

No. 06-70430
Consolidated with No. 06-71182

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Northwest Environmental Defense Center, Public Employees for Environmental
Responsibility, and Northwest Sportfishing Industry Association,

Petitioners

Northwest Power and Conservation Council,

Intervenor

vs.

Bonneville Power Administration,

Respondent

PETITIONERS' OPENING BRIEF

Stephanie M. Parent, OSB #92590
Pacific Environmental Advocacy Center
10015 SW Terwilliger Blvd.
Portland, OR 97219
503-768-6736
503-768-6042 (fax)
parent@lclark.edu

Attorney for Petitioners

CORPORATE DISCLOSURE STATEMENT

Appellants, Northwest Environmental Defense Center, Public Employees for Environmental Responsibility, and Northwest Sportfishing Industry Association, are all non-profit corporations and have no parent companies, subsidiaries or affiliates that have issued shares to the public.

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MISCELLANEOUS

GAO Office of the General Counsel, “Principles of Federal Appropriations Law,”
Third Ed. Vol. I at p. 2-97 26

STATEMENT OF JURISDICTION

Original jurisdiction is proper in the Court of Appeals pursuant to the Pacific Northwest Electric Power Planning and Conservation Act “Northwest Power Act”), which provides that “[s]uits to challenge . . . final actions and decisions taken pursuant to this chapter by the Administrator or the Council, or the implementation of such final actions . . . shall be filed in the United States court of appeals for the region” within 90 days of the challenged action. 16 U.S.C. § 839f(e)(5). The Bonneville Power Administration (“BPA”) made a final decision to defund the Fish Passage Center on December 8, 2006 when it issued a Program Solicitation to replace “Key Functions previously performed by the Fish Passage Center.” NEDC Excerpts of Record (hereafter “ER”) 180. BPA took further action on or before January 26, 2006, when it announced that it had selected two entities to “replace work done by the Fish Passage Center.” ER 274. Petitioners timely filed the Petition on January 23, 2006 and an amended Petition on February 2, 2006. ER 1, 9.

Petitioners have standing because their members regularly use and enjoy, and have firm plans to continue to use and enjoy, the salmon in the Columbia Basin for economic, recreational and sustenance purposes, which will be impacted by BPA’s decision and actions to defund the Fish Passage Center. Petitioners also have interests in the information produced by the Fish Passage Center, the public

participation procedures required by the Northwest Power Act, and the production of sound scientific information without fear of reprisal. ER 18 and 20-24 (Declaration of Liz Hamilton ¶¶5, 7-18); ER 26 and 29-31 (Declaration of Rodney W. Sando ¶¶ 7-9); ER 32-36 (Declaration of Mark S. Riskedahl ¶¶ 4-10) . The substantive, procedural and informational injuries to Petitioners caused by the Bonneville Power Administration's actions to defund the Fish Passage Center in violation of federal law can be remedied by the relief sought in this action.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether congressional report language directing BPA to defund the Fish Passage Center, found nowhere in the enacted appropriations law, carries the force of law and binds BPA to defund the Fish Passage Center.
2. Whether BPA violated the Northwest Power Act's requirement that BPA fund in a manner consistent with the Fish and Wildlife Program when it defunded a component of the Program pursuant to language found in a congressional report, but found nowhere in the enacted appropriations law.

STATEMENT OF THE CASE

This petition challenges BPA's actions to defund the Fish Passage Center, taken pursuant to language included in a congressional report, but found nowhere in the enacted appropriations law. BPA's defunding of the Fish Passage Center violates the Northwest Power Act requirement that BPA use its funding and

authorities to protect, mitigate and enhance fish and wildlife in a manner consistent with the Fish and Wildlife Program adopted by the Northwest Power and Conservation Council. 16 U.S.C. § 839b(h)(10)(A). Petitioners, Northwest Environmental Defense Center, Public Employees for Environmental Responsibility, and Northwest Sportfishing Industry Association (hereafter, collectively “NEDC”) filed a petition for review on January 23, 2006 and an amended petition for review on February 6, 2006. ER 1, 9.

On March 17, 2006, this Court granted NEDC’s request for a stay of BPA’s decision to defund the Fish Passage Center, ordering BPA to continue to fund and support the Center under the same terms and conditions of its existing contract. ER 60. The Court also granted the Northwest Power and Conservation Council (“Council”) motion to intervene. Id. The Court then consolidated NEDC’s petition with a petition filed by the Confederated Tribes & Bands of the Yakama Nation (hereafter “Yakama Nation”) and ordered an expedited schedule. ER 62 (April 7, 2006 Order). On May 1, 2006, BPA served an Index to the Administrative Record, with an electronic copy of the record following. On May 23, 2006, BPA served an amended Index to the Administrative Record, along with an electronic copy of the Record. NEDC files this brief in accordance with the Court’s scheduling order.

BACKGROUND

Congress enacted the Northwest Power Act to resolve regional tensions that erupted during the 1970's energy crisis. 16 U.S.C. § 839 et seq. In resolving these tensions, the Northwest Power Act both expanded and restricted BPA's authority through substantive requirements for regional power planning and programs to protect fish and wildlife. Accordingly, the Northwest Power Act established a delicate balance of power between BPA, the Northwest Power and Conservation Council (the "Council"), the tribes and other fisheries managers and the public. To appreciate this balancing framework and its relationship to the issues underlying this case, it is necessary to briefly examine the Northwest Power Act's historical underpinnings.

In 1937, the BPA was established by the Bonneville Project Act. 16 U.S.C. § 832 et seq. The BPA Administrator was given the authority to sell all of the power generated by the Northwest's federally run dams. 16 U.S.C. § 832a(b). BPA's first administrator, J.D. Ross, optimistically described the Columbia River's potential as "a coal mine that never thins out...[and] an oil well that never runs dry." Sen. Rep. 95-154 (1978). Even in the face of such optimistic predictions about hydropower, there were concerns that the dams might adversely effect the Columbia's fish populations. Thus, a Senate Resolution directed the Commissioner of Fisheries to assess the effects of the Bonneville dam on fish runs

and to recommend measures to “attain full conservation of such fish.” Sen. Doc. No.87, 75th Cong., 1st Sess. (1937). These Congressional concerns about the Columbia’s fish populations remained fundamentally unaddressed until the passage of the Northwest Power Act in 1980.

The Northwest Power Act was enacted as a response to a regional energy crisis. During the 1970's, BPA experienced significant energy shortfalls that caused intensified regional jockeying to lock in a share of BPA’s low-cost hydropower. Aluminum Co. of America v. Central Lincoln Peoples' Utility Dist., 467 U.S. 380, 386 (1984). In an attempt to resolve the destabilizing conflicts, the region’s public and private utilities got together with the major industrial customers to form the Pacific Northwest Utilities Conference Committee (PNUCC). Sen. Rep. 95-154(1978). Washington Senator Henry Jackson introduced a PNUCC draft bill “as a discussion document to focus attention upon the debate.” Id. The ensuing debate lasted two years and encompassed a series of Congressional proceedings and public meetings throughout the Northwest. The result of this intensive process was the passage of the Northwest Power Act.

