



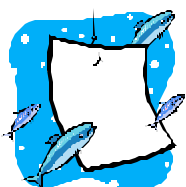
NORTHWEST POWER AND CONSERVATION COUNCIL January 15, 2008

The Council elected Bill Booth of Idaho as chair and Bruce Measure of Montana as vice-chair. Melinda Eden will chair the Power Committee and Rhonda Whiting will continue as chair of the Fish and Wildlife Committee. Other notable actions at the one-day wonder of a meeting in Vancouver, Washington, included extending the deadline for Fish and Wildlife Program amendment recommendations until April 4, 2008 and approval of \$2.4 million to fund "regional coordination." Next Meeting: February 12-13 in Portland, Oregon.

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THE AGENDA



F&W Recommendations Will Follow the Easter Bunny

We received 11 requests to extend our February deadline for receipt of recommendations to amend the Fish and Wildlife (F&W) program, staffer Lynn Palensky said. The F&W Committee and staff are now recommending a 60-day extension, with a new deadline of April 4, she told the Council.

Was there discussion at the F&W Committee of this being "a drop-dead date," with no further extensions possible? Melinda Eden asked. It's strongly implied in this recommendation, said Bill Booth.

Eden asked if the extension would impede the schedule for producing the Sixth Power Plan. Most of the first year of the plan process is spent on technical work and data preparation, replied staffer Terry Morlan. We won't draft a plan until early 2009 so I don't think there will be a scheduling problem, he said.

Is there any legal deadline related to the date we opened the program for amendments? Council Chair Tom Karier asked. When the recommendations come in, the requirement is that the Council has one year to act on them, replied staffer John Shurts. We haven't made a secret of our timeline – it's disturbing to have extension requests when everyone has known what our deadline was, stated Eden.

The motion to extend the deadline to April 4, 2008 passed unanimously.

Millions for Coordination



Palensky presented a recommendation from the F&W Committee for FY 2008 funding of \$2.4 million for regional coordination projects. She said the committee recommendation also calls for the \$2.4 million to be carried forward into FY 2009 until an amended F&W program is adopted by the Council, at which time adjustments would be made to the coordination funding amounts.

Palensky noted that in FY 2007, BPA funded five coordination projects for a total of \$2,481,044, and in November of last year, the Council funded a sixth coordination project for the Upper Snake River Tribes (USRT) in the amount of \$160,659 annually for FY 2008 and 2009. She said the F&W Committee considered different ways to distribute the FY 2008 coordination funds and decided on an approach called Scenario A, a proportionate sharing of the funds. The proposed budget subtracts the funding approved for USRT and includes, according to Palensky: \$1,869,650 for the Columbia Basin Fish and Wildlife Authority (CBFWA); \$62,814 for the Upper Columbia United Tribes; \$58,668 for the Kalispel Tribe; \$58,668 for the Spokane Tribe; and \$189,542 for the Columbia River Inter-Tribal Fish Commission.

Dan Diggs of the U.S. Fish and Wildlife Service, chair of CBFWA, pointed out that the CBFWA funding amount is about \$200,000 less than requested. He said the coordination funding would allow CBFWA members to be with the Council at public hearings on the F&W amendments. This funding "isn't just a request to do good things – there are specific products to be produced," Diggs stated.

Bill Maslen of BPA told the Council BPA is agreeable to the \$2.4 million, but that relative to FY 2006 funding, the amount proposed for coordination is about \$250,000 more. If the Council approves Scenario A, we are not prepared to approve that now, he stated. We need to have

more government-to-government discussions with the sovereigns, Maslen added. BPA thinks some progress is being made, but we are not ready to commit – we want to ensure we meet our responsibility to each sovereign in this process, he stated.

What's the value of our recommendation then? Larry Cassidy asked. It sounds like you aren't going to do what we recommend, he added.

In the end, I suspect that our decision won't be dramatically different from yours, but we need to have more discussions, responded Maslen. We'll keep you informed of their results, he said.

Bruce Jim of the Warm Springs Tribes made a presentation supporting the coordination proposals. He said there is no shortage of processes going on to rebuild the salmon runs, and it can make for hard feelings. Hard feelings or not, it is the Council's job to strike a balance, according to Jim. When times are tough between neighbors, there is a greater need to invest in coordination, he said.

Joan Dukes moved that the Council recommend that BPA fund \$2.4 million in FY 2008 and a portion of FY 2009 for regional coordination, pursuant to budgets for individual coordination projects, and consistent with Scenario A. Jim Yost seconded.

Eden moved to amend the motion to say that the \$160,659 in USRT funding will be added to, not subtracted from, the amount being recommended, and Dukes seconded. When I voted for funds for USRT, I didn't think they would be taken from the regional coordination funding, Eden said.

Just because USRT is a new group that is trying to participate, I don't think that should mean CBFWA should be "dinged" for that amount, she added. I also think it isn't good to have decisions made by the F&W Committee in the morning and brought before the Council for a decision the same afternoon – this needs more discussion, Eden said.

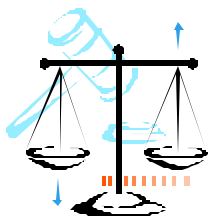
Eden's motion did not pass. Before the vote on the original motion, Eden said I'll vote for this "because

it is the scenario I hate the least." But she stated, "we should be adding funds, not subtracting them." The motion passed, with Rhonda Whiting not voting. She said she would recuse herself from the vote on this item because her daughter has a contract with CBFWA.

