No. 23-593

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IDAHO CONSERVATION LEAGUE, GREAT OLD BROADS FOR WILDERNESS, AND IDAHO RIVERS UNITED,
Petitioners,

v.

BONNEVILLE POWER ADMINISTRATION,
Respondent,

and

PUBLIC POWER COUNCIL, ET AL.,
Intervenors.

On Petition for Review
of a Final Decision of the
Bonneville Power Administration

PETITIONERS' REPLY BRIEF

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INTRODUCTION

The Bonneville Power Administration ("BPA") has adopted an untenable reading of § 4(h)(11)(A) of the Northwest Power Act, 16 U.S.C. § 839b(h)(11)(A). BPA's reading makes little sense in light of the Northwest Power Act's structure and purpose, and it undermines the operation of the statute. In the words of the Northwest Power and Conservation Council ("Council"), the entity at the heart of the Act's fish and wildlife provisions, BPA's reading of § 4(h)(11)(A) is "odd and incorrect." Council Proposed Amicus Br. at 10.

That reading is now front and center in this case. BPA has abandoned any argument that it in fact complied with § 4(h)(11)(A) in making its fiscal year 2022 Reserves Distribution Clause ("FY2022 RDC") decision, relying solely on the argument that § 4(h)(11)(A) did not apply to the decision at all. This Court should reject BPA's reading of § 4(h)(11)(A)—as well as its distracting jurisdictional arguments—and hold that BPA was required to demonstrate "equitable treatment" under § 4(h)(11)(A)(i) and take the Council's Fish & Wildlife Program into account "to the fullest extent practicable" under § 4(h)(11)(A)(ii) when it made the FY2022 RDC decision.

ARGUMENT

I. BPA's Jurisdictional Arguments Are Meritless.

BPA finalized its FY2022 RDC decision on January 6, 2023, and this petition was filed within 90 days. 1-ER-2; 3-ER-448–55. Thus, this petition is timely, and the Court has jurisdiction to hear Petitioners' challenge. 16 U.S.C. § 839f(e)(5).

Somehow, BPA disagrees with this. BPA claims that Petitioners are not *really* challenging the FY2022 RDC decision, but are instead attempting to mount untimely challenges to other decisions. Answer. Br. at 20–27. These arguments are meritless.

A. Petitioners Challenge the FY2022 RDC Decision, Not the Mechanism for the RDC Adopted in the BP-22 Rate Case.

BPA claims that "Petitioners are really seeking review of the RDC itself, not its implementation." Answer Br. at 22. This is false. There is nothing in Petitioners' opening brief challenging the RDC mechanism, which was adopted as part of the BP-22 rate decision. *See* 2-ER-62–65. Petitioners do not contend that the RDC mechanism is unlawful. The RDC mechanism left BPA with significant discretion to devote part of the FY2022 RDC surplus to fish and wildlife, and BPA *did* devote $50 million of the $500 million to fish. *See* 1-ER-4, 19–22, 35; 2-ER-62. Petitioners'

argument is that, in exercising its discretion, BPA had to comply with § 4(h)(11)(A) of the Northwest Power Act, and failed to do so.

BPA nonetheless insists that Petitioners are really challenging the RDC mechanism because Petitioners are "seek[ing] to impose additional (or alter existing) conditions and criteria in the RDC [mechanism]." Answer. Br. at 22. On the contrary, Petitioners take the RDC mechanism as it is. But because the RDC mechanism left BPA with substantial discretion to spend money on fish and wildlife, the FY2022 RDC decision triggered the requirements of § 4(h)(11)(A). Opening Br. at 55–67. Petitioners are not seeking to "alter" the conditions set forth in the RDC mechanism, but are instead insisting that the *statutory* conditions of § 4(h)(11)(A) be enforced.

Finally, BPA argues that Petitioners "had an obligation to raise th[e] issue" of § 4(h)(11)(A) vis-à-vis the RDC at the time the RDC mechanism was adopted because there "was no reasonable basis" for Petitioners to believe that § 4(h)(11)(A) would apply to any future RDC decision. Answer. Br. at 24; *see also id.* at 22–23 (similar argument). But there was no reason for Petitioners to challenge the legality of the RDC mechanism at the time it was adopted, because Petitioners did not (and do not) contend that the mechanism itself is unlawful. And any challenge brought at that time to

a hypothetical future decision as to how BPA would apply the RDC mechanism would have been unripe. *See Nw. Env't Def. Ctr. v. BPA* (*NEDC 1997*), 117 F.3d 1520, 1533–34 (9th Cir. 1997) ("The court's role is not to dictate in advance how BPA is to exercise its obligations under the Northwest Power Act.").

Moreover, this argument once again overlooks the fact that § 4(h)(11)(A)'s "equitable treatment" and "fullest extent practicable" requirements apply of their own force; they are not criteria that BPA can choose to ignore. In the RDC mechanism, BPA set out criteria to guide it in choosing how to spend any future RDC surplus, but those criteria do not operate to the exclusion of applicable statutory requirements such as § 4(h)(11)(A). *Cf. Portland Gen. Elec. Co. v. BPA*, 501 F.3d 1009, 1030–31 (9th Cir. 2007) (rejecting BPA's argument that it could exercise its settlement authority without regard to certain portions of the Northwest Power Act).[1]

This case does not involve a challenge to the RDC mechanism itself. It doesn't even involve a dispute about the proper *interpretation* of the RDC

[1] Of course, BPA contends that § 4(h)(11)(A) was not applicable to the FY2022 RDC decision. But that's a *merits* question.

mechanism—BPA does not dispute that the mechanism left it with substantial discretion to spend RDC surplus funds on fish and wildlife, which BPA in fact did. The question is whether BPA complied with § 4(h)(11)(A) when exercising that discretion.[2]

B. Petitioners Challenge the FY2022 RDC Decision, Not Other Decisions, But the Equitable Treatment Inquiry Requires Consideration of Activities Beyond the RDC Decision.

