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 REPLY BRIEF

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INTRODUCTION

Northwest Resource Information Center ("NRIC") challenges the Northwest Power and Conservation Council's ("the Council") failure to independently consider the needs of salmon and steelhead in the development of its Sixth Power Plan. The Council in the Sixth Plan did not consider how or even whether the Plan's conclusions and forecasts of power generation, conservation, or efficiency would meet the Northwest Power Act's ("Power Act") requirement to "protect, mitigate and enhance ... anadromous fish"—whether by reducing reliance on hydropower or by considering whether those findings allow for additional fish protection measures necessary to meet the fish restoration objective of the Act.

In response, the Council and Intervenor-Respondents emphasize form over substance by arguing that power planning and fish protection are wholly separate sequential procedural duties. They believe that the end results of these two processes are irrelevant so long as the Council follows the procedural steps required by the Act and produces a fish and wildlife program followed by a power plan. The Power Act is not so meaningless. The Act requires the Council to produce a power plan that—together with its fish and wildlife program—achieves the fish restoration and power reliability goals of the Act. Indeed, in past power plans, the Council recognized that hydropower production and fish protection are inextricably linked and understood that it must apply what it learns in the power

planning process to ensure that it is meeting the fish restoration goals of the Act. Instead of producing this integrated end result, the Council has in the Sixth Power Plan disconnected its consideration of power resources and reliability from the protection, mitigation, and enhancement of salmon and steelhead in violation of the Power Act.

More than thirty years ago, Congress responded to the crisis facing Northwest salmon and steelhead by making fish protection a top priority and charging the Council with restoring these anadromous fish in the Columbia River Basin while ensuring that the Northwest continues to enjoy an adequate, economical, and reliable power supply. But thirty years and billions of dollars later, the Power Act's fish restoration goals remain as distant as they were in 1980: Thirteen species of salmon and steelhead in the Columbia River Basin are now protected under the Endangered Species Act, and the Northwest remains embroiled in controversy over the measures necessary to save them. The Council's failure to comply with its duty to accomplish the straightforward objectives of the Power Act is at the heart of this case. None of the Respondents assert that the Sixth Power Plan achieves the fish restoration goal of the Act. Indeed, each treats the ongoing 30-year failure to achieve those goals as irrelevant to this case. *See, e.g.*, Council Resp. at 5; Bonneville Power Administration ("BPA") Resp. at 8.

ARGUMENT

The Power Act imposes two principal responsibilities on the Council: 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 … particularly anadromous fish which are of significant importance to the social and economic well-being of the Pacific Northwest and the Nation," *id.* at 839(6). To ensure those goals are achieved, the Act creates an iterative two-part process that requires consideration of energy and fish and wildlife at both steps. *See* NRIC Br. at 7-8, 21-23 (describing two-step feedback loop between fish and wildlife program and power plan). The Council and Intervenors seek to draw bright lines between fish protection and power planning and to disconnect the process provided in the Act from its intended results, but their attempts to excuse the Council's failure to consider and accurately weigh anadromous fish protection in the Sixth Plan contradict the plain language and structure of the Power Act.

I. THE COUNCIL FAILED TO PROVIDE DUE CONSIDERATION FOR THE NEEDS OF ANADROMOUS FISH.

Although it admits that due consideration is "a serious substantive obligation," Council Resp. at 26, the Council asks this Court to find that it need not explicitly address this requirement in the Sixth Power Plan. Indeed, by arguing that the power plan is assembled in a vacuum that excludes any additional attention to anadromous fish and the fish restoration intent of the Act, the Council and

Intervenors advance an interpretation of the Power Act that renders these statutory provisions meaningless. According to these arguments, as long as the Council adopts a fish and wildlife program before the power plan, its substantive responsibility to consider the needs of anadromous fish is satisfied. The plain language of the Power Act, however, requires precisely the opposite—the Council's duty to assure a reliable power supply that protects, mitigates, and enhances anadromous fish requires the Council to meaningfully consider both of these goals in the power planning process.

A. The Council Is Not Entitled to Deference to Its Interpretation of Due Consideration.

The Council and NRIC agree that this case is ultimately one of statutory construction, turning on the meaning of the relevant Power Act provisions. Council Resp. at 17, n.5 and 23; NRIC Br. at 17-18. Although the Council asks for substantial deference to its interpretation of the Power Act, Council Resp. at 23-24, it is the Court, not the Council, that is the "final authorit[y] on issues of statutory construction." *Central Montana Elec. Power Co-op., Inc. v. Administrator of the Bonneville Power Admin.*, 840 F.2d 1472, 1477 (9th Cir. 1988). Courts do not defer to unreasonable interpretations of a statute. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). As explained below, the Council and Intervenors here advance an interpretation of the statute that would render the due consideration requirement surplusage. An interpretation that reads

out or renders meaningless the due consideration requirement and ignores the salmon restoration intent of the Act is by definition unreasonable and not entitled to any degree of deference. *See United States v. Hoflin*, 880 F.2d 1033, 1038 (9th Cir. 1989) (repeating the "fundamental principle of statutory construction that interpretative constructions of statutes which would render some words surplusage are to be avoided.").[1]

