

No. 15-71482

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NORTHWEST RESOURCE INFORMATION CENTER,

Petitioner,

v.

NORTHWEST POWER AND CONSERVATION COUNCIL,

Respondent,

and

KOOTENAI TRIBE OF IDAHO; NORTHWEST RIVERPARTNERS;
BONNEVILLE POWER ADMINISTRATION; PUBLIC POWER COUNCIL;
SPOKANE TRIBE OF INDIANS; STATE OF MONTANA; STATE OF IDAHO,

Respondent-Intervenors.

PETITIONER'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT REQUIRED BY FRAP 26.1

Petitioner Northwest Resource Information Center has no parent, subsidiary, or affiliate that has issued shares or debt securities to the public.

Respectfully submitted this 14th day of January, 2016.

s/ Todd D. True

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STATEMENT OF JURISDICTION

The Court has original jurisdiction over this petition under 16 U.S.C. § 839f(e)(5). Petitioner, Northwest Resource Information Center (“NRIC”), seeks review of the Northwest Power and Conservation Council’s (“Council”) 2014 Fish and Wildlife Program (“2014 Program”) pursuant to the Pacific Northwest Electric Power Planning and Conservation Act (the “Power Act”), 16 U.S.C. §§ 839-839h. The Council published notice of its decision to adopt the 2014 Program on March 19 and 27, 2015. *See* 80 Fed. Reg. 14418 (Mar. 19, 2015); 80 Fed. Reg. 16463 (Mar. 27, 2015). The Council’s decision is a final action subject to judicial review. 16 U.S.C. § 839f(e)(1)(A). NRIC timely filed its petition on May 15, 2015, within 60 days after publication of the Council’s decision to adopt the 2014 Program. *Id.* § 839f(e)(5).¹

ISSUES PRESENTED

1. Whether the 2014 Program fails to comply with the Power Act’s requirement to “protect, mitigate, and enhance” fish and wildlife species, especially salmon and steelhead, adversely affected by the development and operation of hydroelectric facilities in the Columbia River basin, 16 U.S.C. § 839b(h), because it adopts as sufficient to protect these species under the Power

¹ The Declaration of James Edward Chaney, filed concurrently with this brief, demonstrates NRIC’s standing. *See N.W. Env’tl. Def. Ctr. v. Bonneville Power Ass’n*, 117 F.3d 1520, 1529-30 (9th Cir. 1997) (“*NEDC*”)(finding that NRIC has standing under the Power Act).

Act only those hydrosystem measures already required by a biological opinion for salmon and steelhead under § 7 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1536(a)(2)?

2. Whether the Council arbitrarily failed to consider or explain, in light of the administrative record and the requirements of the Power Act, why the measures of the 2014 Program are sufficient to meet the Power Act’s requirement to protect, mitigate, and enhance for the adverse effects of the Columbia River hydropower system on anadromous species, including those listed for protection under the ESA?

3. Whether the Council’s decision to adopt the 2014 Program improperly relies on factors that are not relevant under the Power Act?

STATEMENT OF THE CASE

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

A. Hydroelectric Development Is a Major Factor In the Current Imperiled Status of Salmon and Steelhead.

Salmon and steelhead are anadromous fish. They are born and rear in fresh water tributaries of the Columbia and Snake Rivers as far east as central Idaho, migrate downstream through the Columbia River to the Pacific Ocean where they grow and live as adults, and return to their natal streams and lakes to spawn and die. The Columbia River, its tributaries, and estuary historically provided habitat for Chinook, sockeye, chum, and Coho salmon, as well as steelhead. A century

ago, between 10 and 30 million salmon returned to the Columbia each year. As of 1991, 67 stocks of Columbia River salmonids were extinct and 76 stocks were at risk of extinction.

Those salmon and steelhead that must successfully pass both the four Lower Snake River hydropower projects and the four mainstem Columbia River projects are particularly hard hit by this system of dams and reservoirs. These runs include all populations of Snake River spring/summer Chinook, Snake River fall Chinook, Snake River sockeye, and Snake River steelhead.² All of these species have been listed as either threatened or endangered under the ESA since the 1990s. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 923 & n.2 (9th Cir. 2008).

The remarkable historic productivity, abundance, and diversity of these anadromous fish are dangerously low today. Scientists from the National Marine Fisheries Service (“NMFS”) have determined that viability risks are high for virtually all of the remaining populations of Snake River spring/summer Chinook. *See* 2008 Federal Columbia River Power System Biological Opinion (“BiOp”) at

² Upper Columbia River spring Chinook and steelhead also are hard hit by passage through hydropower projects because they must navigate both the four federal mainstem Columbia River projects and as many as five additional federally-licensed mainstem projects. These species, too, are listed under the ESA. *NWF v. NMFS*, 524 F.3d at 923 & n.2.

8.3-47 (Table 8.3.2-1) (available at:

<https://www.salmonrecovery.gov/BiologicalOpinions/FCRPSBiOp.aspx>);³ 2014

Supplemental BiOp at 71 (Table 2.1-1) (2011 status review indicates all

populations of Snake River spring/summer Chinook are at “High Risk”)(available

at: <https://www.salmonrecovery.gov/BiologicalOpinions/FCRPSBiOp.aspx>). The

smolt to adult returns (“SARs”) for Snake River spring/summer Chinook

populations have rarely exceeded one percent, even though the Council has

maintained for decades that SARs of 2-4% are necessary for species survival and

SARs of 4-6% are needed for the species to reach self-supporting, sustainable

levels. 2014 Program at 157 (reconfirming this goal); ER 00579 (study concluding

that changes to hydrosystem operations to date “have so far been inadequate to

meet SAR targets required to conserve endangered salmon populations”); ER

00580 (chart showing “observed” SARs for Snake River spring/summer Chinook

of 1% to 1.5%).⁴

³ This viability analysis was prepared by the Interior Columbia Technical Recovery Team (“ICTRT”) which was tasked with developing biological viability criteria for these ESA-listed species. The ICTRT’s work products are *available at* <http://www.nwfsc.noaa.gov/trt/columbia.cfm>.

⁴ NRIC’s Excerpts of Record (“ER”) consist of the 2014 Program together with its appendices, selected documents from the administrative record and supplemental administrative record filed by the Council, and excerpts from transcripts of Council Fish and Wildlife Committee meetings. Citations to the 2014 Program are to the original page numbers in the Program. Citations to administrative record documents and transcript excerpts are to the bates-stamped page number that

Despite several recent years of increased returns, the long-term picture for Snake River fall Chinook is similar. “Available data clearly indicates that the hydropower system has a major affect [sic] on migration and rearing survivals for Snake River fall Chinook.” ICTRT, Survival Rate Change Memo at 25, 26 (available at: http://www.nwfsc.noaa.gov/trt/col_docs/IC_TRT_Memo_Survival_Changes_5-17-06.pdf; *see also* ER 00828 (recent increased returns for this species are not indicative of long-term population improvement because most of the returns are hatchery, not wild, fish). Snake River sockeye face perhaps the bleakest future of all. Returns of adult sockeye to Redfish Lake in Idaho have been in the low single or double digits—with several years where no adults made it back to spawn at all—for most of the past two decades. These fish are now—and have been for years—sustained by a captive breeding and hatchery program that has boosted adult return numbers in some recent years without securing the future of the species. And in 2015, high water temperatures in the mainstem reservoirs caused adult Snake River sockeye survival rates much lower than in prior years despite emergency efforts to rescue these fish from the lethal river conditions. *See* Fish Passage Center, Memorandum re Water Temperature Issues at 3 (Oct. 28, 2015)

appears in the ER. Citations to official documents or studies outside the administrative record, such as the 2008 BiOp are accompanied by identification of a website (Council or agency) where these documents can be accessed.

(available at: <http://www.fpc.org/documents/memos/159-15.pdf>).

As this Court has consistently concluded, the large hydroelectric dams on the Columbia and Snake Rivers, built and operated by the U.S. Army Corps of Engineers and Bureau of Reclamation (the Federal Columbia River Power System or “FCRPS”), are a primary cause of the precipitous decline in salmon and steelhead populations. *See Nw. Res. Info. Ctr., Inc. v. Nw. Power Planning Council*, 35 F.3d 1371, 1375-77 (9th Cir. 1994) (“*NRIC I*”) (“[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); *id.* 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)); *NEDC*, 117 F.3d at 1524-26; *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%”); *see also Nw. Res. Info. Ctr., Inc. v. Nw. Power Planning Council*, 730 F.3d 1008, 1011-12 (9th Cir. 2013) (“*NRIC II*”)(reviewing the Council’s Sixth Power Plan).⁵

⁵ Three of these opinions also discuss the history, purposes, and requirements of the Power Act. *See NRIC I*, 35 F.3d at 1377-79; *NEDC*, 117 F.3d at 1528-32; *NRIC II*, 730 F.3d at 1011-14.