The Act addressed many of the regional energy problems and managed to satisfy numerous competing demands by forging a dynamic system of checks and balances between the BPA, the Northwestern states, the energy consumers, and the general public. The Act greatly expanded BPA’s powers to acquire and market

new sources of energy, however, Congress “was mindful of the concerns by some that this authority not provide a ‘blank check’ to BPA to acquire whatever resources it deems appropriate.” H.R.Rep. 96-976(I), 36 (1980). Accordingly, the Act requires BPA to exercise its authority under the aegis of regional power planning that prioritizes conservation, renewable energy, and fish and wildlife protection. 16 U.S.C. § 839b(e)(2).

The mechanism provided for regional planning was the “ Regional Planning Council” (now the Northwest Power and Conservation Council), an interstate compact agency comprised of two governor-appointed members from the states of Oregon, Washington, Idaho, and Montana. 16 U.S.C. § 839b(a)(2)(B). The Council coordinates regional planning of conservation and electric power plans and programs to protect, mitigate and enhance fish and wildlife. 16 U.S.C. § 839b(a)(1), 16 U.S.C. § 839b(h)(1)(A). As part of its mandate, and the Northwest Power Act’s system of checks and balances, the Council must facilitate widespread public involvement in the planning process. 16 U.S.C. § 839b(g).

The Northwest Power Act provides that BPA must use its funds and authorities in a manner consistent with the Council’s Fish and Wildlife Plans. 16 U.S.C. § 839b(h)(10)(A). The importance of this consistency provision to the Act’s statutory scheme is underscored by legislative history stating that “the requirement that actions be consistent with the Plan is vital to the plan’s

effectiveness.” H.R. Rep. 96-976 (I), 57 (1980). Section 839b(1) of the Act provides that the Council may review BPA’s actions to ensure that they are consistent with its Plan. Furthermore, Section 839b(j), provides the Council with the authority to request BPA to take action under the Northwest Power Act. If BPA’s administrator does not comply with the Council’s request for action, BPA must provide in writing “the reasons why such an action would not be consistent with the plan, or with the Administrator’s legal obligations under this chapter, or other provisions of law.” 16 U.S.C. § 839b(j)(2)(B). Thus, the Northwest Power Act requires BPA to act consistently with the Council’s Fish and Wildlife Program and provides the Council with considerable oversight of BPA’s actions.

Fish and Wildlife Plans

In spite of the 1937 recommendation that BPA protect fish from the effects of the dams, fish runs have dropped precipitously over the course of the Twentieth century. ER 198. The NW Power Act reflected Congressional and regional environmental concerns by devoting one of its seven major sections to provisions that “protect, mitigate, and enhance fish and wildlife...on the Columbia River and its tributaries.” 16 U.S.C. § 839b(h)(1)(A). In order to give effect to these provisions, the Council is required to develop a Fish and Wildlife Program. Id. The Council’s Fish and Wildlife Program must be based upon recommendations, supporting documents, and information obtained through public comment and

participation, as well as through consultation with the agencies, tribes, and customers. 16 U.S.C. § 839b(h)(2)-839b(h)(5). In turn, BPA is required to use its authority and its funds to protect, mitigate, and enhance fish and wildlife ‘in a manner consistent with . . . the program adopted by the council under this subsection’ 16 U.S.C. § 839b(h)(10)(A). BPA’s responsibilities to protect fish and wildlife, however, go beyond the Council’s program, BPA’s obligation is “substantive” and “independent” of BPA’s responsibility to take account of the Council’s program. Northwest Environmental Defense Center v. Bonneville Power Administration, 117 F.3d 1520, 1531 (9th Cir. 1997).

The first Fish and Wildlife program was adopted in 1982. ER 70. Since that time, the Council has reformulated and amended its program on five occasions, with the most recent iteration being the 2000 Program, and its accompaniment the 2003 Mainstem Amendments. ER 71, 544. The scope of the 2000 Plan is extensive. It starts at the broadest level establishing overall biological and basinwide goals. ER 76-101. The Program adopts broad strategies for habitat, artificial production, harvest, hydrosystem passage and operations, wildlife, research and monitoring. Id. The Program integrates highly specific fish and wildlife management provisions by reviewing and adopting 58 subbasin plans proposed by various fisheries managers, including the Oregon Department of Fish and Wildlife, Northwest tribes, and local watershed councils. ER 68. And, the

Program specifically calls for the continued operation of the Fish Passage Center. ER 143 (2000 Program); ER 170-171, 179 (2003 Mainstem Amendments). In its appendices, the Plan adopts incorporates additional specific provisions. ER 125-139. As required by the Northwest Power Act, this detailed and extensive Fish and Wildlife Program is the culmination of a process that involves the Council, the fisheries managers and ample public review, participation, and comment. 16 U.S.C. § 839b(h)(2)-839b(h)(5). While The Council's Program is extensive in breadth, it is conservative in its aims. For example, one goal is to get the salmon population from five percent of its historical level, up to ten percent of its historical level by the year 2025. ER 198.

The Fish Passage Center

The Fish Passage Center has been a component of the Council's Fish and Wildlife Program since 1982. ER 28 (Sando Decl. ¶ 3); ER 44 (Declaration of Gregory K. Delwiche ¶ 10); ER 182 (“[s]ince the early 1980's,” BPA has “funded work completed by the Fish Passage Center”); ER 288. Originally, Fish Passage Center was comprised of only two water budget managers. ER 28 (Sando Decl. ¶ 3); ER 44 (Gregwiche Decl. ¶¶ 9-10) ER 289. These two managers monitored smolt passage and migration timing and made recommendations to Federal agency river operators on how to use the water budget in order to improve the survival rate of fish passing through the dams during their downstream migrations. Id.

Since 1982, the Center's duties have expanded considerably. The 2003 Mainstem Amendments to the 2000 Fish and Wildlife Program provide that the "primary purpose of the Fish Passage Center is to provide technical assistance and information to fish and wildlife agencies and tribes in particular and the public in general, on matters related to juvenile and adult salmon and steelhead passage through the mainstem hydrosystem." ER 170. In order to achieve this purpose, the Fish Passage Center monitors more than 20 dams and fish traps; the Center collects data on chinook, steelhead, coho, shad, sockeye, pink salmon, and lamprey; and, it monitors river conditions, including temperature, dissolved gases, fish hatchery releases, and dam flows and spills. ER 184-188.

The Fish Passage Center makes all of this data available on its web site. Id. The Center receives tens of thousands of visitors to its web site daily. ER251. As well as use by the general public, the data is used by regional fisheries managers to formulate in-season flow and spill requests and to ensure that operating criteria for storage reservoirs are satisfied. ER 270. The Fish Passage Center's role facilitates the Northwest Power Act's requirements for public participation in regional planning.

Controversy over the Fish Passage Center's Scientific Data

Salmon recovery and conservation is a hot button issue here in the Northwest. In recent years, there has been heightened tension between BPA and

regional fisheries managers over funding of the Council's Fish and Wildlife Program. Last summer, Judge Redden's decision in National Wildlife Federation v. National Marine Fisheries Service, 2005 U.S. Dist. Lexis 16345, and Judge Redden's ensuing requirement that BPA spill additional water in order to help migrating salmon, intensified the debate over the need to balance salmon survival and recovery with the production of hydropower.