BPA next argues that Petitioners are not really challenging the FY2022 RDC decision, but are instead mounting an untimely challenge to "past funding decisions, cost projections, or policy guidance concerning the agency's financial goals." Answer. Br. at 24–27.

This argument disregards how this Court reviews "equitable treatment" claims. Equitable treatment is measured on an overall basis, so Petitioners *must* discuss decisions beyond the FY2022 RDC decision in order to litigate an equitable treatment claim. *See Confederated Tribes of the Umatilla Indian Reservation v. BPA*, 342 F.3d 924, 931 (9th Cir. 2003) ("[E]ven

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[2] To the extent that BPA suggests that § 4(h)(11)(A) was not applicable to the RDC decision because of a conflict with the criteria in the RDC mechanism, that is an impermissible post hoc rationalization. *Michigan v. EPA*, 576 U.S. 743, 757–58 (2015).

if [the decision under review] itself disadvantages fish, Petitioners must show ... that, overall, BPA treats fish second to power."). Similarly, BPA cannot demonstrate equitable treatment without some discussion of its activities beyond the decision under review. In *Confederated Tribes*, for instance, BPA demonstrated equitable treatment by pointing to a variety of "programs, decisions, and opinions" it was implementing, not just the decision being challenged. 342 F.3d at 932–33.

The opening brief's discussion of the context for the RDC decision—in particular, the history of BPA's flat funding and its effects on mitigation project sponsors, Opening Br. at 14–18, 22–24, 60–61—is responsive to this Court's demand that a petitioner challenging a BPA decision on "equitable treatment" grounds show how fish are being treated inequitably on the whole.[3] That discussion does not mean that Petitioners are "challenging" any prior decisions. It is the FY2022 RDC decision alone that is being

[3] BPA has leeway to make decisions that, considered alone, treat fish inequitably, *Confederated Tribes*, 342 F.3d at 931; but the Court has insisted that, "when BPA makes a final decision that significantly impacts fish and wildlife," it has to show that is treating fish equitably on an *overall* basis, *id.* Admittedly, this is a somewhat unusual method of reviewing agency decisionmaking, but it is the method prescribed by this Court.

challenged here, because it is that decision that triggered BPA's duty to demonstrate equitable treatment. *See Confederated Tribes*, 342 F.3d at 931 ("BPA's duty to demonstrate compliance with the mandate matures only when BPA makes a final decision that significantly impacts fish and wildlife.") (citation omitted).

BPA compares Petitioners' challenge to two of the challenges deemed untimely in *Confederated Tribes*. Answer. Br. at 25–26 & 26 n.8. But Petitioners' challenge is nothing like those challenges. One was an "unreasonable delay" challenge, which Petitioners obviously do not bring. 342 F.2d at 929. The other was a challenge to a specific set of power emergency declarations and associated criteria that had been issued well over 90 days before the date of the petition. *Id.* at 933. As explained above, Petitioners do not "challenge" any past decisions.[4]

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[4] Petitioners' challenge is exactly like one of the challenges deemed *timely* in *Confederated Tribes*: like the petitioners there, Petitioners challenge the adequacy of BPA's explanation for how it is providing equitable treatment. *Compare* 342 F.3d at 932–33 (adjudicating on the merits the claim that BPA "failed to give a reasoned explanation that permits meaningful review" for how it was providing equitable treatment), *with* Opening Br. at 59–61 (making the same claim).

Finally, BPA argues that, to the extent Petitioners challenge the adequacy of the agency's fish and wildlife cost projections for the BP-22 rate period, that challenge is untimely. Answer. Br. at 26–27. Petitioners do not bring such a challenge here. Even in the prior litigation over the BP-22 rate decision, Petitioners never contended that BPA's cost projections failed substantial evidence review.[5] *See Idaho Conservation League v. BPA* (*ICL v. BPA*), 83 F.4th 1182, 1194 (9th Cir. 2023).

In sum, Petitioners are not attacking the RDC mechanism or any past BPA decisions. They are challenging the FY2022 RDC decision, and that challenge is timely.

II. BPA's Reading of § 4(h)(11)(A) Cannot Be Correct.

BPA devotes most of its brief to the statutory interpretation issue at the heart of this case: the proper scope of § 4(h)(11)(A). Answer. Br. at 27–56. BPA contends that § 4(h)(11)(A) covers "actions relating to physical water management," *id.* at 30, but does not cover non-operational mitigation activities or BPA's funding of such activities. As the Council

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[5] Of course, whether BPA's cost *projections* made during the BP-22 rate case were "realistic" and whether its *actual* spending during the rate period is sufficient to satisfy "equitable treatment" are two different issues.

puts it in its proposed *amicus* brief, this "cannot be correct under the words of the statute." Council Proposed Amicus Br. at 8.

A. BPA Does Not Grapple With the Breadth of the Term "Managing," Nor Does It Justify Its Gerrymandered Reading of § 4(h)(11)(A).