B. The Northwest Power Act.

Congress passed the Power Act in 1980 largely to address the decimation of anadromous fish populations by dams in the Columbia basin that was evident even then. 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 I*, 35 F.3d at 1377 & n.10 (citing legislative history), and to include strong fish protection measures in the Act, *id.* at 1379 (Council must take prompt action to address these harms).

The Act that emerged from these concerns has two main 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), and to “‘assure the Pacific Northwest of an adequate, efficient, economical, and reliable power supply,” *id.* at § 839(2); *see NRIC II* 730 F.3d at 1012 (Power Act “‘marked an important shift in federal policy’ by creating a ‘new obligation on the region and various Federal agencies to protect, mitigate, and enhance fish and wildlife’ while not jeopardizing ‘an adequate, efficient economical, and reliable power supply’”) (internal citations omitted).

To achieve these dual purposes, the Act required the Council to first 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 [power] plan”); *NRIC I*, 36 F.3d at 1387-88 (the program must consider and incorporate recommendations from fishery managers for measures and objectives to protect fish and wildlife or explain its decision not to do so) (rejecting 1992 Program primarily because the Council failed to explain rejection of measures recommended by these managers). Only after developing this program does the Act direct the Council to 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.” 16 U.S.C. § 839b(e)(2). The Act also provides that both the fish and wildlife program and the power plan may be amended from time to time. *See, e.g., id.* § 839b(d)(1).

While the fish and wildlife conservation provisions of the Act address all fish and wildlife in the Columbia basin affected by the development of the hydrosystem, these provisions make protection, mitigation, and enhancement of

anadromous fish populations in the basin a special priority, *see, e.g.*, 16 U.S.C. § 839(6). For example, the Act specifically requires that the fish and wildlife program “provide improved survival [for these anadromous] fish at hydroelectric facilities,” *id.* § 839b(h)(6)(E)(i), and include measures that “provide flows of sufficient quality and quantity between such facilities to improve production, migration, and survival of [anadromous] fish . . . ,” *id.* at § 839b(h)(6)(E)(ii).

Notwithstanding the plain language and clear purposes of the Power Act, and the Court’s decision in *NRIC I* over twenty years ago identifying the “tremendous, detrimental impact of dams on fish runs,” 35 F.3d at 1377, efforts to date under the Power Act and other laws have failed to stem, let alone reverse the decline of these species or secure population growth sufficient to stabilize them.⁶ This failure is a result of decades of decisions by the Council and others to generally focus on small changes to dam operations, and other actions in tributary and estuary habitat in an attempt to make up for dam-caused salmon and steelhead mortality, while minimizing changes in hydroelectric system operations in order to avoid reducing power generation. As this Court succinctly put it in *NRIC I*:

⁶ *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 *Env’tl. L.* 709, 809 (2006) (*NRIC I* “seemed to be a path-breaking opinion” but “proved to be an isolated one, however, and the ESA listings soon dominated salmon restoration efforts”).

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 I, 35 F.3d at 1395; *see also 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) (efforts to protect ESA-listed salmon and steelhead 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”).⁷

II. THE 2014 FISH AND WILDLIFE PROGRAM

The past thirty years have demonstrated the Council’s success in achieving the power supply goal of the Power Act: the lights have not dimmed -- let alone gone out -- in the Pacific Northwest.⁸ But the Council’s fish and wildlife program

⁷ The U.S. District Court in Oregon has continued to find these biological opinions inadequate to comply with the ESA. *See, e.g., Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 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*, 422 F.3d 782 (upholding injunction requiring improved dam operations); *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 839 F. Supp. 2d 1117, 1125, 1130 (D. Or. 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”). A challenge to the current, 2014 BiOp, is pending before the same court.

⁸ The market, nudged by the Power Act, has produced very large energy savings through conservation and efficiency of almost 5,800 average megawatts which now represents the region’s second largest resource after hydropower. By 2035, energy

efforts have been much less successful: the reality of restoring sustainable salmon and steelhead runs to the Columbia Basin continues to recede into the ever-more-distant future, notwithstanding more and more planning and more and more research and the expenditure of more and more money. Rather than implement measures necessary to protect and enhance the critical anadromous fish populations of the Columbia and Snake Rivers, the Council has consistently defaulted and deferred to measures in a series of failed BiOps for these species under the ESA and otherwise largely treated its duties under the Power Act as either purely procedural or affecting fish and wildlife in the Columbia basin *other than* the most imperiled anadromous species of salmon and steelhead. To the continued detriment of the very fish the Act was intended to help, and to continued injury to those in the region who depend upon these fish, the Council has followed this same well-worn path in the development of the 2014 Program.

A. The Legal Framework For the 2014 Program.

The Council formally began its development of the 2014 Program in January, 2013. Early communications from Council staff to Council members

efficiency will be nearly the size of the hydrosystem. As the Council determined in its Sixth Power Plan, the region can retire all of its existing coal plants, and remove the four lower Snake River dams, and customer's monthly power bills will actually decline due to more efficient use of energy. *See* Sixth Power Plan, Appx. O at O-8 to O-9 (Tables O-3 and O-4) (showing year-to-year or overall bill reductions with Lower Snake River dam breach scenario compared to 2010 "Current Policy," depending on carbon cost assumptions); available at https://www.nwcouncil.org/media/6335/SixthPowerPlan_Appendix_O.pdf.

recognize the Council's legal duties under the Power Act as separate and distinct from actions required by the ESA:

[T]o the extent the actions funded and implemented now to address [ESA-] listed species are sufficient to comply with the ESA but do not ultimately result in protection and mitigation [for fish and wildlife, including salmon and steelhead] as those concepts are embedded in the Northwest Power Act, the Council and Bonneville and other agencies will have that continued obligation to implement.

ER 00190; *see also id.* 00013 (February 2013 staff summary of tasks for the Council noting that the Council “[m]ay recommend changes in [dam] operations that are more biologically beneficial and cost effective than those in the biological opinions,” but failing to assign this responsibility to anyone).

In explaining the relationship between the Council's duties to anadromous fish under the Power Act and the Act's requirement to ensure an adequate power supply, Council staff explained:

The Fish and Wildlife Program is part of the Power Plan (Section 4(e)(3)(F)). . . . What this primarily means, and how the Council has implemented this over 30+ years, is that the Council must amend the Fish and Wildlife Program first to determine the non-power constraints on the hydrosystem to benefit fish and wildlife, and then use the Power Plan process to make sure an adequate amount of cost-effective conservation and generating resources have been identified for acquisition to make up for the resulting generation deficiencies and assure that Bonneville and the other federal agencies may implement the operations for fish and wildlife with sufficient certainty and reliability and similarly meet load demands.

ER 00129. In other words, since 1980, the Council has understood that its fundamental duty to fish and wildlife, including salmon and steelhead adversely

affected by the development and operation of the hydrosystem, has been – and remains – to include in the fish and wildlife program those measures necessary to actually protect, mitigate and enhance for the harmful effects of the hydrosystem on these and other species and only then to address how to provide a reliable supply of power for the region.

B. Development of the 2014 Program Provisions.

Notwithstanding this clear articulation of the relevant legal standards for protecting fish and wildlife under the Power Act and the relationship of those standards to other laws like the ESA, the 2014 Program does not follow this approach. The 2014 Program makes only minor modifications to the measures of the 2009 Program for anadromous fish, including ESA-listed salmon and steelhead, and continues to rely on actions required under the ESA to meet the Council’s independent duties to these species under the Power Act.

1. *Program Biological Objectives*

One of the most important provisions of a fish and wildlife program is to establish biological objectives to measure whether the program is meeting the requirements of the Act. In fact, one of the first staff memoranda to the Council regarding the 2014 Program focuses on this issue and summarizes the shortcomings of prior programs by noting that:

The most obvious gap in the Program always has been the lack of useful, measureable objectives above the subbasin and project scale to

measure overall program progress and guide further program planning. It has always been a clear program need, yet developing objectives of this type has proven difficult for a number of reasons. The ISAB [Independent Scientific Advisory Board] also has expressed concern repeatedly about the absence of quantitative and measureable objectives and subbasin objectives. Should the Council put the energy and resources into making it happen this time?

ER 00003.⁹ Recognition of this flaw is hardly surprising. When the Council asked the ISAB to review the 2009 Program before it began work on the 2014 Program, the ISAB reported (in March of 2013) that:

Establishing **quantitative performance goals** both for the biological objectives and restoration strategies is an essential feature of adaptive management and provides measureable thresholds for determining success. True objectives are focused and measureable benchmarks whereas many of the “objectives” identified in the 2009 Program express general intentions as unquantified goals or strategies to achieve goals. *The amended Program should include quantitative biological objectives that can be regularly monitored and evaluated as a means to determine whether the Program is on target or in need of change.*

.....

