the Council determines to be appropriate:

(A) an energy conservation program to be implemented under this chapter, including, but not limited to, model conservation standards;

(B) recommendation for research and development;

(C) a methodology for determining quantifiable environmental costs and benefits under section 839a(4) of this title;

(D) a demand forecast of at least twenty years (developed in consultation with the Administrator, the customers, the States, including State agencies with ratemaking authority over electric utilities, and the public, in such manner as the Council deems appropriate) and a forecast of power resources estimated by the Council to be required to meet the Administrator's obligations and the portion of such obligations the Council determines can be met by resources in each of the priority categories referred to in paragraph (1) of this subsection which forecast (i) shall include regional reliability and reserve requirements, (ii) shall take into account the effect, if any, of the requirements of subsection (h) of this section on the availability of resources to the Administrator, and (iii) shall include the approximate

amounts of power the Council recommends should be acquired by the Administrator on a long-term basis and may include, to the extent practicable, an estimate of the types of resources from which such power should be acquired;

(E) an analysis of reserve and reliability requirements and cost-effective methods of providing reserves designed to insure adequate electric power at the lowest probable cost;

(F) the program adopted pursuant to subsection (h) of this section; and

(G) if the Council recommends surcharges pursuant to subsection (f) of this section, a methodology for calculating such surcharges.

(4) The Council, taking into consideration the requirement that it devote its principal efforts to carrying out its responsibilities under subsections (d) and (h) of this section, shall undertake studies of conservation measures reasonably available to direct service industrial customers and other major consumers of electric power within the region and make an analysis of the estimated reduction in energy use which would result from the implementation of such measures as rapidly as possible, consistent with sound business practices. The Council shall consult with such customers and consumers in the conduct of such studies.

(f) Model conservation standards; surcharges

(1) Model conservation standards to be included in the plan shall include, but not be limited to, standards applicable to (A) new and existing structures, (B) utility, customer, and governmental conservation programs, and (C) other consumer actions for achieving conservation. Model conservation standards shall reflect geographic and climatic differences within the region and other appropriate considerations, and shall be designed to produce all power savings that are cost-effective for the region and economically feasible for consumers, taking into account financial assistance made available to consumers under section 839d(a) of this title. These model conservation standards shall be adopted by the Council and included in the plan after consultation, in such manner as the Council deems appropriate, with the Administrator, States, and political subdivisions, customers of the Administrator, and the public.

(2) The Council by a majority vote of the members of the Council is authorized to recommend to the Administrator a surcharge and the Administrator may thereafter impose such a surcharge, in accordance with the methodology provided in the plan, on customers for those portions of their loads within the region that are within States or political subdivisions which have not, or on the Administrator's customers which have not, implemented conservation measures that achieve energy savings which the Administrator determines are comparable to those which would be obtained under such standards. Such surcharges shall be established to recover such additional costs as the Administrator determines will be incurred because such projected energy savings attributable to such conservation measures have not been achieved, but in no case may such surcharges be less than 10 per centum or more than 50 per centum of the Administrator's applicable rates for such load or portion thereof.

(g) Public information; consultation; contracts and technical assistance

(1) To insure widespread public involvement in the formulation of regional power policies, the Council and Administrator shall maintain comprehensive programs to—

(A) inform the Pacific Northwest public of major regional power issues,

(B) obtain public views concerning major regional power issues, and

(C) secure advice and consultation from the Administrator's customers and others.

(2) In carrying out the provisions of this section, the Council and the Administrator shall—

(A) consult with the Administrator's customers;

(B) include the comments of such customers in the record of the Council's proceedings; and

(C) recognize and not abridge the authorities of State and local governments, electric utility systems, and other non-Federal entities responsible to the people of the Pacific Northwest for the planning, conservation, supply, distribution, and use of electric power and the operation of electric generating facilities.

(3) In the preparation, adoption, and implementation of the plan, the Council and the Administrator shall encourage the cooperation, participation, and assistance of appropriate Federal agencies, State entities, State political subdivisions, and Indian tribes. The Council and the Administrator are authorized to contract, in accordance with applicable law, with such agencies, entities, tribes, and subdivisions individually, in groups, or through associations thereof to (A) investigate possible measures to be included in the plan, (B) provide public involvement and information regarding a proposed plan or amendment thereto, and (C) provide services which will assist in the implementation of the plan. In order to assist in the implementation of the plan, particularly conservation, renewable resource, and fish and wildlife activities, the Administrator, when requested and subject to available funds, may provide technical assistance in establishing conservation, renewable resource, and fish and wildlife objectives by individual States or subdivisions thereof or Indian tribes. Such objectives, if adopted by a State or subdivision thereof or Indian tribes, may be submitted to the Council and the Administrator for review, and upon approval by the Council, may be incorporated as part of the plan.

(h) Fish and wildlife

(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.

(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.

(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—

(A) measures which can be expected to be implemented by the Administrator, using authorities under this chapter 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;

(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

(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.

(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)(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.

(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.

(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.

(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.

(7) The Council shall determine whether each recommendation received is consistent with the purposes of this chapter. 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—

(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.

(8) The Council shall consider, in developing and adopting a program pursuant to this subsection, the following principles:

(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.

(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.

(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.

(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.

(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.

(10)(A) The Administrator shall use the Bonneville Power Administration fund and the authorities available to the Administrator under this chapter 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 chapter. 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.

(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 [16 U.S.C. 838 et seq.]. 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 $2,500,000 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.

(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.

(D) INDEPENDENT SCIENTIFIC REVIEW PANEL.—(i) The Northwest Power Planning Council (Council) shall appoint an Independent Scientific Review Panel (Panel), which shall be comprised of eleven members, to review projects proposed to be funded through that portion of the Bonneville Power Administration's (BPA) annual fish and wildlife budget that implements the Council's fish and wildlife program. Members shall be appointed from a list of no fewer than 20 scientists submitted by the National Academy of Sciences (Academy), provided that Pacific Northwest scientists with expertise in Columbia River anadromous and non-anadromous fish and wildlife and ocean experts shall be among those represented on the Panel. The Academy shall provide such nominations within 90 days of September 30, 1996, and in any case not later than December 31, 1996. If appointments are required in subsequent years, the Council shall request nominations from the Academy and the Academy shall provide nominations not later than 90 days after the date of this request. If the Academy does not provide nominations within these time requirements, the Council may appoint such members as the Council deems appropriate.

(ii) SCIENTIFIC PEER REVIEW GROUPS.—The Council shall establish Scientific Peer Review Groups (Peer Review Groups), which shall be comprised of the appropriate number of scientists, from a list submitted by the Academy to assist the Panel in making its recommendations to the Council for projects to be funded through BPA's annual fish and wildlife budget, provided that Pacific Northwest scientists with expertise in Columbia River anadromous and non-anadromous fish and wildlife and ocean experts shall be among those represented on the Peer Review Groups. The Academy shall provide such nominations within 90 days of September 30, 1996, and in any case not later than December 31, 1996. If appointments are required in subsequent years, the Council shall request nominations from the Academy and the Academy shall provide nominations not later than 90 days after the date of this request. If the Academy does not provide nominations within these time requirements, the Council may appoint such members as the Council deems appropriate.

(iii) CONFLICT OF INTEREST AND COMPENSATION.—Panel and Peer Review Group members may be compensated and shall be considered subject to the conflict of interest standards that apply to scientists performing comparable work for the National Academy of Sciences; provided that a Panel or Peer Review Group members with a direct or indirect financial interest in a project, or projects, shall recuse himself or herself from review of, or recommendations associated with, such project or projects. All expenses of the Panel and the Peer Review Groups shall be paid by BPA as provided for under paragraph (vii). Neither the Panel nor the Peer Review Groups shall be deemed advisory committees within the meaning of the Federal Advisory Committee Act.

(iv) PROJECT CRITERIA AND REVIEW.—The Peer Groups, in conjunction with the Panel, shall review projects proposed to be funded through BPA's annual fish and wildlife budget and make recommendations on matters related to such projects to the Council no later than June 15 of each year. If the recommendations are not received by the Council by this date, the Council may proceed to make final recommendations on

project funding to BPA, relying on the best information available. The Panel and Peer Review Groups shall review a sufficient number of projects to adequately ensure that the list of prioritized projects recommended is consistent with the Council's program. Project recommendations shall be based on a determination that projects: are based on sound science principles; benefit fish and wildlife; and have a clearly defined objective and outcome with provisions for monitoring and evaluation of results. The Panel, with assistance from the Peer Review Groups, shall review, on an annual basis, the results of prior year expenditures based upon these criteria and submit its findings to the Council for its review.

(v) PUBLIC REVIEW.—Upon completion of the review of projects to be funded through BPA's annual fish and wildlife budget, the Peer Review Groups shall submit its findings to the Panel. The Panel shall analyze the information submitted by the Peer Review Groups and submit recommendations on project priorities to the Council. The Council shall make the Panel's findings available to the public and subject to public comment.

(vi) RESPONSIBILITIES OF THE COUNCIL.—The Council shall fully consider the recommendations of the Panel when making its final recommendations of projects to be funded through BPA's annual fish and wildlife budget, and if the Council does not incorporate a recommendation of the Panel, the Council shall explain in writing its reasons for not accepting Panel recommendations. In making its recommendations to BPA, the Council shall consider the impact of ocean conditions on fish and wildlife populations and shall determine whether the projects employ cost-effective measures to achieve program objectives. The Council, after consideration of the recommendations of the Panel and other appropriate entities, shall be responsible for making the final recommendations of projects to be funded through BPA's annual fish and wildlife budget.

(vii) COST LIMITATION.—The annual cost of this provision shall not exceed $500,000 in 1997 dollars.

(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 chapter 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.

(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.

(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 Energy and Commerce and on Natural Resources of the House of Representatives. The report shall describe the actions taken and to be taken by the Council under this chapter, 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.

(B) The Administrator shall keep such committees fully and currently informed of the actions taken and to be taken by the Administrator under this chapter, including this subsection.

(i) Review

The Council may from time to time review the actions of the Administrator pursuant to this section and section 839d of this title to determine whether such actions are consistent with the plan and programs, the extent to which the plan and programs is being implemented, and to assist the Council in preparing amendments to the plan and programs.

(j) Requests by Council for action

(1) The Council may request the Administrator to take an action under section 839d of this title to carry out the Administrator's responsibilities under the plan.

(2) To the greatest extent practicable within ninety days after the Council's request, the Administrator shall respond to the Council in writing specifying—

(A) the means by which the Administrator will undertake the action or any modification thereof requested by the Council, or

(B) the reasons why such action would not be consistent with the plan, or with the Administrator's legal obligations under this chapter, or other provisions of law, which the Administrator shall specifically identify.

(3) If the Administrator determines not to undertake the requested action, the Council, with-

in sixty days after notice of the Administrator's determination, may request the Administrator to hold an informal hearing and make a final decision.

(k) Review and analysis of 5-year period of Council activities

(1) Not later than October 1, 1987, or six years after the Council is established under this chapter, whichever is later, the Council shall complete a thorough analysis of conservation measures and conservation resources implemented pursuant to this chapter during the five-year period beginning on the date the Council is established under this chapter to determine if such measures or resources:

(A) have resulted or are likely to result in costs to consumers in the region greater than the costs of additional generating resources or additional fuel which the Council determines would be necessary in the absence of such measures or resources;

(B) have not been or are likely not to be generally equitable to all consumers in the region; or

(C) have impaired or are likely to impair the ability of the Administrator to carry out his obligations under this chapter and other laws, consistent with sound business practices.