As far back as 1995, there has been tension between BPA and the Fish Passage Center. ER 211. As part of its data reporting process, the Center has documented how and why federal entities have not implemented Fish Passage Center's river management recommendations. Id. BPA has countered this criticism of federal agency actions with accusations that the Center's data reports represent "a political forum for Fish Passage Center to independently promulgate policy." Id. BPA's discomfort with the Fish Passage Center's data and recommendations has given rise to resentment over BPA's obligation to fund the Center. Accordingly, the Council has instituted oversight provisions in order to assuage BPA's concerns about the Fish Passage Center. For example, the Council and the Columbia Basin Fish and Wildlife Authority instituted the Fish Passage Center Oversight Board, comprised of one Council member, one representative of NOAA Fisheries, two representatives of different regional tribes, one

representative of the state fish and wildlife managers, one scientist, and two members of the public. ER 213, 279. Then, under the 2003 Mainstem Amendments, the Fish Passage Center Oversight Board's oversight responsibilities were expanded. ER 218. Further, the Council's Independent Science Review Panel (ISRP) has been called upon to review the Fish Passage Center's work. For example, ISRP reviewed Fish Passage Center's data to ascertain whether or not it duplicated data produced by the University of Washington. ER 228.

Neither the Fish Passage Center Oversight Board, nor the ISRP have found any substantial problems with the Center's data, methods or staff. In fact, there are numerous favorable findings. For example, the 2005 independent review of the Fish Passage Center's staff found a "strong and integrated team . . . fully responsive to expressed needs for technical assistance and information coming from fish and wildlife agencies, tribes, and the general public." ER 253.

Additionally, the ISRP found little overlap between the Fish Passage Center's and the University of Washington's data, instead they found that the University of Washington actually relied upon the Center's data to produce much of its work. ER 227-229.

The record contains one substantive negative response to Fish Passage Center data. That negative comment concerns the Center's Comparative Survival Study (CSS), and it was written by BPA's Fish and Wildlife Director on November 10, 2005, in the heat of the controversy over the prospective abolishment of the Fish Passage Center. ER 256-260. As a result of BPA's comment, the Council requested that ISRP and the Independent Science Advisory Board (ISAB) review the CSS's scientific soundness. The two independent scientific panels found that "CSS is an ambitious, long-term study that is being criticized because its objectives are not yet fully met, despite prodigious efforts in both the field and in complex data analyses . . . the Council should view the CSS as a good, long-term monitoring program, the results of which should be viewed with increasing confidence as years pass." ER 189-193. Thus, in spite of much grumbling about the Fish Passage Center's methodology, and in spite of the extensive oversight and opportunity for comment on the its data and methodology, there is no credible evidence that the Fish Passage Center's science is unreliable. Indeed, to the contrary, the record is full of statements from the regional tribes, fishermen, fisheries managers, and members of the public indicating their reliance on, and respect for, the Fish Passage Center's data. ER 227-240, 242-251, 254-255, 261-274, 285-286.

STATEMENT OF THE RELEVANT FACTS

In 2000, the Council adopted the Columbia River Basin Fish and Wildlife Program (“2000 Program”). ER 71. In 2003, the Council adopted the Mainstem Amendments to the Columbia River Basin Fish and Wildlife Program (“2003 Mainstem Amendments”). ER 146. These documents comprise the Council’s current Fish and Wildlife Program. The 2000 Program and the 2003 Mainstem Amendments expressly call for the continued operation of the Fish Passage Center. ER 95, 170.

The primary purpose of the Center “is to provide technical assistance and information to fish and wildlife agencies and tribes in particular, and the public in general, on matters related to juvenile and adult salmon and steelhead passage through the mainstem hydrosystem.” ER 170. The 2003 Mainstem Amendments require that the “Center shall continue to provide an empirical database of fish passage information for use by the region” ER 171. The 2003 Mainstem Amendments require that “the Center shall” conduct smolt monitoring; gather, analyze, and make available monitoring and research information related to fish passage; provide technical information necessary to assist the agencies and tribes in formulating in-season flow and spill requests; and generally provide technical assistance to coordinate recommendations for storage and river operations to avoid

potential conflicts between anadromous and resident fish. ER 170-171. The Amendments further require that “[o]peration of the Center shall include funds for a manager and for technical and clerical support in order to perform its stated functions.” ER 171. The Amendments require that the fish passage manager be “selected by, and be subordinate to, the Executive Director of the Columbia Basin Fish and Wildlife Authority.” Id. BPA admits that it has funded the Fish Passage Center since the 1980's. ER 43-44 (Delwiche Decl. ¶¶8-10); ER 182.

In November 2005, Congress adopted the Energy and Water Development Appropriations Bill for Fiscal Year 2006. Pub. Law 109-103. Specific to the BPA, Congress states:

Expenditures from the Bonneville Power Administration Fund, established pursuant to Public Law 93-454, are approved for official reception and representation expenses in an amount not to exceed \$1,500. During fiscal year 2006, no new direct loan obligations may be made.

H.R. 2419-30; PL 109-103 ER 64. The Appropriations Act does not in any way reference or seek to alter funding for the Fish Passage Center; funding that has occurred for many years consistent with the Fish & Wildlife Program, as amended by the 2003 Mainstem Amendments. In a Conference Report, the committee of conference states:

The Bonneville Power Administration may make no new obligations in support of the Fish Passage Center. The conferees call upon

Bonneville Power Administration and the Northwest Power and Conservation Council to ensure that an orderly transfer of the Fish Passage Center functions (warehouse smolt monitoring data, routine data analysis and reporting and coordination of the smolt monitoring program) occurs within 120 days of enactment of this legislation.

H.R. 109-275 ER 66. The Conference Report language specific to BPA and the Center appears nowhere in the adopted Appropriations Act. See PL 109-103.

On December 8, 2005, BPA issued a “Program Solicitation for Key Functions previously performed by the Fish Passage Center.” ER 180. BPA relies upon the Report language to state that “Congress passed legislation (House Report 109-275), which forbids BPA from making additional obligations in support of the Fish Passage Center.” ER 182. BPA states that it “has decided to implement this requirement through the issuance of this Program Solicitation.” Id.

On January 26, 2006, BPA announced its decision to have Pacific States Marine Fisheries Commission (PSMFC) manage smolt monitoring, perform related data collection and management, and conduct routine data analysis and reporting.” ER 274. BPA also announced its decision to have Battelle Pacific Northwest Laboratory (BPNL) “oversee, coordinate and facilitate broader, non-routine” scientific data analysis and to manage the scientific analysis process. Id. BPA’s decision also contains a proposal that the Columbia Basin Fish and Wildlife Authority (Authority) should “assume the function of coordinating the

policy interests of regional fishery agencies and tribes on flow and spill issues.”

Id. Implementation of this proposal requires BPA to garner the Authority’s members approval to modify the Authority’s current contract. Id. According to BPA’s decision, PSMFC and BPNL were scheduled to replace the Fish Passage Center on March 21, 2006. Id.

BPA has no legal authority to unilaterally amend the Fish & Wildlife Program, as amended by the 2003 Mainstem Amendments. The Fish & Wildlife Program, as amended by the 2003 Mainstem Amendments, has not been amended in any event.

SUMMARY OF THE ARGUMENT

This petition challenges BPA’s actions to defund the Fish Passage Center, a component of the Council’s Fish and Wildlife Program. BPA took action to defund the Center pursuant to language included in a congressional report, but found nowhere in the enacted appropriations law. BPA misinterprets the report language as “the will of Congress” even though the Constitution is quite explicit about the procedure that Congress must follow in legislating and unequivocal case law directs that report language is not binding upon an agency.

