

Recommendations for Amendments—Mainstem Columbia/Snake Rivers Elements of the Northwest Power Planning Council's Columbia River Basin Fish and Wildlife Program

By
Ed Chaney, Director, Northwest Resource Information Center
June 15, 2001

These comments and recommendations are in response to the Northwest Power Planning Council's March 14, 2001 request for recommended amendments to the mainstem Columbia/Snake Rivers elements of the Council's 2000 *Columbia River Basin Fish and Wildlife Program*.

Comments

In December 1980, the United States Congress passed the *Pacific Northwest Electric Power Planning and Conservation Act of 1980*. The primary impetus of the Act's fish and wildlife measures was the then devastating effect of the Federal Columbia River Power System on Snake River anadromous salmon and steelhead and dependent tribal and non tribal economies.

In passing the Act, Congress declared that the salmon crisis was an "emergency," and that the time for study was over.

The Act called for restoring salmon and steelhead runs decimated by construction and operation of the Federal Columbia River Power System. It recognized that changes in the hydrosystem were necessary, and would increase the cost of energy, and proscribed using economic cost as an excuse for failing to act.

The Act mandated that salmon be given equitable treatment with all other uses of the hydrosystem.

The Act established the Council and charged it with developing on a crash basis a salmon restoration plan. The centerpiece of this plan was to reduce hydrosystem mortalities, i.e:

Provide for improved survival of anadromous fish at hydroelectric facilities; and

Provide for flows of sufficient quantity and quality between these facilities to improve the production, migration, and survival of anadromous fish as necessary to meet sound biological objectives. [*Pacific Northwest Electric Power Planning and Conservation Act*, Pub. L. No 96-501, § 4(h)(5), 94 Stat. 2697, 2709 (1980).]

The Council also was charged with developing a compatible energy plan. Together these plans were to restore the salmon while maintaining an efficient and reliable regional energy supply.

The Act provided Bonneville new authority to acquire major resources as necessary to ensure the latter.

Twenty-one years and a purported \$3 billion later, Snake River salmon have been listed under the Endangered Species Act and are reduced to the verge of extinction.

Sham hydrosystem protections put forth by National Marine Fisheries Service under the ESA have been superseded by one year of drought conditions and Bonneville Power Administration's declaration of a "revenue emergency."

The Council acts as if it and the Northwest Power Act have been preempted by the Endangered Species Act, a charade that is both unbecoming and untenable.

Faced with the stark results of 21 years of failure, i.e., concurrent regional salmon and energy crises, the Council has been reduced to providing political cover for Bonneville and the Army Corps of Engineers to operate the FCRPS to maximize energy revenue so Bonneville can pay its nuclear power plant gambling debts at the expense of endangered Snake River salmon.

The public continues to pay more to kill Snake River salmon than it would cost to restore them.

Comes now the Council asking for recommendations on how it can do what it was charged to do 21 years ago.

It would be indelicate to suggest this is not a serious request.

However, it is very difficult not to notice that this is where the Council (and I) came in 21 years ago. That was the start of what evolved into a perpetual planning process strategically designed to dodge compliance with the intent and letter of the Northwest Power Act by buying off the States with Bonneville revenues generated by killing Columbia and Snake River salmon.

Recommendations

General Basinwide Recommendations

1] Follow the law, i.e., provide salmon and steelhead equitable treatment with all other uses of the hydrosystem. Amend the Program to include a Firm Fish Load Carrying Capacity analogous to Firm Energy Load Carrying Capacity.

The Council should make this FFLCC a hard constraint on the operations of the FCRPS. Let the operating agencies and the market determine the most efficient ways to meet FFLCC; the Council should take responsibility for ensuring that they do so.

2] Give future funding priority to capital improvements in infrastructure [as opposed to research and pet projects] that will facilitate achieving FFLCC.

3] Implement the short-term main stem recommendations of the Idaho Department of Fish and Game and Oregon Department of Fish and Wildlife¹ incorporated as part of these recommendations.

4] The Act confers on the Corps, Bonneville, National Marine Fisheries Service, and all other federal agencies, the duty—independent of the Council's program— "to adequately protect, mitigate and

¹ *Idaho Department of Fish and Game Response to the Northwest Power Planning Council's Request for the Mainstem Plan Recommendations for Fish and Wildlife Program Amendments Council Document 2001-4 (Dated March 14, 2001), June 14, 2001. Recommendations of the State of Oregon for the Mainstem Columbia and Snake Rivers to be Adopted as Amendments to the Northwest Power Planning Council's Fish and Wildlife Program Council Document 2001-4 Dated March 14, 2001, June 15, 2001.*

enhance fish and wildlife, including related spawning grounds and habitat" affected by the dams "in a manner that provides equitable treatment" to anadromous fish.²

