

UNITED STATES CODE ANNOTATED
TITLE 16. CONSERVATION
CHAPTER 12H--PACIFIC NORTHWEST ELECTRIC POWER PLANNING AND
CONSERVATION

Current through P.L. 106-274, approved 9-22-00

§ 839b. Regional planning and participation

(a) Pacific Northwest Electric Power and Conservation Planning Council; establishment and operation as regional agency

(1) The purposes of this section are to provide for the prompt establishment and effective operation of the Pacific Northwest Electric Power and Conservation Planning Council, to further the purposes of this chapter by the Council promptly preparing and adopting (A) a regional conservation and electric power plan and (B) a program to protect, mitigate, and enhance fish and wildlife, and to otherwise expeditiously and effectively carry out the Council's responsibilities and functions under this chapter.

(2) To achieve such purposes and facilitate cooperation among the States of Idaho, Montana, Oregon, and Washington, and with the Bonneville Power Administration, the consent of Congress is given for an agreement described in this paragraph and not in conflict with this chapter, pursuant to which--

(A) there shall be established a regional agency known as the "Pacific Northwest Electric Power and Conservation Planning Council" which (i) shall have its offices in the Pacific Northwest, (ii) shall carry out its functions and responsibilities in accordance with the provisions of this chapter, (iii) shall continue in force and effect in accordance with the provisions of this chapter, and (iv) except as otherwise provided in this chapter, shall not be considered an agency or instrumentality of the United States for the purpose of any Federal law; and

(B) two persons from each State may be appointed, subject to the applicable laws of each such State, to undertake the functions and duties of members of the Council.

The State may fill any vacancy occurring prior to the expiration of the term of any member. The appointment of six initial members, subject to applicable State law, by June 30, 1981, by at least three of such States shall constitute an agreement by the States establishing the Council and such agreement is hereby consented to by the Congress. Upon request of the Governors of two of the States, the Secretary shall extend the June 30, 1981, date for six additional months to provide more time for the States to make such appointments.

(3) Except as otherwise provided by State law, each member appointed to the Council shall serve for a term of three years, except that, with respect to members initially appointed, each Governor shall designate one member to serve a term of two years and one member to serve a term of three years. The members of the Council shall select from among themselves a chairman. The members and officers and employees of the Council shall not be deemed to be officers or employees of the United States for any purpose. The Council shall appoint, fix compensation, and assign and delegate duties to such executive and additional personnel as the Council deems necessary to fulfill its functions under this

chapter, taking into account such information and analyses as are, or are likely to be, available from other sources pursuant to provisions of this chapter. The compensation of the members shall be fixed by State law. The compensation of the members and officers shall not exceed the rate prescribed for Federal officers and positions at step 1 of level GS-18 of the General Schedule.

(4) For the purpose of providing a uniform system of laws, in addition to this chapter, applicable to the Council relating to the making of contracts, conflicts-of-interest, financial disclosure, open meetings of the Council, advisory committees, disclosure of information, judicial review of Council functions and actions under this chapter, and related matters, the Federal laws applicable to such matters in the case of the Bonneville Power Administration shall apply to the Council to the extent appropriate, except that with respect to open meetings, the Federal laws applicable to open meetings in the case of the Federal Energy Regulatory Commission shall apply to the Council to the extent appropriate. In applying the Federal laws applicable to financial disclosure under the preceding sentence, such laws shall be applied to members of the Council without regard to the duration of their service on the Council or the amount of compensation received for such service. No contract, obligation, or other action of the Council shall be construed as an obligation of the United States or an obligation secured by the full faith and credit of the United States. For the purpose of judicial review of any action of the Council or challenging any provision of this chapter relating to functions and responsibilities of the Council, notwithstanding any other provision of law, the courts of the United States shall have exclusive jurisdiction of any such review.

