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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Northwest Environmental Defense)	
Center, Public Employees for)	Civil No. 06-70430
Environmental Responsibility,)	
and Northwest Sportfishing Industry)	MOTION FOR IMMEDIATE STAY
Association,)	PURSUANT TO FRAP 18
Petitioners)	
)	URGENT MOTION UNDER
v.)	CIRCUIT RULE 27-3(b)
)	
Bonneville Power Administration,)	ACTION NECESSARY PRIOR TO
Respondent.)	MARCH 17, 2006
_____)	

INTRODUCTION

Petitioners request an immediate stay of the Bonneville Power Administration (BPA) decision to abolish the Fish Passage Center. BPA will implement the decision on March 20, 2006. The Fish Passage Center has operated for over twenty years to provide objective, technical information and analyses

relied upon by the public, state and federal fisheries agencies, Indian tribes and the federal courts. The sound science provided by the Center is important to the mitigation and recovery of the region's salmon and steelhead.

BPA decided to abolish the Fish Passage Center in violation of the Northwest Power Act requirement to act consistent with the Fish and Wildlife Program, which explicitly requires the Fish Passage Center. BPA justifies its unlawful decision by misrepresenting that Congress passed appropriations legislation directing it to defund the Fish Passage Center. In fact, no reference to the Fish Passage Center is found anywhere in the appropriations bill adopted by Congress; the language was inserted into a House Conference Report. The conference report is not the law, nor can it amend the Northwest Power Act.

An immediate stay of this decision is crucial to avoid irreparable harm to Petitioners' interests in healthy fish in the Columbia Basin and to avoid the chill on the ability of federal employees and contractors to provide sound science without fear of political repercussions and censorship. Action is necessary prior to March 17, 2006, otherwise BPA terminates the Center's funding the following Monday, March 20, 2006.

Without a stay, the combined experience and expertise of the Fish Passage Center and its employees will be lost. The public, states, fish agencies and Indian

tribes rely upon the Center's objective, scientific expertise to fully participate in hydropower operation decisions to mitigate impacts to imperilled fish listed under the Endangered Species Act. It is no coincidence that the Petitioners will lose the Center's expertise at a critical time during the next year of court-ordered, collaborative, salmon recovery negotiations. See Declaration of Rodney W. Sando ¶ 7; National Wildlife Fed'n v. National Marine Fisheries Svc. (“NWF v. NMFS”), CV 01-640-RE, slip op. at 11-12, 2005 WL 2488447 (D. Or. Oct. 7, 2005) (ordering remand of biological opinion on hydropower operations and requiring collaboration with sovereigns, including states and tribes); NWF v. NMFS, slip op. at 16-17, 2005 WL 3576843 (D. Or. Dec. 29, 2005) (court expresses “concern over the demise of the Fish Passage Center” as a remand issue); NWF v. NMFS, Fed. Defs' First Remand Report, Exhibit 5 at 3 (Jan. 3, 2006) (“Sovereign Parties have raised concerns about the consequences of the pending termination of the funding for the Fish Passage Center” believing “the data analysis to support the Collaborative Process and its demanding timelines is compromised” by uncertainty of upcoming transfer of Center functions and funding) (attached as Exhibit A at p. 7 of 8); Exhibit B (letter from Congressmen stating it is “difficult to imagine a worse time to eliminate the most important source of technical information” as the region deals with the biological opinion remand).

Currently, and for the past twenty-three years, the Center has been a centralized provider that has demonstrated its expertise, availability and timely responses for scientific information. The two entities that BPA unilaterally has chosen to replace the Center do not have the Center's expertise, centrality or track record. Moreover, BPA's abolishment of the Fish Passage Center will leave key technical assistance functions unperformed, restructure the oversight mechanism for data and policy management, and reduce public access to the collected data. If BPA is allowed to unlawfully dissolve the Fish Passage Center, its integrated facilities could not effectively be reconstituted. Equally important, allowing BPA to disband the Fish Passage Center at the behest of individual members of Congress will have the obvious impact of chilling federal employees and contractors in their efforts to provide objective, scientific data and analyses.