(2) The Administrator may determine that section 839a(4)(D) of this title shall not apply to any proposed conservation measure or resource if the Administrator finds after receipt of such analysis from the Council that such measure or resource would have any result or effect described in subparagraph (A), (B) or (C) of paragraph (1).

(Pub. L. 96–501, § 4, Dec. 5, 1980, 94 Stat. 2700; Pub. L. 103–437, § 6(u), Nov. 2, 1994, 108 Stat. 4587; Pub. L. 104–206, title V, § 512, Sept. 30, 1996, 110 Stat. 3005; Pub. L. 106–60, title VI, § 610, Sept. 29, 1999, 113 Stat. 502; Pub. L. 112–74, div. B, title III, § 307, Dec. 23, 2011, 125 Stat. 877.)

REFERENCES IN TEXT

The Ethics in Government Act of 1978, referred to in subsec. (b)(3), is Pub. L. 95–521, Oct. 26, 1978, 92 Stat. 1824. Title II of the Ethics in Government Act of 1978 was set out in the Appendix to Title 5, Government Organization and Employees, prior to repeal by Pub. L. 101–194, title II, § 201, Nov. 30, 1989, 103 Stat. 1724. For complete classification of this Act to the Code, see Short Title note set out under section 101 of Pub. L. 95–521 in the Appendix to Title 5 and Tables.

The Federal Columbia River Transmission System Act, referred to in subsecs. (c)(10)(A) and (h)(10)(B), is Pub. L. 93–454, Oct. 18, 1974, 88 Stat. 1376, which is classified generally to chapter 12G (§ 838 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 838 of this title and Tables.

The Federal Advisory Committee Act, referred to in subsec. (h)(10)(D)(iii), is Pub. L. 92–463, Oct. 6, 1972, 86 Stat. 770, which is set out in the Appendix to Title 5, Government Organization and Employees.

CODIFICATION

September 30, 1996, referred to in subsec. (h)(10)(D)(i), (ii), was in the original ''the date of this enactment'', which was translated as meaning the date of enactment of Pub. L. 104–206, which enacted subsec. (h)(10)(D), to reflect the probable intent of Congress.

AMENDMENTS

2011—Subsec. (h)(10)(B). Pub. L. 112–74, which directed amendment of ''section 839b(h)(10)(B) of title 16, United States Code'' by substituting ''$2,500,000'' for ''$1,000,000'', was executed by making the substitution in subsec. (h)(10)(B) of this section, which is section 4 of the Pacific Northwest Electric Power Planning and Conservation Act, to reflect the probable intent of Congress.

1999—Subsec. (h)(10)(D)(vii), (viii). Pub. L. 106–60 added cl. (vii) and struck out former cls. (vii) and (viii) which read as follows:

''(vii) COST LIMITATION.—The cost of this provision shall not exceed $2,000,000 in 1997 dollars.

''(viii) EXPIRATION.—This paragraph shall expire on September 30, 2000.''

1996—Subsec. (h)(10)(D). Pub. L. 104–206, which directed that subpar. (D) be inserted after subsec. (h)(10)(C) of the Northwest Power Planning and Conservation Act, was executed by adding subsec. (h)(10)(D) to this section, which is from the Pacific Northwest Electric Power Planning and Conservation Act, to reflect the probable intent of Congress.

1994—Subsec. (h)(12)(A). Pub. L. 103–437 substituted ''Committees on Energy and Commerce and on Natural Resources'' for ''Committees on Interstate and Foreign Commerce and on Interior and Insular Affairs''.

CHANGE OF NAME

Committee on Energy and Commerce of House of Representatives treated as referring to Committee on Commerce of House of Representatives by section 1(a) of Pub. L. 104–14, set out as a note preceding section 21 of Title 2, The Congress. Committee on Commerce of House of Representatives changed to Committee on Energy and Commerce of House of Representatives, and jurisdiction over matters relating to securities and exchanges and insurance generally transferred to Committee on Financial Services of House of Representatives by House Resolution No. 5, One Hundred Seventh Congress, Jan. 3, 2001.

The Water and Power Resources Service, referred to in subsec. (h)(10)(C), changed to the Bureau of Reclamation on May 18, 1981. See 155 Dep't of the Interior, Departmental Manual 1.1 (2008 repl.); Sec'y James G. Watt, Dep't of the Interior, Secretarial Order 3064, §§ 3, 5 (May 18, 1981).

TERMINATION OF REPORTING REQUIREMENTS

For termination, effective May 15, 2000, of provisions in subsec. (h)(12)(A) of this section relating to submitting annually a detailed report to the Committee on Energy and Natural Resources of the Senate and to the Committees on Energy and Commerce and on Natural Resources of the House of Representatives, see section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance, and page 188 of House Document No. 103–7.

REFERENCES IN OTHER LAWS TO GS–16, 17, OR 18 PAY RATES

References in laws to the rates of pay for GS–16, 17, or 18, or to maximum rates of pay under the General Schedule, to be considered references to rates payable under specified sections of Title 5, Government Organization and Employees, see section 529 [title I, § 101(c)(1)] of Pub. L. 101–509, set out in a note under section 5376 of Title 5.

OPERATION AND MAINTENANCE OF FISH PASSAGE FACILITIES WITHIN THE YAKIMA RIVER BASIN; FUNDING

Pub. L. 98–381, title I, § 109, Aug. 17, 1984, 98 Stat. 1340, provided that: ''The Secretary of the Interior, acting pursuant to Federal reclamation law (Act of June 17, 1902, 32 Stat. 388 [see Short Title note under section 371 of Title 43, Public Lands], and Acts amendatory thereof and supplementary thereto) and in accordance with the Pacific Northwest Electric Power Planning and Con-

servation Act (94 Stat. 2697) [16 U.S.C. 839 et seq.] is authorized to design, construct, operate, and maintain fish passage facilities within the Yakima River Basin, and to accept funds from any entity, public or private, to design, construct, operate, and maintain such facilities.''

§ 839c. Sale of power

(a) Preferences and priorities

All power sales under this chapter shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937 (16 U.S.C. 832 and following) and, in particular, sections 4 and 5 thereof [16 U.S.C. 832c and 832d]. Such sales shall be at rates established pursuant to section 839e of this title.

(b) Sales to public bodies, cooperatives, and Federal agency customers

(1) Whenever requested, the Administrator shall offer to sell to each requesting public body and cooperative entitled to preference and priority under the Bonneville Project Act of 1937 [16 U.S.C. 832 et seq.] and to each requesting investor-owned utility electric power to meet the firm power load of such public body, cooperative or investor-owned utility in the Region to the extent that such firm power load exceeds—

(A) the capability of such entity's firm peaking and energy resources used in the year prior to December 5, 1980, to serve its firm load in the region, and

(B) such other resources as such entity determines, pursuant to contracts under this chapter, will be used to serve its firm load in the region.

In determining the resources which are used to serve a firm load, for purposes of subparagraphs (A) and (B), any resources used to serve a firm load under such subparagraphs shall be treated as continuing to be so used, unless such use is discontinued with the consent of the Administrator, or unless such use is discontinued because of obsolescence, retirement, loss of resource, or loss of contract rights.

(2) Contracts with investor-owned utilities shall provide that the Administrator may reduce his obligations under such contracts in accordance with section 5(a) of the Bonneville Project Act of 1937 [16 U.S.C. 832d(a)].

(3) In addition to his authorities to sell electric power under paragraph (1), the Administrator is also authorized to sell electric power to Federal agencies in the region.

(4) Sales under this subsection shall be made only if the public body, cooperative, Federal agency or investor-owned utility complies with the Administrator's standards for service in effect on December 5, 1980, or as subsequently revised.

(5) The Administrator shall include in contracts executed in accordance with this subsection provisions that enable the Administrator to restrict his contractual obligations to meet the loads referred to in this subsection in the future if the Administrator determines, after a reasonable period of experience under this chapter, that the Administrator cannot be assured on a planning basis of acquiring sufficient resources to meet such loads during a specified period of insufficiency. Any such contract with a public body, cooperative, or Federal agency shall specify a reasonable minimum period between a notice of restriction and the earliest date such restriction may be imposed.

(6) Contracts executed in accordance with this subsection with public body, cooperative, and Federal agency customers shall—

(A) provide that the restriction referred to in paragraph (5) shall not be applicable to any such customers until the operating year in which the total of such customers' firm loads to be served by the Administrator equals or exceeds the firm capability of the Federal base system resources;

(B) not permit restrictions which would reduce the total contractual entitlement of such customers to an amount less than the firm capability of the Federal base system resources; and

(C) contain a formula for determining annually, on a uniform basis, each such customer's contractual entitlement to firm power during such a period of restriction, which formula shall not consider customer resources other than those the customer has determined, as of December 5, 1980, to be used to serve its own firm loads.

The formula referred to in subparagraph (C) shall obligate the Administrator to provide on an annual basis only firm power needed to serve the portion of such customer's firm load in excess of the capability of such customer's own firm resources determined by such customer under paragraph (1) of this subsection to be used to serve its firm load.

(7) REQUIRED SALE.—

(A) DEFINITION OF A JOINT OPERATING ENTITY.—In this section, the term ''joint operating entity'' means an entity that is lawfully organized under State law as a public body or cooperative prior to September 22, 2000, and is formed by and whose members or participants are two or more public bodies or cooperatives, each of which was a customer of the Bonneville Power Administration on or before January 1, 1999.

(B) SALE.—Pursuant to paragraph (1), the Administrator shall sell, at wholesale to a joint operating entity, electric power solely for the purpose of meeting the regional firm power consumer loads of regional public bodies and cooperatives that are members of or participants in the joint operating entity.

(C) NO RESALE.—A public body or cooperative to which a joint operating entity sells electric power under subparagraph (B) shall not resell that power except to retail customers of the public body or cooperative or to another regional member or participant of the same joint operating entity, or except as otherwise permitted by law.

(c) Purchase and exchange sales

(1) Whenever a Pacific Northwest electric utility offers to sell electric power to the Administrator at the average system cost of that utility's resources in each year, the Administrator shall acquire by purchase such power and shall offer, in exchange, to sell an equivalent amount of electric power to such utility for resale to that utility's residential users within the region.

(2) The purchase and exchange sale referred to in paragraph (1) of this subsection with any electric utility shall be limited to an amount not in excess of 50 per centum of such utility's Regional residential load in the year beginning July 1, 1980, such 50 per centum limit increasing in equal annual increments to 100 per centum of such load in the year beginning July 1, 1985, and each year thereafter.

(3) The cost benefits, as specified in contracts with the Administrator, of any purchase and exchange sale referred to in paragraph (1) of this subsection which are attributable to any electric utility's residential load within a State shall be passed through directly to such utility's residential loads within such State, except that a State which lies partially within and partially without the region may require that such cost benefits be distributed among all of the utility's residential loads in that State.

(4) An electric utility may terminate, upon reasonable terms and conditions agreed to by the Administrator and such utility prior to such termination, its purchase and sale under this subsection if the supplemental rate charge provided for in section 839e(b)(3) of this title is applied and the cost of electric power sold to such utility under this subsection exceeds, after application of such rate charge, the average system cost of power sold by such utility to the Administrator under this subsection.

(5) Subject to the provisions of sections 839b and 839d of this title, in lieu of purchasing any amount of electric power offered by a utility under paragraph (1) of this subsection, the Administrator may acquire an equivalent amount of electric power from other sources to replace power sold to such utility as part of an exchange sale if the cost of such acquisition is less than the cost of purchasing the electric power offered by such utility.