(b) Alternative establishment of Council as Federal agency

(1) If the Council is not established and its members are not timely appointed in accordance with subsection (a) of this section, or if, at any time after such Council is established and its members are appointed in accordance with subsection (a) of this section--

(A) any provision of this chapter relating to the establishment of the Council or to any substantial function or responsibility of the Council (including any function or responsibility under subsection (d) or (h) of this section or under section 839d(c) of this title) is held to be unlawful by a final determination of any Federal court, or

(B) the plan or any program adopted by such Council under this section is held by a final determination of such a court to be ineffective by reason of subsection (a) (2) (B) of this section,

the Secretary shall establish the Council pursuant to this subsection as a Federal agency. The Secretary shall promptly publish a notice thereof in the Federal Register and notify the Governors of each of the States referred to in subsection (a) of this section.

(2) As soon as practicable, but not more than thirty days after the publication of the notice referred to in paragraph (1) of this subsection, and thereafter within forty-five days after a vacancy occurs, the Governors of the States of Washington, Oregon, Idaho, and Montana may each (under applicable State laws, if any) provide to the Secretary a list of nominations from such State for each of the State's positions to be selected for such Council. The Secretary may extend this time an additional thirty days. The list shall include at least two persons for each such position. The list shall include such information about such nominees as the Secretary may request. The Secretary shall appoint the Council members from each Governor's list of nominations for each State's positions, except that the

Secretary may decline to appoint for any reason any of a Governor's nominees for a position and shall so notify the Governor. The Governor may thereafter make successive nominations within forty-five days of receipt of such notice until nominees acceptable to the Secretary are appointed for each position. In the event the Governor of any such State fails to make the required nominations for any State position on such Council within the time specified for such nominations, the Secretary shall select from such State and appoint the Council member or members for such position. The members of the Council shall select from among themselves one member of the Council as Chairman.

(3) The members of the Council established by this subsection who are not employed by the United States or a State shall receive compensation at a rate equal to the rate prescribed for offices and positions at level GS-18 of the General Schedule for each day such members are engaged in the actual performance of duties as members of such Council, except that no such member may be paid more in any calendar year than an officer or employee at step 1 of level GS-18 is paid during such year. Members of such Council shall be considered officers or employees of the United States for purposes of title II of the Ethics in Government Act of 1978 (5 U.S.C. app.) and shall also be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in Government service are allowed expenses under section 5703 of Title 5. Such Council may appoint, and assign duties to, an executive director who shall serve at the pleasure of such Council and who shall be compensated at the rate established for GS-18 of the General Schedule. The executive director shall exercise the powers and duties delegated to such director by such Council, including the power to appoint and fix compensation of additional personnel in accordance with applicable Federal law to carry out the functions and responsibilities of such Council.

(4) When a Council is established under this subsection after a Council was established pursuant to subsection (a) of this section, the Secretary shall provide, to the greatest extent feasible, for the transfer to the Council established by this subsection of all funds, books, papers, documents, equipment, and other matters in order to facilitate the Council's capability to achieve the requirements of subsections (d) and (h) of this section. In order to carry out its functions and responsibilities under this chapter expeditiously, the Council shall take into consideration any actions of the Council under subsection (a) of this section and may review, modify, or confirm such actions without further proceedings.

(5) (A) At any time beginning one year after the plan referred to in such subsection (d) of this section and the program referred to in such subsection (h) of this section are both finally adopted in accordance with this chapter, the Council established pursuant to this subsection shall be terminated by the Secretary 90 days after the Governors of three of the States referred to in this subsection jointly provide for any reason to the Secretary a written request for such termination. Except as provided in subparagraph (B), upon such termination all functions and responsibilities of the Council under this chapter shall also terminate.

(B) Upon such termination of the Council, the functions and responsibilities of the Council set forth in subsection (h) of this section shall be transferred to, and continue to be funded and carried out, jointly, by the Administrator, the Secretary of the Interior, and the Administrator of the National Marine Fisheries Service, in the same manner and to the same extent as required by such subsection and in cooperation with the Federal and the region's State fish and wildlife agencies and Indian tribes referred to in subsection (h) of this section and the Secretary shall provide for the transfer to them of all records, books, documents, funds, and personnel of such Council that relate to subsection (h) matters. In order to carry out such functions and responsibilities expeditiously, the Administrator, the Secretary of the

Interior, and the Administrator of the National Marine Fisheries Service shall take into consideration any actions of the Council under this subsection, and may review, modify, or confirm such actions without further proceedings. In the event the Council is terminated pursuant to this paragraph, whenever any action of the Administrator requires any approval or other action by the Council, the Administrator may take such action without such approval or action, except that the Administrator may not implement any proposal to acquire a major generating resource or to grant billing credits involving a major generating resource until the expenditure of funds for that purpose is specifically authorized by Act of Congress enacted after such termination.