FEDERAL RULE OF APPELLATE PROCEDURE 18 REQUIREMENTS

Federal Rule of Appellate Procedure 18 provides that petitioners must ordinarily move the agency for a stay pending review of its decision, unless this would be impracticable. FRAP 18(a). Here, moving BPA is impracticable. BPA made its decision to eliminate the Fish Passage Center without any public or adjudicatory process. In December, 2005, Counsel for Petitioner NEDC sent BPA a letter detailing concerns about the agency's unlawful action. Exhibit C. BPA did

not respond to the letter. BPA also received letters of concern from the expert fisheries agencies and other stakeholders. See e.g., Exhibit D (letter from State, Federal and Tribal Fishery Agencies Joint Technical Staff explaining why the Center could not be replaced without impacts to fish). Nonetheless, on January 26, 2006, BPA announced its decision to contract with two other entities. Exhibit E. BPA believes itself to be constrained to act within 120 days based on the Conference Committee Report language. Exhibit F at 2. Thus, moving BPA is not practicable. Petitioners provided BPA reasonable notice that it intended to move this Court for a stay. FRAP 18(a)(2)(C); Exhibit G.

STANDARD OF REVIEW

This Court evaluates stay requests under the same standards employed by district courts in evaluating motions for preliminary injunctive relief. Abbassi v. INS, 143 F.3d 513, 514 (9th Cir. 1998). Petitioner must show either a probability of success on the merits and the possibility of irreparable injury, or that serious legal questions are raised and the balance of hardships tips sharply in petitioner's favor. These standards represent the outer extremes of a continuum, with the relative hardships to the parties providing the critical element in determining at what point in the continuum a stay pending review is justified. Id.

ARGUMENT

I. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS.

A. BPA's Decision to Abolish the Fish Passage Center Violates the Northwest Power Act Because it is Not Consistent with the Fish and Wildlife Program.

The Northwest Power Act requires 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 Council established by the Act. 16 U.S.C. § 839b(h)(10)(A). The Program expressly delineates the funding and functions of the Fish Passage Center. BPA's decision to abolish the Center violates the Northwest Power Act requirement to act consistent with the Program.

The Pacific Northwest Power Planning and Conservation Act, 16 U.S.C. § 839-839h (1988) (the Northwest Power Act) radically altered BPA's role as a power provider in the Northwest. For the first time, BPA was allowed to acquire new energy sources, rather than just market the power from the federal dams. Association of Public Agency Customers v. BPA, 126 F.3d 1158, 1166 (9th Cir. 1997). This expansion of BPA's sphere of influence was, however, coupled with the creation of a check upon that expansion in the form of the Northwest Power Planning Council (Council), an interstate compact agency comprised of two appointed members from the states of Oregon, Washington, Idaho and Montana.

16 U.S.C §839b(a)(2)(B). While the Council and BPA operate independently of each other, “[t]heir functions directly overlap, however, under those portions of the Act which provide that certain BPA actions will be consistent with the Council’s plan, §§ 839b(d)(2), 839b(h), 839c(d)(3).” Seattle Master Builders Ass’n v. Pacific Northwest Power and Conservation Planning Council, 786 F.2d 1359 (9th Cir. 1986).

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 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). 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...’¹ 16 U.S.C. § 839b(h)(10)(A).

¹BPA’s responsibilities to protect fish and wildlife, however, go beyond the Council’s program. BPA has further “substantive” and “independent” obligations under 16 U.S.C. §839b(h)(11)(A)(i) and §839b(h)(11)(A)(ii). Northwest Environmental Defense Center v. BPA (“NEDC v. BPA”), 117 F.3d 1520, 1531 (9th Cir. 1997).

The Council adopted the current Columbia River Basin Fish and Wildlife Program in 2000 and amended it in 2003, through the public process required by the Northwest Power Act. The Mainstem Amendments to the Columbia River Basin Fish and Wildlife Program (2003 Mainstem Amendments) (excerpts attached as Exhibit H). The 2003 Mainstem Amendments expressly call for “the continued operation of the Fish Passage Center (Center).”² Exhibit H at 27. The Center’s primary purpose 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.” Id.

To meet this purpose, the 2003 Mainstem Amendments provide that the Center “shall:” monitor smolt; gather, organize and disseminate fish passage information, as well as information concerning water management and passage measures; provide technical information to assist agencies and tribes in formulating in-season flow and spill requests and in ensuring that operating criteria for storage reservoirs are satisfied; and, provide technical assistance to coordinate recommendations for storage reservoir and river operations that, to the extent possible, avoid conflicts between anadromous and resident fish. Id. at 27-8.

²See Sando Decl. ¶ 3 (explaining that the Fish Passage Center has been a component of the Fish and Wildlife Program since 1982).