B. The Council Failed to Give Due Consideration to Protection, Mitigation, and Enhancement of Anadromous Fish.

Notwithstanding the Council's agreement that due consideration is "a serious substantive obligation," Council Resp. at 26, the Council did not provide due consideration to anadromous fish in the Sixth Power Plan.[2] NRIC Br. at 25-

[1] Intervenor RiverPartners ("RiverPartners") emphasizes that the Council has broad discretion to determine the level of detail it provides for the elements of the Plan required by 16 U.S.C. § 839b(e)(3). RiverPartners Resp. at 10. That language, however, applies only to the elements described in subsection (e)(3), not the separate due consideration requirement in subsection (e)(2).

[2] In contrast to the Respondents, Intervenor Public Power Council ("PPC") argues that due consideration requires "nothing more than mere consideration." PPC Resp. at 13-18. To the contrary, where Congress meant for Council to "merely" consider a factor, it explicitly so provided. *See* NRIC Br. at 24 (citing other instances where Congress required Council to "take into consideration" or "consider" factors). Moreover, PPC's attempt to redefine this requirement ignores the specific nature of this mandate and its direct tie to the primary goals of the statute. *See* NRIC Br. at 21-22. Ultimately, PPC's attempt to minimize the Council's duty is carried out in service of its argument that the Council satisfied its due consideration duty by referencing measures required by the fish and wildlife program. This argument fails for the same reasons as those advanced by the other Respondents.

37. Because there is no explicit discussion of due consideration in the Sixth Power Plan or the administrative record, Respondents attempt in their briefs to construct one.[3] Each of these attempts fails.

1. Due consideration requires the Council to do more than merely discuss the fish and wildlife program in the power plan.

Respondents primarily argue that the Council satisfied its independent obligation to provide due consideration through its inclusion of the 2009 Fish and Wildlife Program in the Sixth Plan and its discussion of the effects of the program on the power supply. Council Resp. at 26-30; BPA Resp. at 21-23; RiverPartners Resp. at 10-11; PPC Resp. at 21-23. Including, referencing, or even analyzing the effects of the fish and wildlife program in the power plan, however, does not fulfill the Council's independent due consideration obligations. *See* NRIC Br. at 26-32. All of these actions are already required by other provisions in the statute. For example, while the Council argues that its consideration of the program's impact on the regional power supply satisfies its due consideration obligations, Council Resp. at 29-30, the Power Act already requires the Council to "take into account the effect, if any, of the requirements of [the fish and wildlife program in]

[3] As a threshold matter, these explanations attempt to supply an analysis that the Council did not conduct in the Sixth Power Plan, *see* NRIC Br. at 25-37, and are due no deference from this Court. *See Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1049 (9th Cir. 2010) ("We cannot gloss over the absence of a cogent explanation by the agency by relying on the post hoc rationalizations offered by defendants in their appellate briefs."). More important, however, these examples fail to demonstrate compliance with the Power Act's clear mandates.

subsection (h) of this section on the availability of resources to the Administrator." 16 U.S.C. § 839b(e)(3)(D)(ii). *See also* 16 U.S.C. § 839b(e)(3)(F) (requiring the Council to include fish and wildlife program in the power plan). Whether dressed up as an "analy[sis] of the flow and passage measures," or as "embed[ding] and assur[ing] the implementation of the fish and wildlife measures," Council Resp. at 27, the Council cannot fulfill its independent duty to provide due consideration with reference to separate obligations already imposed by the statute.

The Council has understood this in the past. In its first two power plans the Council explicitly recognized 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." First Power Plan at 9-6; Second Power Plan at 9-7.[4] Indeed, in the First Power Plan the due consideration obligation merited separate analysis and process. *See generally* First Power Plan, Chapter 9. That Plan notes: "In compliance with the Northwest Power Act, the Council has considered environmental quality and fish and wildlife concerns throughout the development of this energy plan," including separate studies which were subjected to public review and which "guided the Council as it drafted its resource portfolio." *Id.* First Power Plan at 9-1. *See also* NRIC Br. at 34, n.15. The

[4] The relevant portions of the First and Second Power Plans are *available at* http://www.nwcouncil.org/library/1983/1983Plan.pdf and http://www.nwcouncil.org/library/1986/1986Plan_Vol2.pdf (last visited Jan. 26, 2013).

Second Power Plan's "Consideration of Environmental Quality and Fish and Wildlife" is similar. *See* Second Plan at 9-3(recognizing that power generated by the hydrosystem directly impacts flow and spill for successful fish migration and noting interdependence between fish protection and power production).[5] These are precisely the kinds of separate analyses required by the due consideration mandate and that are missing entirely from the Sixth Power Plan. The Court should reject Respondents' attempts to equate the statutorily required discussion of the program and its measures with the additional requirement that the Council provide due consideration to anadromous fish in the power plan. 16 U.S.C. § 839b(e)(2)(C).