(6) Exchange sales to a utility pursuant to this subsection shall not be restricted below the amounts of electric power acquired by the Administrator from, or on behalf of, such utility pursuant to this subsection.

(7) The ''average system cost'' for electric power sold to the Administrator under this subsection shall be determined by the Administrator on the basis of a methodology developed for this purpose in consultation with the Council, the Administrator's customers, and appropriate State regulatory bodies in the region. Such methodology shall be subject to review and approval by the Federal Energy Regulatory Commission. Such average system cost shall not include—

(A) the cost of additional resources in an amount sufficient to serve any new large single load of the utility;

(B) the cost of additional resources in an amount sufficient to meet any additional load outside the region occurring after December 5, 1980; and

(C) any costs of any generating facility which is terminated prior to initial commercial operation.

(d) Sales to existing direct service industrial customers

(1)(A) The Administrator is authorized to sell in accordance with this subsection electric power to existing direct service industrial customers. Such sales shall provide a portion of the Administrator's reserves for firm power loads within the region.

(B) After December 5, 1980, the Administrator shall offer in accordance with subsection (g) of this section to each existing direct service industrial customer an initial long term contract that provides such customer an amount of power equivalent to that to which such customer is entitled under its contract dated January or April 1975 providing for the sale of ''industrial firm power.''

(2) The Administrator shall not sell electric power, including reserves, directly to new direct service industrial customers.

(3) The Administrator shall not sell amounts of electric power, including reserves, to existing direct service industrial customers in excess of the amount permitted under paragraph (1) unless the Administrator determines, after a plan has been adopted pursuant to section 839b of this title, that such proposed sale is consistent with the plan and that—

(A) additional power system reserves are required for the region's firm loads,

(B) the proposed sale would provide a cost-effective method of supplying such reserves,

(C) such loads or loads of similar character cannot provide equivalent operating or planning benefits to the region if served by an electric utility under contractual arrangements providing reserves, and

(D) the Administrator has or can acquire sufficient electric power to serve such loads, and

unless the Council has determined such sale is consistent with the plan. After such determination by the Administrator and by the Council, the Administrator is authorized to offer to existing direct service industrial customers power in such amounts in excess of the amount permitted under paragraph (1) of this subsection as the Administrator determines to be necessary to provide additional power system reserves to meet the region's firm loads.

(4)(A) As used in this section, the term ''existing direct service industrial customer'' means any direct service industrial customer of the Administrator which has a contract for the purchase of electric power from the Administrator on December 5, 1980.

(B) The term ''new direct service industrial customer'' means any industrial entity other than an existing direct service industrial customer.

(C)(i) Where a new contract is offered in accordance with subsection (g) of this section to any existing direct service industrial customer which has not received electric power prior to December 5, 1980, from the Administrator pursuant to a contract with the Administrator existing on December 5, 1980, electric power delivered under such new contract shall be conditioned on the Administrator reasonably acquiring, in accordance with this chapter and within such estimated period of time (as specified in the contract) as he deems reasonable, sufficient resources to meet, on a planning basis, the load requirement of such customer. Such contract shall also provide that the obligation of the Ad-

ministrator to acquire such resources to meet such load requirement shall, except as provided in clause (ii) of this subparagraph, apply only to such customer and shall not be sold or exchanged by such customer to any other person.

(ii) Rights under a contract described in clause (i) of this subparagraph may be transferred by an existing direct service industrial customer referred to in clause (i) to a successor in interest in connection with a reorganization or other transfer of all major assets of such customer. Following such a transfer, such successor in interest (or any other subsequent successor in interest) may also transfer rights under such a contract only in connection with a reorganization or other transfer of all assets of such successor in interest.

(iii) The limitations of clause (i) of this subparagraph shall not apply to any customer referred to in clause (i) whenever the Administrator determines that such customer is receiving electric power pursuant to a contract referred to in such clause (ii).

(e) Contractual entitlements to firm power

(1) The contractual entitlement to firm power of any customer from whom, or on whose behalf, the Administrator has acquired electric power pursuant to section 839d of this title may not be restricted below the amount of electric power so acquired from, or on behalf of, such customer. If in any year such customer's requirements are less than such entitlement, any excess of such entitlement shall be first made available to increase the entitlement of other customers of the same class before being available for the entitlement of other customers. For purposes of this paragraph, the following entities shall each constitute a class:

(A) public bodies and cooperatives;

(B) Federal agencies;

(C) direct service industrial; and

(D) investor owned utilities.

(2) Any contractual entitlement to firm power which is based on electric power acquired from, or on behalf of, a customer pursuant to section 839d of this title shall be in addition to any other contractual entitlement to firm power not subject to restriction that such customer may have under this section. For the purposes of this subsection, references to amounts of power acquired by the Administrator pursuant to section 839d of this title shall be deemed to mean the amounts specified in the resource acquisition contracts exclusive of any amounts recognized in such contracts as replacement for Federal base system resources.

(3) The Administrator shall, consistent with the provisions of this chapter, insure that any restrictions upon any particular customer class made pursuant to this subsection and subsection (b) of this section are distributed equitably throughout the region.

(f) Surplus power

The Administrator is authorized to sell, or otherwise dispose of, electric power, including power acquired pursuant to this and other Acts, that is surplus to his obligations incurred pursuant to subsections (b), (c), and (d) of this section in accordance with this and other Acts applicable to the Administrator, including the Bonneville Project Act of 1937 (16 U.S.C. 832 and following), the Federal Columbia River Transmission System Act (16 U.S.C. 838 and following), and the Act of August 31, 1964 (16 U.S.C. 837–837h).

(g) Long-term contracts

(1) As soon as practicable within nine months after December 5, 1980, the Administrator shall commence necessary negotiations for, and offer, initial long-term contracts (within the limitations of the third sentence of section 5(a) of the Bonneville Project Act [16 U.S.C. 832d(a)]) simultaneously to—

(A) existing public body and cooperative customers and investor-owned utility customers under subsection (b) of this section;

(B) Federal agency customers under subsection (b) of this section;

(C) electric utility customers under subsection (c) of this section; and

(D) direct service industrial customers under subsection (d)(1) of this section.

(2) Each customer offered a contract pursuant to this subsection shall have one year from the date of such offer to accept such contract. Such contract shall be effective as provided in this subsection.

(3) An initial contract with a public body, cooperative or investor-owned electric utility customer or a Federal agency customer pursuant to subsection (b) of this section shall be effective on the date executed by such customer, unless another effective date is otherwise agreed to by the Administrator and the customer.

(4) An initial contract with an electric utility customer pursuant to subsection (c) of this section shall be effective on the date executed by such customer, but no earlier than the first day of the tenth month after December 5, 1980.

(5) An initial contract with a direct service industrial customer pursuant to subsection (d)(1) of this section, shall be effective on the date agreed upon by the Administrator and such customer, but no later than the first day of the tenth month after December 5, 1980. When such contract is executed, it may for rate purposes be given retroactive effect to such first day.

(6) Initial contracts offered public body, cooperative and Federal agency customers in accordance with this subsection shall provide that during a period of insufficiency declared in accordance with subsection (b) of this section each customer's contractual entitlement shall, to the extent of its requirements on the Administrator, be no less than the amount of firm power received from the Administrator in the year immediately preceding the period of insufficiency.

(7) The Administrator shall be deemed to have sufficient resources for the purpose of entering into the initial contracts specified in paragraph (1)(A) through (D).

(Pub. L. 96–501, § 5, Dec. 5, 1980, 94 Stat. 2712; Pub. L. 106–273, § 1, Sept. 22, 2000, 114 Stat. 802.)

REFERENCES IN TEXT

The Bonneville Project Act of 1937, referred to in subsecs. (a), (b)(1), and (f), is act Aug. 20, 1937, ch. 720, 50 Stat. 731, which is classified generally to chapter 12B (§ 832 et seq.) of this title. For complete classification of

this Act to the Code, see Short Title note set out under section 832 of this title and Tables.

The Federal Columbia River Transmission System Act, referred to in subsec. (f), is Pub. L. 93–454, Oct. 18, 1974, 88 Stat. 1376, which is classified generally to chapter 12G (§ 838 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 838 of this title and Tables.

Act of August 31, 1964, referred to in subsec. (f), is Pub. L. 88–552, Aug. 31, 1964, 78 Stat. 756, which is classified generally to chapter 12F (§ 837 et seq.) of this title. For complete classification of this Act to the Code, see Tables.

AMENDMENTS

2000—Subsec. (b)(7). Pub. L. 106–273 added par. (7).

§ 839d. Conservation and resource acquisition

(a) Conservation measures; resources

(1) The Administrator shall acquire such resources through conservation, implement all such conservation measures, and acquire such renewable resources which are installed by a residential or small commercial consumer to reduce load, as the Administrator determines are consistent with the plan, or if no plan is in effect with the criteria of section 839b(e)(1) of this title and the considerations of section 839b(e)(2) of this title and, in the case of major resources, in accordance with subsection (c) of this section. Such conservation measures and such resources may include, but are not limited to—

(A) loans and grants to consumers for insulation or weatherization, increased system efficiency, and waste energy recovery by direct application,

(B) technical and financial assistance to, and other cooperation with, the Administrator's customers and governmental authorities to encourage maximum cost-effective voluntary conservation and the attainment of any cost-effective conservation objectives adopted by individual States or subdivisions thereof,

(C) aiding the Administrator's customers and governmental authorities in implementing model conservation standards adopted pursuant to section 839b(f) of this title, and

(D) conducting demonstration projects to determine the cost effectiveness of conservation measures and direct application of renewable energy resources.

(2) In addition to acquiring electric power pursuant to section 839c(c) of this title, or on a short-term basis pursuant to section 11(b)(6)(i) of the Federal Columbia River Transmission System Act [16 U.S.C. 838i(b)(6)(i)], the Administrator shall acquire, in accordance with this section, sufficient resources—

(A) to meet his contractual obligations that remain after taking into account planned savings from measures provided for in paragraph (1) of this subsection, and

(B) to assist in meeting the requirements of section 839b(h) of this title.

The Administrator shall acquire such resources without considering restrictions which may apply pursuant to section 839c(b) of this title.

(b) Acquisition of resources

(1) Except as specifically provided in this section, acquisition of resources under this chapter shall be consistent with the plan, as determined by the Administrator.

(2) The Administrator may acquire resources (other than major resources) under this chapter which are not consistent with the plan, but which are determined by the Administrator to be consistent with the criteria of section 839b(e)(1) of this title and the considerations of section 839b(e)(2) of this title.

(3) If no plan is in effect, the Administrator may acquire resources under this chapter which are determined by the Administrator to be consistent with the criteria of section 839b(e)(1) of this title and the considerations of section 839b(e)(2) of this title.

(4) The Administrator shall acquire any non-Federal resources to replace Federal base system resources only in accordance with the provisions of this section. The Administrator shall include in the contracts for the acquisition of any such non-Federal replacement resources provisions which will enable him to ensure that such non-Federal replacement resources are developed and operated in a manner consistent with the considerations specified in section 839b(e)(2) of this title.

(5) Notwithstanding any acquisition of resources pursuant to this section, the Administrator shall not reduce his efforts to achieve conservation and to acquire renewable resources installed by a residential or small commercial consumer to reduce load, pursuant to subsection (a)(1) of this section.

