

**UNITED STATES OF AMERICA
U.S. DEPARTMENT OF ENERGY
BEFORE THE
BONNEVILLE POWER ADMINISTRATION**

Fiscal Year (FY) 2022–2023 Proposed)	Docket No. BP-22
Power and Transmission Rate)	
Adjustments Proceeding)	
)	

INITIAL BRIEF OF THE ENVIRONMENTAL PARTIES:

Idaho Conservation League,
Great Old Broads for Wilderness, and
Idaho Rivers United

May 11, 2021

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INTRODUCTION

The Environmental Parties (Idaho Conservation League, Great Old Broads for Wilderness, and Idaho Rivers United) respectfully submit this Initial Brief opposing the BP-22 Settlement Proposal¹ put forth by BPA and most of the other parties to this rate proceeding. As explained below, the Settlement Proposal and the process leading up to it violate the Northwest Power Act's requirement of "equitable treatment" for fish and wildlife as well as other provisions of law.

When BPA discovered that secondary surplus revenue for the BP-22 rate period is likely to be more than \$100 million per year more than for the BP-20 rate period, the agency correctly recognized that it has discretion as to what to do with the projected money.² BPA Staff identified "two general opportunities[:] . . . allow rates to produce a 4.5 percent reduction" or "hold rates flat (that is, at the same level as BP-20), and use the incremental revenue to support BPA's long-term strategic and financial objectives."³ In its Initial Proposal, BPA Staff recommended doing the latter, which would entail "includ[ing] in power rates an amount of revenue financing up to . . . \$95 million per year or capped at \$190 million for the rate period."⁴

Predictably, BPA's power customers balked at this proposal. The Public Power Council ("PPC"), for instance, claimed that it had "both strong process concerns and substantive concerns regarding BPA's proposal to include sizeable amounts of revenue financing in Power rates."⁵

¹ See Settlement Proposal, BP-22-M-BPA-02 Ex. 1 & Ex. 1 Att. 1. The Settlement Proposal partially modifies the Initial Proposal originally put forth by BPA Staff. *See id.* Att. 1

² See Power Rates Policy Testimony, BP-22-E-BPA-15 at 5:3–24 (discussing BPA's discretion in setting rates).

³ *Id.* at 3:2–12.

⁴ *Id.* at 6:8–11.

⁵ PPC Direct Case, BP-22-E-PP-01 at 2:1–2.

PPC (and many others) recommended “that no revenue financing should be included in Power rates for the BP-22 proceeding.”⁶

The Settlement Proposal now advanced by BPA and nearly all of its power customers roughly splits the difference between BPA’s Initial Proposal and its customers’ counterproposals: under the Settlement Proposal, “[t]he amount of . . . power revenue financing will be limited to \$40 million per year,”⁷ and power rates will decrease from BP-20 levels. Both BPA and its power customers, in other words, get a slice of the pie.

Whether or not the Settlement Proposal represents a fair compromise between BPA and its customers, it is a compromise that is fundamentally unfair to fish and wildlife. As several species of native anadromous fish—particularly Snake River salmon and steelhead—edge closer to extinction,⁸ BPA continues to keep its eyes fixated on cutting costs and shoring up its financial position, putting its obligation to fish and wildlife a distant second on its list of priorities. In this rate case, BPA has not even allowed fish and wildlife to be at the negotiating table, so to speak, insisting that it has *no obligation* to reassess the legality of fish and wildlife funding levels in light of the expected boom in surplus revenues.⁹ Incredibly, BPA has suggested that even making this argument in this rate case is improper¹⁰—an unlawful elevation of the agency’s arcanelly compartmentalized procedures over its statutory mandates.¹¹

⁶ *Id.* at 12:2–3; *see also, e.g.*, WPAG Direct Case, BP-22-E-WG-01 a 5:4–6.

⁷ Settlement Proposal § 1.a, BP-22-M-BPA-02 Ex. 1 Att. 1.

⁸ *See, e.g.*, Comments on BPA’s Integrated Program Review, BP-22-E-ID-01-AT01 at 5.

⁹ *E.g.*, BPA Rebuttal Testimony, BP-22-E-BPA-46 at 5:10–18.

¹⁰ *See id.* at 2:23–26 (stating that “funding levels for BPA’s fish and wildlife program . . . are determined in other forums and are outside of the scope of the rate case”).

¹¹ *See Golden Nw. Aluminum, Inc. v. Bonneville Power Admin.*, 501 F.3d 1037, 1052–53 (9th Cir. 2007).

The agency’s approach cannot be squared with the Northwest Power Act, which requires BPA to (among other things) “provide[] equitable treatment for . . . fish and wildlife” adversely affected by hydropower operations.¹² BPA cannot possibly determine whether it is providing equitable treatment—or demonstrate such treatment, as is required at this time—without accounting for the changed circumstances presented by the large secondary surplus revenue forecast. For that reason alone,¹³ the Environmental Parties maintain that the Administrator must reject the Settlement Proposal. BPA must either (1) commit to setting aside a substantial portion of projected incremental revenue to increase funding for fish and wildlife or, at the very least, (2) reassess its obligations to fish and wildlife in light of the unexpectedly high secondary surplus revenue forecast.

BACKGROUND

I. FACTUAL AND PROCEDURAL BACKGROUND.

This rate proceeding is the final step in a series of actions culminating in a “final rate determination”¹⁴—that is, the “adoption of both power and transmission rates for [fiscal years] 2022–2023.”¹⁵

During this rate proceeding, BPA is setting power and transmission rates based on certain assumptions about its costs and hydropower system operations.¹⁶ Those assumptions are themselves based on the results of earlier processes. For instance, BPA is assuming costs consistent with those developed during the Integrated Program Review (“IPR”) process.¹⁷ At the

¹² 16 U.S.C. § 839b(h)(11)(A)(i).

¹³ As discussed in the Argument section, the Settlement Proposal is defective for other reasons, as well. *See infra* pp. 14–22.

¹⁴ 16 U.S.C. § 839f(e)(1)(G).