BPA’s defunding of the Fish Passage Center violates the Northwest Power Act requirement that BPA use its funding and authorities to protect, mitigate and

enhance fish and wildlife in a manner consistent with the Fish and Wildlife Program adopted by the Northwest Power and Conservation Council (“Council”). 16 U.S.C. § 839b(h)(10)(A). The congressional report language, which instructed BPA to defund the Fish Passage Center, cannot override this statutory mandate. However, because BPA zealously acted to implement the report language as binding legislation, BPA’s decision and the administrative record that BPA has produced for this petition contain little to no explanation of BPA’s decision in the context of its statutory duty to fund the Center consistent with the Program. In reviewing BPA’s decision, BPA is not entitled to any deference regarding its interpretation of the fish and wildlife provisions of the Northwest Power Act because this Court already has determined that these provisions are outside the expertise of the Council and BPA. Moreover, the consistency language is plain and can easily be interpreted and applied by this court. Nor has BPA ever formulated an interpretation of this provision to which this Court could defer. Finally, the facts demonstrate that BPA’s actions defunding the Fish Passage Center do not comply with the Northwest Power Act’s purpose, intent and scheme or the mandate that BPA fund consistent with the Council’s Fish and Wildlife Program.

ARGUMENT

I. STANDARDS OF REVIEW

Whether report language found nowhere in the enacted law is binding upon the agency is a question of law that this Court reviews de novo. Harper v. U.S. Seafoods LP, 278 F.3d 971, 973 (9th Cir. 2002) (questions of statutory interpretation reviewed de novo).

Whether BPA complied with the mandate in the Northwest Power Act to fund consistent with the Fish and Wildlife Program adopted by the Northwest Power and Conservation Council (“Council”) is reviewed under the Administrative Procedure Act (APA) standard of whether BPA’s actions were “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.” 16 U.S.C. § 839f(e)(2); 5 U.S.C. § 706(2). The arbitrary and capricious standard does not shield agency action from a “thorough, probing, in-depth review” of those actions. Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971). The agency must “articulate a satisfactory explanation for its action, including ‘a rational connection between the facts found and the choice made.’” Motor Vehicles Mfrs Ass’n v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983) (quoting Burlington Truck Lines, Inc. v. U.S., 371 U.S. 156, 168 (1962)).

This Court must be able to ascertain the reasons for BPA’s decision; therefore, BPA ““must provide a reasoned explanation for its actions and articulate with some clarity the standards that governed its decision.”” Northwest Resource Information Center v. Northwest Power Planning Council (“NRIC”), 35 F.3d 1371, 1385 (9th Cir. 1994) (quoting Moon v. U.S. Dept. of Labor, 727 F.2d 1315, 1318 (D.C. Cir. 1984)). An agency’s decision can be upheld only on the basis of the reasoning in that decision. Anaheim Mem’l Hosp. v. Shalala, 130 F.3d 845, 849 (9th Cir. 1997). Accordingly, the reviewing court may not make up for the deficiencies in the agency’s decision. Motor Vehicle Mfrs, 463 U.S. at 43. Nor may the court ““supply a reasoned basis for the agency’s decision that the agency itself has not given.”” Id. (quoting SEC v. Chenery Corp., 332 U.S. 194, 196 (1947)).

This Court also should not give deference to BPA’s interpretation of the fish and wildlife provisions of the Northwest Power Act. This Court has established that the Northwest Power Act and its legislative history require that fishery managers, including fish and wildlife agencies and Indian tribes, are entitled to a “high degree of deference” for their interpretations of the fish and wildlife provisions found in Section 839b(h) of the Act. NRIC, 35 F.3d at 1386-88 (distinguishing between the power provisions of the Act, for which deference is

given to the Council and BPA, and the fish and wildlife provisions of § 839b(h), for which fishery agencies and tribes are entitled a “high degree of deference”). BPA and the Council are entitled to deference concerning the power provisions of the Northwest Power Act because their expertise resides there, but they are not entitled to deference concerning the fish and wildlife provision at issue in this petition. See Seattle Master Builders Ass’n v. Pacific Northwest Electric Power and Conservation Planning Council, 786 F.2d 1359, 1366-67 (9th Cir. 1986) (deference to BPA and Council interpretations of the power provisions of the Act, if reasonable); NRIC, 35 F.3d at 1387 (one factor in determining the degree of respect given to an agency’s statutory interpretation is whether it is “based on experience or expertise peculiarly within the agency’s ken”) (citation omitted); Garcia-Lopez v. Ashcroft, 334 F.3d 840, 843 (9th Cir. 2003) (no deference to an agency’s interpretation of a statute that is outside of its expertise). Thus, in this matter, a high level of deference belongs to the fishery agencies and Indian tribes, not to BPA.

This Court should not give deference to BPA in this matter for several further reasons. First, the plain language of the consistency provision of the Northwest Power Act is not ambiguous. Chevron, U.S.A., Inc. v. NRDC, 467 U.S. 837, 843-44 (1984). “The judiciary is the final authority on issues of statutory

construction and must reject administrative construction which are contrary to clear congressional intent.” Id. at 843 n. 9. Further, “judicial deference is not necessarily warranted where courts have experience in the area and are fully competent to decide the issue.” Monex Int’l, Ltd. v. Commodity Futures Trading Comm’n, 83 F.3d 1130, 1133 (9th Cir. 1996). Second, BPA has not advanced any interpretation of the Act’s consistency provision that speaks with the “force of law.” U.S. v. Mead, 533 U.S. 218, 232 (2001); see also Chevron, 467 U.S. at 843 (in the absence of an administrative interpretation, court construes the statute’s meaning). Similarly, no deference is owed to BPA when it has not formulated an official interpretation of the statutory provision, but is merely advancing a litigation position. United States v. Trident Seafoods Corp., 60 F.3d 556, 559 (9th Cir. 1995), cert. denied 519 U.S. 1109 (1997); Bowen v. Georgetown University Hospital, 488 U.S. 204, 212 (1988) (deference does not extend to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice). Finally, BPA is not entitled to deference where it has changed its interpretation. Young v. Reno, 114 F.3d 879, 883 (9th Cir. 1997) (“An agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is ‘entitled to considerably less deference’ than a consistently held

agency view.”) (citations omitted); NRIC, 35 F.3d at 1387 (another factor is agency’s consistency with prior precedent).

II. CONGRESSIONAL REPORT LANGUAGE CANNOT BIND BPA TO DEFUND THE FISH PASSAGE CENTER BECAUSE IT DOES NOT HAVE THE FORCE OF LAW.

BPA has funded the Fish Passage Center since the early 1980's. ER 182. Nonetheless, on December 8, 2005, BPA announced the issuance of a Program Solicitation for Key Functions previously performed by the Fish Passage Center. AR 1442. BPA’s stated reason for abolishing the Center is that “the US Congress passed legislation (House Report 109-275), which forbids BPA from making additional obligations in support of the Fish Passage Center.” ER AR 1444. On January 26, 2006, BPA announced that it had selected two entities to “replace work done by the Fish Passage Center.” ER 274. Until this Court stayed BPA’s decision, BPA intended to allow the Fish Passage Center funding to lapse.

A fundamental rule of administrative law is that an agency’s decision can be upheld only on the basis of the reasoning in that decision. Anaheim Mem’l Hosp., 130 F.3d at 849; Chenery, 332 U.S. at 196, 67 S.Ct. at 1577. If the agency’s grounds “are inadequate or improper, the court is powerless to affirm the administrative action” Chenery, 332 U.S. at 196, 67 S.Ct. at 1577. Here, BPA’s sole stated reason for its decision to defund the Fish Passage Center is that

it is implementing a legislative requirement. ER 182. BPA's reason is improper because it relies upon report language that does not have the force of law.