A **primary conclusion** of this review is that continuing to implement the Program on its existing trajectory is highly uncertain to achieve

⁹ While this staff memorandum does not explain the “reasons” for the Council’s inability to adopt quantitative and measureable objectives, other documents do. In explaining its concerns about the absence of quantitative objectives and the corresponding overall uncertainty of program success, the ISAB noted that “changing the course of a 30 year-old program will be challenging for the Council” because the hundreds of current projects under the program now have both bureaucratic and other constituencies that contribute to an “*enormous inertia to maintain the status quo.*” ER 00100 (emphasis added). This *enormous inertia* extends well beyond specific projects and encompasses the operation and management of the hydrosystem itself.

the Council's biological objectives for the Basin.

ER 00040 (bold and quotation marks in original, emphasis added). Even this advice was not news since the Council had said in its 2009 Program:

Within one year of adopting the amended Program, the Council will work with the fish and wildlife agencies, tribes, and others to initiate a process specifically aimed at assessing the value for the Program of quantitative biological objectives at the basinwide level (or at any level above the subbasin and population level) and, if determined to be useful, develop an updated and scientifically rigorous set of such quantitative objectives.

2009 Program at 11 (available at:

https://www.nwcouncil.org/media/115273/2009_09.pdf). Apparently, this provision failed to produce any specific results, let alone identification of actual quantitative, measurable biological objectives that could be adopted.

Moreover, while Council staff expended considerable energy during the early development of the 2014 Program looking for and collecting descriptions of biological objectives and summarizing the recommendations of the fish and wildlife managers for such objectives, ER 00478-00497,¹⁰ the 2014 Program does not actually adopt *any* quantitative, measureable biological objectives for fish and wildlife, including ESA-listed salmon and steelhead, that do not already exist in the BiOps for FCRPS operations under the ESA. *See, e.g.*, 2014 Program at 153-54 (Appendix D, Program Goals and Objectives)(adopting BiOp standards for total

¹⁰ *See, e.g.*, ER 00314-00315, 00346-00349, 00352-00353, 00413-00414 (all documents describing or discussing possible biological objectives).

dissolved gas as the only “objective” to meet the goal of “[p]roviding adequate water quality and quantity to support targeted species”), 158-59 (adopting dam passage and adult survival standards for anadromous fish from BiOp as the only “objective” to meet the goal of “achiev[ing] anadromous fish in-river migration and passage survival that approximates natural survival during in-river migration”).¹¹ Instead, for nearly all of the anadromous fish and wildlife goals identified in Appendix D to the 2014 Program, the “objectives” for assessing achievement of the goals are listed as “remain to be identified and adopted” and the indicators are listed as “to be developed under the ecosystem health and Council action categories.” 2014 Program at 153-159. And, once again, the 2014 Program itself states only that:

Working with others in the region, including state and federal fish and

¹¹ The only other “biological objectives” in the 2014 Program for anadromous fish are two “high level indicator” *goals*, “increasing total adult salmon and steelhead runs to an average of 5 million annually by 2025,” and “achieving smolt-to-adult return rates in the 2-6 percent range (minimum 2 percent; average 4 percent) for listed Snake River and upper Columbia salmon and steelhead” 2014 Program at 157 (Appendix D). The ISAB in its review of the 2009 Program explained that these broad goals are insufficient to assess whether the Program is meeting the requirements of the Power Act. *See* ER 00090-00093. Yet the five million fish goal has remained unchanged and been part of Council fish and wildlife programs since at least 1987 (the date 2025 was added later) and the SAR goal is similarly longstanding but unmet and for at least Snake River spring/summer Chinook, no closer to being met. *See, e.g.*, ER 00579-00580 (ISAB conclusion that hydrosystem operations so far are inadequate to meet SAR targets for endangered salmon).

wildlife agencies and the tribes, other federal agencies and the independent science panels, the Council will oversee a regional process to survey, collect, identify, and refine a realistic set of quantitative objectives for program focal species and their habitat related to the four broad themes and program goal statements.

Id. at 31. Remarkably, this open-ended commitment to “oversee” an undefined “regional process” at some indefinite future time is a step back from even the failed commitment in the 2009 Program to start such a process “within one year.”

The reasons for this retreat are not revealed in the record and there is certainly no adequate explanation for it, but the Council may have perceived that adopting quantitative and measurable biological objectives, especially ones that go beyond the requirements of the FCRPS BiOps, might be a complex, time-consuming, and controversial task. This is in substance the Council’s explanation in Appendix S to the 2014 Program (its formal response to recommendations) for doing no more to address the absence of quantitative, measurable objectives. *See* 2014 Program at 228-234; *see also infra* at 40-42 (discussing the Council’s Appendix S response regarding biological objectives in more detail).

In light of the recognized failure of prior programs to address this critical missing element that both the ISAB and the Council identified as essential and urgent to correct, and in light of the plain requirements of the Act and the role of quantitative, measurable objectives in determining whether the Program can meet – or is meeting – the Act’s requirements to protect, mitigate and enhance

anadromous fish populations, the lack of any further explanation for the Council's status quo failure to actually identify and adopt, or even set a clear path and timeline for adopting, such objectives – what might charitably be called its “punt” on this issue – is striking.

2. *Dam and Reservoir Operations*

Another longstanding and well-recognized failure of prior fish and wildlife programs is the inadequacy of measures to improve conditions for salmon and steelhead migrating through the main Columbia and Snake Rivers in order to fulfill the Power Act's mandate to protect, mitigate, and enhance anadromous fish adversely affected by the development and operation of the hydrosystem. *See* 16 U.S.C. § 839b(h)(6)(E). Rather than develop and adopt measures that would meet the Act's anadromous fish requirements, the Council explained that in the past it had “defer[red] to the oversight agencies and legal documents for mainstem operations.” ER 00124 (explaining contents of the 2009 Program). The record subsequently specifies that these “legal documents” are “the 2008 BiOp” which, along with its 2014 supplement, “*is deeply integrated into the fish and wildlife program.*” *Id.* (emphasis in original);¹² *see also* ER 00343 (staff summary

¹² The 2009 Program states flatly that establishing additional mainstem measures to protect anadromous fish “is no longer necessary,” because “[t]he 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” 2009 Program at 34 (available at:

accurately noting that “the Mainstem portion of the program defers to the various BiOps and recovery plans”).

Despite the acknowledged need to improve mainstem river conditions for anadromous fish, including dam passage survival and river flows – and notwithstanding a clear recognition that the legal requirements of the Power Act for protecting these fish go beyond the requirements of the ESA – in the 2014 Program the Council proceeded to dismiss every recommendation to actually improve flow, passage, or other conditions for these fish in the mainstem of the Columbia and Snake Rivers that would go beyond the provisions of the FCRPS BiOps. 2014 Program at 259-271(response to comments); *see also infra* at 32-37 (discussing this dismissal in more detail). While the Council calls the mainstem measures from the BiOps a “baseline,” they more accurately represent a ceiling: there are no specific hydrosystem measure in the 2014 Program to meet the needs of ESA-listed salmon and steelhead beyond the measures required by, or provided for in, the FCRPS BiOps.

3. *The 2014 Program Decision Regarding an Adequate, Efficient, Economical and Reliable Power Supply*

Separately, the Council actually emphasizes the lack of any additional

https://www.nwcouncil.org/media/115273/2009_09.pdf); *see also id.*, App. F at 6 (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”).

hydrosystem measures when it concludes that the 2014 Program will still allow the region to enjoy “an adequate, efficient, economical, and reliable power supply.”

2014 Program at 204 (citing 16 U.S.C. § 839b(h)(5)).¹³ First, the Council candidly recognizes that:

The operational measures to benefit fish included in the 2014 Fish and Wildlife Program amendments have not changed materially from the operations included as part of the 2012 adequacy assessment [which was based on the 2009 Program.¹⁴] The operations specified in the NOAA Fisheries’ 2014 FCRPS Biological Opinion similarly have not changed dramatically from those in the 2008/2010 FCRPS Biological Opinion [on which the 2009 Program relied], and the biological opinion operations along with the Columbia Basin Fish Accords remain the baseline operational measures of the Council’s 2014 program.

¹³ The Council must ultimately conclude that the measures in the program will meet the fish restoration purposes of the Act “while assuring the Pacific Northwest an adequate, efficient, economical, and reliable power supply.” 16 U.S.C. § 839b(h)(5). As the Council notes, this does not require adoption of a fish and wildlife program that has no effect on the production of electricity from the hydrosystem but rather requires it to ensure that any effects can be adequately, efficiently, economically and reliably offset. 2014 Program at 206-207; *see NRIC I*, 35 F.3d at 1394-95 (holding that “a fish and wildlife measure cannot be rejected solely because it will result in power losses and economic costs”). In fact, the purpose of the Council’s analysis of the power impacts of the fish and wildlife program is to “guide Bonneville and the region in *acquiring* the least-cost resources necessary to meet the demand for electricity [and] implement the Council’s fish and wildlife program.” 2014 Program at 204 (emphasis added). In other words, as the Council recognizes, it is not even necessary that the region’s power needs be met with *existing* resources so long as the additional resources to assure system reliability and protection of fish and wildlife can be acquired economically and efficiently.