(c) Organization and operation of Council

(1) The provisions of this subsection shall, except as specifically provided in this subsection, apply to the Council established pursuant to either subsection (a) or (b) of this section.

(2) A majority of the members of the Council shall constitute a quorum. Except as otherwise provided specifically in this chapter, all actions and decisions of the Council shall be by majority vote of the members present and voting. The plan or any part thereof and any amendment thereto shall not be approved unless such plan or amendment receives the votes of--

(A) a majority of the members appointed to the Council, including the vote of at least one member from each State with members on the Council; or

(B) at least six members of the Council.

(3) The Council shall meet at the call of the Chairman or upon the request of any three members of the Council. If any member of the Council disagrees with respect to any matter transmitted to any Federal or State official or any other person or wishes to express additional views concerning such matter, such member may submit a statement to accompany such matter setting forth the reasons for such disagreement or views.

(4) The Council shall determine its organization and prescribe its practices and procedures for carrying out its functions and responsibilities under this chapter. The Council shall make available to the public a statement of its organization, practices, and procedures, and make available to the public its annual work program budget at the time the President submits his annual budget to Congress.

(5) Upon request of the Council established pursuant to subsection (b) of this section, the head of any Federal agency is authorized to detail or assign to the Council, on a reimbursable basis, any of the personnel of such agency to assist the Council in the performance of its functions under this chapter.

(6) At the Council's request, the Administrator of the General Services Administration shall furnish the Council established pursuant to subsection (b) of this section with such offices, equipment, supplies, and services in the same manner and to the same extent as such Administrator is authorized to furnish to any other Federal agency or instrumentality such offices, supplies, equipment, and services.

(7) Upon the request of the Congress or any committee thereof, the Council shall promptly provide to the Congress, or to such committee, any record, report, document, material, and other information which is in the possession of the Council.

(8) To obtain such information and advice as the Council determines to be necessary or appropriate to carry out its functions and responsibilities pursuant to this chapter, the Council shall, to the greatest extent practicable, solicit engineering, economic, social, environmental, and other technical studies from customers of the Administrator and from other bodies or organizations in the region with particular expertise.

(9) The Administrator and other Federal agencies, to the extent authorized by other provisions of law, shall furnish the Council all information requested by the Council as necessary for performance of its functions, subject to such requirements of law concerning trade secrets and proprietary data as may be applicable.

(10) (A) At the request of the Council, the Administrator shall pay from funds available to the Administrator the compensation and other expenses of the Council as are authorized by this chapter, including the reimbursement of those States with members on the Council for services and personnel to assist in preparing a plan pursuant to subsection (d) of this section and a program pursuant to subsection (h) of this section, as the Council determines are necessary or appropriate for the performance of its functions and responsibilities. Such payments shall be included by the Administrator in his annual budgets submitted to Congress pursuant to the Federal Columbia River Transmission System Act [16 U.S.C.A. § 838 et seq.] and shall be subject to the requirements of that Act, including the audit requirements of section 11(d) of such Act [16 U.S.C.A. § 838i(d)]. The records, reports, and other documents of the Council shall be available to the Comptroller General for review in connection with such audit or other review and examination by the Comptroller General pursuant to other provisions of law applicable to the Comptroller General. Funds provided by the Administrator for such payments shall not exceed annually an amount equal to 0.02 mill multiplied by the kilowatt hours of firm power forecast to be sold by the Administrator during the year to be funded. In order to assist the Council's initial organization, the Administrator after December 5, 1980 shall promptly prepare and propose an amended annual budget to expedite payment for Council activities.