Therefore, the decision cannot be affirmed. Motor Vehicles, 463 U.S. at 43.

Despite BPA's representation that it was acting pursuant to legislation,¹ the congressional language concerning the Fish Passage Center is found only in a committee report, which is not the law and thus is not binding upon the agency. Nothing in the language of the Energy and Water Development Appropriations Act of 2006, Public Law 109-103, supports BPA's decision to defund the Center and act inconsistently with the Council's Fish and Wildlife Program. Public Law 109-103 does not once mention the Fish Passage Center. See ER 64.

BPA's decision to abnegate its fish and wildlife responsibilities does not stem from a statutory mandate passed by Congress, but from non-binding language placed within a House Conference Report. The Conference Report, H.R. 109-275, states that:

The Bonneville Power Administration may make no new obligations in support of the Fish Passage Center. The conferees call upon Bonneville Power Administration and the Northwest Conservation Council to ensure that an orderly transfer of the Fish Passage Center functions (warehouse

¹BPA makes this misrepresentation despite full knowledge that report language is not law. ER 287 ("Language prohibiting use of BPA funds to fund the Fish Passage Center was inserted into the REPORT language which accompanies the Senate FY2006 Energy and Water appropriations bill. The language is not in the Bill itself. This is a big distinction because report language is not law.").

smolt monitoring data, routine data analysis and reporting and coordination of the smolt monitoring program) occurs within 120 days of enactment of this legislation.

H.R. 109-275; ER 66. However, this Report language is not binding and does not have the force of law.

BPA has argued that its decision to abolish the Fish Passage Center is based upon the “will of Congress,”² but the “will of Congress” is found first and foremost in statutory language, not in conference reports. The Supreme Court has established that conference reports lack the force of law because “the Constitution is quite explicit about the procedure that Congress must follow in legislating.” Am. Hosp. Ass’n v. Nat’l Labor Relations Bd., 499 U.S. 606, 616 (1990). Where Congress adopts a lump sum appropriation without statutorily restricting those funds “indicia in committee reports and other legislative history as to how the funds should be spent...*do not establish any legal requirements on the agency.*” Lincoln v. Vigil, 508 U.S.182, 193 (1993) (quoting LTV Aerospace Corp., 55 Comp. Gen. 307, 319 (1975)) (emphasis added). BPA’s decision to implement the nonbinding report language is not reasonable because the Conference Report is not legally binding and does not provide Congressional approval for a decision that does not accord with the Power Act’s consistency requirement.

²BPA Resp. to Motion to Stay at 19 (filed March 3, 2006).

Report language that is untethered to any language in the act adopted by Congress is not meaningful or binding. Under the plain meaning rule – the overriding principle of statutory construction – the meaning of a statute must be anchored in its text. Aldridge v. Williams, 44 U.S. 9, 24 (1845) (“The law as it passed is the will of the majority of both houses, and the only mode in which that will is spoken is in the act itself”). It may be appropriate to resort to legislative history, such as conference reports, when the plain meaning is ambiguous. Shannon v. United States, 512 U.S. 573, 583 (1994). However, the use of report language becomes improper when the line is crossed from using legislative history to resolve matters that are not clear in the statutory language to using it to rewrite the statute. Shannon, 512 U.S. at 583 (declining to give effect to “a single passage of legislative history that is in no way anchored in the text of the statute”); see also GAO Office of the General Counsel, “Principles of Federal Appropriations Law,” Third Ed. Vol. I at p. 2-97 (excerpts included in addendum).

In Shannon, the defendant tried to argue that the Insanity Defense Reform Act (IDRA) required a specific jury instruction because it was endorsed in a Senate Report. However, the Supreme Court held:

We are not aware of any case, however (and Shannon does not bring one to our attention), in which we have given authoritative weight to a single passage of legislative history *that is in no way anchored in the text of the statute*. On its face, the passage Shannon identifies does

not purport to explain or interpret any provision of the IDRA. Rather, it merely conveys the Committee's "endorsement" of the Lyles "procedure"-*a procedure that Congress did not include in the text of the Act*. To give effect to this snippet of legislative history, we would have to abandon altogether the text of the statute as a guide in the interpretative process. We agree with the District of Columbia Circuit that "courts have no authority to enforce [a] principl[e] gleaned solely from legislative history that has no statutory reference point."

International Brotherhood of Elec. Workers, Local Union No. 474, AFL-CIO v. NLRB, 814 F.2d 697, 712 (1987) (emphasis deleted).

Shannon, 512 U.S. at 583-84 (emphasis added); see also, TVA v. Hill, 437 U.S.

153, 191 (1978) ("Expressions of committees dealing with requests for

appropriations cannot be equated with statutes enacted by Congress"); and,

Cherokee Nation v. Leavitt, 543 U.S. 631, 637, 644 (2005). Similarly, BPA is

relying upon report language this is "in no way anchored in the text of the statute."

Additionally, the Comptroller General has decided:

"[A]s a general proposition, there is a distinction to be made between utilizing legislative history for the purpose of illuminating the intent underlying language used in a statute and resorting to that language for the purpose of writing into the law that which is not there."

55 Comp. Gen. 307, 325 (1975). Here, BPA is relying upon report language to

circumvent its duty under the Northwest Power Act to fund the Fish Passage

Center consistent with the Council's Fish and Wildlife Program.³ While

³Even if the report language had any effect, the Congressional Record also shows that, through the report language, the Committee "did not intend this language to supersede the Northwest Power Act or the Council's fish and wildlife program." Cong. Rec. Nov. 14, 2005 Page S12744 (ER 295).

individual members of the House Conference Committee may well have wished to eliminate the Fish Passage Center, their wishes did not make it into the text of Public Law 109-103. Thus, BPA's reliance upon the Conference Report is an attempt to write into the law "that which is not there."

BPA's sole reason for its decision to defund the Fish Passage Center is that it is implementing a legislative requirement. ER 182; ER 241 (Delwiche states that "what's relevant is what the direction from Wash DC is. We are merely the implementer of the guidance from back there"); ER 296 ("BPA fully intends to implement the report language"). BPA's reason is improper because the report language does not have the force of law, therefore, the decision cannot be affirmed. Anaheim Mem'l Hosp., 130 F.3d at 849; SEC v. Chenery, 332 U.S. at 196, 67 S.Ct. at 1577; Motor Vehicles, 463 U.S. at 43. Without the ability to rely upon the conference report as binding legislation, BPA has no explanation for its decision to deviate from its past practice of funding the Fish Passage Center in accordance with the Fish and Wildlife Program and the consistency provision of the Northwest Power Act. Consequently, this Court should not affirm BPA's decision.