¹⁴ As the 2014 Program explains, the Council regularly assesses the adequacy and reliability of the power system. It did this most recently in 2012 and relies on that assessment in the 2014 Program. 2014 Program at 207-209.

The operational provisions added by the Council to this baseline – such as the call to investigate potential refinements to Libby and Hungry Horse operations to benefit resident fish in the upper river and reservoirs – are not sufficiently specific at this time to model the possible effects.

2014 Program at 209 (App. R). As this statement makes clear, the actual fish and wildlife measures of the 2014 Program to protect anadromous fish are the same as those relied on in the FCRPS BiOps. Any additional measures beyond these so-called “baseline” measures are not aimed at protecting ESA-listed anadromous fish and their impacts are inconsequential in any event.

Second, the Council’s analysis of the impacts of the biological opinion/fish and wildlife program measures on the reliability of the power system also is revealing. As the Council explains, since 1980, fish and wildlife measures have:

reduced hydroelectric generation on average by about 1,200 average megawatts relative to an operation without any constraints for fish and wildlife. . . . Most of [this] reduction occurred gradually over a 30-year period, and the system has had ample time to adjust. The recent changes in hydroelectric generation considered in the most recent [2012] adequacy assessment were small in comparison to the 1,200 aMW as a whole.

. . . .

The operational measures to benefit fish included in the 2014 Fish and Wildlife Program amendments have not changed materially from the operations included as part of the 2012 adequacy assessment.

2014 Program at 207, 209 (App. R). This statement too makes clear that the 2014 Program is not materially different from the 2009 Program and the only measures in either to protect, mitigate, and enhance for the effects of the hydrosystem on

ESA-listed anadromous fish are those from the biological opinions for these species.

Under these circumstances, it is hardly surprising that the Council concludes adoption of the 2014 Program will provide the region with an affordable, efficient, economical and reliable power supply system.¹⁵ What is surprising is that the Council never poses, considers, or analyzes the question whether the 2014 Program could adopt additional measures to protect, mitigate, and enhance for the effects of the hydrosystem on anadromous fish even though the record indicates that the Council is well aware of the need for additional measures to protect these fish, knows that measures beyond those required by the ESA are available and required by the Power Act, and knows – or should know – that the Act also requires it to identify and evaluate such measures in order to determine whether they need to be included in the Program in order to meet the Power Act’s fish and wildlife requirements while still providing the region with reliable and affordable power.

C. Other Factors Affecting the Council’s Decision to Adopt the 2014 Program.

In 2008 the Bonneville Power Administration, Corps of Engineers, and Bureau of Reclamation (“action agencies”) signed 10-year agreements with the

¹⁵ The Council’s analysis in Appendix R notes some small risk to the adequacy of the power system in 2019 and after but also notes that there are a number of steps available and in process that will more than address this small risk. 2014 Program at 208.

states of Idaho and Montana, five Columbia River tribes, and the Columbia River Inter-Tribal Fish Commission in what are known as the “Columbia Basin Fish Accords.” The state of Washington and two additional tribes later signed similar agreements with the action agencies. The Idaho and Montana agreements contain specific habitat and hatchery funding commitments, withdrawal and dispute resolution terms, and other miscellaneous provisions.¹⁶ The introduction to these Accords identifies their purposes to include “address[ing] legal mandates for the FCRPS and Upper Snake Projects under the Endangered Species Act[], the Northwest Power Act[], and the Clean Water Act[.]” *See* Idaho Accord, Sec. I.

The Idaho and Montana agreements also contain language specifically binding these states to support the provisions of the 2008 FCRPS BiOp in all forums as adequate and sufficient to comply with not only the requirements of the ESA but also those of the Power Act:

The Parties agree that the spill and fish transportation measures proposed in the draft BiOps, subject to adaptive management as provided in the FCRPS BA, satisfy ESA and [Power Act] requirements with respect to salmon and steelhead affected by the FCRPS and Upper Snake Projects.

See Id., Sec. II.B & C. These agreements also contain forbearance provisions that

¹⁶ *See* 2008 Columbia Basin Fish Accords Memorandum of Agreement between the State of Idaho and FCRPS Action Agencies, (“Idaho Accord”) (available at: https://www.salmonrecovery.gov/Files/BiologicalOpinions/ID_MOA_Final/.pdf), and 2008 Columbia Basin Fish Accords Memorandum of Agreement between the State of Montana and FCRPS Action Agencies, (“Montana Accord”)(available at: https://www.salmonrecovery.gov/Files/BiologicalOpinions/MT_MOA_Final.pdf).

expressly bar the states from “advocat[ing] against, either directly or through parties not subject to the Agreement, the adequacy of the FCRPS and Upper Snake BiOps and the Action Agencies’ implementation of the BiOps and this agreement” in any forum including under the Power Act. *Id.*, Sec. IV.A.2.d. This section thus states further that:

[t]he Parties support the package of federal and Agreement actions as an adequate combined response of these entities to address the government’s duties to mitigate for the FCRPS effects under applicable environmental laws and regulations for the ten year duration of the BiOps. This includes requirements for: conserving listed salmon and steelhead, including avoiding jeopardy and adverse modification of critical habitat under the ESA [and] protection, mitigation, enhancement and equitable treatment of fish and wildlife under the Power Act

Id., Sec. IV.B.1; *see also id.*, Sec. IV.C.1 (requiring Idaho (and Montana) to “submit comments or recommendations for Council Program amendments that are consistent with and are intended to effectuate this Agreement”).

The continuation of tens of millions of dollars in state funding from BPA depends on compliance with these requirements: if BPA believes a state is not meeting its commitment under the adequacy requirements, following an attempt to resolve any disagreement, BPA may withdraw from the Accords and, in that case, “all funding commitments and/or other covenants made by the withdrawing Party cease, and the withdrawing Party shall have no further rights or obligations pursuant to the Agreement.” *See Idaho Accords*, Sec. IV.E.3. This provision is a

powerful economic hammer hanging over the continuation of state habitat and hatchery projects.

Not surprisingly, these Accord provisions had an effect on the Council members from at least Idaho and Montana. First, BPA was closely involved in the 2014 Program development, including how Idaho and Montana interacted with the process. Numerous emails from BPA requested “accord checkins,” sharing of draft program recommendations, and provided the states “talking points” for the States’ program recommendations and presentations. For example, in November 2013, BPA emailed Montana Council representative Anders, ER 00766 & 00768, Washington representative Karier, ER 00773, and Idaho representative Yost, ER 00775 “to facilitate coordination” with each state under the Accords regarding comments and recommendations to amend the Fish and Wildlife Program. The talking points attached to these messages specifically stated “[n]o new analysis or changed conditions warrant changing course (e.g. new spill test).” ER 00768; *see also* ER 00826 (asking Idaho Council representative whether Idaho planned to submit comments on a draft BiOp, and if so, requesting an “accord checkin”). The extent of BPA’s involvement with member states and directly with Council members is further demonstrated by an email from BPA to Montana’s two Council representatives after Montana made a recommendation for a miniscule adjustment to reservoir operations stating, “I just wanted to flag [that] the recommendations

for additional projects and funding...is not consistent with the Accord's Affirmation of Adequacy provisions. Perhaps you've noted this in your review given our discussion, but figured I better flag for your awareness." ER 00816.

The "Affirmation of Adequacy" provisions in the Idaho and Montana Accords had an explicit effect on Idaho's Council members and may have affected other Council members without explicit record evidence. Numerous emails, Council meeting minutes, and transcripts show that the Idaho representatives rejected measures to protect salmon and steelhead beyond those in the FCRPS BiOps (including consideration of Oregon's proposal for increased spill) because of the Accords' affirmation of adequacy language. BPA representatives specifically communicated with one of Idaho's representatives citing the Accord's affirmation of adequacy clause and reminding the Idaho member "to affirm the adequacy of the commitments of the Action Agencies as adequate to address the government's duties to mitigate for the FCRPS under applicable environmental laws for the 10 year duration of the agreement" and the "commitment of the signatories to submit comments or recommendations for the Council Program amendments that are consistent with and intended to effectuate the Agreement." ER 00770. It is not surprising, therefore, that one of Idaho's representatives said in regard to the Oregon proposal for additional spill beyond that provided by the FCRPS BiOps: "having recently reviewed our Accord it is clear Idaho is

committed to support the BiOp spill regime through 2018.” ER 00777.¹⁷

The record is less clear whether or how the Accord provisions affected the views of the Montana members (and Washington even though its Accord does not contain exactly as those in the Idaho and Montana agreements). Certainly, BPA’s efforts to influence all of these members are well-reflected in the record, *see* ER 00766, 00768, 00770-00771, 00773, 00775, 00777, 00783-00784, 00801, 00815-00816, and the fact remains that the 2014 Program does not contain any measure to protect, mitigate or enhance ESA-listed salmon and steelhead that goes beyond, or is inconsistent with, the provisions of the FCRPS BiOps – just as the Accords require.