¹⁵ 85 Fed. Reg. 77,189, 77,190 (Dec. 1, 2020).

¹⁶ BPA Rebuttal Testimony, BP-22-E-BPA-46 at 2–5.

¹⁷ *Id.* at 5:10–18.

conclusion of the IPR process, BPA committed to “manag[ing] [fish and wildlife] costs—direct funding, direct expense and capital costs—at or below the rate of inflation, inclusive of any new obligations.”¹⁸ That commitment to holding fish and wildlife costs flat stems in large part from the agency’s 2018–2023 Strategic Plan (“Strategic Plan”).¹⁹

BPA’s discretionary policy decisions in this rate proceeding are also guided by the results of earlier processes. In particular, BPA’s initial proposal to hold power rates flat and include in those rates an amount of “revenue financing” is heavily influenced by the Strategic Plan. According to BPA Staff, “hold[ing] rates flat (that is, at the same level as BP-20), and us[ing] the incremental revenue” to deal with issues such as “debt management” and “financial reserves” will “support BPA’s long-term strategic and financial objectives” and allow the agency to “reinvest in [its] long-term mission.”²⁰ Those long-term objectives and goals are found in the 2018–2023 Strategic Plan.²¹ The Strategic Plan, like the result of the IPR process, was an interim or preliminary action feeding into future actions such as this rate case.²²

In BPA’s Initial Proposal, BPA Staff stated that the agency “is facing a unique issue this rate period: a potentially large power rate decrease. . . . This projected decline in power rates presents BPA with unique and important opportunities that will have both near-term and long-term consequences.”²³ The potential for a decrease in power rates is due in substantial part to an

¹⁸ IPR Closeout Report, BP-22-M-ID-02-AT04 at 9.

¹⁹ *Id.*; *see also* BPA 2018–2023 Strategic Plan, BP-22-M-ID-02-AT01 at 41 (“BPA intends to manage its fish and wildlife program costs (direct expense and capital costs) at or below the rate of inflation, inclusive of any new obligations that may emerge from litigation or subsequent commitments in current or future biological opinions.”).

²⁰ Power Rates Policy Testimony, BP-22-E-BPA-15 at 3:10–16, 6:2–4, 22:1–3.

²¹ *See* BPA Response to Data Request ID-BPA-30-4, BPA-22-M-ID-01 at 8 (“BPA’s strategic goals and long-term mission are discussed in BPA’s Strategic Plan.”).

²² *See* Strategic Plan, BP-22-M-ID-02-AT01 at 61 (“If a final decision is necessary to implement any elements of the strategic plan, it will be made in the appropriate forum (e.g., rate case) . . .”).

²³ Power Rates Policy Testimony, BP-22-E-BPA-15 at 2:17–23.

unexpectedly large secondary surplus revenue forecast—more than \$100 million per year more than in the last rate period.²⁴ BPA Staff identified “two general opportunities” created by the projected boon in surplus revenue: “allow rates to produce a 4.5 percent reduction” or “hold rates flat (that is, at the same level as BP-20), and use the incremental revenue to support BPA’s long-term strategic and financial objectives.”²⁵ In the Initial Proposal, BPA Staff recommended doing the latter, which would entail “includ[ing] in power rates an amount of revenue financing up to . . . \$95 million per year or capped at \$190 million for the rate period.”²⁶ This money would be used to pay for capital investments, helping preserve BPA’s Treasury borrowing authority.²⁷

When developing the Initial Proposal in the wake of the unexpectedly large secondary surplus revenue forecast, BPA did not reconsider its assumptions related to fish and wildlife funding.²⁸ According to BPA, “[w]hen . . . developing rate case proposals in light of the new estimates of secondary revenue, the spending levels for fish and wildlife [had] already [been] projected to be sufficient to meet BPA’s obligations in the IPR process. The fact that estimates of secondary sales came in above anticipated levels did not change the assumption that the funding levels for fish and wildlife were sufficient.”²⁹ BPA has specifically denied reassessing whether

²⁴ *Id.* at 22:5–7; *see also* BPA Response to Data Request ID-BPA-30-9, BP-22-M-ID-01 at 19 (discussing the “unexpected increase in forecast net secondary revenue” as “[t]he biggest change” leading to BPA being able to consider a rate decrease).

²⁵ Power Rates Policy Testimony, BP-22-E-BPA-15 at 3:2–12.

²⁶ *Id.* at 6:8–11.

²⁷ *Id.* at 6:21–22, 7:24–8:9.

²⁸ BPA did end up conducting an “IPR 2” in March and April 2021 during which it considered certain fish and wildlife funding issues. *See* Notice of Public Meeting, BP-22-PR-BPA-06. However, BPA’s focus in IPR 2 was on the possible effects of the Columbia River System Operations Environmental Impact Statement and related biological opinions on fish and wildlife costs. *See* IPR 2 Workshop Presentation, BP-22-M-ID-02-AT03 at 43–44.

²⁹ BPA Rebuttal Testimony, BP-22-E-BPA-46 at 5:13–19.

assumed levels of fish and wildlife funding would provide “equitable treatment”³⁰ for fish and wildlife as required by the Northwest Power Act.³¹

In response to BPA’s Initial Proposal, the Environmental Parties presented their Direct Case, in which they urged BPA to consider “using the incremental revenue” from keeping rates flat “to carry out its mission to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, harmed by its operations.”³² The Environmental Parties argued that BPA would violate the law if it failed to consider its statutory commitments to fish and wildlife when deciding how to deal with the large secondary surplus revenue forecast during this proceeding.³³

In their direct cases, BPA’s power customers also expressed disapproval of the Initial Proposal, though for entirely different reasons than those animating the Environmental Parties’ disapproval. Many customers felt that the revenue financing scheme had been sprung on them without sufficient opportunity for discussion and feedback.³⁴ Others raised substantive concerns with revenue financing, arguing that it could potentially violate certain ratemaking principles.³⁵ Most, if not all, power customers recommended that BPA not include *any* amount of revenue financing in rates for BP-22.³⁶

Following the filing of rebuttal cases, BPA and most of the parties to this proceeding reached a settlement.³⁷ The Settlement Proposal provides that “[t]he amount of proposed power

³⁰ 16 U.S.C. § 839b(h)(11)(A)(i).