BPA insists that a "straight-forward approach" leads to the conclusion that "§ 4(h)(11)(A) plainly speaks to actions relating to physical water management." Answer. Br. at 29–30. But BPA ignores the breadth of the term "managing," as well as its own admission that certain financial activities are covered by § 4(h)(11)(A).

BPA first reasons that, because § 4(h)(11)(A) links "operating, managing, or regulating" to "system and facilities," it follows that § 4(h)(11)(A) relates only to "the physical functions, capabilities, and influence of the 'system and facilities' with respect to water." Answer. Br. at 29–30. This ignores the breadth of the word "managing," and it also ignores BPA's own admission that some of its financial activities—including making short-term power purchases to facilitate fish-friendly dam operations, Opening Br. at 32–36—fall within the scope of § 4(h)(11)(A). There is nothing textually amiss about describing BPA's short-term power purchases as "managing" the hydrosystem, just as there

would be nothing textually amiss about describing, say, issuing bonds to fund capital improvements to a hydroelectric facility as "managing" that facility. "Managing" is an exceedingly broad term, and there is nothing in the text of § 4(h)(11)(A) that limits its scope to the "physical functions" of the hydrosystem, especially when "operating" already covers such functions. *See* Opening Br. at 32 n.7, 35–36.

Next, BPA insists that it plays a coordinating role in the physical operation of the federal hydrosystem. Answer. Br. at 31–33. This argument is beside the point. Again, by its own admission, BPA's power marketing activities fall within the scope of § 4(h)(11)(A), 2-ER-241, and, as the term "marketing" suggests, those activities include financial actions such as short-term power purchases to benefit fish. The fact that the U.S. Army Corps of Engineers ("Corps") and the Bureau of Reclamation ("Reclamation") coordinate with BPA about how to operate their dams says little about the scope of the term "managing," nor does it explain why some financial activities related to the hydrosystem should fall under § 4(h)(11)(A) while others should not.

BPA posits that, given its coordinating role in the physical operation of the hydrosystem, the "use of 'manage' can easily be understood as

reflecting congressional intent to expressly bring BPA's water management role within the scope of § 4(h)(11)(A), where a reference to 'operating' alone might have suggested the exclusion of such BPA duties ...." Answer. Br. at 33. All this shows is that, *read in isolation*, § 4(h)(11)(A) *could* be narrowly construed to cover only "actions relating to physical water management." But courts "do not ... construe statutory phrases in isolation; [they] read statutes as a whole." *United States v. Morton*, 467 U.S. 822, 828 (1984). And when § 4(h)(11)(A) is read in context, with an eye toward the purposes of § 4(h) and the Northwest Power Act as a whole, it becomes apparent that it cannot be as narrow as BPA contends. *See United States v. Petri*, 731 F.3d 833, 839 (9th Cir. 2013) ("When interpreting a statute, words and phrases must not be read in isolation, but with an eye toward the 'purpose and context of the statute.'") (quoting *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006)); *see also* Opening Br. at 37–43 (interpreting § 4(h)(11)(A) in context).

Finally, BPA makes a confusing argument about "funding" not being one of the authorized purposes of the federal hydrosystem. Answer. Br. at 33–34. Petitioners' reading of § 4(h)(11)(A) does not result in "funding" being a "purpose." The relevant statutory "purpose" for BPA is "to protect, mitigate and enhance the fish and wildlife, including related spawning

grounds and habitat, of the Columbia River and its tributaries." 16 U.S.C. § 839(6).[6] BPA undertakes several different activities that implicate that purpose, such as making short-term power purchases to facilitate fish-friendly dam operations and funding offsite mitigation measures to help species of fish harmed by the dams. These activities are reasonably described as "managing" the hydrosystem, because they are activities undertaken to achieve one of the system's authorized purposes.

At best, BPA makes a case that § 4(h)(11)(A), read in a vacuum, *could* carry the meaning BPA ascribes to it. But the larger context and purpose of the Northwest Power Act show that BPA's reading of § 4(h)(11)(A) cannot be correct. *See* Opening Br. at 37–43.

B. BPA Continues to Misunderstand the Nature of § 4(h)(11)(A) and Its Relationship to § 4(h)(10).

BPA's next argument is that § 4(h)(11)(A) should not be read to apply to fish mitigation funding because "mitigation funding is governed by" § 4(h)(10)(A) of the Northwest Power Act. Answer. Br. at 34–40. Petitioners

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[6] Section 4(h)(11)(A)(i)'s references to "purposes" include the purposes of the Northwest Power Act itself. *See* SER-17 ("the purposes of the Northwest Power Act also factor into the agencies' consideration of equitable treatment"); *see also* 3-ER-443–44.

have already explained why this reasoning makes little sense, Opening Br. at 53–54, but BPA's heavy reliance on this argument merits a lengthier response.

BPA's analysis misses two key points. First, § 4(h)(10)(A) is not just about funding. Rather, it empowers BPA to use "the [BPA] fund *and the authorities available to the Administrator under this chapter and other laws administered by the Administrator* to protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries." 16 U.S.C. § 839b(h)(10)(A) (emphasis added). BPA's ability to use *any* of its authorities, including its power marketing authority, for the purpose of fish and wildlife mitigation derives from § 4(h)(10)(A).[7] BPA's facile argument that "§ 4(h)(10)(A) is about funding, while § 4(h)(11)(A) is about physical water management" ignores this.

