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' OPENING BRIEF

Laurence ("Laird") J. Lucas
Andrew R. Missel
ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024
Attorneys for Petitioners

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Petitioners Idaho Conservation League, Great Old Broads for Wilderness, and Idaho Rivers United are non-profit organizations recognized by the IRS as Section 501(c)(3) public charities. None has public shares or corporate parents or affiliates with shares.

Date: March 15, 2024 */s/ Andrew R. Missel*

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Federal Register Notices and Regulatory Decisions

Other Authorities

INTRODUCTION

Under the Northwest Power Act, the Bonneville Power Administration ("BPA") is responsible for funding a large suite of mitigation projects to aid fish and wildlife populations harmed by hydroelectric dams in the Columbia River Basin. For years, BPA has been shortchanging fish and wildlife by underfunding these mitigation projects. The state and tribal fish and wildlife agencies that carry out these projects have repeatedly implored BPA to spend more money, but BPA has refused to do so, forcing many mitigation projects to scale back. BPA's parsimony has undermined the protection and restoration of fish and wildlife—particularly threatened and endangered salmon and steelhead species—in the Columbia Basin.

In fiscal year 2022, BPA made record revenues from the sale of power, leading to a $500 million dollar surplus of money available for distribution through the "Reserves Distribution Clause," or RDC. Mitigation project sponsors, suffering from years of BPA underfunding and the effects of inflation, asked BPA to use this opportunity to bolster fish and wildlife spending, but BPA once again refused: BPA elected to devote just 10% of the RDC amount to fish and wildlife, and even that amount was

restricted to funding projects that would allow BPA to avoid costs in the future.

BPA's decision to once again shortchange fish and wildlife cannot be squared with its duties under § 4(h)(11)(A) of the Northwest Power Act, 16 U.S.C. § 839b(h)(11)(A). Under that provision, BPA was required to demonstrate at the time it made the RDC decision how it is providing "equitable treatment" for fish and wildlife. BPA did not make this showing, nor could it have made this showing, because consistently deprioritizing fish and wildlife funding is deeply inequitable treatment. BPA has gotten away with shortchanging fish and wildlife for long enough; it is time for this Court to make clear that § 4(h)(11)(A) does not allow BPA to always put fish and wildlife second.

JURISDICTIONAL STATEMENT

This Court has statutory subject-matter jurisdiction over this petition for review because it was timely filed within 90 days of the date that BPA's RDC decision became final. 16 U.S.C. § 839f(e)(5); *see also* 1-ER-58 ("the RDC decision is a final agency action that marks the end of the RDC review process").

Petitioners have Article III standing. As demonstrated in the declarations filed concurrently with this brief, Petitioners are nonprofit conservation groups concerned about saving imperiled salmon and steelhead in the Pacific Northwest. They and their members face a credible threat of harm to their recreational, aesthetic, scientific, and other interests, especially their interests related to Idaho's salmon and steelhead that are nearing extinction. That harm is fairly traceable to the challenged RDC decision, and, at the time this petition was filed, this Court could remedy or prevent that harm, at least in part, by remanding the decision to BPA. *See Idaho Conservation League v. BPA (ICL v. BPA*), 83 F.4th 1182, 1187–91 (9th Cir. 2023) (finding that Petitioners had standing under similar circumstances); *Nw. Requirements Utils. v. FERC*, 798 F.3d 796, 805 (9th Cir. 2015) (analyzing standing based on the circumstances "at the time the petition[] [was] filed").

Although a remand to BPA to revisit its RDC decision would have provided effective relief at the time this petition was filed, it is not clear that a remand would provide effective relief today, since BPA has now distributed the RDC funds. However, this case fits comfortably within the "capable of repetition, yet evading review" exception to mootness. *See*

generally Alcoa, Inc. v. BPA, 698 F.3d 774, 786–88 (9th Cir. 2012) (discussing the exception). Like many of BPA's decisions, the RDC decision challenged here is one of limited duration. *See id.* (citing several cases in which BPA decisions were found to be "capable of repetition, yet evading review" and applying the exception to a decision with a 17-month duration). And not only is it "capable" of repetition, it has already been repeated once. *See* Missel Decl. Ex. 2 (BPA's fiscal year 2023 RDC decision). The Court can provide Petitioners with meaningful relief by confirming that BPA must comply with § 4(h)(11)(A) of the Northwest Power Act when making financial decisions such as the RDC decision at issue here.

ISSUES PRESENTED[1]

1. Did BPA violate § 4(h)(11)(A)(i) of the Northwest Power Act when it failed to demonstrate "equitable treatment" for fish and wildlife when making its RDC decision?
2. Did BPA violate § 4(h)(11)(A)(ii) of the Act when it failed to take the Northwest Power and Conservation Council's Fish and Wildlife

[1] Section 4(h) of the Northwest Power Act, 16 U.S.C. § 839b(h), is set out in full in the Addendum.

Program "into account ... to the fullest extent practicable" when making its RDC decision?

STATEMENT OF THE CASE

I. The Northwest Power Act.

"The Columbia River Basin was once home to one of the world's largest salmon runs, but over the course of the twentieth century the mainstem Columbia and its tributaries were radically re-engineered to become the most hydroelectrically developed river system in the world, incorporating more than one hundred and fifty dams." *Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 794 (9th Cir. 2013). "In combination with deforestation, over-fishing, irrigated agriculture, grazing, mining, and urbanization, the hydropower system reduced native salmon and steelhead populations from levels of mythic abundance to the brink of extinction." *Id.* Seven salmon and steelhead stocks that spawn upriver of Bonneville Dam are now listed as endangered or threatened under the Endangered Species Act, and four other stocks have gone extinct. 3-ER-394.

The 150+ hydroelectric dams in the Columbia Basin include both federally-owned and non-federal hydroelectric dams. There are 31 federal hydroelectric dams on the Columbia and its tributaries, each of which is

operated by either the U.S. Army Corps of Engineers ("Corps") or the Bureau of Reclamation ("Reclamation"). 3-ER-430. There are more than 100 non-federal hydroelectric projects in the Basin.

The Corps and Reclamation operate the federal dams in the Columbia Basin, but they do not sell the power generated at the dams. That task falls to BPA, the federal "power marketing agent" for the Pacific Northwest. BPA, an agency within the Department of Energy, is responsible for "sell[ing] and transmit[ting] wholesale electricity from ... federal hydroelectric plants, one non-federal nuclear power plant ..., and other non-federal power plants in the Columbia River basin." *Nw. Env't Def. Ctr. v. BPA* (*NEDC 2007*), 477 F.3d 668, 672–73 (9th Cir. 2007). Unlike most federal agencies, "BPA does not receive annual appropriations," but instead deposits the revenue it obtains from power and transmission sales in the BPA fund. *Id.* at 673. "BPA then uses the fund to finance its operations." *Id.*

For decades, federal policy concerning the Columbia Basin's hydroelectric system favored power over salmon. But that changed in 1980 with the passage of the Northwest Power Act, 16 U.S.C. § 839 *et seq.*, which "marked an important shift in federal policy." *Nw. Res. Info. Ctr., Inc. v. Nw.*

Power Planning Council (*NRIC 1994*), 35 F.3d 1371, 1377 (9th Cir. 1994). The Act "ensured the 'equitable treatment' of fish and wildlife[,] [and] it created a new obligation on the region and various Federal agencies to protect, mitigate, and enhance fish and wildlife." *Id.* at 1377–78. In short, the Act sought to "ma[ke] fish and wildlife a 'co-equal partner' with the hydropower industry." *Id.* at 1378.

To accomplish its purposes, the Act "adopted several innovations." *Id.* Perhaps most notably, the Act set up a new body—the Northwest Power and Conservation Council—to develop "'a program to protect, mitigate, and enhance' the Columbia Basin's fish and wildlife 'to the extent affected by the development and operation' of the Basin's hydropower system." *Id.* (quoting 16 U.S.C. § 839b(h)(1)(A), *id.* § 839b(h)(10)(A)). The Council is the "hub" of "a pluralistic intergovernmental and public review process" that involves states, Native American tribes, and other stakeholders. *Id.* (cleaned up). Through that process, the Council creates its Fish and Wildlife Program as well as a regional power plan that guides BPA's power planning activities. *See* 16 U.S.C. § 839b.

Congress intended for the Council's Fish and Wildlife Program to "deal with th[e] [Columbia River] and its tributaries as a system," *id.*

§ 839b(h)(1)(A), reflecting the Northwest Power Act's "comprehensive approach to fish and wildlife protection on the Columbia," *Nw. Env't Def. Ctr. v. BPA* (*NEDC 1997*), 117 F.3d 1520, 1533 (9th Cir. 1997). Congress knew that this approach would entail both changes to hydrosystem operations and the implementation of non-operational mitigation measures such as tributary habitat restoration. Michael C. Blumm, *Implementing the Parity Promise: An Evaluation of the Columbia Basin Fish and Wildlife Program*, 14 Env't L. 277, 281–83, 312–13 (1984). Accordingly, Congress explicitly authorized the Council to include in its Program "off-site mitigation" and "enhancement" measures—measures that help protect fish and wildlife populations affected by hydroelectric dams by addressing sources of harm other than the dams. *See* 16 U.S.C. § 839b(h)(5) (providing that "[e]nhancement measures shall be included in the program to the extent such measures are designed to achieve improved protection and mitigation"); *id.* § 839b(h)(8)(A) (similar); see also 3-ER-446 (discussing off-site mitigation in the Council's Program).

In addition to creating the Council and instructing it to prepare a Fish and Wildlife Program, the Northwest Power Act altered the duties of federal agencies so as to better protect fish and wildlife. No agency was

more affected by these changes than BPA. Section 4(h)(10)(A) of the Act gave BPA authority to "use [its] fund and [other] authorities ... 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). By empowering BPA to use its fund to protect, mitigate, and enhance fish and wildlife, Congress "tapped revenues of the Basin's hydropower system as a source for financing ... biological restoration." *NRIC 1994*, 35 F.3d at 1378.

Section 4(h)(11)(A)(i) of the Act imposed a substantive "equitable treatment" mandate upon BPA and other agencies with responsibility for federal and non-federal hydroelectric facilities in the Columbia Basin, including the Corps, Reclamation, and the Federal Energy Regulatory Commission ("FERC"). That mandate requires BPA to "exercise [its] responsibilities under the Act 'in a manner that provides equitable treatment' for fish and wildlife." *NEDC 1997*, 117 F.3d at 1525 (quoting 16 U.S.C. § 839b(h)(11)(A)(i)). Relevant here, BPA has stated in the past that providing "equitable treatment" for fish and wildlife means providing financial and operational certainty for fish similar to that afforded to other hydrosystem purposes. 2-ER-223–24, 231–32.

Finally, § 4(h)(11)(A)(ii) of the Northwest Power Act imposed on BPA and other agencies a procedural requirement to "tak[e] into account" the Council's Fish and Wildlife Program "at each relevant stage of decisionmaking processes to the fullest extent practicable ..." 16 U.S.C. § 839b(h)(1)(A)(ii).

II. BPA's Recent Efforts to Control Costs.

In the 2010s, BPA's "power customers ... expressed significant concerns that BPA's recent pattern of rising costs and rates is unsustainable." 2-ER-150. "They ... noted that the resurgence of competition in power markets [would] provide them with alternatives when their long-term wholesale power contracts with BPA expire in 2028." *Id.*

In response to this threat, BPA adopted its 2018–2023 Strategic Plan in January 2018. The Strategic Plan set out four goals intended to make BPA more competitive in the energy market. 2-ER-151. The Plan then laid out objectives intended to help BPA fulfill these goals, including Objective 1a—"improve cost management discipline"—and Objective 3c, which set out BPA's "flat funding" policy for fish and wildlife spending. 2-ER-152–56.