(c) Procedure for acquiring major resources, implementing conservation measures, paying or reimbursing investigation and preconstruction expenses, or granting billing credits

(1) For each proposal under subsection (a), (b), (f), (h), or (*l*) of this section to acquire a major resource, to implement a conservation measure which will conserve an amount of electric power equivalent to that of a major resource, to pay or reimburse investigation and preconstruction expenses of the sponsors of a major resource, or to grant billing credits or services involving a major resource, the Administrator shall—

(A) publish notice of the proposed action in the Federal Register and provide a copy of such notice to the Council, the Governor of each State in which facilities would be constructed or a conservation measure implemented, and the Administrator's customers;

(B) not less than sixty days following publication of such notice, conduct one or more public hearings, presided over by a hearing officer, at which testimony and evidence shall be received, with opportunity for such rebuttal and cross-examination as the hearing officer deems appropriate in the development of an adequate hearing record;

(C) develop a record to assist in evaluating the proposal which shall include the transcript of the public hearings, together with exhibits, and such other materials and information as may have been submitted to, or developed by, the Administrator; and

(D) following completion of such hearings, promptly provide to the Council and make public a written decision that includes, in ad-

dition to a determination respecting the requirements of subsection (a), (b), (f), (h), (*l*), or (m) of this section, as appropriate—

(i) if a plan is in effect, a finding that the proposal is either consistent or inconsistent with the plan or, notwithstanding its inconsistency with the plan, a finding that it is needed to meet the Administrator's obligations under this chapter, or

(ii) if no plan is in effect, a finding that the proposal is either consistent or inconsistent with the criteria of section 839b(e)(1) of this title and the considerations of section 839b(e)(2) of this title or notwithstanding its inconsistency, a finding that it is needed to meet the Administrator's obligations under this chapter.

In the case of subsection (f) of this section, such decision shall be treated as satisfying the applicable requirements of this subsection and of subsection (f) of this section, if it includes a finding of probable consistency, based upon the Administrator's evaluation of information available at the time of completion of the hearing under this paragraph. Such decision shall include the reasons for such finding.

(2) Within sixty days of the receipt of the Administrator's decision pursuant to paragraph (1)(D) of this subsection, the Council may determine by a majority vote of all members of the Council, and notify the Administrator—

(A) that the proposal is either consistent or inconsistent with the plan, or

(B) if no plan is in effect, that the proposal is either consistent or inconsistent with the criteria of section 839b(e)(1) of this title and the considerations of section 839b(e)(2) of this title.

(3) The Administrator may not implement any proposal referred to in paragraph (1) that is determined pursuant to paragraph (1) or (2) by either the Administrator or the Council to be inconsistent with the plan or, if no plan is in effect, with the criteria of section 839b(e)(1) of this title and the considerations of section 839b(e)(2) of this title—

(A) unless the Administrator finds that, notwithstanding such inconsistency, such resource is needed to meet the Administrator's obligations under this chapter, and

(B) until the expenditure of funds for that purpose has been specifically authorized by Act of Congress enacted after December 5, 1980.

(4) Before the Administrator implements any proposal referred to in paragraph (1) of this subsection, the Administrator shall—

(A) submit to the appropriate committees of the Congress the administrative record of the decision (including any determination by the Council under paragraph (2)) and a statement of the procedures followed or to be followed for compliance with the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.],

(B) publish notice of the decision in the Federal Register, and

(C) note the proposal in the Administrator's annual or supplementary budget submittal made pursuant to the Federal Columbia River Transmission System Act (16 U.S.C. 838 and following).

The Administrator may not implement any such proposal until ninety days after the date on which such proposal has been noted in such budget or after the date on which such decision has been published in the Federal Register, whichever is later.

(5) The authority of the Council to make a determination under paragraph (2)(B) if no plan is in effect shall expire on the date two years after the establishment of the Council.

(d) Acquisition of resources other than major resources

The Administrator is authorized to acquire a resource, other than a major resource, whether or not such resource meets the criteria of section 839b(e)(1) of this title and the considerations of section 839b(e)(2) of this title but which he determines is an experimental, developmental, demonstration, or pilot project of a type with a potential for providing cost-effective service to the region. The Administrator shall make no obligation for the acquisition of such resource until it is included in the annual budgets submitted to the Congress pursuant to the Federal Columbia River Transmission System Act [16 U.S.C. 838 et seq.].

(e) Effectuation of priorities; use of customers and local entities

(1) In order to effectuate the priority given to conservation measures and renewable resources under this chapter, the Administrator shall, to the maximum extent practicable, make use of his authorities under this chapter to acquire conservation measures and renewable resources, to implement conservation measures, and to provide credits and technical and financial assistance for the development and implementation of such resources and measures (including the funding of, and the securing of debt for, expenses incurred during the investigation and preconstruction of resources, as authorized in subsection (f) of this section).

(2) To the extent conservation measures or acquisition of resources require direct arrangements with consumers, the Administrator shall make maximum practicable use of customers and local entities capable of administering and carrying out such arrangements.

(f) Agreements; investigation and initial development of renewable resources other than major resources; reimbursement of investigation and preconstruction expenses

(1) For resources which the Administrator determines may be eligible for acquisition under this section and satisfy the criteria of section 839b(e)(1) of this title and the considerations of section 839b(e)(2) of this title or, if a plan is in effect, to be consistent with the plan, the Administrator is authorized to enter into agreements with sponsors of—

(A) a renewable resource, other than a major resource, to fund or secure debt incurred in the investigation and initial development of such resource, or

(B) any other resource to provide for the reimbursement of the sponsor's investigation and preconstruction expenses concerning such

resource (which expenses shall not include procurement of capital equipment or construction material for such resource).

In the case of any resource referred to in subparagraph (B) of this paragraph, such reimbursement is authorized only if—

(i) such resource is subsequently denied State siting approval or other necessary Federal or State permits, or approvals,

(ii) such investigation subsequently demonstrates, as determined by the Administrator, that such resource does not meet the criteria of section 839b(e)(1) of this title and the considerations of section 839b(e)(2) of this title or is not acceptable because of environmental impacts, or

(iii) after such investigation the Administrator determines not to acquire the resource and the sponsor determines not to construct the resource.

(2) The Administrator may exercise the authority of this subsection only after he determines that the failure to do so would result in inequitable hardship to the consumers of such sponsors. The Administrator may provide reimbursement under this subsection only for expenses incurred after December 5, 1980.

(3) Any agreement under paragraph (1) of this subsection shall provide the Administrator an option to acquire any such resource, including a renewable resource, and shall include such other provisions, as the Administrator deems appropriate, for the Administrator's recovery from such sponsors or any assignee of the sponsors, if such sponsor or assignee continues development of the resource, of any advances made by the Administrator pursuant to such agreement.

(4) The Administrator shall not reimburse any expense incurred by the sponsors (except necessary expenses involved in the liquidation of the resource) after the date of a final denial of application for State siting approval or after the date the Administrator determines that the resource to be inconsistent with the plan or the criteria of section 839b(e)(1) of this title and the considerations of section 839b(e)(2) of this title.

(g) Environmental impact statements

At the request of the appropriate State, any environmental impact statement which may be required with respect to a resource, to the extent determined possible by the Administrator in accordance with applicable law and regulations, may be prepared jointly and in coordination with any required environmental impact statement of the State or any other statement which serves the purpose of an environmental impact statement which is required by State law.

(h) Billing credits

(1) If a customer so requests, the Administrator shall grant billing credits to such customer, and provide services to such customer at rates established for such services, for—

(A) conservation activities independently undertaken or continued after December 5, 1980, by such customer or political subdivision served by such customer which reduce the obligation of the Administrator that would otherwise have existed to acquire other resources under this chapter, or

(B) resources constructed, completed, or acquired after December 5, 1980, by a customer, an entity acting on behalf of such customer, or political subdivision served by the customer which reduce the obligation of the Administrator to acquire resources under this chapter. Such resources shall be renewable resources or multipurpose projects or other resources which are not inconsistent with the plan or, in the absence of a plan, not inconsistent with the criteria of section 839b(e)(1) of this title and the considerations of section 839b(e)(2) of this title.

(2) The energy and capacity on which a credit under this subsection to a customer is based shall be the amount by which a conservation activity or resource actually changes the customer's net requirement for supply of electric power or reserves from the Administrator.

(3) The amount of credits for conservation under this subsection shall be set to credit the customer implementing or continuing the conservation activity for which the credit is granted for the savings resulting from such activity. The rate impact on the Administrator's other customers of granting the credit shall be equal to the rate impact such customers would have experienced had the Administrator been obligated to acquire resources in an amount equal to that actually saved by the activity for which the credit is granted.

(4) For resources other than conservation, the customer shall be credited for net costs actually incurred by such customer, an entity acting on behalf of such customer, or political subdivision served by such customer, in acquiring, constructing, or operating the resource for which the credit is granted. The rate impact to the Administrator's other customers of granting the credit shall be no greater than the rate impact such customers would have experienced had the Administrator been obligated to acquire resources in an amount equal to that actually produced by the resource for which the credit is granted.

(5) Retail rate structures which are voluntarily implemented by the Administrator's customers and which induce conservation or installation of consumer-owned renewable resources shall be considered, for purposes of this subsection, to be (A) conservation activities independently undertaken or carried on by such customers, or (B) customer-owned renewable resources, and shall qualify for billing credits upon the same showing as that required for other conservation or renewable resource activities.

(6) Prior to granting any credit or providing services pursuant to this subsection, the Administrator shall—

(A) comply with the notice provisions of subsection (c) of this section, and include in such notice the methodology the Administrator proposes to use in determining the amount of any such credit;

(B) include the cost of such credit in the Administrator's annual or amended budget submittal to the Congress made pursuant to the Federal Columbia River Transmission System Act (16 U.S.C. 838(j)) [16 U.S.C. 838 et seq.];

(C) require that resources in excess of customer's reasonable load growth shall have

been offered to others for ownership, participation or other sponsorship pursuant to subsection (m) of this section, except in the case of conservation, multi-purpose projects uniquely suitable for development by the customer, or renewable resources; and

(D) require that the operators of any generating resource for which a billing credit is to be granted agree to operate such resource in a manner compatible with the planning and operation of the region's power system.

(i) Contracts

Contracts for the acquisition of resources and for billing credits for major resources, including conservation activities, entered into pursuant to this section shall contain such terms and conditions, applicable after the contract is entered into, as will—

(1) insure timely construction, scheduling, completion, and operation of resources,

(2) insure that the costs of any acquisition are as low as reasonably possible, consistent (A) with sound engineering, operating, and safety practices, and (B) the protection, mitigation, and enhancement of fish and wildlife, including related spawning grounds and habitat affected by the development of such resources, and

(3) insure that the Administrator exercises effective oversight, inspection, audit, and review of all aspects of such construction and operation.

Such contracts shall contain provisions assuring that the Administrator has the authority to approve all costs of, and proposals for, major modifications in construction, scheduling or operations and to assure that the Administrator is provided with such current information as he deems necessary to evaluate such construction and operation.

(j) Obligations not to be considered general obligations of United States or secured by full faith and credit of United States

(1) All contractual and other obligations required to be carried out by the Administrator pursuant to this chapter shall be secured solely by the Administrator's revenues received from the sale of electric power and other services. Such obligations are not, nor shall they be construed to be, general obligations of the United States, nor are such obligations intended to be or are they secured by the full faith and credit of the United States.

(2) All contracts entered into by the Administrator for the acquisition of resources pursuant to this chapter shall require that, in the sale of any obligations, all offerings and promotional material for the sale of such obligations shall include the language contained in the second sentence of paragraph (1) of this subsection. The Administrator shall monitor and enforce such requirement.

(k) Equitable distribution of benefits

In the exercise of his authorities pursuant to this section, the Administrator shall, consistent with the provisions of this chapter and the Administrator's obligations to particular customer classes, insure that benefits under this section, including financial and technical assistance, conduct of conservation demonstrations, and experimental projects, services, and billing credits, are distributed equitably throughout the region.