(B) Notwithstanding the limitation contained in the fourth sentence of subparagraph (A) of this paragraph, upon an annual showing by the Council that such limitation will not permit the Council to carry out its functions and responsibilities under this chapter the Administrator may raise such limit up to any amount not in excess of 0.10 mill multiplied by the kilowatt hours of firm power forecast to be sold by the Administrator during the year to be funded.

(11) The Council shall establish a voluntary scientific and statistical advisory committee to assist in the development, collection, and evaluation of such statistical, biological, economic, social, environmental, and other scientific information as is relevant to the Council's development and amendment of a regional conservation and electric power plan.

(12) The Council may establish such other voluntary advisory committees as it determines are necessary or appropriate to assist it in carrying out its functions and responsibilities under this chapter.

(13) The Council shall ensure that the membership for any advisory committee established or formed pursuant to this section shall, to the extent feasible, include representatives of, and seek the advice of, the Federal, and the various regional, State, local, and Indian Tribal Governments, consumer groups, and customers.

(d) Regional conservation and electric power plan

(1) Within two years after the Council is established and the members are appointed pursuant to subsection (a) or (b) of this section, the Council shall prepare, adopt, and promptly transmit to the Administrator a regional conservation and electric power plan. The adopted plan, or any portion thereof, may be amended from time to time, and shall be reviewed by the Council not less frequently than once every five years. Prior to such adoption, public hearings shall be held in each Council member's State on the plan or substantial, nontechnical amendments to the plan proposed by the Council for adoption. A public hearing shall also be held in any other State of the region on the plan or amendments thereto, if the Council determines that the plan or amendments would likely have a substantial impact on that State in terms of major resources which may be developed in that State and which the Administrator may seek to acquire. Action of the Council under this subsection concerning such hearings shall be subject to section 553 of Title 5 and such procedure as the Council shall adopt.

(2) Following adoption of the plan and any amendment thereto, all actions of the Administrator pursuant to section 839d of this title shall be consistent with the plan and any amendment thereto, except as otherwise specifically provided in this chapter.

(e) Plan priorities and requisite features; studies

(1) The plan shall, as provided in this paragraph, give priority to resources which the Council determines to be cost-effective. Priority shall be given: first, to conservation; second, to renewable resources; third, to generating resources utilizing waste heat or generating resources of high fuel conversion efficiency; and fourth, to all other resources.

(2) The plan shall set forth a general scheme for implementing conservation measures and developing resources pursuant to section 839d of this title to reduce or meet the Administrator's obligations with due consideration by the Council for (A) environmental quality, (B) compatibility with the existing regional power system, (C) protection, mitigation, and enhancement of fish and wildlife and related spawning grounds and habitat, including sufficient quantities and qualities of flows for successful migration, survival, and propagation of anadromous fish, and (D) other criteria which may be set forth in the plan.

(3) To accomplish the priorities established by this subsection, the plan shall include the following elements which shall be set forth in such detail as the Council determines to be appropriate:

(A) an energy conservation program to be implemented under this chapter, including, but not limited to, model conservation standards;

(B) recommendation for research and development;

(C) a methodology for determining quantifiable environmental costs and benefits under section 839a(4) of this title;

(D) a demand forecast of at least twenty years (developed in consultation with the Administrator, the customers, the States, including State agencies with ratemaking authority over electric utilities, and the

public, in such manner as the Council deems appropriate) and a forecast of power resources estimated by the Council to be required to meet the Administrator's obligations and the portion of such obligations the Council determines can be met by resources in each of the priority categories referred to in paragraph (1) of this subsection which forecast (i) shall include regional reliability and reserve requirements, (ii) shall take into account the effect, if any, of the requirements of subsection (h) of this section on the availability of resources to the Administrator, and (iii) shall include the approximate amounts of power the Council recommends should be acquired by the Administrator on a long-term basis and may include, to the extent practicable, an estimate of the types of resources from which such power should be acquired;

(E) an analysis of reserve and reliability requirements and cost-effective methods of providing reserves designed to insure adequate electric power at the lowest probable cost;

(F) the program adopted pursuant to subsection (h) of this section; and

(G) if the Council recommends surcharges pursuant to subsection (f) of this section, a methodology for calculating such surcharges.