³¹ BPA Response to Data Request ID-BPA-30-2, BP-22-M-ID-01 at 5.

³² Environmental Parties Direct Case, BP-22-E-ID-01 at 5:21–23.

³³ *Id.* at 3:17–20, 5:7–17, 6:7–8.

³⁴ *See, e.g.*, JP02 Direct Case: Power Revenue Financing, BP-22-E-JP02-01 at 3–8 (discussing process concerns with the revenue financing scheme).

³⁵ *E.g.*, Powerex Direct Case, BP-22-E-PX-01 at 12:14–16.

³⁶ *E.g.*, NRU Direct Case, BP-22-E-NR-01 at 21:10–13.

³⁷ *See* Settlement Agreement, BP-22-M-BPA-02 Ex. 1.

revenue financing will be limited to \$40 million per year”³⁸—a little less than half the \$95 million proposed by BPA Staff in the Initial Proposal. The Environmental Parties objected to the Settlement Proposal.³⁹

II. APPLICABLE LEGAL REQUIREMENTS.

The Northwest Power Act requires BPA to set its rates “high enough to ensure that [it] will recover its total costs, including costs associated with ‘fish and wildlife measures.’”⁴⁰ BPA must “periodically revise its rates in order to ensure that it recovers its costs.”⁴¹ This requirement means that BPA must “develop a realistic projection of fish and wildlife costs that accurately reflect[s] the information available at the time the rates [a]re set and the cost recovery mechanisms adopted.”⁴²

The Northwest Power Act also imposes two important environmental duties on BPA that it must fulfill as it exercises its discretion: “First, . . . [BPA must] . . . exercise [its] responsibilities under the Act ‘in a manner that provides equitable treatment’ for fish and wildlife. Second, [BPA] must take into account ‘to the fullest extent practicable, the [fish and wildlife] program adopted by the [Northwest Power and Conservation] Council.’”⁴³ These are “distinct duties.”⁴⁴

BPA’s “equitable treatment” obligation is a substantive obligation that is not automatically satisfied by BPA’s compliance with other statutes and requirements.⁴⁵ In

³⁸ Settlement Proposal § 1.a, BPA-22-M-BPA-02 Ex. 1 Att. 1.

³⁹ Environmental Parties Notice of Objection to Settlement Proposal, BP-22-M-ID-04.

⁴⁰ *Golden Nw. Aluminum*, 501 F.3d at 1049 (quoting 16 U.S.C. § 839e(a), (g)).

⁴¹ *Id.* at 1052.

⁴² *Id.* at 1052–53.

⁴³ *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1525 (9th Cir. 1997) (“*NEDC*”) (quoting 16 U.S.C. § 839b(h)(11)(A)(i), (ii)).

⁴⁴ *Id.* at 1531.

⁴⁵ *Id.* at 1531–32.

particular, even complete adherence to the Council’s fish and wildlife program does not necessarily satisfy the “equitable treatment” mandate.⁴⁶ Rather, BPA’s “equitable treatment” obligation is satisfied only if the agency, “on the whole, . . . treats fish on par with power” and other relevant considerations.⁴⁷ The Ninth Circuit has explained that “BPA’s duty to demonstrate compliance with the [equitable treatment] mandate matures only when BPA makes a final decision that significantly impacts fish and wildlife.”⁴⁸

BPA’s actions during this rate proceeding are also governed by the Administrative Procedure Act (“APA”). In particular, BPA must comply with the APA’s requirement of reasoned decisionmaking when it makes decisions during this rate proceeding.⁴⁹ Under the APA, BPA cannot rely on improper factors, fail to consider important aspects of the issues before it, or offer an explanation for its decision that runs counter to the evidence.⁵⁰

⁴⁶ *Id.* at 1532.

⁴⁷ *Confederated Tribes of Umatilla Indian Reservation v. Bonneville Power Admin.*, 342 F.3d 924, 931 (9th Cir. 2003); *see also* 16 U.S.C. § 839b(h)(11)(A)(i) (BPA must “provide[] equitable treatment for . . . fish and wildlife with the other purposes” of the hydropower system).

⁴⁸ *Id.*

⁴⁹ *Golden Nw. Aluminum*, 501 F.3d at 1045, 1051; *see also Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (stating that the APA “requires agencies to engage in reasoned decisionmaking” (citation and internal quotation marks omitted)).

⁵⁰ *Golden Nw. Aluminum*, 501 F.3d at 1051.

ARGUMENT⁵¹

I. ISSUE 1: AT LEAST IN THE UNIQUE CIRCUMSTANCES OF THIS RATE CASE, BPA MUST RECONSIDER FISH AND WILDLIFE FUNDING LEVELS IN ORDER TO MEET ITS STATUTORY OBLIGATIONS.

A. Summary of the Environmental Parties' Position

BPA's approach to dealing with fish and wildlife funding issues during ratemaking is to take it as a given that previously established spending levels are sufficient to meet its statutory obligations.⁵² Even assuming that such an approach is proper in the usual rate proceeding, it is unlawful in the "unique" circumstances⁵³ present here. When BPA developed its budgets for fish and wildlife spending, it did not yet know that secondary surplus revenue during the BP-22 rate period is expected to be "more than \$100 million per year more than it was in the last rate period."⁵⁴ It therefore would have been *impossible* for BPA to fully take its statutory "equitable treatment" obligation into account at that time, because what constitutes "equitable treatment" necessarily depends on how BPA deals with the unexpectedly high secondary surplus revenue forecast. But rather than going back and reconsidering fish and wildlife spending levels in light of changed circumstances, BPA's Initial Proposal completely ignored the agency's "equitable treatment" obligation, instead treating future secondary surplus revenues as a pot of money to be used solely for non-fish purposes.⁵⁵ The Proposed Settlement reached by BPA and its customers is no better, as it again ignores BPA's "equitable treatment" obligation.⁵⁶ BPA has also ignored

⁵¹ Because all of the Environmental Parties' arguments concern BPA's obligations to fish and wildlife under the Northwest Power Act, all issues raised in this brief fall under the same "category" and "general topic area." *See* Rules of Procedure § 1010.17(a) & Att. A.