***(l)* Investigations**

(1) The Administrator is authorized and directed to investigate opportunities for adding to the region's resources or reducing the region's power costs through the accelerated or cooperative development of resources located outside the States of Idaho, Montana, Oregon, and Washington if such resources are renewable resources, and are now or in the future planned or considered for eventual development by nonregional agencies or authorities that will or would own, sponsor, or otherwise develop them. The Administrator shall keep the Council fully and currently informed of such investigations, and seek the Council's advice as to the desirability of pursuing such investigations.

(2) The Administrator is authorized and directed to investigate periodically opportunities for mutually beneficial interregional exchanges of electric power that reduce the need for additional generation or generating capacity in the Pacific Northwest and the regions with which such exchanges may occur. The Council shall take into consideration in formulating a plan such investigations.

(3) After the Administrator submits a report to Congress pursuant to paragraph (5) of this subsection, the Administrator is authorized to acquire resources consistent with such investigations and consistent with the plan or, if no plan is in effect, with the priorities of section 839b(e)(1) of this title and the considerations of section 839b(e)(2) of this title. Such acquisitions shall be in accordance with the provisions of this subsection.

(4) The Administrator shall conduct the investigations and the acquisitions, if any, authorized under this subsection with the assistance of other Federal agencies as may be appropriate.

(5) No later than July 1, 1981, the Administrator shall submit to the Congress a report of the results of the investigations undertaken pursuant to this subsection, together with the prospects for obtaining additional resources under the authority granted by this subsection and for reductions in generation or generating capacity through exchanges.

(m) Offering of reasonable shares to each Pacific Northwest electric utility

Except as to resources under construction on December 5, 1980, the Administrator shall determine in each case of a major resource acquisition that a reasonable share of the particular resource, or a reasonable equivalent, has been offered to each Pacific Northwest electric utility for ownership, participation, or other sponsorship, but not in excess of the amounts needed to meet such utility's Regional load.

(Pub. L. 96–501, § 6, Dec. 5, 1980, 94 Stat. 2717.)

REFERENCES IN TEXT

The National Environmental Policy Act of 1969, referred to in subsec. (c)(4)(A), is Pub. L. 91–190, Jan. 1, 1970, 83 Stat. 852, which is classified generally to chapter 55 (§ 4321 et seq.) of Title 42, The Public Health and Welfare. For complete classification of this Act to the

Code, see Short Title note set out under section 4321 of Title 42 and Tables.

The Federal Columbia River Transmission System Act, referred to in subsecs. (c)(4)(C), (d), and (h)(6)(B), is Pub. L. 93–454, Oct. 18, 1974, 88 Stat. 1376, which is classified generally to chapter 12G (§ 838 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 838 of this title and Tables.

§ 839d–1. Federal projects in Pacific Northwest

Without further appropriation and without fiscal year limitation, the Secretaries of the Interior and Army are authorized to plan, design, construct, operate and maintain generation additions, improvements and replacements, at their respective Federal projects in the Pacific Northwest Region as defined in the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), Public Law 96–501 (16 U.S.C. 839a(14)), and to operate and maintain the respective Secretary's power facilities in the Region, that the respective Secretary determines necessary or appropriate and that the Bonneville Power Administrator subsequently determines necessary or appropriate, with any funds that the Administrator determines to make available to the respective Secretary for such purposes. Each Secretary is authorized, without further appropriation, to accept and use such funds for such purposes: *Provided*, That, such funds shall continue to be exempt from sequestration pursuant to section 905(g)(1) of title 2: *Provided further*, That this section shall not modify or affect the applicability of any provision of the Northwest Power Act [16 U.S.C. 839 et seq.]. This provision shall be effective on October 1, 1993.

(Pub. L. 102–486, title XXIV, § 2406, Oct. 24, 1992, 106 Stat. 3099.)

REFERENCES IN TEXT

The Pacific Northwest Electric Power Planning and Conservation Act, referred to in text, is Pub. L. 96–501, Dec. 5, 1980, 94 Stat. 2697, which is classified principally to this chapter (§ 839 et seq.). For complete classification of this Act to the Code, see Short Title note set out under section 839 of this title and Tables.

CODIFICATION

Section was enacted as part of the Energy Policy Act of 1992, and not as part of the Pacific Northwest Electric Power Planning and Conservation Act which comprises this chapter.

§ 839e. Rates

(a) Establishment; periodic review and revision; confirmation and approval by Federal Energy Regulatory Commission

(1) The Administrator shall establish, and periodically review and revise, rates for the sale and disposition of electric energy and capacity and for the transmission of non-Federal power. Such rates shall be established and, as appropriate, revised to recover, in accordance with sound business principles, the costs associated with the acquisition, conservation, and transmission of electric power, including the amortization of the Federal investment in the Federal Columbia River Power System (including irrigation costs required to be repaid out of power revenues) over a reasonable period of years and the other costs and expenses incurred by the Administrator pursuant to this chapter and other provisions of law. Such rates shall be established in accordance with sections 9 and 10 of the Federal Columbia River Transmission System Act (16 U.S.C. 838) [16 U.S.C. 838g and 838h], section 5 of the Flood Control Act of 1944 [16 U.S.C. 825s], and the provisions of this chapter.

(2) Rates established under this section shall become effective only, except in the case of interim rules as provided in subsection (i)(6) of this section, upon confirmation and approval by the Federal Energy Regulatory Commission upon a finding by the Commission, that such rates—

(A) are sufficient to assure repayment of the Federal investment in the Federal Columbia River Power System over a reasonable number of years after first meeting the Administrator's other costs,

(B) are based upon the Administrator's total system costs, and

(C) insofar as transmission rates are concerned, equitably allocate the costs of the Federal transmission system between Federal and non-Federal power utilizing such system.

(b) General application of rates to meet general requirements

(1) The Administrator shall establish a rate or rates of general application for electric power sold to meet the general requirements of public body, cooperative, and Federal agency customers within the Pacific Northwest, and loads of electric utilities under section 839c(c) of this title. Such rate or rates shall recover the costs of that portion of the Federal base system resources needed to supply such loads until such sales exceed the Federal base system resources. Thereafter, such rate or rates shall recover the cost of additional electric power as needed to supply such loads, first from the electric power acquired by the Administrator under section 839c(c) of this title and then from other resources.

(2) After July 1, 1985, the projected amounts to be charged for firm power for the combined general requirements of public body, cooperative and Federal agency customers, exclusive of amounts charged such customers under subsection (g) of this section for the costs of conservation, resource and conservation credits, experimental resources and uncontrollable events, may not exceed in total, as determined by the Administrator, during any year after July 1, 1985, plus the ensuing four years, an amount equal to the power costs for general requirements of such customers if, the Administrator assumes that—

(A) the public body and cooperative customers' general requirements had included during such five-year period the direct service industrial customer loads which are—

(i) served by the Administrator, and

(ii) located within or adjacent to the geographic service boundaries of such public bodies and cooperatives;

(B) public body, cooperative, and Federal agency customers were served, during such five-year period, with Federal base system resources not obligated to other entities under

contracts existing as of December 5, 1980, (during the remaining term of such contracts) excluding obligations to direct service industrial customer loads included in subparagraph (A) of this paragraph;

(C) no purchases or sales by the Administrator as provided in section 839c(c) of this title were made during such five-year period;

(D) all resources that would have been required, during such five-year period, to meet remaining general requirements of the public body, cooperative and Federal agency customers (other than requirements met by the available Federal base system resources determined under subparagraph (B) of this paragraph) were—

(i) purchased from such customers by the Administrator pursuant to section 839d of this title, or

(ii) not committed to load pursuant to section 839c(b) of this title,

and were the least expensive resources owned or purchased by public bodies or cooperatives; and any additional needed resources were obtained at the average cost of all other new resources acquired by the Administrator; and

(E) the quantifiable monetary savings, during such five-year period, to public body, cooperative and Federal agency customers resulting from—

(i) reduced public body and cooperative financing costs as applied to the total amount of resources, other than Federal base system resources, identified under subparagraph (D) of this paragraph, and

(ii) reserve benefits as a result of the Administrator's actions under this chapter[1]

were not achieved.

(3) Any amounts not charged to public body, cooperative, and Federal agency customers by reason of paragraph (2) of this subsection shall be recovered through supplemental rate charges for all other power sold by the Administrator to all customers. Rates charged public body, cooperative, or Federal agency customers pursuant to this subsection shall not include any costs or benefits of a net revenue surplus or deficiency occurring for the period ending June 30, 1985, to the extent such surplus or deficiency is caused by—

(A) a difference between actual power deliveries and power deliveries projected for the purpose of establishing rates to direct service industrial customers under subsection (c)(1) of this subsection, and

(B) an overrecovery or underrecovery of the net costs incurred by the Administrator under section 839c(c) of this title as a result of such difference.

Any such revenue surplus or deficiency incurred shall be recovered from, or repaid to, customers over a reasonable period of time after July 1, 1985, through a supplemental rate charge or credit applied proportionately for all other power sold by the Administrator at rates established under other subsections of this section prior to July 1, 1985.

[1] So in original. Probably should be followed by a comma.

(4) The term ''general requirements'' as used in this section means the public body, cooperative or Federal agency customer's electric power purchased from the Administrator under section 839c(b) of this title, exclusive of any new large single load.

(c) Rates applicable to direct service industrial customers

(1) The rate or rates applicable to direct service industrial customers shall be established—

(A) for the period prior to July 1, 1985, at a level which the Administrator estimates will be sufficient to recover the cost of resources the Administrator determines are required to serve such customers' load and the net costs incurred by the Administrator pursuant to section 839c(c) of this title, based upon the Administrator's projected ability to make power available to such customers pursuant to their contracts, to the extent that such costs are not recovered through rates applicable to other customers; and

(B) for the period beginning July 1, 1985, at a level which the Administrator determines to be equitable in relation to the retail rates charged by the public body and cooperative customers to their industrial consumers in the region.

(2) The determination under paragraph (1)(B) of this subsection shall be based upon the Administrator's applicable wholesale rates to such public body and cooperative customers and the typical margins included by such public body and cooperative customers in their retail industrial rates but shall take into account—

(A) the comparative size and character of the loads served,

(B) the relative costs of electric capacity, energy, transmission, and related delivery facilities provided and other service provisions, and

(C) direct and indirect overhead costs,

all as related to the delivery of power to industrial customers, except that the Administrator's rates during such period shall in no event be less than the rates in effect for the contract year ending on June 30, 1985.

(3) The Administrator shall adjust such rates to take into account the value of power system reserves made available to the Administrator through his rights to interrupt or curtail service to such direct service industrial customers.

(d) Discount rates; special rates

(1) In order to avoid adverse impacts on retail rates of the Administrator's customers with low system densities, the Administrator shall, to the extent appropriate, apply discounts to the rate or rates for such customers.

(2) In order to avoid adverse impacts of increased rates pursuant to this chapter on any direct service industrial customer using raw minerals indigenous to the region as its primary resource, the Administrator, upon request of such customer showing such impacts and after considering the effect of such request on his other obligations under this chapter, is authorized, if the Administrator determines that such impacts will be significant, to establish a special rate applicable to such customer if all power sold to

such customer may be interrupted, curtailed, or withdrawn to meet firm loads in the region. Such rate shall be established in accordance with this section and shall include such terms and conditions as the Administrator deems appropriate.