STANDARD OF REVIEW

The Court reviews the Council’s decision to adopt the 2014 Fish and Wildlife Program under the arbitrary and capricious standard of the Administrative Procedure Act (“APA”). 5 U.S.C. § 706(2)(A); 16 U.S.C. § 839f(e)(2); *see also 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 Court’s core inquiry is whether the Council has both: (1) correctly interpreted and

¹⁷ While the record also contains efforts by Council staff to distinguish the Accords’ requirements from the Council’s duties under the Power Act, *see* ER 00780-00781, Idaho’s Council members still believed the Idaho Accord prevented them from supporting even review of the Oregon spill proposal because it went beyond the provisions of the FCRPS BiOps. *See* ER 00881-00882, 00887, 00896, 00901-00902 (transcript excerpts).

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).

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. 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*)).

The Court reviews questions concerning construction of the Power Act *de novo* as questions of law, *NEDC*, 117 F.3d at 1530, and “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”). Moreover, the Power Act itself is “intended to be construed in a consistent matter.” 16 U.S.C. § 839; *see also NRIC I*, 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”).

SUMMARY OF ARGUMENT

Over two decades ago in *NRIC I*, the Court rejected a fish and wildlife program because it failed to explain why its measures were adequate to meet the fish and wildlife protection requirements of the Power Act. In its 2014 Program, the Council has again failed to explain why the measures of the current Program are all that is necessary to meet these requirements.

First, the Council has, contrary to law, treated compliance with the ESA as sufficient to also comply with the Power Act when the two statutes set different legal standards and the Council knows the Power Act requires additional measures to actually protect, mitigate, and enhance for the harmful effects of the hydropower

system on anadromous fish populations, including those listed under the ESA.

Second, the Council has arbitrarily failed to explain, in light of its legal duties under the Power Act, why the 2014 Program does not include measureable, quantitative biological objectives, only includes those specific measures to protect ESA-listed anadromous fish in the mainstem of the Columbia and Snake Rivers that are set out in the FCRPS BiOps, dismisses all recommendations for adopting additional, more protective measures for these fish, including a proposal to increase juvenile salmon and steelhead survival by spilling more water past the dams, and never even asks or addresses the question whether additional measures beyond those in the 2014 Program could be adopted while still providing an adequate and reliable power supply for the region.

Third, the record shows that the Council's decision to adopt the 2014 Program without requiring any protection measures for ESA-listed anadromous fish beyond those in the FCRPS BiOps was based, in part, on consideration of an irrelevant factor – a provision in separate long-term funding agreements that required at least Idaho and Montana to support as legally adequate, including to comply with the Power Act, the hydrosystem measures in the FCRPS BiOps.

For all of these reasons, the Court should find the Council's decision to adopt the 2014 Fish and Wildlife Program contrary to law, arbitrary and capricious, set the decision aside, specify the Council's duties on remand, and set

an expeditious and specific schedule to ensure that the Council promptly complies with the Power Act.

ARGUMENT

I. THE COUNCIL HAS UNLAWFULLY EQUATED THE ESA AND THE POWER ACT

The Power Act imposes substantive requirements on the Council to “protect, mitigate, and enhance” anadromous fish and specifically to include in the Program, among any other measures necessary to meet this requirement, those measures that will “provide for the improved survival” of these fish past the dams and will “provide flows of sufficient quality and quantity between” the dams. 16 U.S.C. § 839b(h)(6)(E). Instead of following these requirements and adopting a suite of measures that will assure protection, mitigation, and enhancement for anadromous fish, the 2014 Program adopts wholesale the dam and reservoir operations from the FCRPS BiOps as sufficient to also comply with the requirements of the Power Act for these species. *See supra* at 18-19 (describing 2014 Program measures for dam operations).

While the 2014 Program repeatedly characterizes these measures as a “starting point” or “baseline,” it and the record make clear that there are no additional requirements for dam and reservoir operations under the Power Act to protect ESA-listed salmon and steelhead. For these species, the Council simply substitutes compliance with the ESA for compliance with the Power Act without

ever explaining why the former is sufficient to comply with the latter. However, as the Council is aware (and as the record shows) the requirements of the Power Act are different from, though complementary to, the responsibilities of other federal agencies to avoid jeopardy to listed species and adverse modification of their critical habitat under § 7 of the ESA. *See supra* at 11-13 (discussion of 2014 Program legal framework).¹⁸

The Council's continued adherence to the measures of the FCRPS BiOps as also adequate to comply with the Power Act did not arise from an absence of recommendations and additional measures to consider. An October 2013 staff summary of "mainstem" measures notes that while a number of agencies, tribes and others urged continued reliance on the biological opinions:

Oregon, the Nez Perce Tribe, the Pacific Fishery Management Council and a number of environmental and fishing groups and individuals recommend implementation of increased spill as an experiment (the proposal out of the CSS studies) if the dissolved gas waivers can be revised. And a number of environmental groups recommend the Council completely de-link its program from the Biological Opinion measures and pursue additional flow and passage actions, including operating John Day and other lower Columbia

¹⁸ It is well-settled that even where statutes share similar purposes or goals, compliance with one does not equate to compliance with another. *See Seattle Audubon Soc'y v. Evans*, 952 F.2d 297, 301-302 (9th Cir. 1991) (designation of spotted owls as endangered under the ESA does not excuse Forest Service from obligations under National Forest Management Act); *Washington Toxics Coal. v. EPA*, 413 F.3d 1024, 1032 (9th Cir. 2005) (EPA's compliance with pesticide law that protected the environment did not relieve it from complying with ESA).

reservoirs at minimum operating pool. A set of these groups, along with the Nez Perce Tribe support an evaluation of the removal of the four dams in the lower Snake River.

....

More broadly and generally, a number of the agencies, tribes, environment and fishing groups, and individuals recommend . . . that the Council’s mainstem plan incorporate an explicit ecosystem function focus and assist in restoring more natural floodplain functions, hydrograph and habitat all along the mainstem through the estuary and plume

ER 00257.¹⁹

The Council’s Fish and Wildlife Committee discussed these and other recommendations for additional mainstem measures in December, 2013. *See generally* ER 00905-00953 (transcript excerpts). In each case, recommendations for additional mainstem measures to further protect, mitigate and enhance the survival of anadromous species, including those listed under the ESA, were either summarily rejected without explanation or were deferred for discussion to an unspecified future point, or until the next iteration of the Program. *See, e.g.*, ER 00933 (transcript excerpts) (assigning recommendations for improved river operations to a “parking lot” that might be explored if Council later decided to

¹⁹ Two months later, the Council staff noted with respect to much the same recommendations, “[o]ther recommending entities would have the Council call for additions or revisions to the baseline measures [of the FCRPS BiOps], either because of a desire to add on to the operations directly focused on migrating salmon and steelhead or because of a desire to see improved protection for other fish. The Committee and Council need to ponder and decide on these recommendations” ER 00379.

“conven[e] a collaborative process ... [for] the next amendment cycle”). For example, the Council acknowledged the recommendation that it include operation of John Day and other lower river reservoirs at Minimum Operating Pool (“MOP”).²⁰ It then rejected this recommendation not for biological reasons, but solely because “[n]o state or federal fish and wildlife agency or Indian tribe recommended or supported this action at this time.” 2014 Program at 266 (App. S);²¹ *see also* ER 00925 (acknowledging recommendation); *id.* at 00928-00929 (acknowledging that Council has substantial information and a study from when this measure was previously recommended); *id.* at 00927-00930 (Council members discussing with staff and rejecting recommendation after clarifying that it did not come from fishery managers at “this time”).

While the Power Act directs the Council to pay special attention to recommendations from state and tribal fish and wildlife managers, *see* 16 U.S.C. §

²⁰ Operating these projects at MOP would decrease the cross-sectional area of the reservoirs and increase the movement of water through them, speeding downstream juvenile salmon and steelhead migration and reducing their exposure to warm water and predators in the reservoirs, among other benefits. ER 00744.

²¹ Of course, when this same measure *was* recommended by the state of Oregon for the 2003 and 2009 Programs, the Council rejected it for the similarly arbitrary reason that the lowest-common-denominator measures in the biological opinion would carry more “weight” with the federal dam operating agencies and would “allow[.]” the biological opinion operations to “work.” 2009 Program, App. F at 7-8 (link provided *supra* at n. 12); *see also* 2014 Program at 261 (App. S) (noting that the “explanations from the 2003 and 2009 findings [on recommendations] also remain valid and are incorporated here”).