III. BPA’S DECISION TO ABOLISH THE FISH PASSAGE CENTER VIOLATES THE NORTHWEST POWER ACT.

The provision of the Northwest Power Act at issue is the mandate found in Section 839b(h)(10)(A) of the Act, which requires that BPA “shall use Bonneville Power Administration fund . . . to protect, mitigate, and enhance fish and wildlife . . . in a manner consistent with” the Fish and Wildlife Program adopted by the Council. 16 U.S.C. § 839b(h)(10)(A). This Court must review BPA’s decision and actions to discontinue funding of the Fish Passage Center, a component of the Fish and Wildlife Program, and determine whether BPA’s actions were arbitrary, capricious or otherwise not in accordance with the law. First, BPA’s decision to defund the Fish Passage Center is arbitrary and capricious because the record does not support any conclusion that the decision is consistent with the Fish and Wildlife Program for the simple reason that BPA never considered it. Second, BPA’s decision is not entitled to deference because it is not an expert fish and wildlife agency. Furthermore, BPA is not entitled to deference as to the meaning of the consistency provision because its plain language is not ambiguous. Even if the consistency provision were ambiguous, BPA has never construed or interpreted the provision, therefore, there is no interpretation to which this Court can defer. Finally, applying the “in a manner consistent with” requirement to the facts at issue here, BPA’s decision is not in accordance with this requirement of

the Northwest Power Act, and it flies in the face of the purpose and intent of the statutory scheme. For these reasons, this Court should set aside BPA’s decision to discontinue funding for the Fish Passage Center. 5 U.S.C. § 706(2).

A. The Record Demonstrates BPA Never Considered Whether Its Decision to Abolish the Fish Passage Center Complied with the Northwest Power Act Consistency Requirement.

Because BPA relied upon the nonbinding report language as its sole explanation for its decision to defund the Fish Passage Center, BPA never bothered to assess whether defunding the Center complies with the Power Act’s consistency provision. Under the “arbitrary and capricious” standard, courts “must ‘consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.’” Motor Vehicle Mfrs., 463 U.S. at 43 (quoting Bowman Transp. Inc. v. Arkansas-Best Freight System, 419 U.S. 281, 285 (1974)). Agency action is arbitrary and capricious when the agency has “entirely failed to consider an important aspect of the problem” Id. Here, BPA entirely failed to consider whether its decision to defund the Fish Passage Center is consistent with the Council’s Fish and Wildlife Program, as required by the Power Act.

There is no support in the record to support BPA’s position that its decision to defund the Center complies with the Power Act’s consistency provision.

Instead, the record shows that BPA was intent upon implementing the “requirements” of the report language to defund the Center and transfer its functions to another entity within 120 days. ER 66 (report language); ER 182 (representing that Congress had “passed legislation . . . which forbids” BPA from funding the BPA and stating that “BPA has decided to implement this requirement thru [sic] the issuance of this Program Solicitation”); ER 241(BPA’s Delwiche states that “what’s relevant is what the direction from Wash DC is. We are merely the implementer of the guidance from back there”); ER 296 (“BPA fully intends to implement the report language”). Any similarity in BPA’s Solicitation to the functions of the Fish Passage Center is a consequence of BPA’s implementation of the report language requiring it to transfer specific functions of the Fish Passage Center. As a result, the decision is arbitrary and capricious and must be set aside. 5 U.S.C.. § 706(2). National Wildlife Fed’n v. F.E.R.C., 801 F.2d 1505 (9th Cir. 1986) (rejecting agency decision because it was not supported by the record).

B. BPA is Not Entitled to Deference in this Matter.

1. BPA Is Not Entitled to Deference Concerning the Fish and Wildlife Provisions of the Northwest Power Act.

This Court should not give deference to BPA’s interpretation of the fish and wildlife provisions of the Northwest Power Act. This Court has established that the Northwest Power Act and its legislative history require that fishery managers,

including fish and wildlife agencies and Indian tribes, are entitled to a “high degree of deference” for their interpretations of the fish and wildlife provisions found in Section 839b(h) of the Act. NRIC, 35 F.3d at 1388 (fishery agencies and tribes are entitled a “high degree of deference” because “Congress recognized, in particular, that fish and wildlife issues are, and should be, outside the expertise of the Council and the hydropower regulating agencies”); NRIC, 35 F.3d at 1387 (one factor in determining the degree of respect given to an agency’s statutory interpretation is whether it is “based on experience or expertise peculiarly within the agency’s ken”) (citation omitted).

The legislative history of the Power Act demonstrates that Congress did not intend for the Council to become a “super fish and wildlife entity,” rather it was to rely heavily on fish and wildlife agencies of the State and Federal Governments. NRIC, 35 F.3d at 1388 (quoting 126 Cong. Rec. E10683 (1980)). Indeed, Congress did not define certain terms, such as the meaning of “protect, mitigate, and enhance” “in recognition of the fact that these terms are not new to those concerned with this resource, and because such a definition might later prove more limiting than anticipated.” Id. (quoting H.R. Rept. No. 96-976, pt. I, 96th Cong., 2nd Sess., at 57). In the scheme of the Northwest Power Act, Congress intended that the Council not merely “tap” the expertise of fish and wildlife agencies and

Indian tribes; rather Congress intended that the Council “heavily rely” upon them for their expertise. Id. Thus, in this matter, a high level of deference belongs to the fishery agencies and Indian tribes, not to BPA.

2. This Court Can Interpret Whether BPA’s Decision Comports with the Plain Language of the Act.

The Northwest Power Act requires BPA to fund “in a manner consistent with” the Council’s Fish and Wildlife Program. This provision is not ambiguous. Because the meaning is plain, there is no need to defer to BPA’s interpretation of whether its decision to defund the Center complies with this provision. Chevron, 467 U.S. at 843-44; NRIC, 35 F.3d at 1383 (“In construing a statute, we look first to the statute’s language”).

Further, this is a case where deference is not warranted because the court has experience interpreting consistency decisions. Monex Int’l, Ltd., 83 F.3d at 1133 (“judicial deference is not necessarily warranted where courts have experience in the area and are fully competent to decide the issue”) Here, courts are well-suited to determine whether BPA’s actions are consistent with the Fish and Wildlife Program⁴ because courts are frequently called upon to make such assessments under statutes such as the National Forest Management Act and the

⁴ Indeed, courts themselves utilize the consistency requirement in court orders that require the parties to act consistent with the court’s opinions.

Federal Land Policy and Management Act. Under these statutes, the agency does not attempt to construe the consistency clauses, rather, the court reviews the peculiar facts of each case and concludes whether the agency action is or is not in compliance with the statutory consistency direction.

3. BPA has not construed the consistency provision, therefore nothing to which the court can defer.

BPA has not advanced any interpretation of the Act's consistency provision that speaks with the "force of law." U.S. v. Mead, 533 U.S. at 232; see also Chevron, 467 U.S. at 843 (in the absence of an administrative interpretation, court construes the statute's meaning). Similarly, no deference is owed to BPA when it has not formulated an official interpretation of the statutory provision, but is merely advancing a litigation position. Trident Seafoods Corp., 60 F.3d at 559; Bowen, 488 U.S. at 212. Here, BPA does not have any regulation or guidance concerning the consistency provision to which the court could defer. Moreover, BPA did not explain in its decision or the record the basis for its decision in the context of the consistency requirement of the Northwest Power Act. Instead, BPA improperly relied upon report language as binding as its basis and explanation. As a result, BPA is not entitled to any deference for further reasons or explanations that its counsel may provide in briefing before this Court.

C. BPA’s Unilateral Decision to Abolish the Fish Passage Center Violates the Purpose and Intent of the Fish and Wildlife Provisions of the Northwest Power Act.