The Strategic Plan explained that, to meet Objective 1a, BPA would be "taking aggressive steps to manage the rising costs of operating the federal power and transmission systems, starting by establishing a cost-management goal to keep the sum of program costs, by business line, at or below the rate of inflation through 2028." 2-ER-152. As for the flat funding goal of Objective 3c, the Strategic Plan stated that "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." 2-ER-156.

BPA adhered to its Strategic Plan, successfully "bending the cost curve" (in its own words) by effectively reducing its fish and wildlife mitigation spending. 2-ER-159–61. In fiscal year 2018, BPA spent $258 million on what it calls its "direct" fish and wildlife program, which consists of funding mitigation measures such as habitat restoration and predator management. 2-ER-198, 200. By contrast, in fiscal year 2022, BPA spent just $235 million—a nearly 10% reduction in funding even without accounting for inflation. 2-ER-198. In inflation-adjusted terms, BPA's fish

and wildlife spending decreased by more than 20% from fiscal year 2018 to fiscal year 2022.[2]

III. The Council's Fish and Wildlife Program Addendum.

As BPA started implementing its Strategic Plan, the Northwest Power and Conservation Council began the process of amending its Fish and Wildlife Program. The Program is largely focused on non-operational mitigation measures such as habitat restoration, installation of fish screens, predator management, and research and monitoring. 3-ER-438–40, 446. As this Court has explained, the reason the Council's Program is focused on non-operational measures is that the Endangered Species Act ("ESA") has provided constraints on how the federal hydrosystem is operated. *Nw. Res. Info. Ctr., Inc. v. Nw. Power & Conservation Council* (*NRIC 2013*), 730 F.3d 1008, 1014 (9th Cir. 2013). Many non-operational measures in the Program are designed to benefit ESA-listed salmon and steelhead. 2-ER-351. But the Program also contains many measures intended to benefit non-ESA listed species, such as white sturgeon and lamprey. 2-ER-311, 327, 344–46.

---

[2] *See* Bureau of Labor Statistics Inflation Calculator, https://data.bls.gov/cgi-bin/cpicalc.pl

BPA plays a large role in funding the non-operational mitigation projects in the Program, but it does not actually carry out those projects. Rather, mitigation projects funded by BPA are carried out by "project sponsors," including Native American tribes, state fish and wildlife agencies, and various non-profit groups. *See* 3-ER-438–40; *see also* 2-ER-199, 201 (breaking down BPA's fish and wildlife spending by type of project sponsor). The design of the Northwest Power Act is that BPA will fund these projects using the revenue it derives from its power marketing activities. *NRIC 1994*, 35 F.3d at 1378.

These non-operational mitigation projects are very important for protecting and restoring salmon and steelhead species in the Columbia Basin. According to a September 2022 report by the National Marine Fisheries Service ("NMFS"), "[t]o make progress towards healthy and harvestable stocks" of salmon in the Basin, a "comprehensive suite of management actions" must be implemented "at a large scale," including

such non-operational actions as predator management and tributary and estuarine habitat restoration.[3] 3-ER-403.

During the comment process for amending the Program, many project sponsors expressed frustration to the Council about BPA's "flat funding" policy—its policy of holding mitigation funding levels flat, as formally adopted in the Strategic Plan. *See* 2-ER-352–54, 357–59. For instance, "the Shoshone Bannock Tribes commented with concern that [BPA's] budget cuts in the interests of budget efficiencies [we]re impacting day-to-day operations ..." 2-ER-358. Likewise, the Columbia River Inter Tribal Fish Commission—a coalition of four tribes—told the Council that "the reality of capped/flatlined budgets means funding 'new' or 'emerging' priorities requires shifting/reducing money currently addressing ongoing priority measures." 2-ER-353.

BPA did not deny that its "flat funding" policy would affect funding for fish and wildlife mitigation projects. On the contrary, BPA told the Council that "its budget ha[d] limited flexibility to accommodate new or

---

[3] NMFS is the expert wildlife agency with jurisdiction over the endangered and threatened salmon and steelhead species in the Columbia Basin.

expanded work, and also only a limited capacity for maintenance of past investments ..." 2-ER-352.

In October 2020, the Council released its final Addendum. The Addendum acknowledged that, "over time, persisting with flat budgets begins to force [mitigation] project sponsors to make cuts that undermine the ability to perform the substantive work and meet project and program objectives." 2-ER-329. In general, the Council expressed concerns about the possible negative effects of BPA's "flat funding" policy and implored BPA to take steps to avoid such effects. 2-ER-328–30.

Despite the Council's concerns, BPA persisted with its "flat funding" policy. Over the next two years, mitigation project sponsors repeatedly pointed out to BPA and the Council that, especially in light of high inflation rates, this flat funding policy was making it impossible for them to implement their projects. For instance, in March 2022, the Washington Department of Fish and Wildlife ("WDFW") told the Council that, "[f]or many of our projects, the allocated budget has been nearly flat funded for a decade or more, resulting in a slow-motion but significant budget cut in real dollars. This has resulted in WDFW being unable to implement some of the highest priorities in the Council's Fish and Wildlife program." 2-ER-

166. Similarly, the Yakama Nation told the Council that as a result of flat funding, "fish and wildlife projects are unable to meet their stated goals, and hence the goals of the [Council's] Fish and Wildlife Program." 2-ER-168. The Yakama Nation opined that "[f]lat funding, in the absence of any serious modification to present hydrosystem structure and operations, is a recipe for failure." 2-ER-169; *see also* 2-ER-162–64, 2-ER-178–95 (more complaints about flat funding).

In April 2022, the Council once again raised concerns to BPA about the effects of "flat funding." The Council noted that "some project budgets have been held without an inflation adjustment for more than a decade while the purchasing power of the dollar has declined due the impact of inflation." 2-ER-176. The Council related to BPA that "[f]ish and wildlife managers and project sponsors continue to raise concerns with the Council over the ever-rising disparity between available budgets and the cost of implementation." *Id.* According to the Council, "[d]espite the persistence and creativity of project sponsors, some have reached a tipping point where the on-the-ground mitigation work must be cut back." *Id.*

IV. BPA's Rate-Setting Process and the Reserves Distribution Clause.

A. The Section 7 Ratemaking Process.

The Northwest Power Act instructs BPA to periodically revise its rates for power and transmission services through a formal ratemaking process. 16 U.S.C. § 839e(a), (i). In recent years, BPA has revised its rates every two years. The formal process—often called a "§ 7(i) hearing" after the relevant portion of the Act—begins with BPA publishing a "[n]otice of the proposed rates ... in the Federal Register with a statement of the justification and reasons supporting such rates." *Id.* § 839e(i)(1). Utilities and other interested parties then participate in a process that includes a hearing or series of hearings, the submission of written evidence, and even a quasi-discovery practice. *See id.* § 839e(i)(2)–(4); *see also* 85 Fed. Reg. 77,189, 77,189–93 (Dec. 1, 2020) (setting out the process).

BPA's most recent rate proceeding—known as "BP-24"—concluded in July 2023.[4] But the rate proceeding most relevant to this case is the BP-22

[4] Prior to the BP-24 rate proceeding, BPA conducted a process called "Integrated Program Review" during which it proposed fish and wildlife spending levels for the BP-24 rate period. During that process, several

proceeding, which concluded in July 2021. 2-ER-233. Petitioners were parties to the BP-22 rate case, where they argued that BPA's § 4(h)(11)(A) fish and wildlife duties—the "equitable treatment" and "fullest extent practicable" requirements discussed earlier—were applicable in the context of BPA's rate decision. 2-ER-236, 249, 265. BPA rejected these arguments, relying principally on the legal argument that § 4(h)(11)(A) categorically "does not apply to BPA's ... expenditures for fish and wildlife mitigation." 2-ER-237, 265.

BPA issued its BP-22 Record of Decision ("BP-22 ROD") in July 2021, and FERC ultimately approved BPA' s BP-22 rates in March 2022. 178 FERC ¶ 61,211, 62,478 (Mar. 24, 2022). Petitioners then sought review of the BP-22 decision in this Court by filing a petition for review in June 2022. *See ICL v. BPA*, Case No. 22-70122. The BP-22 rate schedules were in effect through September 30, 2023. 178 FERC ¶ 61,211, at ¶ 62,479.

---

tribes criticized BPA's "flat funding" policy and explained how that policy was frustrating their mitigation work. *See* 2-ER-178–92.

B. The Reserves Distribution Clause ("RDC") Mechanism.

The rate schedules adopted through the BP-22 proceeding include several "adjustment clauses" and other special rate mechanisms. The special rate mechanism relevant to this case is the "Power Reserves Distribution Clause," or RDC. 2-ER-62–65. In essence, the RDC is a mechanism through which BPA, at the end of each fiscal year, decides how to spend any excess reserves that it has accumulated from power sales. *See* 2-ER-62 ("The Power RDC is a process for determining the distribution of financial reserves to purposes determined by the Administrator."). BPA first determines whether there are excess reserves in the first place—*i.e.*, whether the "Power RDC quantitative criteria ... are met." *Id.* If so, then BPA decides how to spend those reserves. 2-ER-63.

In the BP-22 rate schedules, BPA committed to involving the public in any future RDC decision during the BP-22 rate period. 2-ER-65. Unlike the § 7 formal process used to set rates, BPA set out an informal, *ad hoc* process for any RDC decisions during the BP-22 rate period: BPA promised to "notify customers of the preliminary Power RDC Amount and" its proposed application no "later than November 30 of each applicable year," to "hold at least one public meeting to discuss ... the Power RDC Amount,"

and to provide "an opportunity for comment on the preliminary [RDC] data." *Id.*

BPA did not, however, commit to using any future Power RDC amounts for any particular purpose. In the BP-22 rate schedules, BPA stated that, if the RDC were triggered in a given year, BPA would "calculate the Power RDC Amount, and determine what part, *if any*, will be applied to debt reduction, incremental capital investment, rate reduction through a Power Dividend Distribution (Power DD), distribution to customers, *or any other Power-specific purposes determined by the Administrator*." 2-ER-62 (emphasis added).

V. The Fiscal Year 2022 RDC Process.

By August 2022, it was apparent that the Power RDC for fiscal year 2022 would be triggered under the BP-22 rate schedules.[5] 1-ER-11; *see also* 2-ER-67–68 (showing end-of-fiscal-year projected net reserves for risk as of August 2022). At the same time, BPA's next rate case, BP-24, was set to begin in a few months. 1-ER-11. BPA began discussions with customers and other stakeholders regarding a possible package settlement that would

[5] Fiscal year 2022 ran from October 1, 2021 through September 30, 2022.

cover the upcoming BP-24 rate case, the fiscal year 2022 RDC (which had yet to officially trigger), and a third proceeding called the Average System Cost Review Process. *Id.*

In September 2022, BPA presented a proposed settlement to prospective BP-24 rate case parties, including Petitioners. *Id.*; 2-ER-72–87. The settlement provided that, if the fiscal year 2022 RDC triggered, BPA would allocate the RDC amount as follows: 70% for a "Power Dividend Distribution ... to reduce FY 2023 power rates"; 20% for debt reduction or "revenue financing," or to remain as BPA financial reserves; and 10% for fish and wildlife. 2-ER-77. However, BPA proposed that the fish and wildlife allocation be designated for a very limited, specific purpose: "to address, on an accelerated, one-time basis, certain non-recurring maintenance needs of existing fish and wildlife mitigation assets that (i) Bonneville anticipates would otherwise need to be addressed during future rate periods and (ii) will result in avoidance of those costs in future rate periods." *Id.* In other words, none of the RDC money would go to funding new mitigation projects, expanding existing projects, or even making inflationary adjustments to existing projects.