Second, unlike § 4(h)(10)(A), § 4(h)(11)(A) does not grant any power to BPA or any other agency; rather, it tells the agencies *how* to exercise their

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[7] The individual federal hydroelectric project authorizing statutes include fish and wildlife conservation as an authorized purpose. 3-ER-443. But those statutes apply to the Corps and Reclamation, not BPA.

authorities. Opening Br. at 54; *see also* Council Proposed Amicus Br. at 11 ("Bonneville is missing the point. Section 4(h)(11)(A) is not a grant of new authority to Reclamation; it is additional direction to Reclamation as to how to exercise its authorities."). It is a different type of statutory provision than § 4(h)(10)(A), which BPA's analysis largely ignores.

Once it is understood that § 4(h)(10)(A) is not just about funding and that § 4(h)(11)(A) is a discretion-channeling provision, BPA's arguments quickly fall apart. Consider BPA's point that § 4(h)(11)(A) does not reference § 4(h)(10) or explicitly mention "mitigation funding." Answer. Br. at 35–37. Far from being an argument in BPA's favor, this just demonstrates the type of provision that § 4(h)(11)(A) is. Section 4(h)(11)(A) doesn't reference any hydroelectric project authorizing statutes, nor does it reference the Federal Power Act, nor does it reference the Clean Water Act—indeed, it doesn't reference *any* specific statutes. And yet § 4(h)(11)(A) applies to actions taken under those statutes, insofar as the actions amount to "managing, operating, or regulating" the federal hydrosystem or non-federal hydroelectric facilities in the Columbia Basin. *See PUD No. 1 of Douglas Cnty. v. BPA*, 947 F.2d 386, 394–96 (9th Cir. 1991) (holding that the Corps' regulation of dams under the Clean Water Act can

fall under § 4(h)(11)(A)); *Nat'l Wildlife Fed'n v. FERC*, 801 F.2d 1505, 1513–14 (9th Cir. 1986) (FERC's licensing of non-federal hydroelectric projects falls under § 4(h)(11)(A)).

Similarly, the lack of a specific mention of "mitigation funding" (or some similar phrase) in § 4(h)(11)(A) only goes to show the breadth of the provision. Section 4(h)(11)(A) applies to several agencies' duties under many different statutory provisions. Rather than exhaustively describe the covered duties (non-federal dam licensing, Clean Water Act permitting, power marketing, mitigation funding, etc.) or cross-reference a long list of statutory provisions, Congress used the broad terms "managing, operating, or regulating" to capture the relevant duties.[8]

The converse point made by BPA—that § 4(h)(10)(A) lacks an explicit reference to § 4(h)(11)(A)—is even more unpersuasive. *See* Answer. Br. at 35–38. Again, § 4(h)(11)(A) is a discretion-channeling provision that applies to a wide range of agency activities conducted under many different statutory provisions. *None* of those statutory provisions reference

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[8] By BPA's logic, § 4(h)(11)(A) would not cover BPA's power marketing activities, because it does not use the term "power marketing" or cite the relevant statutory authorities.

§ 4(h)(11)(A), and yet § 4(h)(11)(A) applies to them, insofar as they involve "managing, operating, or regulating" the federal hydrosystem or non-federal hydroelectric facilities in the Columbia Basin, and absent some other indication that § 4(h)(11)(A) should not apply. Congress did not need to include in § 4(h)(10)(A) an explicit reference to § 4(h)(11)(A) any more than it needed to amend (for instance) the Federal Power Act to insert a reference to § 4(h)(11)(A). Indeed, it would have been confusing if Congress had included such a reference in § 4(h)(10): it would have been the only such reference to § 4(h)(11)(A), and it might have implied that § 4(h)(11)(A) did *not* cover activities conducted under other statutory authorities.

BPA next argues that, because § 4(h)(10)'s "mitigation funding requirements and processes are quite detailed," the lack of any reference to § 4(h)(11)(A) implies that Congress did not intend for § 4(h)(11)(A) to apply to mitigation funding. Answer. Br. at 37–38. BPA likens this case to *ICL v. BPA*, where this Court held that § 4(h)(11)(A) did not apply to § 7 ratemaking because of the detailed nature of § 7.[9] *Id.*

[9] 16 U.S.C. § 839e.

ICL v. BPA does not help BPA here. In *ICL v. BPA*, this Court repeatedly cited the length, detail, and technical nature of § 7's requirements as key to its reasoning. *See* 83 F.4th at 1192 (Ratemaking is ... addressed—at length—in § 7 of the Act. That section prescribes extensive requirements and procedures for BPA's ratemakings, many of them highly technical.") (citation omitted), *id.* ("Nowhere in that exceedingly detailed section on ratemaking did Congress so much as acknowledge § 4(h)(11)(A) ...."), *id.* (noting the "extensive provisions governing ratemaking in § 7"), *id.* at 1193 ("given the reticulated nature of § 7 of the NWPA ..."), *id.* ("Because ratemaking is already specifically covered in detail by the NWPA ...."). Section 4(h)(10)—actually, § 4(h)(10)(A) through (C)—is nowhere near as detailed or technical as § 7.[10] *Compare* 16 U.S.C. § 839e (ratemaking), with *id.* § 839b(h)(10)(A)–(C).