⁵² BPA Rebuttal Testimony, BP-22-E-BPA-46 at 3:10–17, 5:10–18.

⁵³ Power Rates Policy Testimony, BP-22-E-BPA-15 at 2:17–23.

⁵⁴ *Id.* at 22:5–9; BPA Rebuttal Testimony, BP-22-E-BPA-46 at 5:13–18.

⁵⁵ *See* Power Rates Policy Testimony, BP-22-E-BPA-15 at 14–22 (discussing considerations that went into the Initial Proposal).

⁵⁶ *See* Settlement Proposal, BP-22-M-BPA-02 Ex. 1 Att. 1.

its separate obligation to “take into account ‘to the fullest extent practicable, the [fish and wildlife] program adopted by the Council.’”⁵⁷

To remedy this problem, BPA must do one of two things. First, BPA can increase its projected fish and wildlife funding for the rate period by committing a substantial portion of incremental revenue to be used to improve implementation of fish protection, mitigation, and enhancement measures. BPA need not decide right now what specific measures should be funded—indeed, this is not the proper forum for such a decision.⁵⁸ But BPA must plan for increased spending during the rate period in order to meet its equitable treatment obligation. Alternatively, BPA should at the very least reassess its fish and wildlife funding levels in light of changed circumstances—which it still has not done—and provide a reasoned explanation for the decision that it makes.⁵⁹

⁵⁷ *NEDC*, 117 F.3d at 1525 (quoting 16 U.S.C. § 839b(h)(11)(A)(ii)).

⁵⁸ PPC has faulted the Environmental Parties for failing to provide specific proposals for how BPA should increase funding for fish and wildlife. *See* PPC Rebuttal Testimony, BP-22-E-PP-02 at 2:7–9 (“From a substantive perspective, the [Environmental Parties’] recommendation is vague and arbitrary, without any specific proposals for the use of funds or analysis of costs and benefits.”). But this is not the proper forum for making decisions about what specific projects should receive funding—indeed, even IPR was not the proper forum for such decisions. Moreover, because BPA has thus far taken the firm position that it need not reconsider the legality or reasonableness of overall fish and wildlife funding levels *at all* in this rate case, making detailed funding recommendations would be a pointless exercise. *See* BPA Rebuttal Testimony, BP-22-E-BPA-46 at 2:23–26 (“[W]e do not intend to discuss whether funding levels for BPA’s fish and wildlife program expenditures are appropriate” because this “issue[] [is] determined in [an]other forum[] and [is] outside of the scope of the rate case.”).

⁵⁹ Of course, the Environmental Parties believe that a decision to devote *none* of the projected incremental revenue to fish and wildlife would be unjustifiable under the equitable treatment mandate. But at this point, BPA has not even *attempted* to justify such a decision; it has instead claimed that it need not even consider revising funding levels.

B. BPA Must Reconsider Whether It Is Meeting Its Statutory Obligations in Light of the Large Secondary Surplus Revenue Forecast.

1. BPA Cannot Use Evidentiary Rules to Ignore Its Statutory Obligations or Keep Out Arguments or Evidence Relevant to Those Obligations.

In their rebuttal cases, both BPA and PPC suggested that any argument concerning appropriate funding levels for fish and wildlife programs is outside the scope of this rate case.⁶⁰ As an initial matter, BPA and PPC have waived any objections to the Environmental Parties' arguments on this point by failing to timely move to strike the relevant portions of the Environmental Parties' Direct Case.⁶¹ BPA and PPC did not preserve their objections by gesturing towards them in rebuttal testimony; if they wished to formally object, they should have complied with the Rules of Procedure.

More importantly, though, the Ninth Circuit has made clear that BPA cannot elevate the procedural and evidentiary rules of its rate cases above its statutory obligations under the Northwest Power Act and the APA. As explained in *Golden Northwest Aluminum*, BPA acts “contrary to law” when it excludes from a rate case information or arguments necessary to fulfill its statutory mandates.⁶² In other words, BPA cannot avoid its statutory responsibilities by using procedural or evidentiary rules to ignore new information or changed circumstances that come to light during or immediately before a rate case. In *Golden Northwest Aluminum*, the new information included “new Clean Water Act requirements” and a new “Biological Opinion . . .

⁶⁰ See BPA Rebuttal Testimony, BP-22-E-BPA-46 at 2:23–26 (“[W]e do not intend to discuss whether funding levels for BPA’s fish and wildlife program expenditures are appropriate” because this “issue[] [is] determined in [an]other forum[] and [is] outside of the scope of the rate case.”); PPC Rebuttal Testimony, BP-22-E-PP-02 at 2:1–7 (similar).

⁶¹ See Rules of Procedure § 1010.13(d) (“Motions to strike Prefiled Testimony and Exhibits must be filed by the deadlines established in the procedural schedule.”); Order Establishing Procedural Schedule, BPA-22-HOO-01 at 2 (establishing a February 16, 2021 deadline for filing motions to strike direct cases).

⁶² *Golden Nw. Aluminum*, 501 F.3d at 1050, 1052–53.

describing what fish and wildlife actions would be necessary pursuant to the ESA.”⁶³ Because those developments undercut the reasonableness of BPA’s previous fish and wildlife cost projections, ignoring them frustrated the agency’s ability to accurately estimate its costs and set rates accordingly.⁶⁴

Here, the new information or changed circumstance is a large—much larger than in the past—secondary surplus revenue forecast.⁶⁵ BPA has admitted that this “unexpected increase in forecast net secondary revenue” was “[t]he biggest change” leading it to be able to consider a rate decrease.⁶⁶ Given the size and rarity of this secondary surplus revenue forecast, ignoring its effect on BPA’s compliance with its equitable treatment obligation and other statutory obligations is not an option: *even if* it was reasonable for BPA to assume that its projected fish and wildlife funding levels coming into this rate case provided equitable treatment,⁶⁷ that assumption is no longer reasonable. As explained in more detail below, the large secondary surplus revenue forecast demands a reassessment of whether planned fish and wildlife funding levels comport with BPA’s statutory mandates under the Northwest Power Act, and BPA cannot skirt that reassessment by blocking out evidence or argument.