The purpose, intent and policy established in the fish and wildlife provisions of the Northwest Power Act is to protect, mitigate and enhance fish and wildlife through a public planning process in reliance upon fishery managers. The Act further promotes a balancing of authorities between the Council, BPA, fishery agencies, Indian tribes and the public, to ensure the balance between hydropower and fish and wildlife. Instead of respecting the roles of each entity established in the Act, BPA acted unilaterally to defund the Fish Passage Center. This violates the policy and purpose of the Northwest Power Act and amounts to a de facto amendment of the Fish and Wildlife Program without engaging in the required public process. Biodiversity Legal Found’n v. Badgley, 309 F.3d 1166, 1175 (9th Cir. 2002) (agency is not entitled to deference where its interpretation or actions frustrate the policy Congress sought to implement); NRIC, 35 F.3d at 1387 (“deference is constrained by our obligation to honor the clear meaning of a statute, as revealed by its language, purpose and history”)(quoting International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Daniel, 439 U.S. 551, 566 n.20 (1979)).

The Northwest Power Act established a delicate federal/state balance in order to ward off “unproductive and endless litigation” between BPA’s customers, the states, and BPA. Aluminum Co. of America v. Central Lincoln’s People’s Utility District, 467 U.S.380, 387 (1984). Furthermore, the Act “marked an important shift in federal policy.....[that] created a new obligation on the region and various federal agencies to protect, mitigate, and enhance wildlife.” NRIC, 35 F.3d at 1377. BPA’s obligation to act consistent with the Council’s Plan is “vital to the Plan’s effectiveness.” H.R. Rep. 96-976(I) at 57 (1980). As one Representative phrased it: “[i]f the fish populations of the Pacific Northwest are to be restored to the sportsmen, the Indians, and the commercial fishermen, this is the mechanism that will do it.” *Id.*

The effectiveness of the federal/state structure embodied in the Northwest Power Act is predicated upon the premise that “[t]he Council and the BPA Administrator should work together.” H.R. Rep. 96-976(I), at 57(1980). Even if the Conference Report suggestion to defund the Fish Passage Center had been binding law, there was nothing in the report to suggest that BPA should usurp the provisions of the Northwest Power Act. Nonetheless, BPA unilaterally decided to defund the Fish Passage Center and it *further* decided that BPA, rather than the

Council and the fishery agencies and tribes, should determine the Fish Passage Center's successors. ER 180.

Moreover, BPA's unilateral decision amounts to a de facto amendment of the Council's Fish and Wildlife Program. Under the Act, the Council is required to develop a program to protect, mitigate, and enhance fish and wildlife ("the Fish and Wildlife Program"). 16 U.S.C. § 839b(h)(1)(A). The Act explicitly provides that the Council must develop the Fish and Wildlife Program on the basis of recommendations, supporting documents, and information obtained through public comment and participation, as well as through consultation with the agencies, tribes, and customers. 16 U.S.C. § 839b(h)(2)-839b(h)(5). See NRIC, 35 F.3d at 1384-1389 (describing the public process for amendment of the Program, including the high deference given to recommendations of fish agencies and tribes and statutory requirements to decline to adopt those recommendations). BPA's unilateral decision to defund the Fish Passage Center, a component of the Program, is a de facto amendment of the Program without respecting the Power Act requirements for such amendment.

BPA's unilateral choices illuminate the danger of allowing BPA to undermine the Council. First, BPA planned to splinter one consolidated entity into three separate entities with the foreseeable result of making local public access to

data more cumbersome. Second, BPA chose Battelle Laboratories, an entity best known in the Northwest for running the Department of Energy's Pacific Northwest Laboratory. ER 275. Thus, BPA's actions not only upset the federal/state balance by undermining the Council's authority but they also would make local access to data more difficult, and would replace a local entity with an entity strongly associated with the federal government.

The result of BPA's actions is to throw a wrench into the delicate balance that Congress has attempted to create through the Northwest Power Act to ensure that fish and hydropower are on equal footing. That balance can only be maintained if the checks and balances of the procedures and planning provisions of the Act are maintained. Here, BPA has upset the balance by unilaterally making a decision that Congress intended be made through a public planning process with deference to the recommendations of fishery managers. The language, the statutory context, and the legislative history of the Northwest Power Act suggest that defunding the Fish Passage Center, without the participation of the Council, regional fisheries managers, regional tribes and general public, is not consistent with the Act.

D. BPA’s Decision to Abolish the Fish Passage Center Violates the Northwest Power Act Consistency Requirement.

The Northwest Power Act commands that BPA “*shall* use [its]..fund and the authorities available to the Administrator under this chapter and other laws administered by the Administrator.... in a manner consistent” with the Council’s Fish and Wildlife Plans. 16 U.S.C. § 839b(h)(10)(A) (emphasis added). This Court’s task is to apply the plain-meaning requirement of consistency to the facts of BPA’s decision to defund the Fish Passage Center, a longstanding component of the Fish and Wildlife Program.

Notably, this consistency requirement of the Power Act does not contain any qualification. In contrast, in Section 839b(h)(11)(A)(ii), which concerns BPA’s duties when exercising responsibilities for managing, operating, or regulating hydroelectric facilities, Congress qualified that BPA shall exercise such responsibilities taking into account the Fish and Wildlife Program “to the fullest extent practicable.” 16 U.S.C. § 839b(h)(11)(A)(ii). At issue here is BPA’s duty under Section 839b(h)(10)(A), which requires that BPA use the fund and authorities available to it to protect fish and wildlife in a manner consistent with the Program without any qualification of “to the fullest extent possible.”⁵ 16

⁵Even if BPA’s duty to act consistent with the Program is qualified, there is no evidence here to suggest that BPA’s decision to disband the Center is a consequence of impracticability, but rather it is a consequence of BPA’s insistence

U.S.C. § 839b(h)(10)(A). When Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that the omission was intentional and purposeful. Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 452 (2002); ONRC v. Kantor, 99 F3d 334, 338 (9th Cir. 1996).

Indeed, when Congress directed the Council to report to it regarding more effective regional control over efforts to conserve and enhance fish and wildlife, the Council recommended that Congress change the language in Section 839b(h)(11)(A)(ii). The Council recommended that Congress remove the “to the fullest extent practicable” language and replace it with “in a manner consistent with” and apply it to all federal agencies taking actions that affect hydropower operations. ER 205. The Council explained that this change “could improve implementation of the program” because “[t]he casual approach the federal agencies have sometimes taken to implementation of the Council’s program in the past would be much less likely with such a consistency obligation.” ER 205-206. The Council’s recommendation to change the qualifying language to consistency language suggests that “in a manner consistent with” is a stringent duty.

in implementing the non-binding report language.

Further, the Council may review BPA’s actions in order to assess “whether such actions are consistent with the plan and programs.” 16 U.S.C. § 839b(i). If the Council exercises its statutory authority to request that BPA take action under the Northwest Power Act, the Act requires that BPA’s response detail how BPA will undertake the action, or explain why “such action would not be consistent with the plan” 16 U.S.C. § 839b(j)(2)(B). Thus, the statute requires that BPA undertake a requested action, or explain why the action would be *inconsistent* with the plan. The legislative history describes this as giving the Council “extraordinary authority” over BPA. H.R. Rep. 96-976 (I), 57 (1980).