Several entities, including Petitioners, objected to the settlement proposal. But BPA's customers—who would receive 70% of the RDC amount—either supported or did not object to the proposal. 1-ER-11. Accordingly, BPA elected to go ahead with the proposed settlement. *Id.*

On November 16, 2022, BPA held a "Quarterly Business Review" at which it announced that the fiscal year 2022 Power RDC had been triggered, and that the RDC amount would be the maximum possible amount of $500 million. 2-ER-91–97. In fact, fiscal year 2022 saw BPA "achieving record agency net revenues." 2-ER-90. BPA invited comments on its RDC proposal, which was identical to the proposal from the settlement agreement: 70% for rate reduction, 20% for debt reduction or revenue financing, and 10% for fish and wildlife. 1-ER-12–13.

BPA received 58 public comments on its RDC proposal. 1-ER-13. The State of Oregon, WDFW, the Coeur d'Alene Tribe, the Spokane Tribe of Indians, the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, and the Yakama Nation all urged BPA to devote a larger share of the RDC amount to fish and wildlife. 2-ER-98–121. WDFW asked BPA to devote "significantly more than 10%" of the RDC amount to fish and wildlife and noted that WDFW could use the additional funding

for (among other things) "inflation adjustments on a scale that would allow us to catch up with a decade of nearly flat funding in the face of increasingly significant inflation." 2-ER-120. The Coeur d'Alene Tribe noted that BPA had "a unique opportunity ... to address historical shortfalls with respect to fish and wildlife mitigation" and asked BPA to "substantially increase the proposed amount" of RDC money for fish. 2-ER-118. The Nez Perce Tribe called the 10% allocation for fish and wildlife "inequitable," 2-ER-103; the State of Oregon called it "simply unacceptable," 2-ER-99.

Many of these commenters pointed out that part of the reason for BPA's record-setting revenues in fiscal year 2022 was that the federal hydrosystem was being operated in a less fish-friendly (and more power-friendly) manner than it could have been operated. As Oregon put it, "much of th[e] excess revenue was realized at the expense of fish and wildlife, not least of which were the salmon. ... [F]ish operations were specifically constrained in order to ensure cost-efficient power operations." 2-ER-99.

Petitioners also commented on the RDC proposal, raising many of the same issues they had raised previously during the BP-22 proceeding.

Specifically, Petitioners argued that the RDC decision triggered BPA's duty to demonstrate "equitable treatment" under § 4(h)(11)(A)(i) and that BPA could not do so in light of its recent history of flat funding. 2-ER-125–26. And Petitioners argued that the RDC proposal did not appear to reflect a full consideration of the Council's Fish and Wildlife Program as required by § 4(h)(11)(A)(ii). 2-ER-126–27.

Petitioners also pointed out to BPA the "Rebuilding Interior Columbia Basin Salmon and Steelhead" report issued by NMFS just two months earlier, which concluded that it was "essential" to implement a "comprehensive suite of management actions ... at a large scale" in order "[t]o make progress towards healthy and harvestable stocks" of salmon in the Columbia Basin. 2-ER-125; *see also* 3-ER-387–429 (NMFS report). Those "management actions" include such things as predator management, tributary and estuarine habitat restoration, and reintroduction of salmon into blocked areas, 3-ER-403–07—all activities that BPA funds, 3-ER-438–40.

BPA issued its final RDC decision on January 6, 2023. 1-ER-2. The final RDC allocation was identical to the allocation from the settlement proposal in September 2022. *Compare id. with* 2-ER-77. As part of its

rationale for the RDC decision, BPA cited the fact that the 70%/20%/10% allocation "had enough support to make a rate settlement with BPA's customers likely," and that adopting that allocation would therefore "support[] BPA['s] efforts to achieve settlement of two other processes—namely its Average System Cost review process and the BP-24 rates." 1-ER-22–23.

In response to Petitioners' (and others') comments, BPA reiterated its legal position from the BP-22 rate case that § 4(h)(11)(A) "do[es] not apply to ... funding for fish and wildlife programs." 1-ER-45. BPA also claimed that, even if § 4(h)(11)(A) did apply to the RDC decision, BPA had not violated it. *Id.*

On April 5, 2023, Petitioners filed their petition for review in this Court challenging BPA's RDC decision. 3-ER-448–55.

VI. Subsequent Events Relevant to This Petition.

At the time this petition was filed, briefing was already complete in Petitioners' challenge in this Court to BPA's BP-22 decision, and oral argument had been noticed for June 8, 2023. On October 16, 2023, the Court issued a published opinion in the BP-22 case, denying Petitioners' petition on the merits. *ICL v. BPA*, 83 F.4th 1182. A majority of the panel held that

Petitioners had established Article III standing, but that BPA did not violate § 4(h)(11)(A)(i) and (ii) in making the BP-22 decision because § 4(h)(11)(A) "do[es] not apply to ratemaking." *Id.* at 1191, 1194.[6]

Although the Court ruled against Petitioners, it did so on the relatively narrow ground that BPA's formal ratemaking decisions are not subject to the mandates of § 4(h)(11)(A). The Court did not adopt BPA's broader argument that § 4(h)(11)(A) does not apply at all to fish and wildlife mitigation funding decisions. The Court found it "unnecessary to reach this argument, and thus unnecessary to offer a fully definitive construction of § 4(h)(11)(A), because other aspects of the statutory scheme confirm that § 4(h)(11)(A) does not extend to *ratemaking*." *ICL v. BPA*, 83 F.4th at 1192 (emphasis added). The Court reasoned that, given the "extensive requirements and procedures for BPA's ratemakings, many of them highly technical," found in § 7 of the Northwest Power Act, Congress could not have intended to "layer on major additional environmental

---

[6] Judge Bea did not think that Petitioners had established standing, and thus did not opine on the merits of the case. *Id.* at 1194 (Bea, J., dissenting).

mitigation-related requirements in a wholly separate provision that does not even discuss ratemaking." *Id.*

Soon after the Court's opinion in *ICL v. BPA* was issued, BPA announced that the RDC mechanism had triggered for fiscal year 2023. Missel Decl. Ex. 2 at 3. BPA again elected to devote the bulk of the RDC amount—$165.4 million out of the $285.4 million, or about 60%—to rate relief for its customers. Missel Decl. Ex. 2 at 1. BPA chose to devote just $30 million to fish and wildlife mitigation, with the same restrictions on use (*i.e.*, "avoidance of future costs") as in the fiscal year 2022 RDC decision. *Id.*

STANDARD OF REVIEW

This Court's review of BPA's RDC decision is governed by the Administrative Procedure Act, 5 U.S.C. § 706. *NEDC 2007*, 477 F.3d at 681. "Under the APA, [this Court] must set aside BPA's action if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Id.* (quoting 5 U.S.C. § 706(2)(A)).

SUMMARY OF THE ARGUMENT

The first merits question in this case is the purely legal question whether § 4(h)(11)(A) of the Northwest Power Act applies to *any* of BPA's mitigation funding decisions or whether, as BPA contends, such decisions

are categorically excluded from the reach of § 4(h)(11)(A). BPA's position on this issue is wrong. The text, structure, and purpose of the Northwest Power Act all lead to the conclusion that at least some of BPA's funding decisions trigger § 4(h)(11)(A), and BPA's contrary position should be rejected. It simply cannot be the case that BPA could decrease funding for fish and wildlife mitigation projects to $0 and comply with the "equitable treatment" mandate.

If the Court agrees with Petitioners as to the scope of § 4(h)(11)(A), the next question is whether the RDC decision challenged in this case triggered BPA's duty to show "equitable treatment" for fish and wildlife under § 4(h)(11)(A)(i). Because of the RDC decision's importance to the successful implementation of BPA-funded mitigation projects, it was a decision "significantly affecting" fish and wildlife, triggering BPA's duty to show equitable treatment. BPA did not do so, and the petition should thus be granted as to the "equitable treatment" issue.

The next question (again assuming that the Court agrees with Petitioners as to the scope of § 4(h)(11)(A)) is whether the RDC decision triggered BPA's duty to take the Council's Program into account "to the fullest extent practicable" under § 4(h)(11)(A)(ii). Because the RDC decision

was plainly a "relevant stage" of a decisionmaking process with significant ramifications for the successful implementation of the Council's Program, BPA's "fullest extent practicable" duty was triggered. The administrative record does not reflect that BPA complied with this duty, so the petition should be granted as to the "fullest extent practicable" issue.

ARGUMENT

I. BPA's Fish and Wildlife Mitigation Funding Decisions Are Not Categorically Exempt from § 4(h)(11)(A).

The key statutory provision in this case is § 4(h)(11)(A) of the Northwest Power Act, which reads as follows:

> The Administrator and other Federal agencies responsible for managing, operating, or regulating Federal or non-Federal hydroelectric facilities located on the Columbia River or its tributaries shall—
>
> > (i) exercise such responsibilities consistent with the purposes of this chapter and other applicable laws, to adequately protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by such projects or facilities in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed and operated;
> >
> > (ii) exercise such responsibilities, taking into account at each relevant stage of decisionmaking processes to the fullest extent practicable, the program adopted by the Council under this subsection. If, and to the extent that, such other Federal agencies as a result of such

> consideration impose upon any non-Federal electric power project measures to protect, mitigate, and enhance fish and wildlife which are not attributable to the development and operation of such project, then the resulting monetary costs and power losses (if any) shall be borne by the Administrator in accordance with this subsection.

16 U.S.C. § 839b(h)(11)(A).

According to BPA, § 4(h)(11)(A) "do[es] not apply to [its] funding for fish and wildlife programs." 1-ER-45. This is incorrect. BPA's fish and wildlife mitigation funding decisions are not categorically exempt from § 4(h)(11)(A), and BPA's contrary interpretation is an unreasonable construction of the statute to which this Court owes no deference.

A. The Northwest Power Act's Text, Structure, Purpose, and Context Support Petitioners' Reading of § 4(h)(11)(A).

The central statutory interpretation question in this case is this: are BPA's mitigation funding decisions categorically outside the reach of § 4(h)(11)(A)? Put another way, could BPA choose to spend $0 on habitat restoration, predator management, etc. and still provide "equitable treatment" for fish and wildlife? A close examination of the text, structure, purpose, and context of § 4(h)(11)(A) and the Northwest Power Act as a whole demonstrates that the answer is "no." *See, e.g.*, *Rojas v. FAA*, 989 F.3d 666, 672–73 (9th Cir. 2021) (en banc) ("as is always true when interpreting

statutes, statutory context and purpose matter"); *Cnty. of Amador v. U.S. Dep't of the Interior*, 872 F.3d 1012, 1022 (9th Cir. 2017) ("understanding the historical context in which a statute was passed can help to elucidate the statute's purpose and the meaning of statutory terms and phrases").

1. As Even BPA Concedes, the Text of § 4(h)(11)(A) Is Expansive Enough to Cover Financial Decisions.

Section 4(h)(11)(A) applies to BPA "and other Federal agencies responsible for managing, operating, or regulating Federal or non-Federal hydroelectric facilities located on the Columbia River or its tributaries." These agencies must exercise "such responsibilities"—*i.e.*, their operational, managerial, and/or regulatory responsibilities—in accordance with the "equitable treatment" provision of § 4(h)(11)(A)(i) and the "fullest extent practicable" provision of § 4(h)(11)(A)(ii).