Respondents next contend that due consideration cannot require more than merely including the fish and wildlife program in the power plan because doing so would require the Council to "ignore," "revisit," "reconsider" or "second-guess" the fish and wildlife program. *See, e.g.*, Council Resp. at 34, BPA Resp. at 10, 16, RiverPartners Resp. at 4-5, 10. These arguments exaggerate NRIC's claims and attempt to erect a wall between the fish and wildlife program and the power plan that is not supported by the Act.

Due consideration requires the Council to take what it learns in the power

[5] While the Council argues that it has consistently understood and applied § 839(e)(2) through six power plans over thirty years, Council Resp. at 26, 35-38, these earlier power plans confirm that it has not consistently viewed this obligation as dismissively as it does here. Regardless of whether history supported the Council's argument, a long-standing legal error is still a legal error.

planning process and ask again whether it is producing the end result the Act requires or whether adjustments to the combined program and plan are necessary to achieve the Act's dual objectives. NRIC Br. at 21-25. The actions that the Council can take in response to what it learns include pursuing additional resources to reduce reliance on hydropower—including conservation and renewable energy—in the power plan itself, revisiting measures rejected during the fish and wildlife program process,[6] or deciding to initiate the process to amend the fish and wildlife program if a significant change is necessary to achieve the goals of the Act.[7] The Council, however, cannot skip the step where it must ask whether more

[6] The Council's argument that it cannot consider the needs of anadromous fish based on the administrative record for the power plan should not distract the Court. Council Resp. at 33-34. Any deficiency in the record stems solely from the Council's failure to give due consideration to anadromous fish in the Sixth Power Plan. This argument also ignores that an extensive record—complete with recommendations from fish managers—was created during the development of the 2009 Fish and Wildlife Program and was available to the Council at the time it adopted the Sixth Plan. NRIC Br. at 26, n.8. As part of that process, the State of Oregon and others had recommended additional spill and modified reservoir operations to aid fish migration. ER:299-303. The Council declined to include those measures (which went beyond the requirements of the now-illegal biological opinion) in the program not for biological reasons, but because it believed that the lowest common-denominator measures in the biological opinion would carry more "weight" with the federal dam operating agencies. ER:301-302. Whatever the wisdom or legality of that decision, the Council could have reexamined Oregon's recommendations in light of what it learned about the reliability of the regional power supply in the Sixth Power Plan. *See id.* at 303 (recognizing that "the Council will need to revisit its program decisions" if future events warrant).

[7] As previously noted, it is not difficult to imagine that the Council would seek to revisit aggressive fish and wildlife program measures if it subsequently found

can be done to protect, mitigate, and enhance anadromous fish just because it believes that additional action might be required to accomplish that goal. This is a distinction with a difference. How the Council implements what it learns is entirely distinct from whether the Council has to ask questions in the first place.

While the Council insists that it cannot consider the "appropriate flows for anadromous fish in the power plan" because such decisions are "the purpose of the process prior to the power plan" in the fish and wildlife program, Council Resp. at 26, the Power Act explicitly requires the Council in the power plan to provide due consideration for "protection, mitigation, and enhancement of fish and wildlife and related spawning grounds and habitat, including sufficient quantities and qualities of flows for successful migration, survival, and propagation of anadromous fish." 16 U.S.C. § 839b(e)(2)(C).[8] S*ee, e.g.*, RiverPartners Resp. at 2 (arguing that the Council may not look beyond commitments in the program). The Council glosses over this substantive mandate and emphasizes instead its preference that these issues be addressed in the fish and wildlife program process. *See, e.g.*, Council

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unacceptable impacts to the reliability of the power supply in the power planning process. NRIC Br. at 23. That this scenario has not occurred in the past thirty years is not the point. Council Resp. at 30, n.6. The Council has the duty to integrate the program and the plan to achieve the fish and power goals of the Act and has the authority to correct any imbalance.

[8] NRIC is not asking the Council to dictate what are the appropriate flows for anadromous fish in the power plan itself. The Power Act, however, requires the Council to consider this and other issues affecting salmon to judge whether the results of the program and the plan achieve the Act's objectives.

Resp. at 26, 41. While the Council may prefer to address all of these issues up front and once-and-for-all in the fish and wildlife program, Congress recognized that the Council may not always be so prescient and required the Council to consider anadromous fish protection again as it develops the power plan.[9]

Intervenors take these arguments one step further and assert that the Council cannot change its fish and wildlife program. *See*, *e.g.*, RiverPartners Resp. at 19, n.2 (arguing that the Council cannot amend the Program "in light of the finality of the Program once adopted."); BPA Resp. at 17-20. To the contrary, the Council has broad authority to amend the fish and wildlife program as necessary, NRIC Br. at 23-24, & n.7, and has repeatedly exercised that authority for both minor and major amendments. *See*, *e.g.*, "2003 Mainstem Amendments to the 2000 Fish and Wildlife Program" at 5-7, *available at* http://www.nwcouncil.org/library/2003/2003-11.pdf (last visited Jan. 20, 2013) (amending 2000 Program to address