(e) Uniform rates; rates for sale of peaking capacity; time-of-day, seasonal, and other rates

Nothing in this chapter prohibits the Administrator from establishing, in rate schedules of general application, a uniform rate or rates for sale of peaking capacity or from establishing time-of-day, seasonal rates, or other rate forms.

(f) Basis for rates

Rates for all other firm power sold by the Administrator for use in the Pacific Northwest shall be based upon the cost of the portions of Federal base system resources, purchases of power under section 839c(c) of this title and additional resources which, in the determination of the Administrator, are applicable to such sales.

(g) Allocation of costs and benefits

Except to the extent that the allocation of costs and benefits is governed by provisions of law in effect on December 5, 1980, or by other provisions of this section, the Administrator shall equitably allocate to power rates, in accordance with generally accepted ratemaking principles and the provisions of this chapter, all costs and benefits not otherwise allocated under this section, including, but not limited to, conservation, fish and wildlife measures, uncontrollable events, reserves, the excess costs of experimental resources acquired under section 839d of this title, the cost of credits granted pursuant to section 839d of this title, operating services, and the sale of or inability to sell excess electric power.

(h) Surcharges

Notwithstanding any other provision of this section (except the provisions of subsection (a) of this section), the Administrator shall adjust power rates to include any surcharges arising under section 839b(f) of this title, and shall allocate any revenues from such charges in such manner as the Administrator determines will help achieve the purposes of section 839b(f) of this title.

(i) Procedures

In establishing rates under this section, the Administrator shall use the following procedures:

(1) Notice of the proposed rates shall be published in the Federal Register with a statement of the justification and reasons supporting such rates. Such notice shall include a date for a hearing in accordance with paragraph (2) of this subsection.

(2) One or more hearings shall be conducted as expeditiously as practicable by a hearing officer to develop a full and complete record and to receive public comment in the form of written and oral presentation of views, data, questions, and argument related to such proposed rates. In any such hearing—

(A) any person shall be provided an adequate opportunity by the hearing officer to offer refutation or rebuttal of any material submitted by any other person or the Administrator, and

(B) the hearing officer, in his discretion, shall allow a reasonable opportunity for cross examination, which, as determined by the hearing officer, is not dilatory, in order to develop information and material relevant to any such proposed rate.

(3) In addition to the opportunity to submit oral and written material at the hearings, any written views, data, questions, and arguments submitted by persons prior to, or before the close of, hearings shall be made a part of the administrative record.

(4) After such a hearing, the Administrator may propose revised rates, publish such proposed rates in the Federal Register, and conduct additional hearings in accordance with this subsection.

(5) The Administrator shall make a final decision establishing a rate or rates based on the record which shall include the hearing transcript, together with exhibits, and such other materials and information as may have been submitted to, or developed by, the Administrator. The decision shall include a full and complete justification of the final rates pursuant to this section.

(6) The final decision of the Administrator shall become effective on confirmation and approval of such rates by the Federal Energy Regulatory Commission pursuant to subsection (a)(2) of this section. The Commission shall have the authority, in accordance with such procedures, if any, as the Commission shall promptly establish and make effective within one year after December 5, 1980, to approve the final rate submitted by the Administrator on an interim basis, pending the Commission's final decision in accordance with such subsection. Pending the establishment of such procedures by the Commission, if such procedures are required, the Secretary is authorized to approve such interim rates during such one-year period in accordance with the applicable procedures followed by the Secretary prior to December 5, 1980. Such interim rates, at the discretion of the Secretary, shall continue in effect until July 1, 1982.

(j) Cost figures to be indicated on rate schedules and power billings

All rate schedules adopted, and all power billings rendered, by the Administrator pursuant to this section shall indicate—

(1) the approximate cost contribution of different resource categories to the Administrator's rates for the sale of energy and capacity, and

(2) the cost of resources acquired to meet load growth within the region and the relation of such cost to the average cost of resources available to the Administrator.

(k) Statutory basis for procedures used in establishing rates or rate schedules

Notwithstanding any other provision of this chapter, all rates or rate schedules for the sale of nonfirm electric power within the United States, but outside the region, shall be estab-

lished after December 5, 1980, by the Administrator in accordance with the procedures of subsection (i) of this section (other than the first sentence of paragraph (6) thereof) and in accordance with the Bonneville Project Act [16 U.S.C. 832 et seq.], the Flood Control Act of 1944, and the Federal Columbia River Transmission System Act [16 U.S.C. 838 et seq.]. Notwithstanding section 201(f) of the Federal Power Act [16 U.S.C. 824(f)], such rates or rate schedules shall become effective after review by the Federal Energy Regulatory Commission for conformance with the requirements of such Acts and after approval thereof by the Commission. Such review shall be based on the record of proceedings established under subsection (i) of this section. The parties to such proceedings under subsection (i) of this section shall be afforded an opportunity by the Commission for an additional hearing in accordance with the procedures established for ratemaking by the Commission pursuant to the Federal Power Act [16 U.S.C. 791a et seq.].

(*l*) Rates for sales outside United States; negotiations

In order to further the purposes of this chapter and to protect the consumers of the region, the Administrator may negotiate, or establish, rates for electric power sold by the Administrator to any entity not located in the United States which shall be equitable in relation to rates for all electric power which is, or may be, purchased by the Administrator or the Administrator's customers from entities outside the United States. In establishing rates other than by negotiation, the provisions of subsection (i) of this section shall apply. In the case of any negotiation with an entity not located in the United States, the Administrator shall provide public notice of any proposal to negotiate such rates. Such negotiated rates shall be not less than the rates established under this chapter for nonfirm power sold within the United States but outside the region. The Administrator shall also afford notice of any rates negotiated pursuant to this subsection.

(m) Impact aid payments; formula

(1) Beginning the first fiscal year after the plan and program required by section 839b(d) and (h) of this title are finally adopted, the Administrator may, subject to the provisions of this section, make annual impact aid payments to the appropriate local governments within the region with respect to major transmission facilities of the Administrator, as defined in section 3(c) of the Federal Columbia River Transmission Act [16 U.S.C. 838a(c)]—

(A) which are located within the jurisdictional boundaries of such governments,

(B) which are determined by the Administrator to have a substantial impact on such governments, and

(C) where the construction of such facilities, or any modification thereof, is completed after December 5, 1980, and, in the case of a modification of an existing facility, such modification substantially increases the capacity of such existing transmission facility.

(2) Payments made under this subsection for any fiscal year shall be determined by the Administrator pursuant to a regionwide, uniform formula to be established by rule in accordance with the procedures set forth in subsection (i) of this section. Such rule shall become effective on its approval, after considering its effect on rates established pursuant to this section, by the Federal Energy Regulatory Commission. In developing such formula, the Administrator shall identify, and take into account, the local governmental services provided to the Administrator concerning such facilities and the associated costs to such governments as the result of such facilities.

(3) Payments made pursuant to this subsection shall be made solely from the fund established by section 11 of the Federal Columbia River Transmission System Act [16 U.S.C. 838i]. The provisions of section 13 of such Act [16 U.S.C. 838k], and any appropriations provided to the Administrator under any law, shall not be available for such payments. The authorization of payments under this subsection shall not be construed as an obligation of the United States.

(4) No payment may be made under this subsection with respect to any land or interests in land owned by the United States within the region and administered by any Federal agency (other than the Administrator), without regard to how the United States obtained ownership thereof, including lands or interests therein acquired or withdrawn by a Federal agency for purposes of such agency and subsequently made available to the Administrator for such facilities.

(n) Limiting the inclusion of costs of protection of, mitigation of damage to, and enhancement of fish and wildlife, within rates charged by the Bonneville Power Administration, to the rate period in which the costs are incurred

Notwithstanding any other provision of this section, rates established by the Administrator, under this section shall recover costs for protection, mitigation and enhancement of fish and wildlife, whether under this chapter or any other Act, not to exceed such amounts the Administrator forecasts will be expended during the fiscal year 2002–2006 rate period, while preserving the Administrator's ability to establish appropriate reserves and maintain a high Treasury payment probability for the subsequent rate period.

(Pub. L. 96–501, § 7, Dec. 5, 1980, 94 Stat. 2723; Pub. L. 106–60, title III, § 316, Sept. 29, 1999, 113 Stat. 497.)

REFERENCES IN TEXT

The Bonneville Project Act, referred to in subsec. (k), is act Aug. 20, 1937, ch. 720, 50 Stat. 731, popularly known as the Bonneville Project Act of 1937, which is classified generally to chapter 12B (§ 832 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 832 of this title and Tables.

The Flood Control Act of 1944, referred to in subsec. (k), is act Dec. 22, 1944, ch. 665, 58 Stat. 887, which enacted sections 460d and 825s of this title, sections 701–1, 701a–1, 708, and 709 of Title 33, Navigation and Navigable Waters, and section 390 of Title 43, Public Lands, and enacted provisions set out as notes under sections 701c, 701f, and 701j of Title 33. For complete classifica-

tion of this Act to the Code, see Tables. For provisions of the Act relating to sale of electric power, see section 825s of this title.

The Federal Columbia River Transmission System Act, referred to in subsec. (k), is Pub. L. 93–454, Oct. 18, 1974, 88 Stat. 1376, which is classified generally to chapter 12G (§ 838 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 838 of this title and Tables.

The Federal Power Act, referred to in subsec. (k), is act June 10, 1920, ch. 285, 41 Stat. 1063, which is classified generally to chapter 12 (§ 791a et seq.) of this title. For complete classification of this Act to the Code, see section 791a of this title and Tables.

AMENDMENTS

1999—Subsec. (n). Pub. L. 106–60 added subsec. (n).

§ 839f. Administrative provisions

(a) Contract authority

Subject to the provisions of this chapter, the Administrator is authorized to contract in accordance with section 2(f) of the Bonneville Project Act of 1937 (16 U.S.C. 832a(f)). Other provisions of law applicable to such contracts on December 5, 1980, shall continue to be applicable.

(b) Executive and administrative functions of Administrator of Bonneville Power Administration; sound and businesslike implementation of chapter

The Administrator shall discharge the executive and administrative functions of his office in accordance with the policy established by the Bonneville Project Act of 1937 (16 U.S.C. 832 and following), section 7152(a)(2) and (3) of title 42, and this chapter. The Secretary of Energy, the Council, and the Administrator shall take such steps as are necessary to assure the timely implementation of this chapter in a sound and businesslike manner. Nothing in this chapter shall be construed by the Secretary, the Administrator, or any other official of the Department of Energy to modify, alter, or otherwise affect the requirements and directives expressed by the Congress in section 7152(a)(2) and (3) of title 42 or the operations of such officials as they existed prior to December 5, 1980.

(c) Limitations and conditions on contracts for sale or exchange of electric power for use outside Pacific Northwest

Any contract of the Administrator for the sale or exchange of electric power for use outside the Pacific Northwest shall be subject to limitations and conditions corresponding to those provided in sections 2 and 3 of the Act of August 31, 1964 (16 U.S.C. 837a and 837b) for any contract for the sale, delivery, or exchange of hydroelectric energy or peaking capacity generated within the Pacific Northwest for use outside the Pacific Northwest. In applying such sections for the purposes of this subsection, the term ''surplus energy'' shall mean electric energy for which there is no market in the Pacific Northwest at any rate established for the disposition of such energy, and the term ''surplus peaking capacity'' shall mean electric peaking capacity for which there is no demand in the Pacific Northwest at the rate established for the disposition of such capacity. The authority granted, and duties imposed upon, the Secretary by sections 5 and 7 of such Act (16 U.S.C. 837e and 837f) [16 U.S.C. 837d and 837f] shall also apply to the Administrator in connection with resources acquired by the Administrator pursuant to this chapter. The Administrator shall, in making any determination, under any contract executed pursuant to section 839c of this title, of the electric power requirements of any Pacific Northwest customer, which is a non-Federal entity having its own generation, exclude, in addition to hydroelectric generated energy excluded from such requirements pursuant to section 3(d) of such Act (16 U.S.C. 837b(d)), any amount of energy included in the resources of such customer for service to firm loads in the region if (1) such amount was disposed of by such customer outside the region, and (2) as a result of such disposition, the firm energy requirements of such customer or other customers of the Administrator are increased. Such amount of energy shall not be excluded, if the Administrator determines that through reasonable measures such amount of energy could not be conserved or otherwise retained for service to regional loads. The Administrator may sell as replacement for any amount of energy so excluded only energy that would otherwise be surplus.