839b(h)(7), nothing in the Act requires the Council to limit its consideration to only these recommendations or relieves it of its plain legal duty to “protect, mitigate, and enhance” anadromous fish populations even if these co-managers fail to recommend or agree on measures adequate to do so. Nor is the Council consistent in applying its own reasoning: in the very same paragraph of Appendix S, it rejected a recommendation from the fishery managers at the Nez Perce Tribe to study dam removal for the similarly arbitrary reason that “no other state or federal fish and wildlife agency or tribe ... raised this issue.” 2014 Program at 266 (App. S).²²

Not surprisingly, subsequent drafts of the mainstem portion of the 2014 Program continue to defer to the specific measures of the hydrosystem biological opinions as sufficient to “protect, mitigate and enhance” the survival of ESA-listed anadromous fish wherever the Program contains concrete actions, *see, e.g.*, ER 00631, 00639, while calling for vague “best efforts,” coordination, investigation, or consideration of other issues and actions without adopting any specific requirements, *see, e.g.*, ER 00631 (“[m]anage system operations, river flows and

²² The most telling example of the Council’s failure to require any additional mainstem hydrosystem measures is its response to the recommendation from the state of Oregon and others to significantly increase the amount of water spilled past the mainstem dams in order to improve juvenile salmon and steelhead passage survival. NRIC discusses the Council’s response to this recommendation in more detail *infra* at 44-45.

reservoir levels in the optimum way to protect and improve habitat conditions and improve survival for *all* fish” (emphasis in original)).

The provisions of the final 2014 Program that address mainstem river conditions and dam operations to protect ESA-listed anadromous fish follow this same pattern.²³ Other measures mentioned as going beyond the requirements of the biological opinions and the ESA are not “additional” at all; they are required by or incorporated into the biological opinion operations that the Council has already adopted as the “baseline.” For example, the “Vernita Bar agreement” for Mid-Columbia project flows is, as the Council acknowledges, already incorporated into the biological opinions’ mainstem measures. ER 00921-00922 (transcript excerpts). Similarly, the modified operations at Libby and Hungry Horse Dams (the “Montana flows” that the Council repeatedly invokes) were also adopted and

²³ For example, the 2014 Program provisions include the “principle” that the FCRPS BiOps are the “starting point” for in-river passage and water quality conditions, 2014 Program at 61, then repeats as a “general measure,” that “[t]he water management and fish passage actions, flow objectives, and passage standards in the FCRPS BiOps and Accords are the baseline flow and passage measures for the Council’s program,” *id.* at 61-62. Any “specific” river flow or dam passage measure the Council actually references in the 2014 Program, beyond those of the FCRPS BiOps, all address actions to benefit non-listed or non-anadromous fish species, or call for investigation and coordination but not actual action, *id.* at 63-67, with the exception of the statement that “[t]he Council assumes that, in the near term, the breaching of dams in the mainstem Columbia and Snake Rivers will not occur,” *id.* at 61. Why the Council “assumes” this is not explained, nor does it ever address why such a measure is not necessary even to investigate, develop or plan for.

incorporated in these opinions. ER 00923 (transcript excerpts).

What all of this verbiage cannot obscure is: (1) the only specific, concrete actions the 2014 Program requires for ESA-listed anadromous fish in need of the most help are measures already required by the FCRPS BiOps; and, (2) nowhere does the 2014 Program address or explain why those biological opinion measures are sufficient, as a matter of law, to comply with the Power Act's separate requirements or why none of the additional measures to increase protection and mitigation for these species recommended by fish and wildlife managers and others are not needed to comply with the legal requirements of the Power Act. The Council does not – and cannot – explain how the mainstem measures of the FCRPS BiOps, even if they were adequate to comply with the ESA, can satisfy the Power Act's separate and broader legal duty to adopt a program with measures that not only “protect, mitigate and enhance” the survival of fish and wildlife, including ESA-listed salmon and steelhead, but also specifically “provide improved survival of such [anadromous] fish at hydroelectric facilities,” and that “provide flows of sufficient quality and quantity between such facilities to improve production, migration, and survival of such [anadromous] fish” 16 U.S.C §§ 839b(h)(6)(E)(i)-(ii).

The 2014 Program simply fails to meet the anadromous fish requirements of the Power Act because it erroneously treats measures developed to comply with

the ESA as also legally sufficient to comply with the Power Act. *See NRIC I*, 35 F.3d at 1393 (finding that Council cannot comply with the Power Act’s fish restoration goals by asserting that the fish and wildlife program is consistent with “lowest common denominator” measures from a biological opinion).

II. THE COUNCIL’S DECISION TO ADOPT THE 2014 PROGRAM IS ARBITRARY AND CAPRICIOUS

Quite apart from the Council’s improper conflation of its legal duties under the Power Act with the requirements of the ESA, the Council also failed to provide a rational account of why the measures in the 2014 Program are adequate to actually meet the requirements of the Power Act itself – to protect, mitigate and enhance the prospects of Columbia basin fish and wildlife, including ESA-listed salmon and steelhead, adversely affected by the development and operation of the hydrosystem. *See, e.g.*, 16 U.S.C. § 839b(h)(5)-(6).

The Council’s arbitrary failure to explain its actions is especially apparent in:

- (1) its failure to adopt quantitative, measureable biological objectives to guide the region in actually complying with the Power Act, even though the record plainly reveals that such objectives are necessary to assess and ensure compliance with the Act;
- (2) its rejection of all recommendations for actions to improve conditions for anadromous fish that must migrate past the federal hydroelectric facilities

of the Columbia and Snake Rivers beyond those measures adopted from ESA-based biological opinions; and,

(3) its failure to even consider whether additional measures that would increase protection, mitigation, and enhancement for salmon and steelhead while still providing an adequate, efficient, and economical power supply, beyond the measures it has adopted, should be included in the 2014 Program.

NRIC addresses each of these failures below.

A. The Absence of Quantitative Biological Objectives.

The urgent need for measureable, quantitative biological objectives as part of the 2014 Program – beyond the broad goals of five million returning salmon by 2025 and sustained SARs between 2% and 6% – is clear from the administrative record. Council staff said as much: “[t]he most obvious gap in the Program *always* has been the lack of useful, measureable objectives,” ER 00003 (emphasis added). The ISAB review of the 2009 Program said the same: “[e]stablishing **quantitative performance goals** both for the biological objectives and restoration strategies is an essential feature . . . and provides measureable thresholds for determining success.” ER 00040 (bold in original). And the prior 2009 Program itself called for the Council to convene a process to identify and adopt biological objectives, 2009 Program at 11 (link provided *supra* at n. 12) – a commitment that

failed to produce any specific results and one that the 2014 Program actually backs away from, 2014 Program at 31.²⁴

The Council's formal effort to explain its failure to adopt, or even set a concrete schedule for adopting, quantitative, measurable biological objectives is set forth in Appendix S to the 2014 Program. *See* 2014 Program at 228-234. Between summarizing who commented on this issue, *id.* at 228, describing how it reorganized material from the 2009 Program, *id.* at 229, how it retained the broad five million fish and SAR goals, *id.*, listing recommendations for biological objectives from fish and wildlife co-managers and others, *id.* at 230-232,²⁵ restating its decision to adopt the objectives of the hydrosystem biological opinions, *id.* at 232, and summarizing the 2014 Program discussion of commencing a process to consider exploring how it should go about adopting quantitative biological objectives, *id.* at 232-233, this entire discussion fails to address the fundamental questions (1) why the Council did not actually develop and adopt at least some quantitative biological objectives beyond those adopted

²⁴ The record also shows that Council staff spent considerable time collecting information on objectives and organizing and presenting recommendations for measurable objectives from other fish and wildlife managers, *see supra* at 15 & n. 10 (citing record documents).

²⁵ The Council's observation that developing these objectives could prove difficult or controversial, 2014 Program at 232 (describing controversy over separate objectives for hatchery programs), is not a rational explanation for failing to adopt measurable biological objectives for anadromous fish that would allow the Council and others to determine whether it is complying with the Power Act.

from the FCRPS BiOps, and (2) why it could not even set an actual schedule, not just for discussing objectives but for actually completing and adopting them. The disconnect between the clear requirements of the Power Act to protect fish and wildlife affected by the hydrosystem, together with the unequivocal record evidence that these legal requirements cannot plausibly be assessed, let alone met, without measurable, quantitative biological objectives and measures to meet them (on the one hand), and the Council’s decision to kick the can down the road without even a time line for meeting this need (on the other hand) is plainly arbitrary.²⁶

As this Court explained in *NRIC I*, the fish and wildlife program at issue there failed, in part, because it “failed to evaluate proposed program measures against sound biological objectives.” *NRIC I*, 35 F.3d at 1395.²⁷ The 2014 Program fails for the same reason. Indeed, it is even less adequate – if that is

²⁶ Rather than explain how the 2014 Program meets the substantive legal requirements of the Power Act, the Council acts as though its only responsibility is to consider issues, facilitate discussions, seek occasional outside reviews, defer any substantive decisions about what is required to protect anadromous fish, and continue on the course it has set in prior fish and wildlife programs. As noted above, this misconstrues the requirements of the Power Act. *See supra* at 7-10, 11-13.