2. BPA Must Reassess Its “Equitable Treatment” Obligation in Light of Changed Circumstances.

For three related reasons, the unexpectedly large secondary surplus revenue forecast requires the agency to reassess whether it is providing “equitable treatment” for fish and wildlife.

⁶³ *Id.* at 1052.

⁶⁴ *Id.* at 1052–53.

⁶⁵ Power Rates Policy Testimony, BPA-22-E-BPA-15 at 2:17–23, 22:5–7.

⁶⁶ BPA Response to Data Request ID-BPA-30-9, BP-22-M-ID-01 at 19.

⁶⁷ As discussed *infra* pp. 20–22, such an assumption would not have been reasonable.

First, as explained in more detail *infra* pp. 17–20, BPA’s final rate determination in this rate case qualifies as a “final decision that significantly impacts fish and wildlife,” requiring the agency to “demonstrate compliance with the [equitable treatment] mandate” at this time.⁶⁸ Even assuming that BPA had demonstrated equitable treatment at the time it settled on fish and wildlife funding levels during IPR, the secondary surplus revenue forecast changes the landscape: the equitable treatment mandate requires BPA to treat fish equitably “on the whole,”⁶⁹ and that “whole” now includes a huge surplus that BPA could devote (at least in part) to fish and wildlife. BPA cannot possibly demonstrate compliance with the equitable treatment mandate without taking into account this changed condition.⁷⁰

Second, and relatedly, the APA requires BPA to consider its equitable treatment obligation when deciding what to do with the projected secondary surplus revenues in this rate case. As this rate proceeding has demonstrated, BPA has discretion to use surplus revenue for various purposes, including bolstering its financial health. But in exercising that discretion, BPA must take into account its statutory obligations and other “important aspects” of the decision before it.⁷¹ By failing to do so—by pretending that the decision of what to do with the expected surplus somehow lies outside its “equitable treatment” obligation—BPA violates the APA.

Third, because the secondary surplus revenue forecast calls into question whether assumed fish and wildlife funding levels provide “equitable treatment,” it necessarily casts doubt on the reasonableness of BPA’s cost projections, raising the risk that BPA may underestimate its

⁶⁸ *Confederated Tribes of Umatilla Indian Reservation*, 342 F.3d at 931.

⁶⁹ *Id.*

⁷⁰ *See, e.g., Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1293–94 (D.C. Cir. 2000) (holding that an agency could not justify continuing a policy without addressing changed circumstances).

⁷¹ *See, e.g., Regents of the Univ. of Cal.*, 140 S. Ct. at 1913 (holding that an agency had violated the APA by failing to consider an important aspect of the problem before it).

costs. In other words, in light of the large secondary surplus revenue forecast, it is no longer reasonable to assume that the level of fish and wildlife funding from IPR provides equitable treatment,⁷² so BPA must revisit that assumption and then adjust projected costs accordingly. A failure to do will violate BPA’s duty to reasonably estimate its costs at the time it sets rates.⁷³

3. BPA Must Again Take Into Account the Council’s Fish and Wildlife Program.

BPA’s failure to reconsider fish and wildlife spending levels in light of the secondary surplus revenue forecast also violates its duty “to take into account ‘to the fullest extent practicable, the [fish and wildlife] program adopted by the Council’” when exercising its responsibilities.⁷⁴ Even assuming that BPA complied with this duty through the conclusion of IPR, the large secondary surplus revenue forecast represents a changed condition that requires further consideration of the Council’s program. Put another way, the circumstances are such that the rate case itself now represents a “relevant stage of [the] decisionmaking process”⁷⁵—that is, a stage at which BPA has discretion to take actions that will affect fish and wildlife.⁷⁶

Even a cursory examination of the most recent update to the Council’s program—the October 2020 Addendum to the 2014 Program (“2020 Addendum”)—suggests many ways in which BPA might exercise its discretion differently in this rate case in a way to benefit fish and wildlife. In particular, the 2020 Addendum makes clear that increased funding is needed to close the “obvious gap in the implementation commitments . . . to address the direct effects of the federal hydropower development and operations on fish and wildlife in the Lake

⁷² Assuming, of course, that it was ever reasonable to do so. *See infra* pp. 20–22.

⁷³ *Golden Nw. Aluminum*, 501 F.3d at 1052–53.

⁷⁴ *NEDC*, 117 F.3d at 1525 (quoting 16 U.S.C. § 839b(h)(11)(A)(ii)).

⁷⁵ 16 U.S.C. § 839b(h)(11)(A)(ii).

⁷⁶ *See Nat’l Wildlife Fed’n v. FERC*, 801 F.2d 1505, 1514 (9th Cir. 1986) (discussing how there are multiple “relevant stages” at which the Council’s program must be taken into account).

Roosevelt/Spokane River area.”⁷⁷ The large secondary surplus revenue forecast represents a new opportunity to address this gap and other implementation shortcomings.

C. Requested Action

BPA has thus far simply ignored its equitable treatment obligation and the Council’s fish and wildlife program during this rate proceeding. The Administrator can remedy this error by adopting the Environmental Parties’ suggestion⁷⁸ to use a substantial portion of incremental revenue⁷⁹ to boost funding for measures to “protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by” the Federal Columbia River Power System.⁸⁰ BPA need not and should not decide during this rate case what specific measures should receive additional funding.⁸¹ Indeed, BPA need not even decide at this time what precise amount of funding is needed to satisfy its “equitable treatment” obligation—BPA can instead modify its proposal to devote incremental revenue to revenue financing and “improved fish and wildlife protection, mitigation, and enhancement implementation,” with the split between the two to be determined in a later public proceeding.⁸²

⁷⁷ 2020 Addendum to the Columbia River Basin Fish and Wildlife Program 2014, Council Doc. 2020-9 at App’x 118 (Oct. 20, 2020).