(d) Disposition of power which does not increase amount of firm power Administrator is obligated to provide to any customer

No restrictions contained in subsection (c) of this section shall limit or interfere with the sale, exchange or other disposition of any power by any utility or group thereof from any existing or new non-Federal resource if such sale, exchange or disposition does not increase the amount of firm power the Administrator would be obligated to provide to any customer. In addition to the directives contained in subsections (i)(1)(B) and (i)(3) of this section and subject to:

(1) any contractual obligations of the Administrator,

(2) any other obligations under existing law, and

(3) the availability of capacity in the Federal transmission system,

the Administrator shall provide transmission access, load factoring, storage and other services normally attendant thereto to such utilities and shall not discriminate against any utility or group thereof on the basis of independent development of such resource in providing such services.

(e) Judicial review; suits

(1) For purposes of sections 701 through 706 of title 5, the following actions shall be final actions subject to judicial review—

(A) adoption of the plan or amendments thereto by the Council under section 839b of this title, adoption of the program by the Council, and any determination by the Council under section 839b(h) of this title;

(B) sales, exchanges, and purchases of electric power under section 839c of this title;

(C) the Administrator's acquisition of resources under section 839d of this title;

(D) implementation of conservation measures under section 839d of this title;

(E) execution of contracts for assistance to sponsors under section 839d(f) of this title;

(F) granting of credits under section 839d(h) of this title;

(G) final rate determinations under section 839e of this title; and

(H) any rule prescribed by the Administrator under section 839e(m)(2) of this title.

(2) The record upon review of such final actions shall be limited to the administrative record compiled in accordance with this chapter. The scope of review of such actions without a hearing or after a hearing shall be governed by section 706 of title 5, except that final determinations regarding rates under section 839e of this title shall be supported by substantial evidence in the rulemaking record required by section 839e(i) of this title considered as a whole. The scope of review of an action under section 839d(c) of this title shall be governed by section 706 of title 5. Nothing in this section shall be construed to require a hearing pursuant to section 554, 556, or 557 of title 5.

(3) Nothing in this section shall be construed to preclude judicial review of other final actions and decisions by the Council or Administrator.

(4) For purposes of this subsection—

(A) major resources shall be deemed to be acquired upon publication in the Federal Register pursuant to section 839d(c)(4)(B) of this title;

(B) resources, other than major resources, shall be deemed to be acquired upon execution of the contract therefor;

(C) conservation measures shall be deemed to be implemented upon execution of the contract or grant therefor; and

(D) rate determinations pursuant to section 839e of this title shall be deemed final upon confirmation and approval by the Federal Energy Regulatory Commission.

(5) Suits to challenge the constitutionality of this chapter, or any action thereunder, final actions and decisions taken pursuant to this chapter by the Administrator or the Council, or the implementation of such final actions, whether brought pursuant to this chapter, the Bonneville Project Act [16 U.S.C. 832 et seq.], the Act of August 31, 1964 (16 U.S.C. 837–837h), or the Federal Columbia River Transmission System Act (16 U.S.C. 838 and following), shall be filed in the United States court of appeals for the region. Such suits shall be filed within ninety days of the time such action or decision is deemed final, or, if notice of the action is required by this chapter to be published in the Federal Register, within ninety days from such notice, or be barred. In the case of a challenge of the plan or programs or amendments thereto, such suit shall be filed within sixty days after publication of a notice of such final action in the Federal Register. Such court shall have jurisdiction to hear and determine any suit brought as provided in this section. The plan and program, as finally adopted or portions thereof, or amendments thereto, shall not thereafter be reviewable as a part of any other action under this chapter or any other law. Suits challenging any other actions under this chapter shall be filed in the appropriate court.

(f) Tax treatment of interest on governmental obligations

For purposes of enabling the Administrator to acquire resources necessary to meet the firm load of public bodies, cooperatives, and Federal agencies from a governmental unit at a cost no greater than the cost which would be applicable in the absence of such acquisition, the exemption from gross income of interest on certain governmental obligations provided in section 103(a)(1)[1] of title 26 shall not be affected by the Administrator's acquisition of such resources if—

(1) the Administrator, prior to contracting for such acquisition, certifies to his reasonable belief, that the persons for whom the Administrator is acquiring such resources for sale pursuant to section 839c of this title are public bodies, cooperatives, and Federal agencies, unless the Administrator also certifies that he is unable to acquire such resources without selling a portion thereof to persons who are not exempt persons (as defined in section 103(b)[1] of title 26), and

(2) based upon such certification, the Secretary of the Treasury determines in accordance with applicable regulations that less than a major portion of the resource is to be furnished to persons who are not exempt persons (as defined in section 103(b)[1] of title 26).

The certification under paragraph (1) shall be made in accordance with this subsection and a procedure and methodology approved by the Secretary of the Treasury. For purposes of this subsection, the term ''major portion'' shall have the meaning provided by regulations issued by the Secretary of the Treasury.

(g) Review of rates for sale of power to Administrator by investor-owned utility customers

When reviewing rates for the sale of power to the Administrator by an investor-owned utility customer under section 839c(c) or 839d of this title, the Federal Energy Regulatory Commission shall, in accordance with section 824h of this title—

(1) convene a joint State board, and

(2) invest such board with such duties and authority as will assist the Commission in its review of such rates.

(h) Companies which own or operate facilities for the generation of electricity primarily for sale to Administrator

(1) No ''company'' (as defined in section 79b(a)(2)[1] of title 15), which owns or operates facilities for the generation of electricity (together with associated transmission and other facilities) primarily for sale to the Administrator under section 839d of this title shall be deemed an ''electric utility company'' (as defined in section 79b(a)(3)[1] of title 15), within the meaning of any provision or provisions of chapter 2C[1] of title 15, if at least 90 per centum of the electricity generated by such company is sold to the Administrator under section 839d of this title, and if—

(A) the organization of such company is consistent with the policies of section 79a(b) and

[1] See References in Text note below.

(c)[1] of title 15, as determined by the Securities and Exchange Commission, with the concurrence of the Administrator, at the time of such organization; and

(B) participation in any facilities of such ''company'' has been offered to public bodies and cooperatives in the region pursuant to section 839d(m) of this title.

(2) The Administrator shall include in any contract for the acquisition of a major resource from such ''company'' provisions limiting the amount of equity investment, if any, in such ''company'' to that which the Administrator determines will be consistent with achieving the lowest attainable power costs attributable to such major resource.

(3) In the case of any ''company'' which meets the requirements of paragraph (1), the Administrator, with the concurrence of such Commission, shall approve all significant contracts entered into by, and between, such ''company'' and any sponsor company or any subsidiary of such sponsor company which are determined to be consistent with the policies of section 79a(b) and (c)[1] of title 15 at the time such contracts are entered into. The Administrator and the Securities and Exchange Commission shall exercise such approval authority within sixty days after receipt of such contracts. Such contracts shall not be effective without such approval.

(4) Paragraph (1) of this subsection shall continue to apply to any such ''company'' unless the Administrator or the Securities and Exchange Commission, or both, through periodic review, (A) determine at any time that the ''company'' no longer operates in a manner consistent with the policies of section 79a(b) and (c)[1] of title 15 and in accordance with this subsection, and (B) notify the ''company'' in writing of such preliminary determination. This subsection shall cease to apply to such ''company'' thirty days after receipt of notification of a final determination thereof. A final determination shall be made only after public notice of the preliminary determination and after a hearing completed not later than sixty days from the date of publication of such notice. Such final determination shall be made within thirty days after the date of completion of such hearing.

(i) Electric power acquisition or disposition

(1) At the request and expense of any customer or group of customers of the Administrator within the Pacific Northwest, the Administrator shall, to the extent practicable—

(A) acquire any electric power required by (i) any customer or group of customers to enable them to replace resources determined to serve firm load under section 839c(b) of this title, or (ii) direct service industrial customers to replace electric power that is or may be curtailed or interrupted by the Administrator (other than power the Administrator is obligated to replace), with the cost of such replacement power to be distributed among the direct service industrial customers requesting such power; and

(B) dispose of, or assist in the disposal of, any electric power that a customer or group of customers proposes to sell within or without the region at rates and upon terms specified by such customer or group of customers, if such disposition is not in conflict with the Administrator's other marketing obligations and the policies of this chapter and other applicable laws.

(2) In implementing the provisions of subparagraphs (A) and (B) of paragraph (1), the Administrator may prescribe policies and conditions for the independent acquisition or disposition of electric power by any direct service industrial customer or group of such customers for the purpose of assuring each direct service industrial customer an opportunity to participate in such acquisition or disposition.

(3) The Administrator shall furnish services including transmission, storage, and load factoring unless he determines such services cannot be furnished without substantial interference with his power marketing program, applicable operating limitations or existing contractual obligations. The Administrator shall, to the extent practicable, give priority in making such services available for the marketing, within and without the Pacific Northwest, of capability from projects under construction on December 5, 1980, if such capability has been offered for sale at cost, including a reasonable rate of return, to the Administrator pursuant to this chapter and such offer is not accepted within one year.

(j) Retail rate designs which encourage conservation and efficient use of electric energy, installation of consumer-owned renewable resources, and rate research and development

(1) The Council, as soon as practicable after December 5, 1980 shall prepare, in consultation with the Administrator, the customers, appropriate State regulatory bodies, and the public, a report and shall make recommendations with respect to the various retail rate designs which will encourage conservation and efficient use of electric energy and the installation of consumer-owned renewable resources on a cost-effective basis, as well as areas for research and development for possible application to retail utility rates within the region. Studies undertaken pursuant to this subsection shall not affect the responsibilities of any customer or the Administrator which may exist under the Public Utility Regulatory Policies Act of 1978.

(2) Upon request, and solely on behalf of customers so requesting, the Administrator is authorized to (A) provide assistance in analyzing and developing retail rate structures that will encourage cost-effective conservation and the installation of cost-effective consumer-owned renewable resources; (B) provide estimates of the probable power savings and the probable amount of billing credits under section 839d(h) of this title that might be realized by such customers as a result of adopting and implementing such retail rate structures; and (C) solicit additional information and analytical assistance from appropriate State regulatory bodies and the Administrator's other customers.

(k) Executive position for conservation and renewable resources

There is hereby established within the administration an executive position for conservation

and renewable resources. Such executive shall be appointed by the Administrator and shall be assigned responsibility for conservation and direct-application renewable resource programs (including the administration of financial assistance for such programs). Such position is hereby established in the senior executive service in addition to the number of such positions heretofore established in accordance with other provisions of law applicable to such positions.

(Pub. L. 96–501, § 9, Dec. 5, 1980, 94 Stat. 2729; Pub. L. 99–514, § 2, Oct. 22, 1986, 100 Stat. 2095.)