²⁷ Council staff sought to dismiss this aspect of the *NRIC I* decision as simply a restatement of the Court’s ruling that the Council had failed to adequately explain its response to the recommendations of fish and wildlife co-managers. *See* ER 00134. But the inability to measure program progress against sound biological objectives is fundamental to complying with the Power Act and distinct from a failure to explain Council action regarding a particular recommended measure.

possible – because twenty years after *NRIC I*, and in the face of more than one clear acknowledgement that “[t]he most obvious gap in the Program *always* has been the lack of useful, measureable objectives,” ER 00003 (emphasis added), the Council still failed to explain why in the 2014 Program it could not identify and adopt these “essential” objectives, ER 00040.

B. The Absence of Additional Measures to Protect Salmon and Steelhead.

As the Council acknowledged, it received many recommendations for measures to improve anadromous fish survival through the hydrosystem for both the juvenile out-migration and adult returns. *See* 2014 Program at 259-266 (Appendix S)(summarizing recommendations). As described above, however, the Council systematically rejected any recommendation that would go beyond the mainstem actions to protect salmon from dam operations found in the FCRPS BiOps. *See supra* at 18-19, 32-37. It did not explain why it rejected all such measures or why it refused to even require that some of the additional measures be investigated and developed further so that they could be implemented to provide additional protection, mitigation, and enhancement.

Again, the record is clear that salmon and steelhead in the Columbia basin are not surviving at rates that will assure their continued existence, let alone at rates that would lead to sustainable populations. *See, e.g.*, ER 00579-00580 (ISAB statement that hydrosystem measures so far are not meeting SAR targets for

endangered salmon and graph showing “observed” SARs for Snake River Chinook of 1% to 1.5%). The record also indicates the Council understood that, regardless of the requirements of other laws, the Power Act requires it to include in the fish and wildlife program measures that will protect, mitigate, and enhance the condition of salmon and steelhead harmed by the hydrosystem. *See supra* at 11-13, 31-32 (describing Power Act). And the Council received recommendations, including from fishery managers, to improve river flows and dam passage conditions for salmon. *See* 2014 Program at 263-265 (summarizing recommendations, including, *inter alia*, draw-downing reservoir levels to speed migration and increase spill to improve dam passage survival).

Yet the Council rejected all of these recommendations with at most the procedural observation that there was no consensus among all the fishery managers to adopt any one specific measure, *see supra* at 18-19, 32-37 (describing dismissal of recommendations), or that the measures were not sufficiently developed and ready to implement immediately, 2014 Program at 268-270 (dismissing spill proposal), or that it had considered and rejected them before, *id.* at 266 (addressing dam removal). What the Council did not do is evaluate whether any of these additional measures were necessary and could contribute to actually *increasing* the level of mitigation, protection, and enhancement for salmon and steelhead in order to comply with the Power Act, or otherwise explain its failure to address this

fundamental issue.²⁸

The Council’s dismissal of the proposal from Oregon and others to increase spill at the hydroelectric dams to improve juvenile fish survival and overall SARs is the most telling example of the Council hiding behind procedure and avoiding the substantive issue of whether and how to accomplish the necessary additional protection, mitigation, and enhancement for salmon and steelhead required by the Power Act. Initially, the Council recognized the potential significance of this proposal as a protection and mitigation measure. ER 00368-00369 (staff memo listing option to address spill proposal including “[s]upport the recommended spill proposal” for implementation “as soon as practical”). It then not unreasonably chose to seek additional review of the proposal from the ISAB. *See, e.g.*, ER 00266, 00317-00318. While this review identified aspects of the proposal that required further development, it also explicitly recognized its potential benefits for

²⁸ As with its discussion of measureable biological objectives, the Council’s discussion in Appendix S of the 2014 Program of the recommendations to improve hydrosystem operations for salmon is a narrative of process not substance. It describes the recommendations, 2014 Program at 259-260, explains the adoption of measures from the FCRPS BiOps as a “baseline” (and, *sub silentio*, also the end of the line), *id.* at 261-263, recites its standard litany of measures to address non-listed species and investigate/consider various processes or actions for these species, *id.* at 263-265, and finally dismisses recommended changes either because they were not supported by a fishery manager consensus or because they had been considered but not adopted in prior programs, *id.* at 265-266. Of course, where some of these measures had been previously considered, they also were rejected for procedural not biological reasons. *See supra* at n. 12.

salmon survival:

Other changes to hydrosystem operations have so far been inadequate to meet the SAR targets required to conserve endangered salmon populations, even with structural changes that have been made at the dams such as surface spillway weirs. It appears that increasing the amount of water spilled at lower Columbia and Snake River dams has merit as a hypothesis to test, but additional review of literature and analysis of data would be worthwhile.

ER 00579; *see also* ER 00577, 00580-00581 (noting potential benefits to salmon and suggesting steps to complete the proposal). Yet the Council took no steps to actually require further development of the proposal, let alone set a timeline for doing so. It simply dismissed the proposal as not ready for prime-time with an encouraging pat on the head for those who had developed and recommended it. 2014 Program at 65-66.

In short, the Council's consideration of actions, beyond those from the FCRPS BiOps that could provide additional protection and mitigation for salmon and steelhead from Columbia basin dam operations, fails to adopt any of these measures, ultimately dismisses them all on procedural grounds without even setting a schedule for developing or implementing any of them, and does this all without an explanation that connects the dots between the requirements of the Power Act and the Council's failure to act.²⁹ The fish and wildlife provisions of

²⁹ It is important to recognize the extent to which the Council's failure to adopt specific, quantitative, biological objectives to gauge compliance with the Power Act also enables its failure to address the need for additional actions to better

the Power Act are not just procedural. *See NRIC I*, 35 F.3d at 1393 (the fish protection standards of the Power Act are “substantive criteria that each program measure must meet”); *see also NRIC II*, 730 F.3d at 1012. Nor does the Power Act establish the Council as regional convenor or facilitator in-chief. *NRIC I*, 35 F.3d at 1395 (“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”). The Council’s continued default to procedural excuses to satisfy a core substantive legal duty under the Power Act without more is a failure to explain how its actions comply with the Act and is arbitrary and capricious.

C. The Failure to Explain Why Additional Measures to Protect Anadromous Fish Could Not Be Adopted While Also Providing a Reliable Power Supply.

Ultimately, the Council’s procedural approach to its substantive duties to protect fish and wildlife under the Power Act leads to an assessment of the effects of the 2014 Program on the regional electric power supply in Appendix R that never asks or answers the core question posed in the Power Act: whether the 2014 Program includes enough measures to actually protect, mitigate and enhance the

protect, mitigate and enhance for the adverse effects of the hydropower system on anadromous fish as the Act requires. Without measureable objective there can be no rational assessment of progress or a meaningful evaluation of the extent to which additional actions are necessary to comply with the law.

condition of salmon and steelhead while providing the region the ability to retain or acquire an adequate, economical and efficient power supply. While the Council recognizes it has not yet met its duty under the Power Act to protect, mitigate, and enhance the condition of these species, it never asks whether it could do more to meet this duty and still provide the region an adequate power supply. Instead of asking what anadromous fish actually need to meet the restoration requirements of the Power Act, it asks the much easier question whether the limited measures of the 2014 Program, drawn as they are from the FCRPS BiOps, will allow the region to retain an adequate power supply. *See* 2014 Program at 209 (App. R). In effect, the Council asks whether a glass that is, at best, half full for anadromous fish will allow the region to retain an economical power supply. The law requires it to ask and answer whether a full glass – or at least one that is as full as the available measures (or ones that can be developed) will allow – will leave the region with an adequate and reliable power supply.

The Court recognized this flaw in the Council’s approach in its recent decision regarding the Sixth Power Plan, which is based on and incorporates the 2009 Fish and Wildlife Program. There the Court agreed that “consideration of additional fish and wildlife measures in the existing hydrosystem is not an unreasonable proposition,” *NRIC II*, 730 F.3d at 1018, and explained that this is so because the Sixth Plan included increased energy availability through energy

conservation that was more than double the 1,200 annual megawatt impact of the fish and wildlife measures on the power supply, *id.* The Court also noted that the Sixth Plan appeared to rely on a BPA estimate of the cost of the 2009 Program's fish and wildlife measures that ranged from \$750 to \$900 million and included the cost of foregone power generation in order to protect fish and wildlife. *Id.* at 1020-21. As the Court observed, the Council never asked whether it should or could do more to protect fish and wildlife if it disregarded the BPA estimate and instead relied on its own much lower cost estimate, or used some of the increased energy available through conservation, to allow implementation of additional measures to protect, mitigate and enhance the condition of fish and wildlife species, including those salmon and steelhead listed for protection under the ESA. *Id.* at 1021.

