



Department of Energy

Bonneville Power Administration
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ENVIRONMENT, FISH AND WILDLIFE

February 4, 2002

In reply refer to: KEW-4

Mr. Doug Marker
Director, Fish and Wildlife Division
Northwest Power Planning Council
851 S.W. Sixth Avenue, suite 1100
Portland, OR 97204-1348

~~Dear Mr. Marker.~~ *Doug*

As we have discussed, Bonneville is planning to adopt an interim policy on funding mitigation activities on Federal lands. The policy is intended to apply to habitat improvement projects that Bonneville funds, on a cost-share basis, on lands under the jurisdiction of the U.S. Forest Service and the Bureau of Land Management. We are very interested in regional review of the proposed policy and would appreciate the assistance of the Northwest Power Planning Council in soliciting public comment and providing Bonneville their views on the content of the draft policy as it affects the Fish and Wildlife Program. We hope to be able to review comments and adopt a final policy by the end of March 2002.

Your assistance with this effort is greatly appreciated. Please contact me directly if you require any additional information.

Sincerely,

Sarah
Sarah R. McNary

Director for Fish and Wildlife

Enclosure

Draft Proposed Interim Policy for BPA Funding of Mitigation Activities on Federal Land

cc:

Mr. Larry Cassidy, Chairman, Northwest Power Planning Council
Ms. Linda Ulmer, U.S. Forest Service
Mr. Tim Burton, U. S. Bureau of Land Management
Ms. Jann Eckman, Acting Director, Columbia Basin Fish and Wildlife Authority

Draft Proposed Interim Policy for BPA Funding of Mitigation Activities on Federal Land

BPA has historically funded some mitigation activity on federal lands under the jurisdiction of the Department of Interior Bureau of Land Management (BLM) and the Department of Agriculture Forest Service (FS). Although work funded through the Fish and Wildlife Program on federal lands has generally been of good quality and under some form of cost-share relationship with the federal land management agency, past funding has not always considered the roles and responsibilities of the FS or BLM in developing and funding these projects. BPA now intends to clarify how and when we could participate in funding projects on federal lands. This draft policy sets forth proposed criteria to guide the Northwest Power Planning Council (Council) and resource managers when they propose, screen, and recommend projects for BPA funding. It is our intent that this policy be consistent with other BPA policies and statutory requirements, including those concerning augmentation of appropriations and in-lieu funding.

Background

BPA funds fish and wildlife habitat improvements that are consistent with the Council's Fish and Wildlife Program established under the Pacific Northwest Electric Power Planning and Conservation Act. The Act directs BPA "to protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation" of the Federal Columbia River Power System (FCRPS). 16 U.S.C. § 839b(h)(10)(A). BPA "expenditures ... shall be in addition to, not in lieu of, other expenditures authorized or required from other entities under other agreements or provisions of law." *Id.* Congress's intent is clear: "Consumers of electric power should bear only those costs attributable to electric power facilities and programs (but not the cost of measures designed to deal with impacts caused by other factors)." H.R. Rep. No. 96-976, Part II, at 45 (1980); 16 U.S.C. § 839b(h)(8)(B).

The in lieu prohibition, which typically applies to non-federal entities, is a Northwest Power Act corollary of the prohibition against augmentation of appropriations which applies to funding between federal agencies. Augmentation comes in three forms: 1) unauthorized transfer of appropriations, 2) use of appropriations for other than their authorized purpose, and 3) and augmentation of the receiving agency's appropriations. 2 Principles of Federal Appropriations Law at 6-156. "[S]pecific authority to incur the obligation in excess or advance of appropriations, not merely the general authority any agency has to enter into contracts to carry out its functions," is necessary to overcome the prohibition against augmentation. *Id.* at 6-153. When Congress appropriates funds for an activity, the appropriation represents limits Congress has fixed for that activity, and all expenditures must come from that appropriation absent express authority to the contrary. *See* 23 Comp. Gen. 694 (1944); 57 Comp. Gen. 662 (1978); 59 Comp. Gen. 415 (1980).

An exception to this prohibition is the Economy in Government Act. It allows federal agencies to contract with one another for goods and services when it is more economical and efficient than contracting commercially. 31 U.S.C. § 1535. To contract under the Economy Act, the provider agency, here the Forest Service or BLM, must not be authorized to perform the service

requested—i.e., mitigation for the FCRPS. In addition, the requested service cannot be a part of the provider agency's mission for which it has received appropriations. 31 U.S.C. § 1301; *see Matter of Merit Systems Protection Bd.*, 59 Comp. Gen. 415, 416 (1980). The requesting agency, here BPA, may use its appropriations—the BPA Fund—only for actions it has authority to execute.

BPA also has an obligation under the Endangered Species Act (ESA) to avoid jeopardizing fish and wildlife listed for protection under the act, to avoid the destruction or adverse modification of their critical habitat, and to aid in their recovery. BPA meets this responsibility by consulting under section 7 of the ESA on actions it takes that may adversely affect listed species or adversely modify critical habitat. In furtherance of ESA section 10, BPA contractors secure permits from the National Marine Fisheries Service (NMFS) or the U.S. Fish and Wildlife Service whenever off-site mitigation may involve take of a listed species.