[9] Congress required the adoption of the fish and wildlife program before the plan because of its "sense of urgency" about the situation facing fish, not because it was seeking to provide for administrative convenience or orderly planning. *Nw. Res. Info. Ctr., Inc. v. Nw. Power Planning Council*, 35 F.3d 1371, 1379 (9th Cir. 1994) ("*NRIC*"). Indeed, "'the emphasis of the entire structure of the legislation is on prompt action'" to address the decline of anadromous fish. *Id.* (citing *Nw. Res. Info. Ctr. v. NMFS*, 818 F. Supp. 1339, 1441 (W.D. Wash. 1993). Because of the need for immediate action, Congress required the program to "'be adopted and implemented whether or not the plan is adopted.'" *Id*. (quoting legislative history). Respondents' attempt to transform a sequence born of urgency into a directive to solidify a set of measures for administrative convenience turns this Congressional intent on its head.

mainstem dam operations); "Council Decision to Amend the Fish and Wildlife Program to add the Blackfoot River Subbasin Plan," (Feb. 2011)**,** *available at* http://www.nwcouncil.org/library/2011/2011-03.pdf (last visited Jan. 20, 2013). Intervenors' portrayal of the fish and wildlife program as inviolate once adopted does not square with the law or the facts.

Finally, the arguments that NRIC should have challenged the fish and wildlife program are derivative of the attempt to impose procedural rigidity where the Power Act emphasizes an iterative process designed to achieve the Act's goals. *See, e.g.*, Council Resp. at 41; BPA Resp. at 18; RiverPartners Resp. at 14. Indeed, outside the context of this litigation, the Council has appropriately understood the border between the power plan and the fish and wildlife programs to be far more porous. *See* 2003 Mainstem Amendments at 67 (cited in NRIC Br. at 33 & n.13). When reviewing recommendations to change hydrosystem operations to benefit fish in the fish and wildlife program, the Council explained that it agreed

> with the premise [and] goals of these recommendations. The Act calls for hydrosystem operations and a regional power system that provide both protection for fish and wildlife and for an adequate, reliable and economical power supply. <u>One 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</u>.

Id. at 67.[10] NRIC seeks to compel the Council to perform this same "central

[10] Elsewhere in the Sixth Power Plan itself, the Council recognizes that matters of

task[]" in the Sixth Power Plan by giving "full consideration" to both of the Act's objectives.

In sum, the Power Act does not require the Council to "give due consideration to the Program and its measures" in the power plan; it requires the Council to include the program, analyze its effects on power supply, *and then* to give independent due consideration to the needs of anadromous fish. The Court should reject Respondents' invitation to read the due consideration requirement of § 839b(e)(2)(C) as meaningless surplusage.

2. Respondents' other examples and arguments are irrelevant.

The Council notes that its inclusion of the fish and wildlife program was "not the only way" it gave due consideration in the Sixth Power Plan. Council Resp. 30. But few of these miscellaneous citations even mention anadromous fish, and none provides the analysis the Act requires. The Council first notes that it considered the needs of anadromous fish when looking at various power resource options from wave energy, wind, solar, and coal. Council Resp. at 31 (citing fifty pages of SER). The lack of quotations or specifics drawn from these pages is telling: None of the cited pages even mention anadromous fish, let alone contain

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system reliability and cost affect fish and wildlife planning. ER:174-75. *See also* 16 U.S.C. § 839b(h)(1)(5). The problem is that the Council's arguments in this case do not recognize or apply the same permeability to consideration of anadromous fish protection in power planning, despite the Act's similarly explicit command to do so, *see id.* at § 839b(e)(2)(C).

any discussion of adequate flows, water quality, or any other specific factors required by the Act. *See, e.g.*, SER at 155 (presentation of wave energy noting sport and commercial fisheries as one factor affecting siting of facilities); SER at 1045-65 (presentation assessing wind generation and noting only that siting of development can avoid "[e]cological impacts"); SER 1066-76 (presentation on coal noting pollution concerns and state laws discouraging new plants); 1077-89 (noting only potential terrestrial habitat impacts of improperly sited solar generation); 1090-1105 (noting only that biomass generation is "[n]ot perceived as 'green'"). As NRIC has highlighted, the Council's failure to consider how these or other alternative resources may be utilized to enhance anadromous fish by, for example, reducing reliance on hydropower, is part and parcel of its failure to provide due consideration in the Sixth Power Plan. NRIC Br. at 34-37. While the Council's summary of broad environmental factors in these discussions may help satisfy its duty to provide due consideration to "environmental quality," 16 U.S.C. § 839b(e)(2)(A), this general discussion cannot satisfy the more specific mandate to provide due consideration to the protection, mitigation, and enhancement of anadromous fish, including flows of sufficient quality and quantity for successful migration, survival, and propagation.

The Council's reference to its protected areas policy as a "primary example" of due consideration in the power plan fares no better. Council Resp. at 31. The

Council tellingly cites to the fish and wildlife program for that policy; it was not developed as part of the power plan, nor was it considered in any of the Council's analyses. *See id.* (citing App. P of the Sixth Plan, SER at 822, which merely lists "protected areas" as one example of an existing regulation to "recognize" in assessing environmental costs and benefits).