Congress's choice of the broad terms "managing, operating, or regulating" to describe the activities subject to § 4(h)(11)(A), plus its inclusion of both federal and non-federal hydroelectric projects, suggests an intent to sweep in a wide range of agency actions related to hydroelectric facilities in the Columbia Basin. Everyone agrees that certain activities are covered by § 4(h)(11)(A): "project configuration, flow management, spill operations, and water quality management" for federal

dams, for instance. 2-ER-238. In simple terms, this includes the Corps' and Reclamation's operational decisions regarding the storage and release of water. *See* 3-ER-437 (listing "operational" measures); *see also* 2-ER-325 (portion of Council's Program containing operational measures for the Corps and Reclamation). In addition, both FERC's regulation of non-federal hydroelectric dams under the Federal Power Act and the Corps' regulation of dams under the Clean Water Act are covered by § 4(h)(11)(A) as "regulating." *PUD No. 1 of Douglas Cnty. v. BPA*, 947 F.2d 386, 394–96 (9th Cir. 1991).

As BPA admits, § 4(h)(11)(A) also covers BPA's "power marketing activities." 2-ER-241. This makes sense—BPA is, after all, a power marketing agency. Operational activities such as "project configuration, flow management, spill operations, ... water quality management," and the like are ultimately the responsibility of the Corps and Reclamation, the "operators" of the federal hydroelectric projects.[7] *See Nat'l Wildlife Fed'n v.*

---

[7] The term "operating," though not defined in the Northwest Power Act, must be "construed in a consistent manner" with its use in other laws related to federal hydroelectric projects in the Columbia Basin. 16 U.S.C. § 839; *see also NRIC 1994*, 35 F.3d at 1378 (discussing the Act's "textual consistency" requirement). Congress used the word "operate" (or its

Nat'l Marine Fisheries Serv., 886 F.3d 803, 812 (9th Cir. 2018) ("The Corps operates the eight mainstem dams, Reclamation operates other ... dams, and Bonneville markets and transmits power ..."); 3-ER-431 ("Congress authorized the Corps and Reclamation to construct, operate, and maintain the [federal hydroelectric] projects ..."); 3-ER-433 ("The Corps and Reclamation are largely responsible for deciding how to operate their projects based on the principles of multiple-use operation, agency statutes, operations experience, and public input."). BPA's role is to sell the power generated at those projects. *E.g.*, *ICL v. BPA*, 83 F.4th at 1184–85; *see also* 3-ER-432 ("[BPA] markets and distributes the power generated at all Federal projects in the Columbia River Basin").

---

gerund or noun forms) in several of the statutes granting the Corps and Reclamation authority over those projects. *See, e.g.*, 16 U.S.C. § 832 (authorizing the Corps to "complete[], maintain[], and operate[]" the Bonneville Project); 43 U.S.C. § 593a (authorizing Interior to "construct[], operat[e], and maint[ain]" the Hungry Horse Dam). Consistent with those statutes, this Court and the agencies themselves have recognized that the Corps and Reclamation are the "operators" of the federal hydroelectric dams. *See, e.g.*, *ICL v. BPA*, 83 F.4th at 1185; 3-ER-432 (describing the agencies' roles). Thus, "operating" in § 4(h)(11)(A) should be read to describe the Corps' and Reclamation's execution of their duties under the various hydroelectric project authorizing statutes.

One example of a "power marketing" activity is "making short-term power purchases to facilitate increased flows to improve fish habitat and spill to improve fish survival at dams." 2-ER-243. The operational activities at the dams that necessitate these short-term power purchases are of the type discussed above (*e.g.*, "spill operations"), and are clearly within the scope of § 4(h)(11)(A). But the power purchases themselves—the actions that BPA, as opposed to the Corps and Reclamation, actually performs—are also within the scope of § 4(h)(11)(A), by BPA's own admission.

BPA's short-term power purchases are an exercise of its authority to use the BPA fund to benefit fish and wildlife. In this respect, they are no different from BPA's financing of mitigation measures, even off-site mitigation measures: in each case, BPA is using its spending authority to aid fish and wildlife species affected by the federal hydrosystem. In the case of power purchases, BPA is ensuring that it can meet its obligations to customers while allowing the Corps and Reclamation to carry out more fish-friendly operations at the dams. In the case of financing mitigation measures, BPA is using money from power sales to help protect species adversely affected by the dams.

BPA has correctly concluded that its power marketing actions, such as short-term power purchases, are within the scope of § 4(h)(11)(A). It insists, however, that its mitigation funding decisions are outside the scope of § 4(h)(11)(A) under that provision's "plain text." *E.g.*, 2-ER-237, 239. But there is simply no textual basis in § 4(h)(11)(A) for such differential treatment of these two types of financial decisions. Neither power marketing nor mitigation funding amounts to "operating" or "regulating" a federal hydroelectric facility. As BPA admits, "managing" is broad enough to cover power marketing decisions, 2-ER-247—but, by that token, it is also broad enough to cover mitigation funding decisions. Nothing in the text of § 4(h)(11)(A) supports the conclusion that the exceedingly broad term "managing" includes one type of financial activity related to fish and wildlife and not the other.

As discussed below, considering § 4(h)(11)(A) in light of the structure, purpose, and context of the Northwest Power Act leads to the conclusion that it should be read to cover BPA's mitigation funding decisions. Section 4(h)(11)(A) should *also* be read to cover BPA's power marketing decisions, at least insofar as they affect fish and wildlife. Undoubtedly Congress could have brought these activities within the

scope of § 4(h)(11)(A) by using a more precise term than "managing."[8] But the breadth of that term—and the fact that it should not be construed to mean the same thing as "operating," *e.g.*, *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115–16 (1879)—reflects Congress's aim to ensure that the agencies use all their relevant authorities in a "comprehensive approach to fish and wildlife protection on the Columbia." *NEDC 1997*, 117 F.3d at 1533.

In short, nothing in the text of § 4(h)(11)(A) suggests that BPA's mitigation funding decisions are excluded from its scope, and BPA's differential treatment of its power marketing and mitigation funding duties under § 4(h)(11)(A) is not supported by the statutory text.[9]

---

[8] Unlike "operating," the term "managing" does not appear in the statutes authorizing the federal hydroelectric projects in the Columbia Basin.

[9] This analysis has assumed that the word "such" in § 4(h)(11)(A)(i) and (ii) limits the agency responsibilities that fall under those provisions to "managing, operating, [and] regulating" responsibilities. As discussed, "managing" is broad enough to encompass BPA's mitigation funding duties. But § 4(h)(11)(A) can be read another way: the phrase "[t]he Administrator and other Federal agencies responsible for managing, operating, or regulating Federal or non-Federal hydroelectric facilities located on the Columbia River or its tributaries" can be read as a phrase that merely identifies *which* agencies are subject to § 4(h)(11)(A), and *all* of those agencies' duties vis-à-vis Columbia Basin hydroelectric facilities then

2. *The Structure, Context, and Purpose of the Northwest Power Act All Point to the Conclusion that Mitigation Funding Decisions Are Not Categorically Outside § 4(h)(11)(A).*

When § 4(h)(11)(A) is construed in the context of § 4(h) and the Northwest Power Act as a whole, with an eye to the statute's purposes, it becomes clear that BPA's mitigation funding duties are not categorically excluded from that provision's scope. *See, e.g.*, *Abramski v. United States*, 573 U.S. 169, 179 (2014) ("[W]e must (as usual) interpret the relevant words not in a vacuum, but with reference to the statutory context, structure, history, and purpose.") (cleaned up); *see also Rojas*, 989 F.3d at 672–73 ("as is always true when interpreting statutes, statutory context and purpose matter").

Section 4(h) contemplates that the Council's Fish and Wildlife Program may include non-operational mitigation measures for the other (non-BPA) agencies to carry out, and the Program in fact contains such measures. *See* 16 U.S.C. § 839b(h)(2)(A) (instructing the Council to solicit recommendations for "measures which can be expected to be implemented by [BPA] ... and other Federal agencies to protect, mitigate, and enhance

---

fall under § 4(h)(11)(A)(i) and (ii). This reading leads to the same end result: BPA's mitigation funding duties are not categorically excluded from § 4(h)(11)(A).

fish and wildlife, including related spawning grounds and habitat"); 2-ER-307, 343 (discussing the Corps' efforts to deter birds from feeding on salmon and other fish). Section 4(h)(11)(A) is the *only* provision that imposes a duty on the non-BPA agencies to implement the Council's Program. Given the careful procedures laid out in § 4(h) for developing the Program, it is unthinkable that Congress would have intended for parts of the Program to have no effect. *See Jones v. Hendrix*, 143 S.Ct. 1857, 1870 (2023) ("We decline to infer that Congress intended AEDPA's carefully crafted limits on collateral relief under § 2255 to be mere nullities.").

But if § 4(h)(11)(A) is really as narrow as BPA contends, this is precisely the result that obtains: the Program's non-operational mitigation measures for the Corps and Reclamation do not fall under § 4(h)(11)(A) and are thus unenforceable, because they do not constitute "project configuration, flow management, spill operations, ... water quality management," etc.—*i.e.*, hydrosystem "operations." The text of § 4(h)(11)(A) does not require, or even suggest, this result, which undermines the operation of the statute. Rather, the use of the broad, undefined term "managing" in § 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); *see also Rojas*, 989 F.3d at 681 ("It is no lapse into purposivism to insist that, in choosing among the permissible readings that the text will bear, a textually permissible interpretation that furthers rather than obstructs the statute's purpose should be favored.") (Collins, J., concurring) (cleaned up).

Interpreting § 4(h)(11)(A) to categorically exclude BPA's mitigation funding decisions also makes little sense in light of § 4(h)'s requirement of mitigation for "wildlife" in addition to fish. The major effect of hydroelectric dams on wildlife (as opposed to fish) is the loss of habitat due to dam construction and inundation, a harm that is mitigated largely through acquisition of new land and habitat enhancement. *See* 2-ER-227–28 (discussing the Council's approach to wildlife mitigation); 2-ER-319–20 (portion of the Council's Program dealing with wildlife mitigation); 3-ER-440 (discussing BPA's efforts to mitigate for wildlife). BPA's role in these wildlife mitigation efforts is to fund that land acquisition and habitat enhancement. 3-ER-440.

Under BPA's narrow reading, § 4(h)(11)(A) would not apply to its decisions concerning land acquisition for wildlife mitigation. The result

would be that Congress (1) instructed BPA to provide "equitable treatment" for "wildlife" in § 4(h)(11)(A)(i) but then (2) excluded from the scope of the "equitable treatment" provision the activities that actually affect wildlife. This result makes little sense. *See Quarles v. United States*, 139 S.Ct. 1872, 1879 (2019) ("We should not lightly conclude that Congress enacted a self-defeating statute.") And it is not compelled, or even suggested, by the text: the broad term "managing" is elastic enough to encompass BPA's funding of mitigation measures, thereby ensuring that BPA actually has the ability to provide "equitable treatment" for wildlife, as Congress intended.