This Court has stated that the Act “requires federal water managers to act in a manner consistent with the Council’s fish and wildlife program.” NRIC, 35 F.3d at 1379; see also Northwest Resource Information Center v. National Marine Fisheries Serv., 25 F.3d 872, 874 (9th Cir. 1994) (BPA “must act consistently with the Council’s program but in the end has final authority to determine its own decisions’). This Court has further interpreted the balance of power between the BPA and the Council in that they “operate independently of each other...while their functions directly overlap...under those portions of the Act which provide that certain BPA actions will be consistent with The Council’s Plan; [and] that the Council can request certain actions of BPA; and that the Council can review BPA

actions.” Seattle Master Builders, 786 F.2d at 1363. The Ninth Circuit has not addressed the question of what it means for BPA to act consistently with the Council’s Fish and Wildlife Program under Section 839b(h)(10)(A) under the facts presented here.

While most of the Council’s Plan is written in broad strokes that would allow BPA ample leeway to choose congruous actions, funding the Fish Passage Center is one of the Plan’s few specific provisions. ER 170. BPA admits that it has funded the Fish Passage Center since the 1980's (ER 182) and that the Center “was originally established as part of the Northwest Power and Conservation Council’s fish and wildlife program.” ER AR 2367; ER 43-44, 48 (Delwiche Decl. ¶¶ 8-11, 18 (extending contract)). BPA has now disregarded the Program and its longstanding and consistent practice of funding the Fish Passage Center. This decision is arbitrary, capricious and not in accordance with the Power Act’s consistency requirement. See, Idaho Dep't of Health & Welfare v. U.S. Dep't of Energy, 959 F.2d 149, 153 (9th Cir.1992) (Idaho’s attempts to prohibit shipping spent nuclear fuels to Idaho was belied by its consistent, nine-year practice of allowing spent nuclear fuels into the state).

BPA’s decision to eliminate the Fish Passage Center is inconsistent with the Fish and Wildlife Program in several respects. First, and foremost, the Program

expressly calls for the continued operation of the Fish Passage Center. ER 143 (2000 Program); ER 170-171, 179 (2003 Mainstem Amendments); ER 189 (the glossary to the Council's 2000 Fish and Wildlife Program defines "Fish Passage Center" as the "center established under section III(D)(6) of the program""). In its comments on the draft of the 2003 Mainstem Amendments, BPA expressed its appreciation that the Council, through the Oversight Committee, was addressing concerns regarding the transparency of the Center's activities and availability of data and scientific analysis. ER 202. However, BPA never commented that the continued operation of the Fish Passage Center as a component of the Fish and Wildlife Program was somehow inappropriate or unacceptable. ER 202. BPA's omission in its comments and history of funding the Center demonstrate that but for the congressional report language, BPA would have continued to fund the Center consistent with the Council's Program.

Second, BPA's decision to replace the Center with Pacific States and Battelle will leave many of the functions provided by the Center unfulfilled. In Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1069 (9th Cir. 1998), this Court admonished the agency for claiming it was acting consistently with a Forest Plan because its timber sale was consistent with most of "the old Forest Plan" and some of the "new Plan." The Court made it clear that consistency requires more than picking and choosing among "selected elements of two Plans."

Id. Similarly, BPA has adopted selected elements of the Program, but has chosen to ignore other key elements of the Program.

Pacific States and Battelle will gather and analyze data, but there is no indication that they will provide the timely and extensive technical assistance functions performed by the Center. For example, the fish and wildlife agencies and the tribes have relied upon the Fish Passage Center staff for data analysis, calculations, and compilation of historic data. ER 284. The Fish Passage Center has been able to satisfy these requests even in the face of short turn-around times caused by pressing needs for in-season management decisions. Id. Instead of speedy analysis, BPA's proposal would have Battelle:

establish a coordinator for handling requests for such analysis. Battelle will also arrange ahead of time, through some sort of RFQ process, to have a stable of expert analysts qualified, contracted with, and available to do this sort of analysis. And it will establish and have ready an independent technical review team to review the analysis, [sic] The process is then to work like this: As a request for analysis comes in, the Battelle coordinator will decide whether the request is within the scope of the analysis called for in the Council's Program. If so, the coordinator will arrange with one or more of the expert analysts...The coordinator will also arrange to have the independent technical review team review whatever analysis comes from the expert analysts. The coordinator will then make the final analysis available to the requester and the public.

ER 281. This process is unlikely to produce the short turn-around time required by the local fisheries managers for making in-season management decisions.

Additionally, BPA's proposal leaves out the Comparative Survival Study (CSS). ER 298. CSS documents "different survival rates of different [salmon and steelhead] stocks under different migration conditions." ER 191. The Independent Scientific Review Panel and the Independent Scientific Advisory Board found CSS to be an "ambitious, long-term study that ...the Council should view... as a good, long-term monitoring program, the results of which should be viewed with increasing confidence as years pass." ER 191-192.

Other omissions from BPA's decision include a mechanism for coordinating data collection with regional "Research, Monitoring, and Evaluation" programs, collecting river operations data, fish migration data, bull trout data, lamprey data, Ives Island water data, and Walla Walla water data. ER 299. It is notable that there is no safeguard for public access to the data collected by Pacific States and Battelle because it does not guarantee that collected data will remain non-proprietary or that the public will have access to the company's databases.

BPA's decision to hand over the Center's functions to Pacific States and Battelle would do away with timely technical data analysis; the Comparative Survival Study; the coordination of regional research, monitoring, and evaluation programs; the collecting river operations data, fish migration data, bull trout data, lamprey data, Ives Island water data, Walla Walla water data; and, the non-proprietary public access guarantees. In making such changes, BPA is not acting

in accordance with the consistency requirement of the fish and wildlife provisions of the Northwest Power Act. As a result, this Court should set aside BPA's decision. 5 U.S.C. § 706(2).

CONCLUSION

NEDC respectfully requests that this Court hold that only language found in legislation passed by Congress is binding upon the agency and that BPA's reliance upon report language is an improper basis for its decision to discontinue funding for the Fish Passage Center, and, therefore, the decision cannot be upheld or affirmed. Further, NEDC requests that this Court set aside and otherwise render null and void BPA's decision to defund the Fish Passage Center because it violates the Northwest Power Act mandate to fund consistent with the Fish and Wildlife Program, of which the Center is an important and explicit component.

Respectfully submitted this 16th day of June, 2006

STEPHANIE M. PARENT - OSB #92590
Attorney for Plaintiffs/Appellants

STATEMENT OF RELATED CASES

Counsel is not aware of any related cases in this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that this opening brief is proportionately spaced, has a typeface of 14 points or more, and contains _____ words.

STEPHANIE M. PARENT - OSB #92590
Attorney for Plaintiffs/Appellants

PROOF OF SERVICE

I, the undersigned, do hereby certify that true and correct copies of Petitioners' Opening Brief and Excerpts of Record were transmitted via U.S. First Class Mail on June 16, 2006 to the following:

Philip Key
BPA, Office of the General Counsel
BPA/LC-7
P.O. Box 3621
Portland, OR 97208-3621
pskey@bpa.gov

Stephen J. Odell
Assistant U.S. attorney
1000 SW Third Ave., Suite 600
Portland, OR 97204-2902
steve.odell@usdoj.gov

John Shurts, General Counsel
Northwest Power and Conservation Council
Council Central offices
851 SW Sixth Avenue, Suite 1100
Portland, OR 97204
jshurts@nwcouncil.org

Tim Weaver
Attorney for Petitioner Yakama Nation
PO Box 487
402 E. Yakima Avenue, Ste 710
Yakima, WA 98907
weavertimatty@qwest.net

Stephanie M. Parent (OSB # 92950)

Attorney for Petitioners

Addendum