The Council also points to several different resource scenarios modeled in the power planning process. Council Resp. at 32-33. One of these scenarios—removal of the lower Snake River dams—showed that action could be accomplished without jeopardizing an economical or reliable power supply. But as NRIC has explained, the problem with the Council's discussion of this scenario is that the Council did nothing with it. NRIC Br. at 34-36. The Sixth Power Plan contains no consideration of whether or how this information could be used to protect, mitigate, and enhance anadromous fish. Indeed, the Council's only discussion of this exercise presented a one-sided assessment concluding that the power would be replaced entirely by fossil fuel generation and highlighting the resulting undesirable increases in carbon emissions. NRIC Br. at 34-35.

Finally, Respondents attempt to defend the Council's continued reliance on the flow and passage measures of the illegal 2008/2010 biological opinion as sufficient by themselves to meet the Act's requirement to protect, mitigate, and enhance anadromous fish, Council Resp. at 38-41, and attempt to sow conflict

between the Endangered Species Act ("ESA") and the Power Act, RiverPartners Resp. at 19-20. These arguments should not distract the Court, but merit a short response.

The Power Act imposes substantive requirements on the Council to "protect, mitigate, and enhance" anadromous fish that are different than (though complementary to) other federal agencies' duties to avoid jeopardizing the continued existence of species (*i.e.*, appreciably reducing their chances of survival or recovery) under Section 7 of the Endangered Species Act, 16 U.S.C. § 1536(a)(2). NRIC Br. at 9, 11. Despite the Power Act's distinct mandates, the Council has stated that establishing mainstem measures to protect anadromous fish "is no longer necessary," ER:278, because those measures are contained in a biological opinion that was designed—and is failing—merely to avoid extinction under the ESA. *But see NRIC*, 35 F.3d at 1395 (finding that Council cannot comply with the Power Act's fish restoration goals by adopting such "lowest common denominator" measures).

The Council's attempt to defend this course by suggesting that *NWF v. NMFS*, 839 F. Supp. 2d 1117 (D. Or. 2011), "did not put at issue the mainstem flow and passage measures" in that biological opinion is incorrect. Council Resp. at 40. In *NWF* the court rejected the off-site mitigation program that the biological opinion relied upon to mitigate for the harm caused by continued operation of the

mainstem dams, s*ee NWF*, 839 F. Supp. 2d at 1121, and remanded the biological opinion to consider, among other things, whether "more aggressive action in the mainstem such as dam removal and/or additional flow augmentation and reservoir modifications are necessary," *Id.* at 1130. To help alleviate harm caused by dam operations in the interim, the court ordered the federal agencies to continue to spill in excess of the levels adopted in that biological opinion. *Id.* at 1131.[11] Regardless of whether it was wise to incorporate the biological opinion operations in the 2009 Fish and Wildlife Program, the Council cannot rely solely on measures drawn from an illegal biological opinion to comply with its separate Power Act duty to provide due consideration to the protection, mitigation, and enhancement of anadromous fish in the Sixth Power Plan. NRIC Br. at 9-12.

RiverPartners' insistence that the Council cannot comply with its duty to consider anadromous fish in the power plan without risking "potential conflict with the ESA," RiverPartners Resp. at 20, misunderstands the relationship of the two

[11] The Sixth Power Plan contradicts the Council's statement in its brief that it "recognized and included in the analysis spill amounts at the dams ordered by the federal court above the specifications in the biological opinion," Council Resp. at, 40. In the Plan, the Council explained that "[i]t assumes that bypass spill levels are fixed, as specified in the 2008 Biological Opinion. Additional court-ordered spill, which has been implemented since 2005, is not included in the analysis because it is uncertain whether it will be incorporated into long-term Biological Opinion operations." ER:188. *See also* ER:177 (same). The Council's reluctance to consider even the spill levels required by court order is indicative of its failure to provide due consideration to the needs of anadromous fish in the Plan. *See* NRIC Br. at 51-52 (detailing Council's failure to consider whether power system could accommodate additional spill).

statutes and presumes that the Council would somehow conclude that less is needed for salmon than is currently being provided under an illegal biological opinion. The continued imperiled status of anadromous fish undermines any legitimate basis for the latter assertion and there is similarly no basis to imagine a future conflict with the ESA. As even the Council admits, to the extent that the biological opinion is relevant to its Power Act decisions at all, it at most sets a floor for measures that the Council may include in its combined program and plan. *See* Council Resp. at 39 (flow and passage measures in biological opinion are "the baseline mainstem actions in the program"); ER:176 (same). The biological opinion measures are not a ceiling that could hamper adoption of measures necessary to achieve the Power Act's distinct, but complementary, mandate to "protect, mitigate, and enhance … anadromous fish." 16 U.S.C. § 839(6). There is simply no basis for RiverPartners' belief that the ESA precludes the Council or any other federal dam management agencies from taking additional steps necessary to comply with the fish restoration objectives of the Power Act.