⁷⁸ See Environmental Parties Direct Case, BP-22-E-ID-01 at 5:20–23.

⁷⁹ By “incremental revenue,” the Environmental Parties mean the surplus created by holding rates at BP-20 levels. See Power Rates Policy Testimony, BP-22-E-BPA-15 at 3:10–16.

⁸⁰ 16 U.S.C. § 839b(h)(11)(A)(i).

⁸¹ The Environmental Parties have pointed out the need for increased funding for the Lower Snake River Compensation Plan. Environmental Parties Direct Case, BP-22-E-ID-01 at 5:23–6:2. Measures from the Council’s program that would benefit from additional funding include measures aimed at addressing high temperatures and other water quality issues in the lower Snake River. See generally Columbia River Basin Fish and Wildlife Program 2014, Council Doc. 2014-12 at 54–56 (Oct. 2014).

⁸² BPA could also elect to lower rates from BP-20 levels—leading to a smaller amount of incremental revenue—and devote the smaller surplus to revenue financing and improved fish and wildlife protection, mitigation, and enhancement implementation, with the split to be determined in a later public proceeding. This would benefit BPA’s power customers, BPA itself, and fish and wildlife.

Alternatively, the Administrator can reject the Settlement Proposal and direct BPA Staff to reassess the agency's compliance with the equitable treatment mandate in light of the unexpectedly large secondary surplus revenue forecast. This would also allow for consideration of the Council's program, which has still not occurred in this rate case.

What the Administrator *cannot* do in this rate case is ignore his obligations to fish and wildlife by pointing to processes that concluded before BPA projected a huge increase in secondary surplus revenue. The unexpected surge in surplus revenue has given BPA a "unique" opportunity to shore up its financial position through revenue financing, but it also presents an opportunity for fish and wildlife. BPA has a statutory duty to take advantage of that opportunity.

II. ISSUE 2: BPA HAS AN OBLIGATION TO DEMONSTRATE "EQUITABLE TREATMENT" AT THE TIME OF A FINAL RATE DETERMINATION, AND BPA HAS NOT DONE SO AND CANNOT DO SO.

A. Summary of the Environmental Parties' Position

As much as BPA would like to artificially separate out this rate case from the rest of its decisions, the truth is that the "final rate determination"⁸³ that will mark the endpoint of this proceeding is the last in a long string of decisions that includes IPR and the adoption of the Strategic Plan. Those earlier decisions, intermediate or preliminary in nature, are implemented by and will take effect as a result of the final rate determination; the string of decisions, taken together, have a significant impact on fish and wildlife, triggering BPA's obligation to demonstrate compliance with the equitable treatment mandate.⁸⁴

BPA has not met that obligation here. BPA has "assumed" that the fish and wildlife funding levels set during IPR provide equitable treatment.⁸⁵ Even putting aside the fact that that

⁸³ 16 U.S.C. § 839f(e)(1)(G).

⁸⁴ *Confederated Tribes of Umatilla Indian Reservation*, 342 F.3d at 931.

⁸⁵ BPA Rebuttal Testimony, BP-22-E-BPA-46 at 5:13–19.

assumption is no longer tenable in light of the projected secondary surplus revenues, it is not an assumption that rests on an earlier reasoned determination. Indeed, BPA has *never* provided a reasoned explanation for how its current fish and wildlife funding levels fit into its equitable treatment obligation, likely because BPA appears to have simply *ignored* its equitable treatment obligation when setting funding levels. At least since the adoption of its Strategic Plan, BPA’s decisions with respect to fish and wildlife funding have been driven almost entirely by cost control considerations, with no heed paid to the need to provide equitable treatment. Not surprisingly, this has resulted in deeply inequitable treatment, with many mitigation and protection projects underimplemented.⁸⁶ Looking at BPA’s actions as a whole, it is evident that fish have been relegated to second place, if not lower.

The Administrator can rectify these problems by committing a substantial portion of incremental revenue from holding rates at BP-20 levels⁸⁷ to improve implementation of fish protection, mitigation, and enhancement measures. Such action is necessary to correct BPA’s substantive violation of the equitable treatment mandate.

B. BPA Has Not Demonstrated Equitable Treatment, and It Will Not Be Able To Do So in Light of Its Recent Treatment of Fish and Wildlife.

1. BPA Must Demonstrate Equitable Treatment at the Time of a Final Rate Determination.

“BPA’s duty to demonstrate compliance with the [equitable treatment] mandate matures only when BPA makes a final decision that significantly impacts fish and wildlife.”⁸⁸ Of course, many of the decisions that BPA makes are not “final decisions,” but are instead intermediate or

⁸⁶ See 2020 Addendum at 45 & App’x 118–21.

⁸⁷ Again, BPA also has the option of lowering rates *and* committing to increased funding for fish and wildlife. See *supra* n.82.

⁸⁸ *Confederated Tribes of Umatilla Indian Reservation*, 342 F.3d at 931.

procedural decisions that ultimately lead to a final decision.⁸⁹ As discussed earlier, BPA’s development of the Strategic Plan and its IPR process resulted in such intermediate decisions. The “final rate determination”—the endpoint of this rate case—is a “final decision” that implements those intermediate decisions.⁹⁰ Therefore, judicial review of BPA’s Strategic Plan, its most recent IPR process, and other intermediate decisions feeding into this rate case will be available as part of the review of BPA’s final rate determination.⁹¹

Just as the intermediate decisions feeding into a final decision become reviewable on review of the final decision, so too do those intermediate decisions count when deciding whether a final decision “significantly impacts fish and wildlife” such that it requires BPA to show compliance with the equitable treatment mandate. This is because, however important those intermediate decisions might be for fish and wildlife, they do not have *legal* consequences until implemented through the final decision.⁹² Thus, the “impact” of those intermediate decisions is part of the “impact” of the final decision.