(4) The Council, taking into consideration the requirement that it devote its principal efforts to carrying out its responsibilities under subsections (d) and (h) of this section, shall undertake studies of conservation measures reasonably available to direct service industrial customers and other major consumers of electric power within the region and make an analysis of the estimated reduction in energy use which would result from the implementation of such measures as rapidly as possible, consistent with sound business practices. The Council shall consult with such customers and consumers in the conduct of such studies.

(f) Model conservation standards; surcharges

(1) Model conservation standards to be included in the plan shall include, but not be limited to, standards applicable to (A) new and existing structures, (B) utility, customer, and governmental conservation programs, and (C) other consumer actions for achieving conservation. Model conservation standards shall reflect geographic and climatic differences within the region and other appropriate considerations, and shall be designed to produce all power savings that are cost-effective for the region and economically feasible for consumers, taking into account financial assistance made available to consumers under section 839d(a) of this title. These model conservation standards shall be adopted by the Council and included in the plan after consultation, in such manner as the Council deems appropriate, with the Administrator, States, and political subdivisions, customers of the Administrator, and the public.

(2) The Council by a majority vote of the members of the Council is authorized to recommend to the Administrator a surcharge and the Administrator may thereafter impose such a surcharge, in accordance with the methodology provided in the plan, on customers for those portions of their loads within the region that are within States or political subdivisions which have not, or on the Administrator's customers which have not, implemented conservation measures that achieve energy savings which the Administrator determines are comparable to those which would be obtained under such standards. Such surcharges shall be established to recover such additional costs as the Administrator determines will be incurred because such projected energy savings attributable to such

conservation measures have not been achieved, but in no case may such surcharges be less than 10 per centum or more than 50 per centum of the Administrator's applicable rates for such load or portion thereof.

(g) Public information; consultation; contracts and technical assistance

(1) To insure widespread public involvement in the formulation of regional power policies, the Council and Administrator shall maintain comprehensive programs to--

(A) inform the Pacific Northwest public of major regional power issues,

(B) obtain public views concerning major regional power issues, and

(C) secure advice and consultation from the Administrator's customers and others.

(2) In carrying out the provisions of this section, the Council and the Administrator shall--

(A) consult with the Administrator's customers;

(B) include the comments of such customers in the record of the Council's proceedings; and

(C) recognize and not abridge the authorities of State and local governments, electric utility systems, and other non-Federal entities responsible to the people of the Pacific Northwest for the planning, conservation, supply, distribution, and use of electric power and the operation of electric generating facilities.

(3) In the preparation, adoption, and implementation of the plan, the Council and the Administrator shall encourage the cooperation, participation, and assistance of appropriate Federal agencies, State entities, State political subdivisions, and Indian tribes. The Council and the Administrator are authorized to contract, in accordance with applicable law, with such agencies, entities, tribes, and subdivisions individually, in groups, or through associations thereof to (A) investigate possible measures to be included in the plan, (B) provide public involvement and information regarding a proposed plan or amendment thereto, and (C) provide services which will assist in the implementation of the plan. In order to assist in the implementation of the plan, particularly conservation, renewable resource, and fish and wildlife activities, the Administrator, when requested and subject to available funds, may provide technical assistance in establishing conservation, renewable resource, and fish and wildlife objectives by individual States or subdivisions thereof or Indian tribes. Such objectives, if adopted by a State or subdivision thereof or Indian tribes, may be submitted to the Council and the Administrator for review, and upon approval by the Council, may be incorporated as part of the plan.

(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 tributaries. 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 systemwide 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) of this section.

(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.A. § 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 \$1,000,000 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 the Federal Advisory Committee Act [5 U.S.C.A. App. 2].

(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.

(i) Review

The Council may from time to time review the actions of the Administrator pursuant to this section and section 839d of this title to determine whether such actions are consistent with the plan and programs, the extent to which the plan and programs is [FN1] being implemented, and to assist the Council in preparing amendments to the plan and programs.