This Court should find arbitrary and capricious the Council's failure to provide due consideration as required by § 839(b)(e)(2) and grant NRIC's request for a remand pursuant to the schedule and process outlined in NRIC's Opening Brief.

II. THE SIXTH POWER PLAN DOES NOT CONTAIN A RATIONAL METHODOLGY FOR ASSESSING 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). The Council failed to satisfy this requirement in two ways. NRIC Br. at 37-42.

First, apart from the eleventh-hour addition of Appendix P, there is no evidence in the Plan itself or the record that the Council developed or applied this—or any other—methodology in developing the Sixth Plan. NRIC Br. at 38. The Council admits that omitting the methodology in the draft plan was error, but maintains that this error is forgivable because it is nevertheless "clear in the draft power plan how the Council assessed the environmental costs and benefits of new resources." Council Resp. at 50. To support this assertion, however, the Council cites only to Appendix P and the Council's discussion of the methodology after public comments highlighted its omission. *Id.* The Council's failure to identify any portion of the admittedly extensive record where it discussed or applied any methodology for assessing costs and benefits in the development of the Sixth Plan, makes it anything but "clear" that it did so. "It is a basic principle of administrative law that the agency must articulate the reason or reasons for its decision," and may not ""implicitly"" perform analyses or reach conclusions.

PCFFA v. U.S. Bureau of Reclamation, 426 F.3d 1082, 1091 (9th Cir. 2005). *See also Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 935 n.16 (9th Cir. 2008) (courts "cannot simply take the agency's word" that it considered a factor in its decision). The Court should decline the Council's invitation to read into the Plan a methodology that the Council did not articulate until after its analysis was complete.

Second, the methodology that the Council described in Appendix P fails to provide a rational method for calculating environmental costs and benefits of resources or measures necessary to meet the fish protection and power reliability goals of the Act. NRIC Br. at 39-42 (explaining that there are quantifiable environmental benefits to reducing reliance on hydropower and quantifiable costs to continuing to rely on hydropower).[12] Respondents avoid addressing the substance of NRIC's arguments by characterizing the required methodology as pertaining only to the acquisition of "new" resources. Although the adjective "new" is peppered throughout Respondents' briefs, it does not appear in the statute. *See* NRIC Br. at 40, & n.18 (explaining that nothing in 16 U.S.C.

[12] The relationship between hydropower generation and fish protection is straightforward and lies at the heart of the Power Act. As the Council itself has noted, the more the hydropower system is used to provide firm power load, "the greater the potential conflict with its use for flows and spills needed for fish passage." Second Power Plan at 9-3. The converse is also true: reducing energy demand and reliance on hydropower through power planning, would allow for additional measures to protect migrating salmon and steelhead.

§§ 839b(e)(3)(C) and 839a(4)(B) restricts inquiry to only future or additional resources).

For example, while the Council invokes 16 U.S.C. § 839a(4) to assert that the "statue is clear" that the methodology applies only to "new" resources, that section says nothing about "new" resources. To the contrary, when that section is read together with the definitions and rest of the Act, it is clear that the required methodology applies to the Council's decisions to carry existing resources forward and to its determination of what new resources are necessary. While the power plan necessarily looks forward to ensure the reliability of the regional energy supply while meeting fish needs, it does so by adopting a resource portfolio that includes a mix of carrying forward existing resources, reducing demand from those resources, and adding new resources as needed to meet system reliability and the fish and wildlife objectives of the Act.[13] In determining and comparing the environmental costs and benefits of the resources that comprise that portfolio, including the effects on anadromous fish, the Council cannot limit its consideration to only new resources.

Contrary to the Council's position that the Act "assumes the continued

[13] Resources are defined broadly as "the actual or planned electric power capability of generating facilities" and as "actual or planned load reduction resulting from" renewable energy or conservation measures. 16 U.S.C. §§ 839a(19)(A), (B) (emphases added).

existence and value of the mainstem hydrosystem resources," Council Resp. at 44, Congress passed the Power Act to address the tremendous harm to fish caused by the existing system and directed the Council and the federal dam management agencies to modify hydrosystem operations as necessary to protect fish.[14] *See NRIC*, 35 F.3d at 1377. The Act "emphasiz[es] changes in hydro project operations," *NRIC*, 35 F.3d at 1378, and Congress "expected increased costs and lost profits to the hydropower system to the extent the system was responsible for damaging fish and wildlife in the region," *id.* at 1395. *See also id.* at 1379, n.13 (noting that "the statute requires a 'power supply' not a 'hydropower supply'" and encouraged "conservation and the development of other resources"); 16 U.S.C. § 839(6). Recognizing that these changes would reduce the generating capacity of the existing system, Congress provided new authority to acquire resources as needed to ensure a reliable and economical power supply. 16 U.S.C. § 839d(a)(4)

[14] The Council repeatedly mischaracterizes NRIC's argument as seeking the "retirement" or "remov[al]" of existing hydropower resources. Council Resp. at 44, 46. As described in its opening brief, NRIC contends that a full accounting and comparison of the environmental costs and benefits of all available resources would illuminate the relative impacts of existing versus alternative new resources and lead to changes that would improve conditions for anadromous fish. *See* NRIC Br. at 41-42 (explaining that an analysis that includes benefits of salmon restoration would allow more balanced consideration of reductions in hydropower from increased spill). The Council's speculation that a proper methodology would compel the Council to recommend, NRIC to pursue, or others to implement the complete retirement of existing resources has no bearing on the Council's duty to adopt and apply that methodology in the first instance.