It is uncontroverted in the legislative history of the Act that this provision of law "is aimed at placing fish and wildlife on a par with . . . other purposes and providing a means by which [covered agencies] will act to protect, mitigate, and enhance fish and wildlife."³

The United States Court of Appeals, Ninth Circuit has affirmed this independent duty. In addition, the court ruled that each agency covered by this provision of the Act, which includes Bonneville, the Corps, and NMFS, must "develop a mechanism for fulfilling its obligation" under this provision of the Act, and "will be required to demonstrate, by means that allow for meaningful review, that it has treated fish and wildlife equitably."⁴

The Council has never made any effort to seek compliance with this pivotal provision of the Act. The Council should amend its program to require each relevant federal agency to develop within 90 days a mechanism by which it can demonstrate for meaningful review by decision makers, the public, and the courts, that it is providing anadromous fish "equitable treatment" "on a par" with other uses of the hydrosystem.

This should include a risk analysis and management protocol which addresses all uses of the system. It should discuss the needs of each respective use of the system, the likelihood those needs will not be met, the factors that threaten or make it less likely that identified needs will not be met, and how each agency will perform its duties so that the risk a use's needs will not be met is equitably apportioned among all major users (including at least irrigation, recreation, power, navigation, fish and flows for fish, and meeting the federal government's special obligations to Indian tribes).

For example, the Corps and Bonneville should provide a comparison between the likelihood of meeting the Act's salmon restoration objectives and the Council's interim targets, compared to the likelihood of meeting firm power loads.

5] The Council should amend its program to provide for disbanding the Council within three years [for a total of a quarter-century of effort] if it is unable to put in place a plan that will ensure meeting the fish restoration intent of the Northwest Power Act [including a specific, discrete plan for the Snake River]. The Council should put forward for public review and input a proposed mechanism by which the Council's performance can be evaluated by the public and by the courts.

Snake River Recommendations

It is uncontroverted that in designing the four dams and reservoirs on the lower main-stem Snake River in southeastern Washington the Army Corps of Engineers negligently failed to make any provision for passing juvenile Snake River salmon.⁵

² *Pacific Northwest Electric Power Planning and Conservation Act*, Pub. L. No 96-501, § 4(h)(11)(A)(I), 94 Stat. 2710 (1980).

³ 126 Cong. Rec. H10,683 (daily ed. Nov. 17, 1980) (remarks of Rep. Dingell).

⁴ 1997 WL 359821 (9th Cir.)

⁵ This clearly was contrary to Congressional intent. It was contrary to pre-construction warnings that the four lower Snake River dams were a threat to survival of Snake River salmon and steelhead. It was contrary to

The Corps has spent hundreds of millions of dollars tacking on post-construction "fixes" that weren't. Finally the Corps determined that in the four lower Snake River dams and reservoirs it had created a salmon doomsday machine that can't be fixed; either the dams must be breached or all the fish must be removed from their habitat and catapulted to the estuary in barges or trucks. The latter violates the letter and intent of the Power Act⁶ and, among other things, biological common sense.

The Council should amend its program to:

- 1] Direct the U.S. Army Corps of Engineers to breach the four lower Snake River dams. Provide the Corps a schedule consistent with the nature of the emergency, i.e., not more than five years to breach the first dam, and not more than 10 years to breach them all.
- 2] The Council should take responsibility for: a] developing a mitigation plan for waterway shippers and irrigators affected by breaching; b] detailing the local, regional, and national economic and non-economic benefits of breaching; and c] championing both in local, state, regional, and national forums.
- 3] Implement the short-term main stem recommendations of the Idaho Department of Fish and Game and Oregon Department of Fish and Wildlife incorporated as part of these recommendations.

common sense—anadromous fish that go upstream must come downstream. It was contrary to the glaring lesson provided by the juvenile fish passage disaster just upstream at Idaho Power Company's Brownlee Dam, which occurred in 1958, prior to completion of the Corps' first lower Snake River dam.

In short, the Corps' failure to design the four lower Snake River dams and reservoirs to pass migrating juvenile Snake River salmon and steelhead was not merely the unfortunate result of inattention to detail—it took effort.

⁶ It is a specific purpose of the Act:

To protect, mitigate, and enhance the fish and wildlife, including related spawning grounds and habitat, of the Columbia River and its tributaries, particularly anadromous fish which are of significant importance to the social and economic well-being of the Pacific Northwest and the Nation and which are dependent on suitable environmental conditions substantially obtainable from the management and operation of the Federal Columbia River Power System and other power generating facilities on the Columbia River and its tributaries. [Emphasis supplied] [Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. No 96-501, § 4(h)(7), 94 Stat. 2697, 2709 (1980).]

Nowhere in the Act does it call for removing fish from their habitat and substituting the environmental conditions of barges and trucks. The Act calls for "flows" of adequate quantity and quality. B-a-r-g-e-s does not spell "flows."