In the NMFS 2000 FCRPS Biological Opinion (BiOp), NMFS agreed to credit BPA progress toward achievement of the offsite mitigation performance standards when BPA implements measures that provide biological benefits to the listed evolutionarily significant units of a species (ESUs). BiOp at 9-21. The NMFS draft “crediting paper” suggests that activities allowed by an existing section 4(d) limit, section 7 biological opinion, or section 10 take permit would not be credited against the action agencies’ responsibilities for off-site mitigation under the BiOp. The federal land management agencies are operating under two biops, PACFISH and INFISH. NMFS would not likely credit BPA under the FCRPS BiOp for cost-share activities on federal lands meant to comply with the ESA obligations of the FS or BLM.

The Federal Caucus’s document titled Conservation of Columbia Basin Fish (All-H Paper) (Dec. 2000) provides a template for nine federal agencies—including BPA, the FS, and BLM—to promote the avoidance of jeopardy and recovery of species listed under the ESA. In this policy paper, the Caucus communicated its expectation that federal land management agencies would assume the lead responsibility for implementing elements of the strategy on the lands within their respective jurisdictions. BPA’s efforts were to focus on non-federal lands where others do not have an enforceable responsibility. In a December 2000 Memorandum of Understanding, the Caucus member agencies all agreed to implement the commitments delineated in the All-H Paper. The nature and level of recent requests for BPA funding on federal lands raises concerns about the potential for funds, which should be directed to meeting BPA’s obligations under the BiOp, the Northwest Power Act, and the All-H Paper, being diffused or redirected to cover the ESA responsibilities of other federal agencies.

Underlying Principles For BPA Funding Projects on Federal Lands

1. Any action BPA funds on federal lands must be to meet BPA’s responsibilities under the Northwest Power Act and the ESA. BPA will not fund actions that fulfill the responsibilities of other persons or entities. This will avoid the prohibitions against augmentation of appropriations and in lieu funding. BPA may require documentation, and findings where appropriate, that any distribution of funds to another federal agency does not result in an improper augmentation of appropriations.

2. All projects BPA funds will be on a cost-share basis. Following a review of proposals submitted for work on FS lands under the BPA/Council High Priority Solicitation of November 13, 2000, BPA clarified that it will consider limited cost-share opportunities where the projected benefits of BPA funded past or ongoing actions may be compromised if actions are not taken on federal lands. BPA funds should not exceed 15% of the total FS or BLM Columbia Basin anadromous fish restoration program dollars in any fiscal year.
3. Projects selected for funding will be reviewed annually. Most projects will probably be a single year funding commitment or will sunset upon adoption of a subbasin plan. At that point, the full array of priorities within the subbasins can be determined and all funding sources will work together to address those priorities. Project proponents should not expect funding beyond initial funding levels.
4. BPA will review this policy when the Council has adopted all subbasin plans. This is a period of transition as we begin to implement the new Program, the All-H Plan, and the BiOps on the FCRPS. As the region develops subbasin plans, basin-wide mitigation responsibilities and priorities for BPA as well as for the federal land managers will be more clearly defined.
5. Given the interim nature of this policy, BPA will not at this time commit to operation and maintenance funding of cost-share projects on federal lands. Operation and maintenance funding provided by federal land managers is not eligible to be counted toward their cost share.
6. All projects implemented pursuant to this proposed policy must have first received a favorable review by the Independent Scientific Review Panel and be recommended by the Council for funding.
7. BPA will use its broad contracting authorities to fund its share of selected projects in the most cost effective manner. This may, at times, mean that BPA performs the necessary construction or habitat improvement work itself.

Criteria for BPA Funding Eligibility

BPA proposes the following interim criteria for projects on federal land.

- The project proposal must be linked directly to current or historically BPA-funded fish and wildlife projects, and the benefits of these past projects would be compromised if the proposal is not funded.
- A subbasin assessment and watershed analysis should already exist for the project area. The project is a high priority for furthering the goals of the assessment.
- The project proponents cite and interpret the provisions of law allowing the federal land agency to accept BPA funds, and they any provide any findings necessary to comply with such mandates.
- Proposals must include documentation of the linkage between the proposed project and spatially explicit and measurable benefits in one or more life stages of the target species. In addition, each proposal must meet at least one of the following:

- a) provide for the long-term conservation of high quality habitat through maintenance or restoration of underlying ecological/hydrological processes (i.e. low level investments to secure and conserve high quality habitat);
 - b) reconnect isolated high quality habitats or improve connections between high quality habitats;
 - c) test the effectiveness of mitigation measures or strategies through monitoring or evaluation which are consistent with and contribute to the NMFS or USFWS BiOps Research, Monitoring and Evaluation Plan;
 - d) measurably increase the likelihood of benefits to listed fish over what would occur with FS or BLM program funding alone;
 - e) restore critical habitat function to areas that limit the full expression of the salmonid life cycle (i.e. eliminates a passage barrier or restores the major spawning or rearing habitat of a stream where other habitat types are still intact);
or
 - f) restore hydrologic or geomorphic stability in stream reaches to maintain and protect downstream high quality habitat.
- Non-BPA funds should account for 50% or more of the costs for those portions of activities on federal land, with in-kind contributions not exceeding half of that.

Rating Criteria

Projects meeting the above criteria will receive priority based upon the following factors:

- The degree of integration with federal lands recovery goals (PACFISH/INFISH) for ESA listed aquatic and terrestrial species or ESUs.
- The degree of integration or linkage with the Program and subsequent Provincial Planning process.
- The project is in a high priority watershed identified in the NMFS 2000 FCRPS BiOp.
- The project is creditable to the ESA obligations of the FCRPS under the 2000 BiOp.
- Linkage of benefits with adjacent projects on non-federal lands.
- Strength of management relationship between federal land management agency and other project sponsors.