Furthermore, reading § 4(h)(11)(A) to exclude non-operational mitigation measures (and BPA's funding of such measures) greatly undermines the overall efficacy of the Council's Fish and Wildlife Program, frustrating the statutory scheme. Congress created the Council as the "hub" of a "pluralistic intergovernmental and public review process" and directed the Council to create its Program through that process. *NRIC 1994*, 35 F.3d at 1378 (quoting Michael C. Blumm, *Fulfilling the Parity Promise: A Perspective on Scientific Proof, Economic Cost, and Indian Treaty Rights in the Approval of the Columbia Basin Fish and Wildlife Program*, 13 Env't L. 103, 112

(1982)). The process for creating and amending the Program is set out at great length in the statute. *See* 16 U.S.C. § 839b(h)(1)–(10). Congress expected that "[t]he primary fish and wildlife protection measures [would] be established through the" Council's Program. *NEDC 1997*, 117 F.3d at 1531. In short, the Council's Program is a key component of the Northwest Power Act's approach to fish and wildlife protection.

The importance Congress attached to the Council's Program is reflected in § 4(h)(11)(A)(ii)'s command to agencies to take the Program into account "to the fullest extent practicable" when exercising their responsibilities. It would have made little sense for Congress to exclude BPA's funding decisions from the reach of § 4(h)(11)(A)(ii)—after all, BPA is the primary implementer of the Program, and Congress knew that BPA funding would be essential to carrying out the Program's non-operational mitigation measures. *See NRIC 1994*, 35 F.3d at 1378; Blumm, *Implementing*, *supra*, at 281–83.

Indeed, as BPA has noted, the Program in its current form is comprised *mostly* of non-operational measures. 3-ER-446. Thus, under BPA's interpretation of § 4(h)(11)(A), the requirement to take the Council's Program into account "to the fullest extent practicable" does not apply to

the decisions that have by far the most bearing on how and whether the Council's Program is actually implemented—BPA's mitigation funding decisions. The text of § 4(h)(11)(A) does not require such an odd result; rather, it provides "ample textual room to choose an interpretation that does not undermine the rest of the statute." *Chicken Ranch Rancheria of Me-Wuk Indians*, 42 F.4th at 1044.

Finally, interpreting § 4(h)(11)(A) to exclude decisions regarding non-operational mitigation, including BPA's funding of such mitigation, is contrary to the Northwest Power Act's "comprehensive approach to fish and wildlife protection on the Columbia." *NEDC 1997*, 117 F.3d at 1533. Congress understood that protecting and restoring anadromous fish populations in the Columbia Basin would require changes to hydrosystem operations *and* off-site mitigation, and the Act contemplates both. *See* Blumm, *Implementing*, *supra*, at 281–83, 312–14. Congress also recognized that it would take the combined efforts of *all* the relevant agencies to achieve the fish-protective goals of the Act. *See* 16 U.S.C. § 839b(h)(2)–(4) (providing that the Council's Program should be directed at BPA and other relevant agencies). Accordingly, this Court has endorsed the view that "equitable treatment" must be measured on "a system-wide basis." *NEDC*

1997, 117 F.3d at 1533–34. Completely excluding non-operational mitigation from the "equitable treatment" calculus flies in the face of this comprehensive approach.

B. BPA's Interpretation of § 4(h)(11)(A) Is in Serious Tension with This Court's Caselaw.

This Court has never decided whether § 4(h)(11)(A) covers BPA's mitigation funding decisions. As discussed *supra* pp. 26–27, *ICL v. BPA* did not resolve this question, ruling against Petitioners on the ground that "§ 4(h)(11)(A) does not apply to *ratemaking*" conducted under § 7 of the Northwest Power Act. 83 F.4th at 1192–93 (emphasis added). The Court's reasoning rested on the "exceedingly detailed" nature of the § 7 process. *Id.* This reasoning has no bearing on the question whether § 4(h)(11)(A) applies to the RDC decision—a decision made through a highly informal process—or to mitigation funding decisions generally.

However, two earlier cases support Petitioners' position that § 4(h)(11)(A) covers at least some mitigation funding decisions. These cases are hard to square with BPA's current position.

In *NEDC 1997*, this Court clarified the relationship between the Council's Fish and Wildlife Program and the "equitable treatment" mandate. As discussed above, the Council's Program is central to the

scheme set out by Congress, and "[t]he primary fish and wildlife protection measures are intended to be established through the" Program. *NEDC 1997*, 117 F.3d at 1531. According to this Court, the Council's Program is the first of "two levels of consideration for fish and wildlife." *Id.* The second level is the equitable treatment provision, which may not be satisfied even by "complete adoption of the" Program. *Id.* at 1532.

BPA's reading of § 4(h)(11)(A) is difficult, if not impossible, to square with *NEDC 1997*. "Complete adoption of the Council's program" means adoption of non-operational as well as operational measures—indeed, the current Program is largely "an off-site mitigation (or 'enhancement') program." 3-ER-446. This Court's statement that equitable treatment requires at least full implementation of the Council's Program necessarily implies that BPA's implementation (through funding) of non-operational measures is part of providing "equitable treatment."

In addition, *NEDC 1997* noted that BPA had "exercised its [§ 4(h)(11)(A)(ii)] responsibility to take into account the Council's Program" by, among other things, "fund[ing] fish hatcheries," 117 F.3d at 1525–26. This is a clear indication that the Court considered § 4(h)(11)(A)(ii) to cover BPA's funding for non-operational mitigation measures.

Confederated Tribes is also hard to reconcile with BPA's view of § 4(h)(11)(A). In that case, this Court again considered BPA's compliance with the "equitable treatment" provision. *Confederated Tribes of the Umatilla Indian Reservation v. BPA*, 342 F.3d 924, 932–33 (9th Cir. 2003). The Court concluded that BPA had given a satisfactory explanation for how it was providing "equitable treatment." *Id.* Crucially, BPA argued, and the Court accepted, that BPA's "expenditures to support fish and wildlife measures, principally those in the ... Council's Fish and Wildlife Program," were part of the "equitable treatment" calculus. *Id.*

Although neither *NEDC 1997* nor *Confederated Tribes* resolved the question whether BPA's mitigation funding decisions are subject to § 4(h)(11)(A), those cases expressed an understanding of the provision that is consistent with Petitioners' reading and inconsistent with BPA's reading.

C. BPA's Interpretation of § 4(h)(11)(A) Does Not Deserve Deference.

As demonstrated above, when all the tools of statutory construction are brought to bear, the Northwest Power Act "unambiguously bars [BPA's] interpretation" of § 4(h)(11)(A). *Valenzuela Gallardo v. Lynch*, 818 F.3d 808, 815 (9th Cir. 2016). But even if the Court finds that the statute is ambiguous as to the question whether BPA's mitigation funding duties are

categorically outside § 4(h)(11)(A), the Court should not defer to BPA's interpretation under *Chevron*,[10] for four reasons: (1) BPA is not the only agency that administers § 4(h)(11)(A), so its interpretation lacks the force of law; (2) BPA's interpretation has been inconsistent; (3) BPA's interpretation is suspect because it furthers the agency's financial interests; and (4) BPA's explanation of its interpretation makes no sense.

1. *Because BPA Is Not the Only Agency That Administers § 4(h)(11)(A), Its Interpretation Cannot Receive* Chevron *Deference.*

BPA is not the only agency that implements § 4(h)(11)(A), so it lacks the authority to speak with "the force of law" as to that provision's scope and meaning. *See Proffitt v. FDIC*, 200 F.3d 855, 860 (D.C. Cir. 2000) ("When a statute is administered by more than one agency, a particular agency's interpretation is not entitled to *Chevron* deference."). "Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). But where

---

[10] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

more than one agency is tasked with carrying out a statute or statutory provision, "it cannot be said that Congress implicitly delegated to one agency authority to reconcile ambiguities or to fill gaps, because more than one agency will independently interpret the statute." *Salleh v. Christopher*, 85 F.3d 689, 692 (D.C. Cir. 1996).[11]

2. BPA Has Been Inconsistent in Its Interpretation of § 4(h)(11)(A).

A second reason that BPA's interpretation of § 4(h)(11)(A) should not receive deference is that BPA has failed to acknowledge the many times in the past when it adopted a different view of § 4(h)(11)(A). "[A]n 'unexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (quoting *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)) (alterations omitted). "An arbitrary and capricious

---

[11] A panel of this Court rejected this "multiple agencies" rule in *Navajo Nation v. U.S. Dep't of Health & Human Servs.*, 285 F.3d 864 (9th Cir. 2002). But that opinion was vacated and the case reheard en banc, and the en banc court did not address the "multiple agencies" rule. *See Navajo Nation v. U.S. Dep't of Health & Human Servs.*, 325 F.3d 1123 (9th Cir. 2003) (en banc).

[interpretation] of this sort is itself unlawful and receives no *Chevron* deference." *Id.*

In the mid-1990s, BPA prepared an environmental impact statement under the National Environmental Policy Act ("NEPA") in connection with a new business plan. 2-ER-202–12. In that statement, BPA considered six different alternatives for how it could run its business. 2-ER-206–12. In evaluating the effects of the various alternatives, BPA repeatedly discussed how an inability to generate enough revenue to fund fish and wildlife measures would negatively impact its ability to provide "equitable treatment" for fish and wildlife. *Id.* In its subsequent record of decision, BPA again discussed how its "ability to generate revenues to fund fish and wildlife measures" would necessarily affect its "ability to provide equitable treatment for fish and wildlife." 2-ER-216.

Later, BPA argued to this Court in both *NEDC 1997* and *Confederated Tribes* that it was providing equitable treatment for fish and wildlife through the Council's Fish and Wildlife Program. *See NEDC 1997*, 117 F.3d at 1533 ("BPA provides equitable treatment in a system-wide manner through the Council's Fish and Wildlife Program and through BPA's implementation of that program and other fish and wildlife measures BPA

elects to undertake.") (quoting the BPA decision at issue in the case); *Confederated Tribes*, 342 F.3d at 934 ("BPA ... stated that it was fulfilling the [equitable treatment] mandate through the Council's program, along with other programs, plans, and efforts."). BPA's primary role vis-à-vis the Program is to fund the Program's non-operational mitigation measures. Thus, when BPA told this Court that it was providing equitable treatment through the Council's Program, it necessarily meant that it was providing equitable treatment through funding of the Program's mitigation measures—a position at odds with the position it takes today.

Finally, in the 2000s, BPA justified decisions to enter into long-term mitigation funding agreements on the ground that doing so would help it meet its equitable treatment obligations. For instance, in 2009, BPA entered into a long-term agreement with the Corps, Reclamation, and the State of Washington to fund efforts to restore the Columbia River Estuary. 2-ER-217–24. BPA justified its decision to enter into the agreement in part on the idea that doing so would help "provide[] a higher level of *financial* and operational certainty for fish, further solidifying BPA's efforts to" satisfy the equitable treatment mandate. 2-ER-223–24; *see also* 2-ER-231–32 (similar language in Willamette wildlife mitigation decision).