REFERENCES IN TEXT

The Bonneville Project Act of 1937, referred to in subsecs. (b) and (e)(5), is act Aug. 20, 1937, ch. 720, 50 Stat. 731, as amended, which is classified generally to chapter 12B (§ 832 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 832 of this title and Tables.

Act of August 31, 1964, referred to in subsec. (e)(5), is Pub. L. 88–552, Aug. 31, 1964, 78 Stat. 756, as amended, which is classified generally to chapter 12F (§ 837 et seq.) of this title. For complete classification of this Act to the Code, see Tables.

The Federal Columbia River Transmission System Act, referred to in subsec. (e)(5), is Pub. L. 93–454, Oct. 18, 1974, 88 Stat. 1376, as amended, which is classified generally to chapter 12G (§ 838 et seq.) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 838 of this title and Tables.

Section 103 of title 26, referred to in subsec. (f), which related to interest on certain governmental obligations was amended generally by Pub. L. 99–514, title XIII, § 1301(a), Oct. 22, 1986, 100 Stat. 2602, and as so amended relates to interest on State and local bonds. Section 103(b)(3), which prior to the general amendment defined exempt persons, relates to the applicability of the interest exclusion to bonds not in registered form, etc.

Chapter 2C of title 15, referred to in subsec. (h), contained the Public Utility Holding Company Act of 1935, act Aug. 26, 1935, ch. 687, title I, 49 Stat. 803, as amended, and consisted of section 79 et seq. of Title 15, Commerce and Trade, prior to repeal by Pub. L. 109–58, title XII, § 1263, Aug. 8, 2005, 119 Stat. 974. For complete classification of this Act to the Code, see Tables.

The Public Utility Regulatory Policies Act of 1978, referred to in subsec. (j)(1), is Pub. L. 95–617, Nov. 9, 1978, 92 Stat. 3117, as amended. For complete classification of this Act to Code, see Short Title note set out under section 2601 of this title and Tables.

AMENDMENTS

1986—Subsec. (f). Pub. L. 99–514 substituted ''Internal Revenue Code of 1986'' for ''Internal Revenue Code of 1954'', which for purposes of codification was translated as ''title 26'' thus requiring no change in text.

§ 839g. Savings provisions

(a) Rights of States and political subdivisions of States

Nothing in this chapter shall be construed to affect or modify any right of any State or political subdivision thereof or electric utility to—

(1) determine retail electric rates, except as provided by section 839c(c)(3) of this title;

(2) develop and implement plans and programs for the conservation, development, and use of resources; or

(3) make energy facility siting decisions, including, but not limited to, determining the need for a particular facility, evaluating alternative sites, and considering alternative methods of meeting the determined need.

(b) Rights and obligations under existing contracts

Nothing in this chapter shall alter, diminish, or abridge the rights and obligations of the Administrator or any customer under any contract existing as of December 5, 1980.

(c) Statutory preferences and priorities of public bodies and cooperatives in sale of federally generated power

Nothing in this chapter shall alter, diminish, abridge, or otherwise affect the provisions of other Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power.

(d) Contractual rights under provisions later found to be unconstitutional

If any provision of this chapter is found to be unconstitutional, then any contract entered into by the Administrator, prior to such finding and in accordance with such provisions, to sell power, acquire or credit resources, or to reimburse investigation and preconstruction expenses pursuant to section 839c of this title, and section 839d(a), (f) or (h) of this title shall not be affected by such finding.

(e) Treaty and other rights of Indian tribes

Nothing in this chapter shall be construed to affect or modify any treaty or other right of an Indian tribe.

(f) Reservation of electric power for Montana; Hungry Horse and Libby Dams and Reservoirs

The reservation under law of electric power primarily for use in the State of Montana by reason of the construction of Hungry Horse and Libby Dams and Reservoirs within that State is hereby affirmed. Such reservation shall also apply to 50 per centum of any electric power produced at Libby Reregulating Dam if built. Electric power so reserved shall be sold at the rate or rates set pursuant to section 839e of this title.

(g) Rights of States to prohibit recovery of resource construction costs through retail rates

Nothing in this chapter shall be construed to affect or modify the right of any State to prohibit utilities regulated by the appropriate State regulatory body from recovering, through their retail rates, costs during any period of resource construction.

(h) Water appropriations

Nothing in this chapter shall be construed as authorizing the appropriation of water by any Federal, State, or local agency, Indian tribe, or any other entity or individual. Nor shall any provision of this chapter of any plan or program adopted pursuant to the chapter (1) affect the rights or jurisdictions of the United States, the States, Indian tribes, or other entities over waters of any river or stream or over any groundwater resource, (2) alter, amend, repeal, interpret, modify, or be in conflict with any interstate compact made by the States, or (3) otherwise be construed to alter or establish the respective rights of States, the United States, In-

dian tribes, or any person with respect to any water or water-related right.

(i) Existing Federal licenses, permits, and certificates

Nothing in this chapter shall be construed to affect the validity of any existing license, permit, or certificate issued by any Federal agency pursuant to any other Federal law.

(Pub. L. 96–501, § 10, Dec. 5, 1980, 94 Stat. 2734.)

§ 839h. Separability

If any provision of section 839b(a) through (c) of this title or any other provision of this chapter or the application thereof to any person, State, Indian tribe, entity, or circumstance is held invalid, neither the remainder of section 839b of this title or any other provisions of this chapter, nor the application of such provisions to other persons, States, Indian tribes, entities, or circumstances, shall be affected thereby.

(Pub. L. 96–501, § 12, Dec. 5, 1980, 94 Stat. 2736.)

CHAPTER 13—REGULATION OF TRANSPORTATION IN INTERSTATE OR FOREIGN COMMERCE OF BLACK BASS AND OTHER FISH

§§ 851 to 856. Repealed. Pub. L. 97–79, § 9(b)(1), Nov. 16, 1981, 95 Stat. 1079

Section 851, acts May 20, 1926 ch 346, § 1, 44 Stat. 576; July 2, 1930, ch. 801, 46 Stat. 845; July 30, 1947, ch. 348, 61 Stat. 517; July 16, 1952, ch. 911, § 1, 66 Stat. 736; Dec. 5, 1969, Pub. L. 91–135, § 9(d), 83 Stat. 282, defined the terms ''person'' and ''State''. See section 3371 of this title.

Section 852, acts May 20, 1926, ch. 346, § 2, 44 Stat. 576; July 2, 1930, ch. 801, 46 Stat. 845; July 30, 1947, ch. 348, 61 Stat. 517; July 16, 1952, ch. 911, § 2, 66 Stat. 736; Dec. 5, 1969, Pub. L. 91–135, § 9(a), 83 Stat. 281, made illegal the transportation of illegally taken black bass or other fish. See section 3372 of this title.

Section 852a, act May 20, 1926, ch. 346, § 3, as added July 2, 1930, ch. 801, 46 Stat. 846; amended July 30, 1947, ch. 348, 61 Stat. 517; July 16, 1952, ch. 911, § 2, 66 Stat. 736; Dec. 5, 1969, Pub. L. 91–135, § 9(b), 83 Stat. 282, provided for the markings on the outside of packages and containers used in the transportation of fish. See section 3376(a) of this title.

Section 852b, act May 20, 1926, ch. 346, § 4, as added July 2, 1930, ch. 801, 46 Stat. 846; amended July 30, 1947, ch. 348, 61 Stat. 517; July 16, 1952, ch. 911, § 2, 66 Stat. 736, related to the application of State laws with regard to fish arriving in the State. See section 3378(a) of this title.

Section 852c, act May 20, 1926, ch. 346, § 5, as added July 2, 1930, ch. 801, 46 Stat. 846; amended 1939 Reorg. Plan No. II, § 4(e), eff. July 1, 1939, 4 F.R. 2731, 53 Stat. 1433; July 30, 1947, ch. 348, 61 Stat. 517; 1970 Reorg. Plan No. 4, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090, authorized the making of expenditures by the Secretary in carrying out the responsibilities under this chapter. See section 3378(d) and (e) of this title.

Section 852d, act May 20, 1926, ch. 346, § 6, as added July 2, 1930, ch. 801, 46 Stat. 846; amended 1939 Reorg. Plan No. II, § 4(e), eff. July 1, 1939, 4 F.R. 2731, 53 Stat. 1433; July 30, 1947, ch. 348, 61 Stat 517; Oct. 17, 1968, Pub. L. 90–578, title IV, § 402(b)(2), 82 Stat. 1118; Dec. 5, 1969, Pub. L. 91–135, § 9(c), 83 Stat. 282; 1970 Reorg. Plan No. 4, eff. Oct. 3, 1970, 35 F.R. 15627, 84 Stat. 2090, related to the power of arrest without warrant, utilization of Federal agencies, searches and seizures, and forfeitures. See sections 3374 and 3375 of this title.

Section 853, act May 20, 1926, ch. 346, § 7, as added July 2, 1930, ch. 801, 46 Stat. 847; amended July 30, 1947, ch. 348, 61 Stat. 517, set out the penalties for the violation of the provisions of this chapter. See section 3373 of this title.

Section 854, act May 20, 1926, ch. 346, § 8, as added July 2, 1930, ch. 801, 46 Stat. 847; amended July 30, 1947, ch. 348, 61 Stat. 517; July 16, 1952, ch. 911, § 2, 66 Stat. 736, related to the effect of this chapter on the power of States. See section 3378(a) of this title.

Section 855, act May 20, 1926, ch. 346, § 9, as added July 2, 1930, ch. 801, 46 Stat. 847; amended July 30, 1947, ch. 348, 61 Stat. 517; Aug. 25, 1959, Pub. L. 86–207, 73 Stat. 430, related to the effect of this chapter on breeding and stocking. See section 3377(c) of this title.

Section 856, act May 20, 1926, ch. 346, § 10, as added July 30, 1947, ch. 348, 61 Stat. 517; amended July 16, 1952, ch. 911, § 2, 66 Stat. 736, directed that this chapter not apply to steelhead trout (salmo gairderii) legally taken in the Columbia River between the States of Washington and Oregon.

CHAPTER 14—REGULATION OF WHALING

SUBCHAPTER I—WHALING TREATY ACT

Sec.
901 to 915. Repealed.

SUBCHAPTER II—WHALING CONVENTION ACT

916. Definitions.
916a. United States Commissioner.
916b. Acceptance or rejection by United States Government of regulations, etc.; acceptance of reports, recommendations, etc., of Commission.
916c. Unlawful acts.
916d. Licenses.
916e. Failure to keep returns, records, reports.
916f. Violations; fines and penalties.
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916i. Taking of whales for biological experiments.
916j. Allocation of responsibility for administration and enforcement.
916k. Regulations; submission; publication; effectiveness.
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SUBCHAPTER I—WHALING TREATY ACT

§§ 901 to 915. Repealed. Aug. 9, 1950, ch. 653, § 16, 64 Stat. 425

Sections, act May 1, 1936, ch. 251, §§ 1–15, 49 Stat. 1246–1249, related to hunting of whales. See sections 916 to 916*l* of this title.

SUBCHAPTER II—WHALING CONVENTION ACT

§ 916. Definitions

When used in this subchapter—

(a) Convention: The word ''convention'' means the International Convention for the Regulation of Whaling signed at Washington under date of December 2, 1946, by the United States of America and certain other governments.

(b) Commission: The word ''Commission'' means the International Whaling Commission established by article III of the convention.

(c) United States Commissioner: The words ''United States Commissioner'' mean the member of the International Whaling Commission representing the United States of America appointed pursuant to article III of the convention and section 916a of this title.

(d) Person: The word ''person'' denotes every individual, partnership, corporation, and asso-