For several reasons, a final rate determination is a “final decision that significantly impacts fish and wildlife.” First, if the rates set as part of a final rate determination are too low, BPA runs the risk of not recovering its true costs, putting at risk its ability to meet its legal obligations to fish and wildlife.⁹³ Thus, the setting of rates is by itself a vital decision that has serious consequences for fish and wildlife.

⁸⁹ See *Indus. Customers of Nw. Utils. v. Bonneville Power Admin.*, 408 F.3d 638, 644–46 (9th Cir. 2005) (discussing what constitutes a “final decision” by BPA).

⁹⁰ See *supra* pp. 3–4 (discussing how the Strategic Plan and IPR fed into this rate case); see also *Indus. Customers of Nw. Utils.*, 408 F.3d at 646–47.

⁹¹ *Indus. Customers of Nw. Utils.*, 408 F.3d at 645, 647; see also 5 U.S.C. § 704 (“A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action.”).

⁹² *Indus. Customers of Nw. Utils.*, 408 F.3d at 647.

⁹³ *Golden Nw. Aluminum*, 501 F.3d at 1051–52.

Perhaps more importantly, a final rate decision puts into effect the decisions⁹⁴ regarding fish and wildlife funding levels made during the IPR process and, at least in this case, implements BPA’s Strategic Plan. Although BPA does not decide during IPR which specific fish and wildlife measures or programs will be funded during the relevant rate period,⁹⁵ it does settle on an overall level of fish and wildlife funding.⁹⁶ The chosen level of funding—at least in this rate case—is driven in large part by the Strategic Plan,⁹⁷ which calls for BPA “to manage its fish and wildlife program costs (direct expense and capital costs) at or below the rate of inflation, inclusive of any new obligations that may emerge from litigation or subsequent commitments in current or future biological opinions.”⁹⁸ These funding levels, once determined during IPR and factored into the revenue requirement underlying BPA’s rates, are substantially adhered to by BPA during the rate period.⁹⁹ Thus, a final rate decision represents, as a practical matter, the

⁹⁴ BPA sometimes seems to suggest that it makes “decisions” regarding overall levels of fish and wildlife spending outside the IPR process—that is, that IPR merely involves *projecting* costs. *See, e.g.*, BPA Response to Data Request ID-BPA-30-3, BP-22-M-ID-01 at 7 (stating that “[t]he forecast cost of BPA’s programmatic fish and wildlife spending . . . [was] determined in” IPR). That characterization is hard to square with BPA’s statements made in the IPR Closeout Report and other documents. *See, e.g.*, IPR Closeout Report, BP-22-M-ID-02-AT04 at 9 (“As called for in BPA’s Strategic Plan, the Fish & Wildlife Program *will* manage costs—direct funding, direct expense and capital costs—at or below the rate of inflation, inclusive of any new obligations.” (emphasis added)). At any rate, this is immaterial: whenever and however BPA decides on overall fish and wildlife funding levels, that decision is reported during IPR, fed into the ratemaking process, and made “final,” as a practical matter, at the time of a “final rate determination.”

⁹⁵ IPR Initial Publication, BP-22-M-ID-02-AT05 at 108–12.

⁹⁶ *See, e.g.*, BPA Response to Data Request ID-BPA-30-2, BP-22-M-ID-01 at 7 (“BPA’s forecast programmatic fish and wildlife spending levels are determined in the [IPR] process”).

⁹⁷ IPR Closeout Report, BP-22-M-ID-02-AT04 at 9; *see also* Strategic Plan Progress Update, BP-22-M-ID-02-AT02 at 16–17 (discussing how “[t]he Environment, Fish and Wildlife organization is doing its part to align the Fish and Wildlife program with the agency’s strategic goals”).

⁹⁸ Strategic Plan, BP-22-M-ID-02-AT01 at 41.

⁹⁹ *See* Power Rates Policy Testimony, BP-22-E-BPA-15 at 21:18–24 (discussing “the tremendous cost-savings that BPA and its partners have delivered over the last five years, including the most recent 2020 IPR process with flat power costs”); *see also* BPA Annual Report

consummation of BPA’s decisionmaking process with respect to overall fish and wildlife funding levels during the relevant rate period.¹⁰⁰

2. *BPA Has Not Demonstrated Equitable Treatment, Nor Has it Properly Taken Its Equitable Treatment Obligation Into Account.*

Because a “final rate determination” is a “final decision that significantly impacts fish and wildlife,” BPA has a duty at this time to demonstrate its compliance with its equitable treatment obligation. BPA has not even attempted to do so. BPA admits that, for purposes of the rate case itself, it has “assume[d]” that [the] budgets for fish and wildlife . . . developed” during IPR “are set to fund activities that meet BPA’s statutory requirements,” including the requirement of equitable treatment.¹⁰¹ As discussed above, that assumption is no longer tenable given the unexpectedly large secondary surplus revenue forecast. And, even putting that aside, BPA did not provide a sufficient explanation during the IPR process of how its projected budget for fish and wildlife complies with the equitable treatment mandate.¹⁰² Though BPA is not required to produce a separate document or study detailing its compliance with the equitable treatment mandate, it must at the very least “provid[e] a reasoned explanation” of how its actions comply with its statutory mandates that “allow[s] for meaningful review.”¹⁰³ It has not done so.

This failure to explain how it is complying with its equitable treatment obligation reflects a more fundamental procedural error on BPA’s part: BPA has simply not taken into account its equitable treatment obligation when determining its fish and wildlife funding levels and its

2020, DOE/BP-5046 at 16 (Nov. 2020) (“BPA’s IPR cost expenditures for the year are \$1.7 billion, which is 97% of the rate case expectation . . .”).

¹⁰⁰ See, e.g., *Gill v. U.S. Dep’t of Justice*, 913 F.3d 1179, 1184 (9th Cir. 2019).

¹⁰¹ BPA Rebuttal Testimony, BP-22-E-BPA-46 at 5:10–11.

¹⁰² See IPR Initial Publication, BP-22-M-ID-02-AT05 at 15, 35, 108 (cursory statements that BPA will be able to fulfill legal obligations to fish and wildlife at proposed funding levels); IPR Closeout Report, BP-22-M-ID-02-AT04 at 9 (same).