On each of these occasions, BPA explicitly or implicitly recognized that its funding decisions implicate § 4(h)(11)(A). For instance, in its estuary and wildlife funding agreements, BPA understood that long-term commitments to spend money on mitigation measures would help provide "financial certainty" for fish and wildlife, contributing to equitable treatment. Under its current interpretation, on the other hand, BPA could announce an intent to reduce fish and wildlife mitigation spending to $0 without implicating "equitable treatment" at all.[12]

3. *BPA's Interpretation Is Suspect Because It Furthers the Agency's Financial Interests.*

A third reason to reject any claim to deference that BPA might make is that BPA's interpretation furthers its financial interests. "Where an agency interprets or administers a statute in a way that furthers its own administrative or financial interests, the agency interpretation must be

---

[12] BPA's inconsistent interpretation of § 4(h)(11)(A) is also a reason why that interpretation is not a persuasive one for purposes of *Skidmore* deference. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (listing factors that influence the weight given to an agency interpretation of the law, including the "consistency" of agency interpretation); *see also Bittner v. United States*, 598 U.S. 85, 97 n.5 (2023) ("[W]hen the government (or any litigant) speaks out of both sides of its mouth, no one should be surprised if its latest utterance isn't the most convincing one.").

subject to greater scrutiny to ensure that it is consistent with Congressional intent and the underlying purpose of the statute." *Amalgamated Sugar Co. LLC v. Vilsack*, 563 F.3d 822, 834 (9th Cir. 2009). Though agency self-interest does not necessarily undermine a claim to deference, "*Chevron* deference may be inappropriate where, as here, (1) the agency has a self-serving or pecuniary interest in advancing a particular interpretation of a statute, and (2) the construction advanced by the agency is *arguably* inconsistent with Congressional intent." *Id.* (emphasis added).

BPA's interpretation of § 4(h)(11)(A) has been a convenient one for the agency, because it has allowed BPA to engage in "flat funding" of fish and wildlife mitigation without having to justify that practice under the "equitable treatment" and "fullest extent practicable" mandates. *See supra* pp. 11–12, 14–18, 22–24 (describing BPA's recent history of flat funding). In light of that history of flat funding, the RDC decision is particularly hard to square with the "equitable treatment" mandate, as discussed in more detail below. But BPA's interpretation of § 4(h)(11)(A) excuses it from having to make that showing at all, because it excludes even the most consequential financial decisions from its scope. Again, under BPA's interpretation, it

could spend $0 on habitat restoration, predator management, etc. without violating the "equitable treatment" mandate.

BPA's interpretation of § 4(h)(11)(A) is, at the very least, *arguably* inconsistent with Congressional intent. That, coupled with the obvious financial incentive BPA has to interpret § 4(h)(11)(A) to exclude its mitigation funding decisions, should deprive it of any claim to *Chevron* deference, especially when considered in combination with the other three reasons discussed herein. *See Amalgamated Sugar Co.*, 563 F.3d at 834.

4. BPA's Explanation of Its Interpretation of § 4(h)(11)(A) Is Irrational.

Finally, BPA should not receive deference for its interpretation of § 4(h)(11)(A) because its explanation of its interpretation—which is contained in the BP-22 Record of Decision ("BP-22 ROD")—is muddied, factually inaccurate, and legally unsound. An agency does not receive *Chevron* deference for a statutory interpretation supported by an unreasonable explanation, even if that interpretation could conceivably be permissible. *Ariz. Alliance for Cmty. Health Ctrs. v. Ariz. Health Care Cost Containment Sys.*, 47 F.4th 992, 1003–04 (9th Cir. 2022).

Most glaringly, BPA's explanation in the BP-22 ROD purports to rely on the "express language" and "plain text" of the statute, 2-ER-238, but, by

BPA's own admission, the ROD "does not even attempt to define" the key terms "operating" and "managing," 2-ER-247. In other words, BPA has no idea what "managing" means—all it knows is that it (very conveniently) does not include BPA's mitigation funding duties. As discussed earlier, the "plain text" of the statute does not compel BPA's reading of § 4(h)(11)(A). *See supra* pp. 31–36.

Aside from the "plain text," BPA's reasoning in the BP-22 ROD appears to rest on three pillars: the relationship between § 4(h)(10)(A) and § 4(h)(11)(A); BPA's history of implementing the statute; and this Court's caselaw. None of those pillars actually supports BPA's conclusion. As discussed earlier, BPA has been inconsistent in its interpretation of § 4(h)(11)(A), *supra* pp. 47–50, and this Court's caselaw simply does not support BPA's interpretation, *supra* pp. 43–45.

As for the relationship between § 4(h)(10)(A) and § 4(h)(11)(A), BPA simply misreads the statute. BPA contends that § 4(h)(10)(A) is about funding, § 4(h)(11)(A) is about hydrosystem operations, and never the twain shall meet. 2-ER-238–40, 245–48. But this is wrong. Section 4(h)(10)(A) is *not* just about funding; it instructs BPA to use "the [BPA] fund *and the authorities available to [BPA] under this chapter and other laws*

administered by [BPA] to protect, mitigate, and enhance fish and wildlife." 16 U.S.C. § 839b(h)(10)(A) (emphasis added). Section 4(h)(10)(A) is the source of BPA's power to use all of its authorities, including its power marketing authority, to protect fish and wildlife.

What BPA fails to grasp is that § 4(h)(11)(A), unlike § 4(h)(10)(A), is not a power-granting provision, but rather a provision that directs agencies how to exercise their *existing* power. *Cf. Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 299 (5th Cir. 1998) (describing § 7(a)(2) of the Endangered Species Act as "a directive to agencies to channel their *existing* authority in a particular direction") (emphasis in original). Section 4(h)(10)(A) is the source of some of that existing power: it empowers BPA to use its spending authority, its power marketing authority, and all its other authorities "to protect, mitigate, and enhance fish and wildlife." Section 4(h)(11)(A) then requires BPA to exercise all its authorities in a manner that provides "equitable treatment" for fish and wildlife.[13]

---

[13] BPA's shoddy reasoning is another reason its interpretation of § 4(h)(11)(A) lacks persuasive power under *Skidmore*. *See Skidmore*, 323 U.S. at 140 (listing "the validity of [the agency's] reasoning" as one factor that determines the weight a court gives to an agency statutory interpretation).

In sum, § 4(h)(11)(A) should not be read to categorically exclude the implementation and funding of non-operational mitigation measures such as habitat restoration, fish screen installation and maintenance, and predator management, and BPA's contrary position deserves no deference.

II. The RDC Decision Triggered BPA's Duty to Demonstrate "Equitable Treatment," and BPA Failed to Do So.

Although BPA's mitigation funding decisions are not categorically excluded from the reach of § 4(h)(11)(A), it does not necessarily follow that *every* funding decision triggers BPA's duty to show "equitable treatment." Under this Court's caselaw, BPA needs to demonstrate equitable treatment "only when [it] makes a final decision that significantly impacts fish and wildlife." *Confederated Tribes*, 342 F.3d at 931. The FY2022 RDC decision was undoubtedly such a decision, and BPA failed to demonstrate equitable treatment.

A. The RDC Decision Significantly Impacts Fish and Wildlife, Triggering the Need to Demonstrate Equitable Treatment.

The RDC decision was plainly a decision "significantly impact[ing] fish and wildlife." The "significantly" limitation introduced by this Court in *Confederated Tribes* reflects the fact that § 4(h)(11)(A)(i) "does not require every BPA decision to treat fish and wildlife equitably." 342 F.3d at 931.

Rather, BPA must provide equitable treatment "on the whole." *Id.* Thus, BPA need not demonstrate equitable treatment every time it engages in a power marketing action or makes a decision about mitigation funding. But when BPA makes a "big" decision—one with potentially "significant" consequences for fish and wildlife—it must show that it is treating fish equitably on the whole. *See id.* ("BPA's duty to demonstrate compliance with the mandate matures only when BPA makes a final decision that significantly impacts fish and wildlife.").

By any measure, the FY2022 RDC decision was a "big" one. The amount of money at stake—$500 million—was twice as much as BPA spends annually on its entire "direct" fish and wildlife program. 2-ER-198. And the decision came after years of flat funding, compounded by a recent uptick in inflation, had forced project sponsors to cut corners and forgo project expansions. *See supra* pp. 14–18, 22–24 (describing complaints of project sponsors in recent years). Finally, unlike a decision about whether and how much to fund a particular mitigation project, the RDC decision had potential ramifications for a wide range of projects. For all these reasons, the FY2022 RDC decision was one with a "significant[] impact" on fish and wildlife.

In its response to comments on the RDC proposal, BPA resisted the conclusion that its decision would "significantly impact" fish and wildlife. 1-ER-46–48. BPA offered two arguments on this point. The first of these was a recapitulation of its argument that § 4(h)(11)(A) does not apply at all to mitigation funding decisions. *See* 1-ER-46. As discussed above, that argument is wrong.

BPA's second argument was that the "significance" of the RDC decision should not be measured in terms of what BPA *could* do for fish through the decision, because that would result in "virtually every financial decision BPA makes" triggering the "equitable treatment" duty. 1-ER-46–47. This is not true, for two reasons. First, it is not the case that "virtually every financial decision BPA makes" involves half a billion dollars. Half a billion dollars represents over 25% of BPA's annual program costs. 1-ER-159. It represents twice the amount that BPA spends on fish and wildlife mitigation each year. 2-ER-198. Wherever the line separating "significant" financial decisions from other decisions is located, it is below $500 million.

Second, the RDC decision afforded BPA significant discretion to spend money for fish and wildlife in a way that many financial decisions

do not. The examples offered by BPA illustrate this point. *See* 1-ER-47. For instance, if BPA is deciding "whether to purchase equipment now or later," *id.*, then it is deciding just that; forgoing the purchase of equipment completely and spending the money on fish is not an option. Such a decision does not "significantly affect" fish and wildlife because none of the available options significantly affects fish and wildlife. The RDC decision was different, because BPA left itself with the discretion to spend the RDC amount on rate relief *or* revenue financing *or* fish and wildlife. It could have, had it so chosen, spent the *entire* $500 million on fish and wildlife.

Contrary to BPA's argument, holding that the RDC decision "significantly impacts" fish and wildlife would not "paralyz[e] BPA's financial and business decisions." 1-ER-47. The vast majority of BPA's financial decisions will not trigger BPA's duty to demonstrate equitable treatment, either because they are not big enough, because they do not involve fish and wildlife at all, or both. But a decision about how to spend $500 million where BPA has discretion to spend that money on fish and wildlife is clearly one that "significantly impacts" fish and wildlife.

B. BPA Failed to Demonstrate Equitable Treatment.

Because the FY2022 RDC decision "significantly impacts" fish and wildlife, it triggered BPA's duty to demonstrate equitable treatment. *Confederated Tribes*, 342 F.3d at 931. The question is whether BPA gave "a reasoned explanation allowing for meaningful review" as to how it has been providing equitable treatment "on the whole." *Id.* at 931–32. For three separate reasons, BPA did not provide such an explanation.

First, BPA did not explain what equitable treatment even means in the context of non-operational mitigation. *See* 1-ER-45. This omission is not surprising, given BPA's position that equitable treatment does not apply in the context of such mitigation. But it makes "meaningful review" of BPA's compliance with the equitable treatment mandate difficult, to say the least—how can the Court tell whether BPA has demonstrated equitable treatment without knowing what BPA thinks equitable treatment means in the non-operational mitigation context?

This is not to suggest that BPA had to choose between advancing its primary legal position (*i.e.*, "equitable treatment doesn't apply to this decision at all") and attempting to demonstrate equitable treatment; agencies may offer alternative grounds for their decisions. *E.g.*, *BDPCS, Inc.*

v. FCC, 351 F.3d 1177, 1183 (D.C. Cir. 2003). But at least one of those grounds must be "valid" to sustain the decision. *Id.* Here, although BPA gestured at an alternative ground for its decision ("even if those statutory provisions applied," 1-ER-45) it did not provide "a reasoned explanation allowing for meaningful review" as to how its decision could be sustained on that ground.