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[10] The lengthiest and most detailed part of § 4(h)(10) is by far § 4(h)(10)(D), which instructs the *Council* how to select projects to recommend to BPA for funding. 16 U.S.C. § 839b(h)(10)(D). The procedures of § 4(h)(10)(D) are detailed, but they don't apply to BPA. Moreover, § 4(h)(10)(D) was not part of the Northwest Power Act as originally enacted. *See* Pub. L. No. 104-206, tit. V, § 512, 110 Stat. 3005 (1996) (adding § 4(h)(10)(D)). BPA's argument depends on making inferences about what Congress intended *in 1980*, when § 4(h)(10)(A) through (C) and § 4(h)(11)(A) were enacted together.

Furthermore, § 4(h)(10) lacks two other features of § 7 that were important in *ICL v. BPA*. Unlike § 7, § 4(h)(10) does not "require[] BPA to consider various 'equitable' considerations" while saying "nothing about ... 'equitable treatment.'" 83 F.4th at 1193. And, unlike § 7, § 4(h)(10) does not "cross-reference various other specific provisions of the NWPA but ... not ... § 4(h)(11)(A)." *Id.* In short, § 4(h)(10) lacks all of the features of § 7 that mattered in *ICL v. BPA*.

BPA next argues that § 4(h)(10) contains some prescriptions for how the agency should use its spending authority, supposedly undermining Petitioners' argument about the different natures of § 4(h)(11)(A) and § 4(h)(10). Answer. Br. at 39. This again misses the point. *All* of the activities subject to § 4(h)(11)(A) are conducted pursuant to statutory authorities with their own conditions. For instance, when FERC licenses a non-federal hydroelectric facility in the Columbia Basin, it does so pursuant to detailed requirements under the Federal Power Act as well as § 4(h)(11)(A). *See Nat'l Wildlife Fed'n*, 801 F.2d at 1507–10, 1513–15. The same is true of BPA's power-marketing activities, to which § 4(h)(11)(A) concededly applies. 2-ER-241. The fact that § 4(h)(10) contains certain

conditions on BPA's spending authority says nothing about whether the exercise of that authority is *also* subject to § 4(h)(11)(A).

Finally, BPA points out that § 4(h)(10)(A) and § 4(h)(11)(A)(ii) contain "different legal standard[s] ... with respect to the Council's Program," the apparent implication being that Congress could not have wanted both standards to apply to BPA's mitigation funding decisions. Answer. Br. at 39–40. But *everything* BPA does that touches on fish and wildlife is subject to the "consistency" requirement of § 4(h)(10)(A)—including its power-marketing activities, which are *also* subject to § 4(h)(11)(A)(ii)'s "fullest extent practicable" requirement. Furthermore, because the "consistency" requirement is substantive and the "fullest extent practicable" requirement is procedural, there is nothing odd about them both applying to a given decision. *Cf. Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1227 (9th Cir. 2008) (discussing the Endangered Species Act's procedural and substantive requirements).

BPA's reading of the relationship between § 4(h)(10) and § 4(h)(11)(A) is wrong. Nothing in § 4(h)(10) precludes, or even weighs against, Petitioners' reading of § 4(h)(11)(A).

C. BPA's Historical Musings Are Misguided.

BPA tries to justify its reading of § 4(h)(11)(A) by recounting a curated history of the Northwest Power Act.[11] Answer. Br. at 40–43. But BPA gets a key fact wrong: the purpose of the Act vis-à-vis fish and wildlife was not to "correct[] a water management regime that skewed heavily against the well-being of anadromous fish," Answer Br. at 40, but rather—as the statute itself says—"to protect, mitigate and enhance the fish and wildlife, including related spawning grounds and habitat, of the Columbia River and its tributaries, particularly anadromous fish ...." 16 U.S.C. § 839(6). Correcting a fish-unfriendly water management regime was a key *means* to achieve that purpose, but it was not the purpose itself. And Congress understood that operational changes alone would not be enough to achieve the purpose set out in § 839(6), which is why it provided a mechanism to fund non-operational mitigation measures. *See* Opening Br. at 8, 42–43; *see also* Council Proposed Amicus Br. at 11 ("Congress directed

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[11] BPA's reliance on isolated pieces of legislative history is akin to "entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment).

the Council and the relevant federal agencies to plan and implement a broad range of offsite mitigation actions as well as hydrosystem protection actions.").

D. BPA Misreads the Two Key Cases Addressing § 4(h)(11)(A).

BPA claims that its interpretation of § 4(h)(11)(A) is supported by *NEDC 1997* and *Confederated Tribes*. Answer. Br. at 43–46. Petitioners have already explained why this is incorrect. Opening Br. at 43–45. But BPA's brief contains inaccuracies and mischaracterizations of those two decisions that merit correction.

First, BPA is wrong that the "system-wide" approach to equitable treatment adopted in *NEDC 1997* refers only to the federal hydrosystem. In adopting a "system-wide approach" in *NEDC 1997*, this Court quoted in full § 4(h)(1)(A) of the Northwest Power Act, which instructs the Council to develop a Fish & Wildlife Program that, "to the greatest extent possible, [is] designed to deal with th[e] [Columbia] [R]iver and its tributaries *as a system*." 117 F.3d at 1533 (quoting 16 U.S.C. § 839b(h)(1)(A)) (emphasis added). The Court also mentioned "the entire [Columbia Basin] ecosystem" and then, in the next sentence, stated that "each power marketing action that affects the system implicates the equitable treatment provision." *Id.*

Thus, this Court was referring not to the federal hydrosystem, but rather to the broader Columbia River system. A "system-wide" strategy is one that takes "a comprehensive approach to fish and wildlife protection on the Columbia." *Id.* Such an approach involves both hydrosystem operational changes and non-operational mitigation. *See* Opening Br. at 42–43.[12]