(allowing acquisition of resources "to replace Federal base system resources"); *id.* at §§ 839a(10)(A), (C) (defining "Federal base system resources" in part to mean "the Federal Columbia River Power System hydroelectric projects" or resources to replace reductions from those hydroelectric projects). In short, Congress explicitly recognized that there would be a trade-off between the existing system and measures necessary to protect anadromous fish. It did not cement the existing system in place, but rather gave the Council and others the explicit authority to acquire resources to mitigate the impact of fish protection measures on the regional power supply. The Council's litigation position that existing hydrosystem operations are set in stone and cannot be considered in an analysis of environmental costs and benefits cannot be squared with the plain language, history, or purpose of the Power Act.

Though Respondents do not believe that the methodology is required to make the decisions in the power plan, the Council cannot fulfill its obligation in the power plan to determine whether the integrated plan and program achieve the goals of the Act without it. Even the Council acknowledges that it "has a responsibility to consider the quantifiable environmental costs and benefits of different resources as it decides what … resources to add to the existing system over time to meet forecast load growth and potential changes to the existing system." ER:230. The costs and benefits of continuing to rely on the existing hydropower system are

clearly relevant to making this determination. There is no dispute that the existing system continues to harm anadromous fish. Indeed, the Council has recognized that reductions in reliance on hydropower reduce the "potential conflict with its use for flows and spills needed for fish passage." Second Power Plan at 9-3. Thus, deciding to rely on hydropower going forward—and deciding not to acquire replacement resources—has environmental costs and benefits associated with it. These environmental costs are relevant when the Council makes a decision about the resource portfolio in the power plan. If it had quantified these costs and benefits according to a balanced methodology, the Council would be able to decide, for example, whether it should carry forward X megawatts of hydroelectric power versus requiring new resources that would either alleviate the need for that power and thus alleviate some of the environmental and net social costs associated with continued reliance on hydropower. These are not only appropriate analyses to perform in the power planning context, they are necessary to achieve the Act's fish protection and power reliability goals. Because the Council did not develop or apply that methodology in the Sixth Power Plan, it did not ask these questions. The Court should find that the Council's failure to include or apply this methodology in the power plan was arbitrary and capricious.

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

The Council's failure to include and employ a balanced and complete

methodology for determining the environmental costs and benefits is exacerbated by its decision to adopt BPA's inflated estimates of the "costs" associated with fish protection measures in the Sixth Power Plan. NRIC Br. at 43-52. Although it presented a range of methods to estimate the costs of the fish and wildlife program in the draft Sixth Power Plan, the Council dropped this description from the final power plan without explanation and instead reported only BPA's view of its fish and wildlife "costs."

As a threshold matter, estimating the amount of "foregone revenue" is based on inaccurate legal assumptions that violate the Power Act. NRIC Br. at 44-46. BPA's estimates of this "cost" are based on the assumption that it is entitled to use all of the water in the river to produce power. The Power Act, however, 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 provide "equitable treatment" for fish and wildlife); *NRIC*, 35 F.3d at 1377, & n.10 (Power Act puts fish and wildlife '"on a par with"' other purposes of the hydrosystem) (quoting legislative history). Even apart from the affirmative requirements of the Power Act, BPA is legally permitted to market only the "surplus" power produced by many of the dams. *See, e.g.*, Rivers and Harbors Act of 1945, 59 Stat. 10, 22 (Mar. 2, 1945) (authorizing construction of

Snake River dams and marketing of "surplus electrical energy" generated by the dams); 16 U.S.C. § 832 (providing authority to market surplus power produced by Bonneville Dam). Because BPA is not legally entitled to maximize power production, it cannot assign a value to actions it has no legal authority to take. NRIC Br. at 45 (citing ER:325).