Second, BPA did not explain how it is providing equitable treatment *on the whole*; its explanation, such as it is, is focused almost entirely on the RDC decision itself. *See* 1-ER-45. Any reasonable discussion of how BPA is providing equitable treatment "on the whole" in the mitigation funding context would have to grapple with the "flat funding" issue, but BPA ignores or downplays its recent history of flat funding and the struggles it has caused for mitigation project sponsors. *See* 1-ER-37–38. At one point, BPA even states—against a mountain of evidence to the contrary[14]—that there is no "gap in the adequacy of its existing mitigation compliance ... that needs to be solved for at this time." 1-ER-38. Because BPA did not

---

[14] *See supra* pp. 14–18, 22–24 (discussing complaints from mitigation project sponsors, including two states and six Native American tribes, about the amount of mitigation funding provided by BPA).

explain how it is providing equitable treatment *on the whole*, its explanation is deficient.

Finally, under any reasonable interpretation of § 4(h)(11)(A), BPA has not been providing equitable treatment for fish and wildlife "on the whole." For years, BPA has consistently put its own financial interests and the interests of its customers ahead of fish and wildlife mitigation. BPA actually *lowered* power rates for the BP-22 rate period while continuing to pursue its flat funding policy for fish and wildlife mitigation, a decision that, in light of inflation, meant significant rate relief for customers and funding shortfalls for fish and wildlife mitigation project sponsors. *See* 2-ER-234 (lowered rates for BP-22). BPA then had a record-setting year in terms of power revenue in fiscal year 2022, but elected to use 90% of the resulting $500 million for the benefit of itself and its customers. These decisions have led to a lower level of "financial certainty" for fish mitigation than for BPA's other statutory objectives. *See* 2-ER-223–24. In short, under any reasonable interpretation of "equitable treatment," BPA has treated fish inequitably.

BPA's halfhearted explanation for how it is providing "equitable treatment" in the mitigation funding context falls short. It does not even

explain what equitable treatment *is* in this context, and it either ignores or downplays the serious shortcomings in BPA's mitigation funding in recent years. And, even putting all that aside, it is clear from the record that BPA has not been providing equitable treatment for fish and wildlife, because it has consistently underfunded mitigation efforts.

III. BPA Failed to Take the Council's Program into Account "to the Fullest Extent Practicable" When Making the RDC Decision.

BPA's RDC decision violated the Northwest Power Act for a second reason: BPA failed to take the Council's Fish and Wildlife Program into account "to the fullest extent practicable" when making that decision.

A. The RDC Decision Triggered BPA's Duty to Take the Council's Program into Account "to the Fullest Extent Practicable."

Section 4(h)(11)(A)(ii) requires agencies to fully consider the Council's Program "at each relevant stage of decisionmaking processes." 16 U.S.C. § 839b(h)(11)(A)(ii). The Northwest Power Act does not define what a "relevant stage" is, but the term "relevant" is usually used to cast a wide net. *See EEOC v. Shell Oil Co.*, 466 U.S. 54, 68–69 (1984) (discussing the meaning of "relevant" in the context of EEOC investigations); *Sandoval v. Cnty. of San Diego*, 985 F.3d 657, 666 (9th Cir. 2021) (discussing the "low bar of relevance" under Rule 401 of the Federal Rules of Evidence). And this

Court has held that § 4(h)(11)(A)(ii)'s reference to "each" relevant stage "recogniz[es] there is more than one." *Nat'l Wildlife Fed'n v. FERC*, 801 F.2d 1505, 1514 (9th Cir. 1986).

Given its use of the terms "each" and "relevant," it seems apparent that Congress intended for BPA to take the Council's Program fully into account whenever making decisions with ramifications for Program implementation. For the same reasons that the RDC decision "significantly impacts" fish and wildlife, thus triggering BPA's duty to demonstrate equitable treatment, it was a "relevant stage" triggering BPA's duty to take the Council's Program into account to the fullest extent practicable. *See supra* pp. 55–58 (explaining why the RDC decision "significantly impacts" fish and wildlife). Notably, BPA did not even dispute this in its response to comments on the RDC proposal. *See* 1-ER-46–48 (contending that the RDC decision would not "significantly impact" fish and wildlife, but not disputing that the RDC decision was a "relevant stage").

B. BPA Did Not Take the Council's Program into Account "to the Fullest Extent Practicable" When Making the RDC Decision.

In its response to comments, BPA insisted that it had taken the Council's Program into account to the fullest extent practicable when

making its RDC decision. 1-ER-45–46. The record belies this. As early as September 2022—well before soliciting comments on the RDC proposal, and even before it was certain that the RDC would trigger—BPA was committed to the 70%/20%/10% allocation of the RDC amount. By predetermining the outcome of the RDC process, BPA made it impossible to comply with the procedural requirement of § 4(h)(11)(A)(ii).

As this Court has recognized in several different contexts, compliance with procedural requirements is incompatible with predetermination. In the context of the National Environmental Policy Act ("NEPA"), for instance, this Court has held that "[a]n agency predetermines the outcome of its analysis in violation of NEPA when it makes an irreversible and irretrievable commitment of resources before finishing its review." *City of Los Angeles v. FAA*, 63 F.4th 835, 848 (9th Cir. 2023) (cleaned up). Similarly, in the context of the Individuals with Disabilities Education Act, this Court has held that "[a] school district violates the [statute] if it predetermines placement for a student before" developing an individualized education program." *K.D. ex rel. C.L. v. Dep't of Educ., Haw.*, 665 F.3d 1110, 1123 (9th Cir. 2011). Procedural requirements are supposed to guide agency

decisionmaking, but such guidance is impossible when the agency has already made its decision.

Here, BPA committed to the 70%/20%/10% RDC allocation when it agreed in October 2022 to "propose and support adoption" of that allocation as part of its settlement agreement with customers. 2-ER-72; *see also* 1-ER-11–12. Because the proposed settlement was a package—the FY2022 RDC, the BP-24 rate case, and the Average System Cost Review Process—BPA could not change its mind about the RDC allocation without upsetting the other processes. As many of BPA's customers made clear in comments on the RDC proposal, they were supportive of the settlement as a *package*. *See* 1-ER-17 ("BPA acknowledges that its Power RDC proposal is being supported because it is part of a compromise ..."). Had BPA changed course and decided to devote, say, 50% of the RDC amount to fish and wildlife, it would have upset the compromise and invited challenges to both the RDC and the BP-24 rate proposal. *See* 2-ER-148 (comments from Central Lincoln PUD that "[c]hanging the terms of the settlement would be an inappropriate step and Central Lincoln would have to rescind support for the BP-24 ... settlement if changes were made"); 2-ER-136 (comments from the Public Power Council that "[i]t is essential for BPA to follow

through on its settlement proposal to maintain the faith and trust of their customers"); *see also* 2-ER-137–47 (comments from other customers and groups of customers).

Importantly, the Average System Cost Review Process (one of the components of the settlement package) had already concluded by the time the RDC was officially triggered. 1-ER-22. Thus, even though the settlement package was labeled a "proposal," by the time the comment period on the Power RDC opened, BPA and its customers had already acted in reliance on the overall settlement agreement. Changing course on the RDC proposal would have been "a breach of trust," as one customer put it. 2-ER-147. As a practical matter, then, BPA committed to the RDC allocation before it solicited comments from the general public.

Because BPA effectively predetermined the outcome of its RDC process before it even solicited comments from the general public, it necessarily failed to take the Council's Fish and Wildlife Program into

account "to the fullest extent practicable" when making its RDC decision, violating § 4(h)(11)(A)(ii) of the Northwest Power Act. [15]

IV. The Court Should Award Declaratory Relief to Ensure that BPA Follows the Law in Future Financial Decisions.

When a case is heard under the "capable of repetition, yet evading review" exception to mootness, declaratory relief is a proper remedy. *See, e.g.*, *Webster v. Mesa*, 521 F.2d 442, 443 (9th Cir. 1975) ("While the completion of the election makes injunctive relief moot, declaratory relief is still available. The question otherwise would be 'capable of repetition, yet evading review.'") (cleaned up). As then-Judge Ginsburg wrote, "[t]he atypical posture of requests to review short-term agency orders 'capable of repetition' mandates prospective declaratory relief in appropriate cases." *Am. Trading Transp. Co., Inc. v. United States*, 841 F.2d 421, 426 (D.C. Cir. 1988). "[T]he remedy ... is in the nature of a declaration that the action

---

[15] The settlement talks between BPA and its customers in August and September 2022 did not involve all relevant stakeholders. For instance, the Spokane Tribe only learned of the proposed settlement through third parties. 2-ER-88. Thus, even assuming that BPA had fully taken the Council's Program into account when developing the settlement—and there is no evidence that it did—the public comment period represented a new "relevant stage" for purposes of § 4(h)(11)(A)(ii). By that time, though, BPA's decision was effectively made.

taken was wrongful, in hopes that that will deter similar acts in the future." *Id.* (quoting *Golden Holiday Tours v. Civil Aeronautics Bd.*, 531 F.2d 624, 626 (D.C. Cir. 1976)).

This Court should declare that (1) BPA was required to demonstrate equitable treatment at the time it made its fiscal year 2022 RDC decision; (2) BPA failed to demonstrate equitable treatment; (3) BPA was required to take the Council's Fish and Wildlife Program into account "to the fullest extent practicable" when making its RDC decision; and (4) BPA failed to take the Council's Program into account to the fullest extent practicable. Such a declaration would deter BPA from ignoring its duties to fish and wildlife when making future RDC decisions, including a possible fiscal year 2024 RDC decision.

CONCLUSION

For the reasons given above, BPA violated § 4(h)(11)(A) of the Northwest Power Act in making its FY2022 RDC decision.

Date: March 15, 2024

Respectfully submitted,

/s/ Andrew R. Missel
Laurence ("Laird") J. Lucas
Andrew R. Missel
ADVOCATES FOR THE WEST
P.O. Box 1612
Boise, ID 83701
(208) 342-7024

Attorneys for Petitioners

STATEMENT OF RELATED CASES

The undersigned attorney is unaware of any related cases currently pending in this Court.

Date: March 15, 2024 */s/ Andrew R. Missel*

CERTIFICATE OF COMPLIANCE

I am the attorney for Petitioners.

This brief contains no more than 13,569 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: March 15, 2024 */s/ Andrew R. Missel*

[This page left intentionally blank per 9th Cir. R. 28-2.7]

ADDENDUM TABLE OF CONTENTS

16 U.S.C. § 839b(h)

(h) Fish and wildlife

(1)

(A) The Council shall promptly develop and adopt, pursuant to this subsection, a program to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, on the Columbia River and its trib-utaries. Because of the unique history, problems, and opportunities presented by the development and operation of hydroelectric facilities on the Columbia River and its tributaries, the program, to the greatest extent possible, shall be designed to deal with that river and its tributaries as a system.

(B) This subsection shall be applicable solely to fish and wildlife, including related spawning grounds and habitat, located on the Columbia River and its tributaries. Nothing in this subsection shall alter, modify, or affect in any way the laws applicable to rivers or river systems, including electric power facilities related thereto, other than the Columbia River and its tributaries, or affect the rights and obligations of any agency, entity, or person under such laws.

(2) The Council shall request, in writing, promptly after the Council is established under either subsection (a) or (b) of this section and prior to the development or review of the plan, or any major revision thereto, from the Federal, and the region's State, fish and wildlife agencies and from the region's appropriate Indian tribes, recommendations for—

(A) measures which can be expected to be implemented by the Administrator, using authorities under this chapter and other laws, and other Federal agencies to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by the development and operation of any hydroelectric project on the Columbia River and its tributaries;

(B) establishing objectives for the development and operation of such projects on the Columbia River and its tributaries in a manner designed to protect, mitigate, and enhance fish and wildlife; and

(C) fish and wildlife management coordination and research and development (including funding) which, among other things, will

assist protection, mitigation, and enhancement of anadromous fish at, and between, the region's hydroelectric dams.