Second, BPA is incorrect that Petitioners' position is inconsistent with *NEDC 1997*'s understanding of the relationship between § 4(h)(11)(A)(i) and (ii). Answer. Br. at 43–44. Just as this Court in *NEDC 1997* construed § 4(h)(11)(A)(i) and (ii) as containing independent duties, 117 F.3d at 1530–32, Petitioners read § 4(h)(10)(A) and § 4(h)(11)(A)(i) as containing independent duties: BPA must act "consistent with" the Council's Program under § 4(h)(10)(A); it must separately provide equitable treatment under § 4(h)(11)(A)(i); and compliance with the "consistency" requirement does not necessarily satisfy "equitable treatment." *See* 117 F.3d at 1532 ("[A] federal agency c[an]not satisfy its equitable treatment responsibilities

[12] Given that § 4(h)(11)(A)(i) applies to non-federal as well as federal facilities, it would make no sense for the "system" to be limited to the federal hydrosystem.

under paragraph (i) simply by adopting the Council's program under paragraph (ii).").

In both *NEDC 1997* and *Confederated Tribes*, this Court suggested that BPA's fish mitigation funding is covered by § 4(h)(11)(A). *See* Opening Br. at 43–45 (discussing *NEDC 1997*'s mention of fish hatchery funding and *Confederated Tribes*' consideration of BPA's mitigation funding); Answer Br. at 45–46 (attempting to explain this away). This Court was right to read § 4(h)(11)(A) that way, and it should adopt that reading as a holding.

E. BPA's Attempt to Explain Away Its Admission That Certain Financial Activities Fall Under § 4(h)(11)(A) Is Unconvincing.

BPA has admitted that its short-term power purchases made to facilitate fish-friendly dam operations are subject to § 4(h)(11)(A). *See* Opening Br. at 32–36. As Petitioners argued in their opening brief, there is no textual basis for treating this type of financial activity differently from mitigation funding. *Id.*

BPA now attempts to provide a textual basis for treating these two activities differently. Answer. Br. at 46–48. BPA argues that the two activities are different "because they are authorized and undertaken under the text of two different statutes." Answer. Br. at 47. For two reasons, this explanation is unconvincing.

First, this is not a "textual basis" for distinguishing between fish mitigation funding and short-term power purchases to help fish. BPA never explains why it considers the latter, but not the former, to be part of "operating or managing" the hydrosystem within the meaning of § 4(h)(11)(A), and there is no good textual explanation for such differential treatment.

Second, § 4(h)(11)(A) is indifferent to the source of an agency's authority to conduct a particular activity. If the activity counts as "operating, managing, or regulating" the federal hydrosystem or a non-federal hydroelectric facility, then it is subject to § 4(h)(11)(A), absent some indication that § 4(h)(11)(A) shouldn't be read to apply.[13] For instance, both FERC's regulation of non-federal dams under the Federal Power Act and the Corps' regulation of dams under the Clean Water Act are subject to § 4(h)(11)(A)(ii), because those activities count as "regulating." *PUD No. 1 of Douglas Cnty.*, 947 F.2d at 394–96. So too with BPA's fish mitigation

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[13] As discussed *supra* pp. 12–19, unlike ratemaking under § 7, there is no indication in the text of § 4(h)(10) or the structure of the Northwest Power Act that § 4(h)(11)(A) shouldn't be read to apply to BPA's mitigation funding activities.

funding and short-term power purchases to benefit fish: both count as "managing" the hydrosystem, and it is irrelevant if they are authorized under different statutory provisions.

F. BPA Is Wrong About the Consequences of Its Reading of § 4(h)(11)(A).

BPA argues that its reading of § 4(h)(11)(A) would not undermine the operation of the Northwest Power Act. BPA first addresses Petitioners' argument that, under BPA's interpretation, portions of the Council's Program that apply to agencies besides BPA have no effect. Answer Br. at 48–49. BPA insists that Petitioners' argument rests on "two mistaken premises," but neither premise actually underlies Petitioners' argument. Petitioners' argument is very simple: the Council's Program includes, and was always intended to include, non-operational mitigation measures for non-BPA agencies to carry out under various statutory authorities, and those portions of the Council's program are rendered a nullity under BPA's interpretation of § 4(h)(11)(A). *See* Opening Br. at 37–39; *see also* Council Proposed Amicus Br. at 10 ("Bonneville's odd and incorrect interpretation of Section 4(h)(11)(A) ... would strip from ... other federal agencies the explicitly stated responsibility to use their authorities to help 'mitigate' and 'enhance' fish and wildlife affected by the hydrosystem, with actions

explicitly intended by the Act to [include] offsite habitat protection and other mitigation.").

BPA also argues that its interpretation of § 4(h)(11)(A) would not undermine the efficacy of the Council's Program because § 4(h)(10)(A) "requires the fish and wildlife mitigation that BPA funds to be 'consistent with' the Council's Program." Answer. Br. at 50–51. This argument is quite disingenuous given BPA's interpretation of how the "consistency" requirement applies to mitigation funding: BPA has taken the position that "the 'in a manner consistent with' standard of ... § 4(h)(10)(A) should be understood in reference to the substantive mitigation actions that BPA funds, *not to the funding itself or the amount BPA spends*." Mot. Jud. Not. Ex. 1 at 83 (emphasis added); *see also id.* at 82 ("compliance with the 'consistency' requirement" is not "dependent on the level of BPA's spending"). In other words, in BPA's view, its decisions about how much to spend to fund measures in the Council's Program are not constrained by the "consistency" requirement of § 4(h)(10)(A). Thus, BPA cannot point to that

requirement as a backstop that will ensure adequate mitigation funding if § 4(h)(11)(A)(ii) is construed not to apply to mitigation funding decisions.[14]

BPA's reading of § 4(h)(11)(A) frustrates the operation of the Northwest Power Act. There is no need for such a result—§ 4(h)(11)(A) provides "ample textual room to choose an interpretation that does not undermine the rest of the statute." *Chicken Ranch Rancheria of Me-Wuk Indians v. California*, 42 F.4th 1024, 1044 (9th Cir. 2022).