(j) Requests by Council for action

(1) The Council may request the Administrator to take an action under section 839d of this title to carry out the Administrator's responsibilities under the plan.

(2) To the greatest extent practicable within ninety days after the Council's request, the Administrator shall respond to the Council in writing specifying--

(A) the means by which the Administrator will undertake the action or any modification thereof requested by the Council, or

(B) the reasons why such action would not be consistent with the plan, or with the Administrator's legal obligations under this chapter, or other provisions of law, which the Administrator shall specifically identify.

(3) If the Administrator determines not to undertake the requested action, the Council, within sixty days after notice of the Administrator's determination, may request the Administrator to hold an informal hearing and make a final decision.

(k) Review and analysis of 5-year period of Council activities

(1) Not later than October 1, 1987, or six years after the Council is established under this chapter, whichever is later, the Council shall complete a thorough analysis of conservation measures and conservation resources implemented pursuant to this chapter during the five-year period beginning on the date the Council is established under this chapter to determine if such measures or resources:

(A) have resulted or are likely to result in costs to consumers in the region greater than the costs of additional generating resources or additional fuel which the Council determines would be necessary in the absence of such measures or resources;

(B) have not been or are likely not to be generally equitable to all consumers in the region; or

(C) have impaired or are likely to impair the ability of the Administrator to carry out his obligations under this chapter and other laws, consistent with sound business practices.

(2) The Administrator may determine that section 839a(4) (D) of this title shall not apply to any proposed conservation measure or resource if the Administrator finds after receipt of such analysis from the Council that such measure or resource would have any result or effect described in subparagraph (A), (B) or (C) of paragraph (1).

CREDIT(S)

2000 Main Volume

(Pub.L. 96-501, § 4, Dec. 5, 1980, 94 Stat. 2700; H.Res. 549, Mar. 25, 1980; Pub.L. 103-437, § 6(u), Nov. 2, 1994, 108 Stat. 4587; Pub.L. 104-206, Title V, § 512, Sept. 30, 1996, 110 Stat. 3005; Pub.L. 106-60, Title VI, § 610, Sept. 29, 1999, 113 Stat. 502.)

[FN1] So in original. Probably should be "are".

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1980 Acts. House Report No. 96-976(Parts I and II), see 1980 U.S. Code Cong. and Adm. News, p. 5989.

1994 Acts. House Report No. 103-779, see 1994 U.S. Code Cong. and Adm. News, p. 3639.

1999 Acts. Statement by President, see 1999 U.S. Code Cong. and Adm. News, p. 93.

References in Text

This chapter, referred to in subsecs. (a), (b)(1)(A), (4), (5)(A), (c)(2), (4), (5), (8), (10), (12), (d)(2), (e)(3)(A), (h)(2)(A), (7), (10)(A), (11)(A)(i), (12), (j)(2)(B), and (k)(1), read in the original "this Act", meaning Pub.L. 96-501, Dec. 5, 1980, 94 Stat. 2697, known as the Pacific Northwest Electric Power Planning and Conservation Act, which enacted this chapter, amended sections 837, 838i, and 838k of this title, and enacted provisions set out as notes under this section. For complete classification of this Act to the Code, see Short Title note set out under section 839 of this title and Tables volume.

GS-18 of the General Schedule, referred to in subsecs. (a) (3) and (b) (3), is set out under section 5332

of Title 5, Government Organization and Employees.

The Ethics in Government Act of 1978, referred to in subsec. (b)(3), is Pub.L. 95-521, Oct. 26, 1978, 92 Stat. 1824, as amended. Title II of the Ethics in Government Act of 1978 is set out under the heading "Executive Personnel Financial Disclosure Requirements" in the Appendix to Title 5, Government Organization and Employees. For complete classification of this Act to the Code, see Short Title note set out under section 701 of Title 2, The Congress, and Tables volume.

The Federal Columbia River Transmission System Act, referred to in subsecs. (c)(10)(A) and (h)(10)(B), is Pub.L. 93-454, Oct. 18, 1974, 88 Stat. 1376, as amended, which is classified generally to chapter 12G (section 838 et seq.) of this title. Section 11(d) of that Act is classified to section 838i(d) of this title. For complete classification of this Act to the Code, see Short Title note set out under section 838 of this title and Tables volume.