(3) Such agencies and tribes shall have 90 days to respond to such request, unless the Council extends the time for making such recommendations. The Federal, and the region's, water management agencies, and the region's electric power producing agencies, customers, and public may submit recommendations of the type referred to in paragraph (2) of this subsection. All recommendations shall be accompanied by detailed information and data in support of the recommendations.

(4)

(A) The Council shall give notice of all recommendations and shall make the recommendations and supporting documents available to the Administrator, to the Federal, and the region's, State fish and wildlife agencies, to the appropriate Indian tribes, to Federal agencies responsible for managing, operating, or regulating hydroelectric facilities located on the Columbia River or its tributaries, and to any customer or other electric utility which owns or operates any such

facility. Notice shall also be given to the public. Copies of such recommendations and supporting documents shall be made available for review at the offices of the Council and shall be available for reproduction at reasonable cost.

(B) The Council shall provide for public participation and comment regarding the recommendations and supporting documents, including an opportunity for written and oral comments, within such reasonable time as the Council deems appropriate.

(5) The Council shall develop a program on the basis of such recommendations supporting documents, and views and information obtained through public comment and participation, and consultation with the agencies, tribes, and customers referred to in subparagraph (A) of paragraph (4). The program shall consist of measures to protect, mitigate, and enhance fish and wildlife affected by the development, operation, and management of such facilities while assuring the Pacific Northwest an adequate, efficient economical, and reliable power supply. Enhancement

measures shall be included in the program to the extent such measures are designed to achieve improved protection and mitigation.

(6) The Council shall include in the program measures which it determines, on the basis set forth in paragraph (5), will—

(A) complement the existing and future activities of the Federal and the region's State fish and wildlife agencies and appropriate Indian tribes;

(B) be based on, and supported by, the best available scientific knowledge;

(C) utilize, where equally effective alternative means of achieving the same sound biological objective exist, the alternative with the minimum economic cost;

(D) be consistent with the legal rights of appropriate Indian tribes in the region; and

(E) in the case of anadromous fish—

(i) provide for improved survival of such fish at hydroelectric facilities located on the Columbia River system; and

(ii) provide flows of sufficient quality and quantity between such facilities to improve production, migration, and survival of such fish as necessary to meet sound biological objectives.

(7) The Council shall determine whether each recommendation received is consistent with the purposes of this chapter. In the event such recommendations are inconsistent with each other, the Council, in consultation with appropriate entities, shall resolve such inconsistency in the program giving due weight to the recommendations, expertise, and legal rights and responsibilities of the Federal and the region's State fish and wildlife agencies and appropriate Indian tribes. If the Council does not adopt any recommendation of the fish and wildlife agencies and Indian tribes as part of the program or any other recommendation, it shall explain in writing, as part of the program, the basis for its finding that the adoption of such recommendation would be—

(A) inconsistent with paragraph (5) of this subsection;

(B) inconsistent with paragraph (6) of this subsection; or

(C) less effective than the adopted recommendations for the protection, mitigation, and enhancement of fish and wildlife.

(8) The Council shall consider, in developing and adopting a program pursuant to this subsection, the following principles:

(A) Enhancement measures may be used, in appropriate circumstances, as a means of achieving offsite protection and mitigation with respect to compensation for losses arising from the development and operation of the hydroelectric facilities of the Columbia River and its tributaries as a system.

(B) Consumers of electric power shall bear the cost of measures designed to deal with adverse impacts caused by the development and operation of electric power facilities and programs only.

(C) To the extent the program provides for coordination of its measures with additional measures (including additional enhancement measures to deal with impacts caused by factors other than the development and operation of electric power facilities and programs), such additional measures are to be implemented in accordance with agreements among the appropriate parties providing for the administration and funding of such additional measures.

(D) Monetary costs and electric power losses resulting from the implementation of the program shall be allocated by the Administrator consistent with individual project impacts and system wide objectives of this subsection.

(9) The Council shall adopt such program or amendments thereto within one year after the time provided for receipt of the recommendations. Such program shall also be included in the plan adopted by the Council under subsection (d).

(10)

(A) The Administrator shall use the Bonneville Power Administration 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 in a manner consistent with the plan, if in existence, the program adopted by the Council under this subsection, and the purposes of this chapter. Expenditures of the Administrator pursuant to this paragraph shall be in addition to, not in lieu of, other expenditures authorized or required from other entities under other agreements or provisions of law.

(B) The Administrator may make expenditures from such fund which shall be included in the annual or supplementary budgets submitted to the Congress pursuant to the Federal Columbia River Transmission System Act [16 U.S.C. 838 et seq.]. Any amounts included in such budget for the construction of capital facilities with an estimated life of greater than 15 years and an estimated cost of at

least $2,500,000 shall be funded in the same manner and in accordance with the same procedures as major transmission facilities under the Federal Columbia River Transmission System Act.

(C) The amounts expended by the Administrator for each activity pursuant to this subsection shall be allocated as appropriate by the Administrator, in consultation with the Corps of Engineers and the Water and Power Resources Service, among the various hydroelectric projects of the Federal Columbia River Power System. Amounts so allocated shall be allocated to the various project purposes in accordance with existing accounting procedures for the Federal Columbia River Power System.

(D) Independent Scientific Review Panel.—

(i) The Northwest Power Planning Council (Council) shall appoint an Independent Scientific Review Panel (Panel), which shall be comprised of eleven members, to review projects proposed to be funded through that portion of the Bonneville Power Administration's (BPA) annual fish and wildlife budget

that implements the Council's fish and wildlife program. Members shall be appointed from a list of no fewer than 20 scientists submitted by the National Academy of Sciences (Academy), provided that Pacific Northwest scientists with expertise in Columbia River anadromous and non-anadromous fish and wildlife and ocean experts shall be among those represented on the Panel. The Academy shall provide such nominations within 90 days of September 30, 1996, and in any case not later than December 31, 1996. If appointments are required in subsequent years, the Council shall request nominations from the Academy and the Academy shall provide nominations not later than 90 days after the date of this request. If the Academy does not provide nominations within these time requirements, the Council may appoint such members as the Council deems appropriate.

(ii) Scientific Peer Review Groups.—

The Council shall establish Scientific Peer Review Groups (Peer Review Groups), which shall be comprised of the appropriate

number of scientists, from a list submitted by the Academy to assist the Panel in making its recommendations to the Council for projects to be funded through BPA's annual fish and wildlife budget, provided that Pacific Northwest scientists with expertise in Columbia River anadromous and non-anadromous fish and wildlife and ocean experts shall be among those represented on the Peer Review Groups. The Academy shall provide such nominations within 90 days of September 30, 1996, and in any case not later than December 31, 1996. If appointments are required in subsequent years, the Council shall request nominations from the Academy and the Academy shall provide nominations not later than 90 days after the date of this request. If the Academy does not provide nominations within these time requirements, the Council may appoint such members as the Council deems appropriate.

(iii) Conflict of Interest and Compensation.—
Panel and Peer Review Group members may be compensated and shall be considered subject to the conflict of interest

standards that apply to scientists performing comparable work for the National Academy of Sciences; provided that a Panel or Peer Review Group members with a direct or indirect financial interest in a project, or projects, shall recuse himself or herself from review of, or recommendations associated with, such project or projects. All expenses of the Panel and the Peer Review Groups shall be paid by BPA as provided for under paragraph (vii). Neither the Panel nor the Peer Review Groups shall be deemed advisory committees within the meaning of chapter 10 of title 5.

(iv) Project Criteria and Review.—

The Peer Groups, in conjunction with the Panel, shall review projects proposed to be funded through BPA's annual fish and wildlife budget and make recommendations on matters related to such projects to the Council no later than June 15 of each year. If the recommendations are not received by the Council by this date, the Council may proceed to make final recommendations on project funding to BPA, relying on the

best information available. The Panel and Peer Review Groups shall review a sufficient number of projects to adequately ensure that the list of prioritized projects recommended is consistent with the Council's program. Project recommendations shall be based on a determination that projects: are based on sound science principles; benefit fish and wildlife; and have a clearly defined objective and outcome with provisions for monitoring and evaluation of results. The Panel, with assistance from the Peer Review Groups, shall review, on an annual basis, the results of prior year expenditures based upon these criteria and submit its findings to the Council for its review.

(v) Public Review.—

Upon completion of the review of projects to be funded through BPA's annual fish and wildlife budget, the Peer Review Groups shall submit its findings to the Panel. The Panel shall analyze the information submitted by the Peer Review Groups and submit recommendations on project priorities to

the Council. The Council shall make the Panel's findings available to the public and subject to public comment.

(vi) Responsibilities of the Council.—

The Council shall fully consider the recommendations of the Panel when making its final recommendations of projects to be funded through BPA's annual fish and wildlife budget, and if the Council does not incorporate a recommendation of the Panel, the Council shall explain in writing its reasons for not accepting Panel recommendations. In making its recommendations to BPA, the Council shall consider the impact of ocean conditions on fish and wildlife populations and shall determine whether the projects employ cost-effective measures to achieve program objectives. The Council, after consideration of the recommendations of the Panel and other appropriate entities, shall be responsible for making the final recommendations of projects to be funded through BPA's annual fish and wildlife budget.

(vii) Cost limitation.—

The annual cost of this provision shall not exceed $500,000 in 1997 dollars.

(11)

(A) The Administrator and other Federal agencies responsible for managing, operating, or regulating Federal or non-Federal hydroelectric facilities located on the Columbia River or its tributaries shall—

(i) exercise such responsibilities consistent with the purposes of this chapter and other applicable laws, to adequately protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by such projects or facilities in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed and operated;

(ii) exercise such responsibilities, taking into account at each relevant stage of decisionmaking processes to the fullest extent

practicable, the program adopted by the Council under this subsection. If, and to the extent that, such other Federal agencies as a result of such consideration impose upon any non-Federal electric power project measures to protect, mitigate, and enhance fish and wildlife which are not attributable to the development and operation of such project, then the resulting monetary costs and power losses (if any) shall be borne by the Administrator in accordance with this subsection.

(B) The Administrator and such Federal agencies shall consult with the Secretary of the Interior, the Administrator of the National Marine Fisheries Service, and the State fish and wildlife agencies of the region, appropriate Indian tribes, and affected project operators in carrying out the provisions of this paragraph and shall, to the greatest extent practicable, coordinate their actions.

(12)

(A) Beginning on October 1 of the first fiscal year after all members to the Council are appointed initially, the Council shall submit annually a detailed report to the Committee on Energy and Natural Resources of the Senate and to the Committees on Energy and Commerce and on Natural Resources of the House of Representatives. The report shall describe the actions taken and to be taken by the Council under this chapter, including this subsection, the effectiveness of the fish and wildlife program, and potential revisions or modifications to the program to be included in the plan when adopted. At least ninety days prior to its submission of such report, the Council shall make available to such fish and wildlife agencies, and tribes, the Administrator and the customers a draft of such report. The Council shall establish procedures for timely comments thereon. The Council shall include as an appendix to such report such comments or a summary thereof.

(B) The Administrator shall keep such committees fully and currently informed of the actions taken and to be taken by the Administrator under this chapter, including this subsection.