¹⁰³ *Confederated Tribes of Umatilla Indian Reservation*, 342 F.3d at 931–32.

revenue requirements. This failure violates the APA, which requires agencies to “consider[] . . . relevant factors” when making decisions.¹⁰⁴

3. BPA Has Not Provided Equitable Treatment for Fish and Wildlife.

The procedural failures outlined above are both the cause and result of BPA’s substantive violation of the “equitable treatment” mandate. Simply put, BPA’s Initial Proposal, as modified by the Settlement Proposal, is the latest chapter in a story of fish and wildlife being treated as subservient to BPA’s other duties and needs. The Strategic Plan makes clear that the agency considers its fish and wildlife obligations to be, at best, a nuisance: the only “objective” in the Strategic Plan that mentions fish and wildlife is Objective 3c, which provides that BPA should “manage fish and wildlife program costs at or below inflation, inclusive of new obligations and commitments.”¹⁰⁵ BPA has faithfully carried out that objective over the past few years,¹⁰⁶ despite the fact that, “over time, persisting with flat budgets begins to force project sponsors to make cuts that undermine the ability to perform . . . substantive work and meet project and program objectives.”¹⁰⁷ BPA’s ability to fully implement the Council’s fish and wildlife program is in jeopardy as a result of its commitment to holding costs down; it is thus clearly out of compliance with the equitable treatment obligation, which demands even more.¹⁰⁸

BPA’s treatment of the unexpected secondary surplus revenue forecast in this rate case only exacerbates its violation of its equitable treatment mandate. To be sure, BPA need not show

¹⁰⁴ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

¹⁰⁵ Strategic Plan, BP-22-M-ID-02-AT01 at 39.

¹⁰⁶ See Power Rates Policy Testimony, BP-22-E-BPA-15 at 21:18–24 (discussing “the tremendous cost-savings that BPA and its partners have delivered over the last five years, including the most recent 2020 IPR process with flat power costs”).

¹⁰⁷ 2020 Addendum at 45.

¹⁰⁸ See *NEDC*, 117 F.3d at 1532 (“BPA’s responsibilities to protect fish and wildlife do not end with even complete adoption of the Council’s Program.”).

equitable treatment for each and every decision it makes.¹⁰⁹ Had BPA recently committed to increasing spending on its fish and wildlife program, perhaps it could devote the expected incremental revenue during the rate period entirely to other purposes. But in the context of flat fish and wildlife spending over the last two rate periods, a decision to dedicate *none* of the expected secondary surplus revenue to address fish and wildlife concerns places fish a distant second (or lower) to BPA’s other needs, violating the equitable treatment mandate.

C. Requested Action.

The only way for BPA to correct its substantive violation of the Northwest Power Act is for it to adopt the Environmental Parties’ suggestion¹¹⁰ to use a substantial portion of incremental revenue to boost funding for measures to “protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by” the Federal Columbia River Power System.¹¹¹ As discussed *supra* pp. 15–16, BPA need not and should not decide during this rate case what specific measures should receive additional funding, and it need not even decide at this time what precise amount of funding is needed to satisfy its “equitable treatment” obligation. But it *cannot* simply ignore its equitable treatment obligation. The Administrator should reject the Settlement Proposal and commit to increased funding for measures to protect, mitigate, and enhance fish and wildlife.

CONCLUSION

For the foregoing reasons, the Administrator should reject the Settlement Proposal and commit to increased funding for measures to protect, mitigate, and enhance fish and wildlife.

¹⁰⁹ *Id.* at 1533–34.

¹¹⁰ *See* Environmental Parties Direct Case, BP-22-E-ID-01 at 5:20–23.

¹¹¹ 16 U.S.C. § 839b(h)(11)(A)(i).

Respectfully submitted on this 11th day of May 2021.

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EXHIBIT LIST

Filing Number	Document Title	Date Filed	Status	Date Admitted
BP-22-E-ID-01	Direct Testimony of Idaho Conservation League, Great Old Broads for Wilderness, and Idaho Rivers United (“Environmental Parties Direct Case”)	02-03-21	Admitted	04-29-21
BP-22-Q-ID-01	Qualification Statement of Mitchell Cutter	02-03-21	Admitted	04-29-21
BP-22-E-ID-01-AT01	Exhibit 1 to Environmental Parties Direct Case: Comments Submitted During Integrated Program Review	02-03-21	Admitted	04-29-21
BP-22-E-ID-01-AT02	Exhibit 2 to Environmental Parties Direct Case: BPA Staff Responses to Data Requests	02-03-21	Admitted	04-29-21
BP-22-E-ID-01-AT03	Exhibit 3 to Environmental Parties Direct Case: Excerpts from IPR Closeout Report	02-03-21	Admitted	04-29-21
BP-22-E-ID-01-AT04	Exhibit 4 to Environmental Parties Direct Case: Excerpts from the CRSO EIS Executive Summary	02-03-21	Admitted	04-29-21
BP-22-M-ID-01	Motion to Admit Responses to Data Requests Into Evidence [Responses to Data Requests Included With Motion]	04-12-21	Admitted	04-29-21
BP-22-M-ID-02-AT01	BPA 2018–2023 Strategic Plan	04-29-21	Admitted	04-29-21
BP-22-M-ID-02-AT02	BPA Strategic Plan Progress Update	04-29-21	Admitted	04-29-21
BP-22-M-ID-02-AT03	IPR 2 Workshop Presentation	04-29-21	Admitted	04-29-21
BP-22-M-ID-02-AT04	IPR Closeout Report	04-29-21	Admitted	04-29-21
BP-22-M-ID-02-AT05	IPR Initial Publication	04-29-21	Admitted	04-29-21
BP-22-M-ID-02-AT06	CRSO EIS Chapter 7	04-29-21	Admitted	04-29-21
BP-22-M-ID-03	Motion for Official Notice of IPR 2 Closeout Report	05-04-21	Pending	N/A