PNUCC A Brief PNUCC Report

Morlan said the Council's paper on issues for the Sixth Power Plan is out for comment and that comments are due January 25. He told the Council he gave a presentation about the paper at PNUCC's board meeting the previous week and as a result, received about 15 suggestions for issues, new approaches, or changes that should be addressed in the power plan.

Surprisingly, there was a lot of agreement from the utilities about what the big issues are and what should be addressed in the plan, Morlan stated. I don't know if we can resolve all of the big issues, he noted.



How the Legal Landscape Changed in 2007

"2007 was quite a wild year for court decisions," said Shurts at the outset of a summary and retrospective on litigation last year. Usually, we get one significant decision a year, but in 2007, we got seven or eight, he stated. These decisions will structure a lot of what will happen in the coming year with respect to the F&W amendments and the power plan, Shurts said.

Among the significant power decisions last year were the ones the Ninth Circuit made in May when it invalidated the residential exchange program and its associated rates in *PGE v. BPA* and *Golden Northwest Aluminum v. BPA*, he reported. The implications are "still spinning themselves out" and include such questions as, what do you do about exchange dollars BPA collected in the past, how do

you run the 7(b)(2) rate test, and how do you fix the exchange program for the future, including the next rate case and the power sales contracts, according to Shurts. If the region can't find a solution to the exchange, it calls into question a significant underpinning of the Northwest Power Act, he said.

There are also implications involving the Bonneville Project Act because the Ninth Circuit said BPA's powers under the Project Act must be seen in light of specific provisions of the Power Act, Shurts explained. That may make BPA less able to rely on the Project Act than it has previously, he said. And while in the past, the Ninth Circuit has given BPA substantial deference, that seems to have changed in these rulings, Shurts noted.

Another decision of interest is *Northwest Environmental Defense Center v. BPA*, involving the Fish Passage Center, in which the Ninth Circuit ruled that BPA must provide a rational, lawful explanation for not adhering to the F&W program language to "protect, mitigate, and enhance F&W," he said. It's remarkable that we went 20 years without litigating Section 4(h)(10)(A) of the Power Act, Shurts stated. The court said the only reason BPA could "drive the agency away from consistency with the program" is if its other statutory obligations cause it to do so, he noted.

The court recognized a level of deference by BPA to the Council's program parallel to the level of deference the Council is to give to F&W agencies and tribes in the development of the program, according to Shurts. This decision has implications for the F&W amendment process, he added.

The *Golden Northwest v. BPA* decision said that BPA acted contrary to the law by excluding information related to F&W costs in rate cases, Shurts explained. There is the possibility now that a number of F&W program areas could be brought into rate cases, he said. The impact of this decision "can be and has been overstated," Shurts continued. BPA is still largely going to have control over its cost projections and rate-setting, he said. But the agency is no longer insulated in rate cases from having to consider countervailing evidence on cost

projections or having to provide reasoned explanations for its projections and rates, and that will be subject to judicial review, Shurts noted.

ESA Decisions

Another key decision was the Ninth Circuit's affirmation of Judge Redden's decision on the Biological Opinion (BiOp), he said. The court's ruling about the "reasonably certain to occur" standard has implications for the F&W program – for example, the court said Removable Spillway Weirs aren't reasonably certain to occur because they are subject to Congressional appropriations, according to Shurts. In the F&W amendment process, we will be trying to define a specific set of actions certain to occur, but in light of that, how does a program do adaptive management? he said.

Shurts discussed recent federal court decisions related to the *Alsea Valley* case, in which a judge made a ruling about the inclusion of hatchery fish that called into question all of NOAA Fisheries' previous listing decisions. As a result, NOAA reviewed all of its determinations and came up with new listings and a new hatchery policy, he said. There were "forces in the region" who thought that the *Alsea Valley* case could be "a revolution" in how NOAA develops its listing and hatchery policies, according to Shurts. But after all was said and done, the result has been that NOAA's listings look much like they did before the case came through, he said.

Shurts also explained a federal court decision in *U.S. v. Washington* last year in which the court ruled that treaties reserving tribal rights to take fish impose a duty on a state to refrain from diminishing fish runs through the use of culverts that block fish passage. This case, which is likely to be appealed, has no direct implications, but it may mean something for habitat conditions in the Columbia River over the next 10 years, he said.

The legal landscape did change in 2007, said staffer Tony Grover. We will try to be as conscious as possible of all these legal decisions and their implications in the upcoming program amendment process, he stated. In light of these rulings, we'll

likely be taking some risks in the decisions we make as we amend the program, Grover told the Council.



Data Standardization, Bug by Bug

The Council adopted a set of protocols for reporting location and time-related data for F&W projects, with a recommendation that BPA implement them through its contracting process. The Council also voted to release for public comment a paper on "Methods for Collection and Analysis of Benthic Macroinvertebrate Assemblages in Wadeable Streams of the Pacific Northwest." These actions are part of the Council's efforts to standardize data processes in the region, and "if we have to do it one bug at a time, we will," quipped Karier.

END NOTES

Conservation Committee Created. The Council approved a charter for a Conservation Resources Advisory Committee that will be established to assist in the preparation of the Sixth Power Plan.

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Council 2008 Calendar

February 12-14	Portland, OR
March 11-13	Boise, ID
April 15-17	Whitefish, MT
May 13-15	Walla Walla, WA
June 10-12	Spokane, WA
July 15-17	Montana
August 12-14	Spokane, WA
September 16-18	Astoria, OR
October 15-16	Missoula, MT
November 18-20	Coeur d'Alene, ID
December 9-11	Portland, OR