The failure to heed the Court's decision in *NRIC II* is plainly evident in the 2014 Program's Appendix R analysis where the Council again includes a figure from BPA for foregone power – "\$152.2 million in foregone hydropower sales revenue that results from dam operations that benefit fish but reduce hydropower generation," 2014 Program at 215-216, but seeks to dismiss its inclusion by asserting that with or without it, the Council would have found the 2014 Program's fish and wildlife measures affordable. *Id.* at 216. This conclusion, however, begs the relevant question: whether the Council could and should have disregarded the foregone power cost estimate and considered including in the 2014 Program

additional actions to protect and mitigate for the effects of the hydrosystem on anadromous fish even if they “cost” \$150 million or more in foregone power generation.³⁰ Likewise, the Council’s conclusion that the 2014 Program is affordable fails to address the even larger relevant question the Court identified in *NRIC II* – whether in light of available conservation and the ability to acquire additional generation resources, the 2014 Program went as far as the Power Act requires to protect, mitigate and enhance for the fish and wildlife impacts of the hydrosystem.

The Council’s approach to and discussion of the ultimate balance it is required by the Power Act to strike, between protecting fish and wildlife and an affordable power supply, is arbitrary and capricious.

³⁰ For example, as the Council notes in Appendix R, the proposed spill experiment discussed *supra* at 44-45 “could in theory alter system generation to such a material extent as to necessitate a further adequacy assessment,” but concluded that there was no need to consider this further at present because “[t]he Council concluded that proposal was not sufficient to consider for implementation” 2014 Program at 209. Increasing spill was vigorously opposed by BPA and its customers because water that passes over the dams’ spillways does not produce electricity. *See, e.g., NWF v. NMFS*, 422 F.3d at 794; *see also* ER 00526 (BPA calculating foregone revenue as a “cost” of Oregon’s spill proposal). And, as noted above, the Council failed to require any steps to develop or otherwise advance the proposal to increase spill so that, if appropriate, it could be implemented at some point over the course of the 2014 Program. *See supra* at 44-45.

III. THE COUNCIL CONSIDERED IRRELEVANT FACTORS IN ADOPTING THE 2014 PROGRAM

A. The Requirements of the 2008 Columbia Basin Fish Accords Are Not a Relevant Factor Under the Power Act.

An agency action is arbitrary and capricious if “the agency has relied on factors which Congress has not intended it to consider[.]” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983). Contrary to the plain language and structure of the Power Act regarding development of the fish and wildlife program, the Council considered the effects of third party funding agreements on the measures to include in the 2014 Program.

The millions of dollars of funding provided by the Accords, their affirmation of adequacy provisions, and the financial risk to the Accord parties if BPA terminated the Accord funding had an explicit effect on the measures Council members from Idaho believed could be included in the 2014 Program and likely affected the views of members from Montana and Washington regarding these measures as well. BPA was closely involved in the 2014 Program development, including how these three Accord states interacted with the process. *See supra* at 24-27 (citing and quoting record evidence). At each step of the process, BPA attempted to influence either the recommendations and comments from these States, *see, e.g.*, ER00816, or the members’ views of specific proposals, *see, e.g.*, ER 00768 (BPA’s suggested common “talking points” for Accord states that “[n]o

new analysis or changed conditions warrant changing course (e.g., new spill test).” These statements are consistent with the language of the 2008 Accords themselves, which are based on the agreement that the actions required by the 2008 FCRPS BiOps also are sufficient for “protection, mitigation, enhancement and equitable treatment of fish and wildlife under the [Power Act],” *see* Idaho Accord, Sec. IV.B.1, and require Montana and Idaho to “submit comments or recommendations for Council Program amendments that are consistent with and are intended to effectuate this Agreement,” *id.* Sec. IV.C.1.

These efforts to influence Council members by using the Accord provisions affected the fish and wildlife program development process. Indeed, the fact remains that the 2014 Program does not contain any measure to protect, mitigate or enhance ESA-listed salmon and steelhead that goes beyond, or is inconsistent with, the provisions of the FCRPS BiOps – just as the Accords require. However, in adopting the 2014 Program, the Council must include those program measures required by the Power Act and adhere to the prescribed statutory principles, none of which include the considerations, or limitations, of third-party funding agreements between Council member states and federal agencies. The requirements of the Columbia Basin Fish Accords are clearly outside of the scope of what Congress intended the Council to consider under the Power Act.

B. The Council's Consideration of the Accords Is Not Harmless Error.

The Court should reject any argument that consideration of the Accords, including their affirmation-of-adequacy requirements and the attendant threat to state funding, was harmless error. This Court has already addressed the role of the harmless error rule in reviewing actions by the Council, recognizing that it “must take ‘due account’ of the harmless error rule when final agency action is reviewed under the APA and an error is only harmless if it *clearly had no bearing on* the procedure used or the substance of the decision reached.” *NRIC II*, 730 F.3d at 1020-1021 (citations omitted)(emphasis added). The burden on a petitioner to show an error was *not* harmless is relatively light. *Id.* at 1021 (citing *Shinseki v. Sanders*, 556 U.S. 396 (2009), and concluding that the Council’s error in *NRIC II* was not harmless).

The record is replete with Council meeting minutes, meeting recordings, emails, and memos from Council members, Council staff, and BPA staff, indicating that at least some Council members believed the affirmation-of-adequacy provisions of the Accords limited their ability to consider measures for the 2014 Program, such as Oregon’s spill proposal or lowering reservoir levels, that exceeded the actions required by the FCRPS BiOps. *See supra* at 18-19, 32-37, 44-45 (citing and discussing this evidence). Indeed, BPA representatives specifically told one of Idaho’s representatives, citing the Accord’s affirmation-of-

adequacy clause, “to affirm the adequacy of the commitments of the Action Agencies as adequate to address the government’s duties to mitigate for the FCRPS under applicable environmental laws for the 10 year duration of the agreement” and the “commitment of the signatories to submit comments or recommendations for the Council Program amendments that are consistent with and intended to effectuate the Agreement.” ER 00770-00771, 00801.

The repeated concerns articulated by the Idaho council members alone demonstrate the Accords’ impact on the Program amendment process. While the record is unclear as to whether or to what extent other members felt similarly constrained, there is no evidence that consideration of the Accords “clearly had no bearing on the procedure used or substance reached.” *NRIC II*, 730 F.3d at 1021. The plain fact is the 2014 Program does not include any hydrosystem measures that go beyond the requirements of the biological opinions that the Accords require at least Idaho and Montana to support in all forums. Because the Accord provisions are not a relevant factor in the decision to adopt the 2014 Program but plainly played a role in that decision, the decision should be set aside as arbitrary. *Motor Vehicle Mfrs. Ass’n*, 463 U.S. at 43.

IV. THE COURT SHOULD REQUIRE THE COUNCIL TO COMPLY WITH THE POWER ACT

To facilitate timely completion of a remand and compliance with the Power Act, the Court should direct the Council to specifically:

(1) develop and adopt the biological objectives necessary to comply with the Act’s anadromous fish restoration goals within 180 days;

(2) consider and adopt, insofar as possible, the specific mainstem measures, beyond those already required by FCRPS BiOps and without consideration of the Accords, necessary to meet the anadromous fish protection requirements of the Power Act— especially for Snake River salmon and steelhead —including but not limited to provision of flows of adequate quantity and quality to provide safe migration conditions and any changes to hydrosystem configuration or operation necessary to accomplish these measures;

(3) recognize that the fish and wildlife measures needed to protect anadromous fish “cannot be rejected solely because [they] will result in power losses and economic costs,” *NRIC I*, 35 F.3d at 1394, or simply because they do not come from fish and wildlife managers or are not consensus recommendations; and,

(4) develop and adopt a timeline to implement such measures.

This Court has the authority to issue 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). The Court also “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 35-year history of failing to meet the anadromous fish protection requirements of the Power Act. While directing the Council to take the steps set out above (all of which are required by the Power Act in the first instance), the Court will still properly leave to the Council the ultimate “substance and manner of achieving ... compliance” with the law. *Id.*

CONCLUSION

For all of the foregoing reasons, the Court should find the Council’s decision to adopt the 2014 Fish and Wildlife Program contrary to law, arbitrary and capricious, set the decision aside, and set an expeditious schedule on remand that requires the Council to take the above steps to promptly develop and adopt a new program that complies with the Power Act.

Respectfully submitted this 14th day of January, 2016.

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STATEMENT OF RELATED CASES

The undersigned counsel of record for Petitioner Northwest Resource Information Center is aware of no cases related to this opening brief pending before this Court.

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CERTIFICATE OF COMPLIANCE

This Opening Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,984 words, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This Opening Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 Times New Roman 14 point font.

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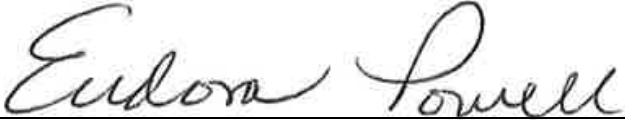
CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2016, I electronically filed *Petitioner's Opening Brief, Petitioner's Excerpt of Record and Declaration of James Chaney* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF electronic filing system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 14th day of January, 2016, at Seattle, Washington.



EUDORA POWELL