According to the 2003 Mainstem Amendments, the Center is also to be overseen by a board made up of representatives from NOAA Fisheries, state fish and wildlife agencies, tribes, and the Council. Id. at 28. The oversight board provides policy guidance for the Center and “assures regional accountability and compatibility with the regional data management system.” Id. Further, the Center’s manager shall be “selected by, and be subordinate to, the Executive Director of the Columbia Basin Fish and Wildlife Authority (Authority), in consultation with the oversight board.” Id. The data collected by the Center “shall not be considered proprietary,” and “the Center [will] ensure that all parties have timely and thorough access to the database.” Id.

On December 8, 2005, BPA issued a “program Solicitation for Key Functions previously performed by the Fish Passage Center.” Exhibit I. On January 26, 2006 BPA announced its decision to have Pacific States Marine Fisheries Commission (Pacific States) manage smolt monitoring, perform related data collection and management, and conduct routine data analysis and reporting and to have Battelle Pacific Northwest Laboratory (Battelle) “oversee, coordinate and facilitate broader, non-routine” scientific data analysis and to manage the scientific analysis process. Exhibit E. In reference to the Columbia Basin Fish and Wildlife Authority, BPA proposed that the Authority should “assume the

function of coordinating the policy interests of regional fishery agencies and tribes on flow and spill issues.” Id. BPA’s proposal requires that the Authority’s current contract be modified and that the Authority’s members approve such a modification. Id.

BPA’s decision to eliminate the Fish Passage Center is inconsistent with the Fish and Wildlife Program in a number of respects. First, and most obvious, the Program calls for the continued operation of the Fish Passage Center explicitly. Second, BPA made its decision to hire Pacific States and Battelle to perform some of the functions of the Center unilaterally, despite the Program’s explicit provision that the Center’s manager be selected by the Columbia Basin Authority in consultation with the oversight board. Third, BPA’s decision to replace the Center with Pacific States and Battelle will leave many of the functions provided by the Center unfulfilled. They will gather and analyze data, but there is no indication that they will provide the extensive technical assistance functions performed by the Center. Nor does it appear that Pacific States and Battelle will work with the Council’s oversight board, or be subordinate to the authority of the Columbia Basin Fish and Wildlife Authority’s Executive Director, as required by the Program. Finally, BPA’s decision also does not safeguard 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. Moreover, even if the public and stakeholders are given nominal access, there is no guarantee of the timeliness of a response. Sando Decl. ¶¶ 4-6. Having abandoned these crucial technical and public participation functions of the Fish Passage Center, it cannot be said that BPA is acting consistently with the Council's Fish and Wildlife Program.

In NEDC v. BPA, this Court interpreted Section 839b(h)(11)(A)(ii) of the Northwest Power Act to mean BPA must take into account the Council's Program "to the fullest extent possible." 117 F.3d at 1532. However, Section 839b(h)(11)(A)(ii) only concerns BPA's duties to the Program when exercising responsibilities for managing, operating, or regulating hydroelectric facilities. 16 U.S.C. § 839b(h)(11)(A)(ii). And, this section qualifies that BPA shall exercise such responsibilities taking into account the Fish and Wildlife Program "to the fullest extent practicable." Id. 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. This provision of the Act does not qualify the duty to act consistent with the Program "to the fullest extent possible." 16 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). Even 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 impossibility.

B. BPA's Assertions That the Fish Passage Center Is Being Abolished Pursuant to a Congressional Mandate Are Not Supported by the Facts.

BPA asserts that it is abolishing the Fish Passage Center pursuant to legislation passed by Congress. Exhibit J. Nothing in the language of the Energy and Water Development Appropriations Act of 2006, Public Law 109-103, supports BPA's decision to act inconsistently with the Council's Fish and Wildlife Program. Public Law 109-103 does not mention, or even drop a hint, about the Fish Passage Center. Exhibit K (mentioning BPA only twice at pages 30 and 33 of the Enrolled Bill, but never mentioning the Center). BPA's decision to abnegate its fish and wildlife responsibilities does not stem from a Congressional mandate, but from a non-binding recommendation 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 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 (attached as Exhibit F). However, this Report language is not binding and does not have the force of law.

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 attached as Exhibit L). 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. Additionally, the Comptroller General 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 attempting to write into the law that which is not there by 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. However, 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 (attached as Exhibit M).

While 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 House Conference Report is an attempt to write into the law "that which is not there." BPA cannot use the Conference Report as a justification for making a decision that violates the Northwest Power Act.