G. There Is No Such Thing As "BPA Deference."

BPA claims that it "is not asking for *Chevron* deference," but then argues that it should receive a comparable level of deference. Answer. Br. at 52. In essence, BPA is claiming that there is a special "BPA deference."

This is nonsense. In *Aluminum Co. of America v. Central Lincoln Peoples' Utility District*, the Supreme Court relied on "established administrative

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[14] Combining BPA's interpretation of § 4(h)(11)(A) with its interpretation of the "consistency" requirement leads to the result that there is *no* provision of the Northwest Power Act against which to measure the adequacy of BPA's mitigation funding. Given that BPA's major role vis-à-vis fish and wildlife under the Act is to fund mitigation measures, this cannot be what Congress intended. Congress did not tap the revenues of the federal hydropower system for fish restoration only to give BPA unreviewable power to divert those revenues for other purposes.

law principles" to hold that it was proper to defer to BPA's reasonable interpretation of the Northwest Power Act. 467 U.S. 380, 389–90 (1984). Less than three weeks later, the Court decided *Chevron*, which relied on the same "well-settled" deference principles as *Central Lincoln*, and even cited *Central Lincoln* in support of those principles. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843–45 & 844 n.14 (1984); *see also* John H. Reese, *Bursting the* Chevron *Bubble: Clarifying the Scope of Judicial Review in Troubled Times*, 73 Fordham L. Rev. 1103, 1139 (2004) ("[*Chevron*'s] two steps ... were well-established principles of statutory construction long before the Court wrote its *Chevron* opinion."). The two decisions dealt with the *same* deference doctrine, which has since come to be called *Chevron* deference. That is why, just three months after *Chevron* was decided, this Court cited *Central Lincoln* and *Chevron* together in its discussion of deference to BPA's proffered statutory interpretation. *See Forelaws on Board v. Johnson*, 743 F.2d 677, 684 n.5 (9th Cir. 1984).

"BPA deference" does not exist, but, like any agency, BPA may sometimes merit *Chevron* deference. However, because BPA "is not asking for *Chevron* deference," this Court should decline to consider whether such deference is due. *See HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels*

Ass'n, 594 U.S. 382, 394 (2021) ("[T]he government is not invoking *Chevron*[.] We therefore decline to consider whether any deference might be due its regulation.") (cleaned up). At any rate, for the reasons given in Petitioners' opening brief, BPA's interpretation of § 4(h)(11)(A) does not deserve *Chevron*, or even *Skidmore*, deference. *See* Opening Br. at 45–55.

III. BPA's Attempt to Minimize the Importance of the FY2022 RDC Decision Is Unavailing.

BPA next argues that the FY2022 RDC decision was not important enough for fish and wildlife to trigger § 4(h)(11)(A)'s requirements. Answer. Br. at 57–61. This blinkers reality. If the RDC decision did not "significantly affect" fish and wildlife, then it is hard to imagine a funding decision that would.

A. By Any Measure, the FY2022 RDC Decision Was One "Significantly Affecting" Fish and Wildlife.

The trigger for BPA to demonstrate "equitable treatment" is "a final decision that significantly impacts fish and wildlife." *Confederated Tribes*, 342 F.3d at 931. BPA insists that the RDC decision—where BPA decided to spend $50 million on fish and wildlife—was not such a decision. Answer. Br. at 57–59. BPA is wrong.

BPA first tries to liken this case to *NEDC 1997*. Answer. Br. at 57–58. But that case actually cuts against BPA. In *NEDC 1997*, the petitioners challenged BPA's decision to enter into agreements concerning rights to water stored in reservoirs in the Columbia River system in Canada. 117 F.3d at 1525–27. They contended that BPA should have dedicated a portion of the stored water to fish, and that its failure to do so violated the "equitable treatment" mandate. *Id.* at 1533. Crucially, "the vast majority of BPA's share of the ... storage capacity [was] unallocated," so the Court was "left to speculate about *how much* water BPA will dedicate for fish and wildlife." *Id.* The Court thus found it "premature" to decide whether BPA had complied with the equitable treatment mandate. *Id.* at 1534. But the Court made clear that, "[o]nce BPA allocates the ... storage, ... BPA will be required to demonstrate, by means that allow for meaningful review, that it has treated fish and wildlife equitably." *Id.*

Here, there is no need to speculate about how much money BPA will allocate for fish, because the allocation has already happened. The factual scenario here is analogous to the post-allocation scenario discussed in *NEDC 1997*—the scenario that the Court held *would* trigger BPA's duty to show equitable treatment. *Id.* Thus, unlike in *NEDC 1997*, the decision

challenged here will affect fish and wildlife, and it is not "premature" for this Court to assess whether BPA has demonstrated equitable treatment.