Rather than respond to these arguments, Respondents attempt to downplay the Council's incorporation of BPA's one-sided "costs" methodology as irrelevant to the Plan and argue that the Council's decision to report and perpetuate BPA's methodology was not arbitrary because the Council did not rely on these costs when it made decisions in the Sixth Power Plan. *See, e.g.,* Council Resp. at 51-53. Each of these arguments, however, begs the question of why the Council included BPA's estimates at all. The Council does not explain in the power plan why it chose to present only one side of the story. The Council in its brief states that it retained BPA's estimates for "informational purposes." Council Resp. at 4, 52 (recognizing that costs are "an important piece of information to many"). NRIC agrees that there is great interest in BPA's inflated cost estimates. *See* ER:322 (Council recognizing debate in draft Appendix M). This interest sharpens the need for the Council to present accurate and balanced information. Part of the Council's job in the power plan is to provide information to facilitate "the participation and consultation of" state, local, and tribal government, fish managers, customers and

the "public at large" in implementing the Act. 16 U.S.C. § 839(3); *id.* at § 839(g) (outlining Council's responsibilities to provide information and public involvement in adoption of the Plan). The Council cannot comply with its duty to facilitate public participation if it provides incomplete and inaccurate information in the Plan. Indeed, the Council's explanation that it removed discussion of other methodologies to avoid continued "contentious discussion" does not answer why BPA's methodology and numbers were favored and retained. If the goal is to avoid a contentious discussion, the answer should have been for the Council to remove all cost estimates, not just those that differed from BPA's preferred methods.

The Council's *de facto* adoption of BPA's cost estimates has meaningful (and harmful) consequences. As NRIC has explained, the use of these cost estimates outside the power planning context can have a direct chilling effect on recommended measures to include in program amendments and elsewhere in the regional discussion of these issues. NRIC Br. at 51-52. As BPA confirms in its brief, these cost estimates do, in fact, influence discussion and decisionmaking "in the Fish and Wildlife Program and other processes." BPA Resp. at 28.[15] *See also*

[15] BPA confusingly asserts that NRIC "requested" the removal of the draft's discussion of other cost methodologies. BPA Resp. at 28. NRIC requested no such thing; rather it is challenging the Council's unexplained omission of these alternative methodologies and retention of BPA's estimates as arbitrary and capricious. NRIC Br. at 43-52.

§ 839b(h)(5) (requiring the program to consist of measures that protect fish "while assuring the Pacific Northwest an adequate, efficient, economical, and reliable power supply."); ER:174-175 (describing Council's preliminary estimates of power supply impacts in fish and wildlife program). BPA's estimates are included in the Council's annual reports to the governors and repeated in the context of other power council decisions and deliberations. *Id.* at 27-28. The Council's insistence that these figures are nothing more than "informational" or irrelevant fails to account for this larger context. The Council's failure to consider these and other pernicious effects of adopting BPA's inflated cost estimates is arbitrary and capricious.

IV. THE COURT SHOULD ISSUE A TAILORED REMAND TO REQUIRE THE COUNCIL TO COMPLY WITH THE POWER ACT.

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 incorporates a baseless 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, including the specific requests included in NRIC's opening brief. NRIC Br. at 53-54.

Of the Respondents, only RiverPartners opposes NRIC's request for tailored relief if this Court finds a violation of the Power Act. It argues that a new biological opinion due a year from now may render the 2009 Fish and Wildlife Program moot and urges the Court not order relief that may implicate that program on "prudential grounds." RiverPartners Resp. at 31-32. This argument begs the question why that program is not already under reconsideration in response to a federal court's rejection of the current biological opinion. *NWF v. NMFS*, 839 F. Supp. 2d at 1125, 1130. Regardless, as Respondents emphasize elsewhere, NRIC has challenged the Sixth Power's Plan's failure to achieve the power reliability and fish protection goals of the Power Act. While the fish and wildlife program is incorporated into the Sixth Power Plan and the Council may decide to amend it at any time, its theoretical future mootness does not bar this court from ordering the relief NRIC seeks.

CONCLUSION

In 1980, Congress declared that it was an "urgent priority" to restore salmon devastated by the Federal Columbia River Power System and directed the Council to act quickly to determine how to change the hydrosystem and then to develop a

power plan to ensure those changes did not jeopardize maintaining an economical and reliable power supply. Despite the previous intervention of this Court, and the clear language and structure of the Power Act, the Council has not done so. As reflected in the Sixth Power Plan, the Council has instead detached the process Congress provided from the results Congress demanded.

NRIC asks this Court to require the Council to reintegrate its fish and power responsibilities by providing due consideration to the needs of anadromous fish, to fully analyze the costs and benefits of its resources decisions, and to ensure that it provides accurate information about the impacts of fish protection on an economical and reliable power supply. NRIC respectfully requests that the Court issue a tailored remand to ensure that the Sixth Power Plan complies with the Power Act.

Respectfully submitted this 28th day of January, 2013.

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CERTIFICATE OF COMPLIANCE

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

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Respectfully submitted this 28th day of January, 2013.

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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 January 28, 2013, I served a true and correct copy of attached document on the parties listed below:

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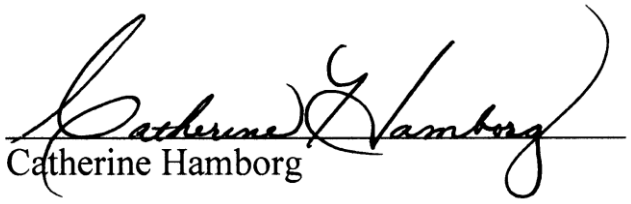
I, Catherine Hamborg, declare under penalty of perjury that the foregoing is true and correct. Executed this 28th day of January, 2013, at Seattle, Washington.



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