II. THE BALANCE OF HARDSHIPS FAVORS A STAY

A. Petitioners and the Public Will Suffer Irreparable Harm

Petitioners are the Northwest Sportfishing Industry Association (NSIA), Public Employees for Environmental Responsibility (PEER) and Northwest Environmental Defense Center (NEDC). All petitioners will suffer irreparable harm if a stay is not granted because the loss of the Fish Passage Center will harm the ability to provide for protections and recovery of fish as well as chilling federal employees and contractors from conducting and reporting objective science that could impact economic objectives.

NSIA and its members rely upon healthy fish stocks for their business and livelihood, recreation and family enjoyment and bonding. Declaration of Liz

Hamilton ¶ 1-2, 7; Sando Decl. ¶¶ 4-6. The economic well-being of NSIA members and the Pacific Northwest Region is dependent upon healthy fish runs that can be fished by sportfishers. Hamilton Decl. ¶ 13-14, 16. NSIA focuses its efforts to improve fish runs for its members through public participation and, when necessary, litigation. Hamilton Decl. ¶ 3-6.

Through interim relief in litigation concerning the biological opinion on the operation of federal hydroelectric dams, NSIA and others gained greater spills over the dams for better fish passage in the summer of 2005. NWF v. NMFS, CV 01-640-RE, 2005 WL 1398223 (D. Or. June 10, 2005). This victory was due in part to information and analyses produced by the Fish Passage Center. See e.g. Second Declaration of Stephen W. Pettit at 22, relying on two Fish Passage Center reports (attached as Exhibit N). NSIA also secured a remand of the biological opinion with an order that the federal government must collaborate with the Sovereigns (states and Indian tribes) and cooperate with all parties in preparing a new biological opinion. NWF v. NMFS, CV 01-640-RE, slip op. at 11-12, 2005 WL 2488447. The parties in NWF v. NMFS, in particular, plaintiffs (including NSIA) and the tribes, rely heavily on the information and analyses produced by the Fish Passage Center. Hamilton Decl. ¶¶ 9-12. BPA's unilateral decision to eliminate the Fish Passage Center at this point in time will harm NSIA's ability to

ensure a biological opinion that is protective of fish. Hamilton Decl. ¶¶ 11-12, 15; see also Exhibit D (letter from the expert fish agencies, U.S. Fish and Wildlife Service, Oregon Department of Fish and Wildlife and the Columbia River Intertribal Fish Commission, explaining the importance of the Fish Passage Center); Northwest Resource Information Center v. Northwest Power Planning Council, 35 F. 3d 1371, 1388 (9th Cir. 1994) (giving a high degree of deference to fishery managers' interpretations of fish provisions and their recommendations for program measures). The loss of the Center will harm this effort and may result in a significant depletion of the salmon population in the Columbia River Basin, harming NSIA and its members. Sando Decl. ¶¶ 5-7, 9.

NSIA also will be harmed because NSIA actively participates in the public processes required by the Northwest Power Act and the Fish and Wildlife Program. NSIA and its members participate by testifying at public hearings and providing written comments on policies and rules relative to the effects of the Columbia River hydrostem operations on their industry. Hamilton Decl. ¶ 17. The NSIA Executive Director also sits on the board that oversees the Fish Passage Center. Hamilton Decl. ¶¶ 5, 17. BPA's decision does not appear to retain an oversight board. As a result, NSIA will be further harmed because it will not be able to participate in the *de facto* decision to amend the Program and to ensure that

the information and analyses produced by Pacific States and Battelle is objective.

PEER and its members are irreparably harmed as a result of the chilling effect closing the Center will have on fisheries scientists and managers in the Columbia River. Here, the Fish Passage Center information and analyses were relied upon to increase summer spill, with a resultant loss in additional power production. Thereafter, individual members of Congress inserted language into a committee report ordering the defunding of the Center. Sando Decl. ¶ 7. Many of the Region's fisheries scientists work for entities that receive funding from BPA or other federal sources. Sando Decl. ¶ 8. Allowing BPA to eliminate funding "because the analysis results were inconvenient for some of the Region's policy makers" will have a chilling effect on the federally funded scientists.³ Sando Decl. ¶ 8. Allowing BPA to succeed in abolishing the Center will have the irreparable effect of influencing the science and scientists in the Columbia Basin with detrimental results to fish protection and recovery.