BPA next complains that Petitioners' standard for determining when a financial decision is consequential enough to "significantly affect" fish and wildlife is "unworkable." Answer. Br. at 58–59. But Petitioners have not proposed a "standard" or a comprehensive theory. The point is that, under *any* reasonable standard, the RDC decision was a significant one for fish and wildlife. *See* Opening Br. at 56 ("By any measure, the FY2022 RDC decision was a 'big' one."), 57 ("Wherever the line separating 'significant' financial decisions from other decisions is located, it is below $500 million."). This Court does not have to develop an all-encompassing theory for when a BPA financial decision is significant enough to trigger the equitable treatment obligation; all it has to do is acknowledge the obvious fact that a decision in which BPA spends $50 million on fish and wildlife—and declines to spend up to an additional $450 million on fish and wildlife—"significantly affects" fish and wildlife. *See* Opening Br. at 56–57 (comparing the scale of the RDC decision to BPA's annual fish and wildlife spending).

B. The FY2022 RDC Decision Was Plainly a "Relevant Stage" of a Decisionmaking Process.

BPA argues that the FY2022 RDC decision did not represent a "relevant stage of [a] decisionmaking process[]" under § 4(h)(11)(A)(ii). Answer. Br. at 59–61. According to BPA, because the RDC decision "did not solicit, prioritize, select, or contract for any particular fish and wildlife mitigation actions or projects," it did not trigger § 4(h)(11)(A)(ii).

This is a post hoc rationalization. When it made the FY2022 RDC decision, BPA never claimed that the decision was not a "relevant stage" for the reason that BPA was not selecting or soliciting particular mitigation projects. *See* 1-ER-45–48.

Even putting that aside, BPA's argument ignores that "[t]he statute requires consideration of the Council's Program 'at each relevant stage,' recognizing there is more than one." *Nat'l Wildlife Fed'n*, 801 F.2d at 1514. The fact that BPA will have to comply with § 4(h)(11)(A)(ii) when making future project-specific funding decisions does not mean that it was free to ignore the statute when it made the FY2022 RDC decision. The RDC decision determined how much of the $500 million RDC surplus would go to fish and wildlife, and future decisions will determine how that money is distributed. *Both* are "relevant stages" under § 4(h)(11)(A)(ii). *Cf.*

Cottonwood Env't Law Ctr. v. U.S. Forest Serv., 789 F.3d 1075, 1082 (9th Cir. 2015) (discussing the utility of complying with procedural requirements at different stages).

IV. BPA Has Abandoned Any Argument That It Did, In Fact, Demonstrate Equitable Treatment and Take the Council's Program Into Account.

In its brief, BPA does *not* contend that it actually demonstrated equitable treatment or that it took the Council's Program into account to the fullest extent practicable. Answer. Br. at 57–61. Instead, BPA relies on the ground that those requirements did not apply to the FY2022 RDC decision at all. *Id.* By electing to defend against Petitioners' challenge to the RDC decision on the sole ground that § 4(h)(11)(A) did not apply to that decision, BPA has waived reliance on the alternative ground that it actually complied with § 4(h)(11)(A). *See United States v. Dreyer*, 804 F.3d 1266, 1277 (9th Cir. 2015) (en banc) ("Generally, an appellee waives any argument it fails to raise in its answering brief."); *see also Nat. Res. Def. Council, Inc. v. Reilly*, 976 F.2d 36, 39–40 (D.C. Cir. 1992) (not considering a ground relied

on by the agency at the administrative level where the ground "was not urged on appeal" by the agency).[15]

Because of BPA's waiver, there is no occasion for the Court to decide whether BPA actually demonstrated equitable treatment or took the Council's Program into account to the fullest extent practicable. The Court should simply grant the petition and declare that BPA was required to comply with those requirements when it made the FY2022 RDC Decision. Such relief would be appropriate because it is reasonable to expect that the issue of the applicability of § 4(h)(11)(A) to BPA's financial decisions will continue to arise in future cases between Petitioners and BPA, as indeed it already has.[16] *See Hooks for and on behalf of NLRB v. Nexstar Broadcasting, Inc.*, 54 F.4th 1101, 1113–14 (9th Cir. 2022) (finding that a case was "capable of

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[15] Unlike BPA, the Council defends the FY2022 RDC decision on the ground that BPA did, in fact, comply with its § 4(h)(11)(A) obligations. Council Proposed Amicus Br. at 7–8, 13–14. But an *amicus* cannot "unwaive" an argument waived by a party. *Zango, Inc. v. Kaspersky Lab, Inc.*, 568 F.3d 1169, 1177 n.8 (9th Cir. 2009); *see also Food & Water Watch v. FERC*, 28 F.4th 277, 290 (D.C. Cir. 2022) ("[A]mici are powerless to revive an argument the parties failed to preserve.").

[16] Petitioners have challenged BPA's fiscal year 2023 RDC decision. *See Idaho Conservation League v. BPA*, 24-1653 (filed Mar. 18, 2024).

repetition, yet evading review" where it was "reasonable to expect" that a legal issue in the case would recur); *see also* Opening Br. at 67–68 (discussing appropriate relief).

CONCLUSION

For the reasons given above and in Petitioners' opening brief, the Court should grant the petition.

Date: June 7, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am the attorney for Petitioners.

This reply brief contains no more than 6,998 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(f). The brief's type size and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6).

I certify that this this brief complies with the word limit of Ninth Circuit Rule 32-1.

Date: June 7, 2024 */s/ Andrew R. Missel*