NEDC's and its members' use and enjoyment of salmon for recreation and

³Many scientists who are federal employees or federally funded are contending with censorship or the shaping of science to meet policy needs. See Exhibit O (NASA press office exerted strong pressure during the 2004 presidential campaign to cut the flow of news releases on glaciers, climate, pollution and other earth sciences); Exhibit P (Oregon State University graduate student's federal funding suspended after publication of study that logging in burned forests sets back recovery of those forests; funding restored to avoid the impression of scientific censorship).

nourishment will be irreparably harmed without a stay because the loss of the Fish Passage Center. Declaration of Mark S. Riskedahl ¶ 7, 9. In addition, NEDC is harmed by the circumvention of the public participation requirement of the Northwest Power Act when the Fish and Wildlife Program is amended because it could not participate in this decision, and BPA will be emboldened to ignore public participation requirements in future. Riskedahl Decl. ¶ 8, 10.

B. BPA Will Suffer No Harm as a Result of the Stay

In contrast, to Petitioners' knowledge, BPA will not suffer irreparable harm as a result of the stay. BPA can continue the Fish Passage Center contract under the existing terms and conditions. Upon information and belief, BPA intends to implement contracts with Pacific States and Battelle on March 1, 2006. To the extent that BPA chooses to implement those contracts, it may incur more costs than it would without the stay. However, in balancing the harms, "the Government's economic loss cannot be considered compelling if it is to be gained in contravention of federal law." Wilderness Soc'y v. Tyrrel, 701 F.Supp. 1473, 1491 (E.D. Cal. 1988) (citing Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1157 (9th Cir. 1988), rev'd on other grounds, 918 F.2d 813 (9th Cir. 1990).

III. THIS COURT SHOULD NOT REQUIRE A BOND.

It is well established that in public interest environmental cases the

plaintiffs need not post bonds because of the potential chilling effect on litigation to protect the environment and the public interest. Federal courts have consistently waived the bond requirement in public interest environmental litigation, or required only a nominal bond. People ex rel. Van de Kamp v. Tahoe Regional Plan, 766 F.2d 1319 (9th Cir. 1985) (no bond); Wilderness Society v. Tyrrel, 701 F. Supp. 1473 (E.D. Cal. 1988), rev'd on other grounds, 918 F.2d 813 (9th Cir. 1990) (\$100).

Respectfully submitted this 16th day of February, 2006

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PROOF OF SERVICE

I, the undersigned, hereby certify that true and correct copies of Petitioners' Urgent Motion for Stay and supporting declarations were transmitted via electronic mail (without exhibits) and U.S. First Class Mail, postage prepaid, on February 16, 2006, to the following:

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EXHIBIT LIST

- Exhibit A National Wildlife Fed'n v. National Marine Fisheries Svc., CV 01-640-RE, Fed. Defs' First Remand Report (Jan. 3, 2006) .
- Exhibit B Letter from Congressmen Earl Blumenauer and Jay Inslee to BPA (Dec. 2, 2005).
- Exhibit C Letter from counsel for Petitioner NEDC to BPA (Dec. 15, 2005).
- Exhibit D Letter from State, Federal and Tribal Fishery Agencies Joint Technical Staff to BPA (Jan. 25, 2006).
- Exhibit E BPA Press Release, "BPA selects successors to Fish Passage Center" (Jan. 26, 2006).
- Exhibit F Conference Report H.R. 109-275 (Nov. 7, 2005).
- Exhibit G Letter from counsel for Petitioners to counsel for BPA (Feb. 13, 2006).
- Exhibit H Mainstem Amendments to the Columbia River Basin Fish and Wildlife Program (Northwest Power and Conservation Council Document 2003-11) (excerpts).
- Exhibit I BPA Program Solicitation for Key Functions previously performed by the Fish Passage Center (Dec. 8. 2005).
- Exhibit J BPA announcement of Program Solicitation (last viewed 2/16/2006).
- Exhibit K Energy and Water Development Appropriations Act, 2006, H.R. 2419.
- Exhibit L GAO Office of the General Counsel, "Principles of Federal Appropriations Law, Third Ed. Vol. I (GAO-04-261SP) (excerpts).
- Exhibit M Congressional Record – Senate, p. S12744 (Nov. 14, 2005).

- Exhibit N National Wildlife Fed'n v. National Marine Fisheries Svc., CV 01-640-RE, Second Declaration of Stephen W. Pettit in Support of Motion for an Injunction (May 16, 2005).
- Exhibit O “Call for Openness at NASA Adds to Reports of Pressure,” New York Times (Feb. 16, 2006).
- Exhibit P “About-face restores OSU study money,” The Oregonian (Feb. 9, 2006).