The Federal Advisory Committee Act, referred to in subsec. (h)(10)(D)(iii), is Pub.L. 92-463, Oct. 6, 1972, 86 Stat. 770, as amended, which is classified to sections 1 to 15 of Appendix 2 of Title 5, Government Organization and Employees.

Codifications

Amendment to subsec. (h)(12)(A) by Pub.L. 103-437, § 6(u), which directed the substitution of "Committees on Energy and Commerce and on Natural Resources" for "Committees on Interstate and Foreign Commerce and on Interior and Insular Affairs", was executed by substituting "Committees on Energy and Commerce and on Natural Resources" for "Committees on Energy and Commerce and on Interior and Insular Affairs", as the probable intent of Congress.

Amendments

1999 Amendments. Subsec. (h)(10)(D)(vii), (viii). Pub.L. 106-60, § 610, rewrote cl. (vii) which formerly read: "The cost of this provision shall not exceed \$2,000,000 in 1997 dollars."; and struck out cl. (viii) which formerly read:

"(viii) Expiration

"This paragraph shall expire on September 30, 2000."

1996 Amendments. Subsec. (h)(10)(D). Pub.L. 104-206, § 512, added subpar. (D).

1994 Amendments. Subsec. (h)(12)(A). Pub.L. 103-437, § 6(u), substituted reference to Committee on Natural Resources of the House of Representatives, for reference to Committee of Interior and Insular Affairs of the House of Representatives. See Codification note set out under this section.

Effective and Applicability Provisions

1980 Acts. Section effective Dec. 5, 1980, see section 11 of Pub.L. 96-501, set out as an Effective Date note under section 839 of this title.

Change of Name

Any reference in any provision of law enacted before Jan. 4, 1995, to the Committee on Energy and Commerce of the House of Representatives treated as referring to the Committee on Commerce of the House of Representatives, except that any reference in any provision of law enacted before Jan. 4, 1995, to the Committee on Energy and Commerce of the House of Representatives treated as referring to the Committee on Agriculture of the House of Representatives, in the case of a provision of law relating to inspection of seafood or seafood products, the Committee on Banking and Financial Services of the House of Representatives, in the case of a provision of law relating to bank capital markets activities generally or to depository institution securities activities generally, and the Committee on Transportation and Infrastructure of the House of Representatives, in the case of a provision of law relating to railroads, railway labor, or railroad retirement and unemployment (except revenue measures related thereto), see section 1(a)(4) and (c)(1) of Pub.L. 104-14, set out as a note preceding section 21 of Title 2, The Congress.

Committee on Interior and Insular Affairs of the House of Representatives changed to Committee on Natural Resources of the House of Representatives on Jan. 5, 1993, by House Resolution No. 5, one Hundred Third Congress.

Any reference in any provision of law enacted before Jan. 4, 1995, to the Committee on Natural Resources of the House of Representatives treated as referring to the Committee on Resources of the House of Representatives, see section 1(a)(8) of Pub.L. 104-14, set out as a note preceding section 21 of Title 2, The Congress.

The name of the Committee on Interstate and Foreign Commerce of the House of Representatives was changed to Committee on Energy and Commerce immediately prior to noon on Jan. 3, 1981, by House Resolution 549, Ninety-sixth Congress, Mar. 25, 1980.

Operation and Maintenance of Fish Passage Facilities within Yakima River Basin; Funding

Pub.L. 98-381, Title I, § 109, Aug. 17, 1984, 98 Stat. 1340, provided that: "The Secretary of the Interior, acting pursuant to Federal reclamation law (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof and supplementary thereto) [chapter 12 (§ 371 et seq.) of Title 43, Public Lands] and in accordance with the Pacific Northwest Electric Power Planning and Conservation Act (94 Stat. 2697) [see Short Title note set out under section 839 of this title] is authorized to design, construct, operate, and maintain fish passage facilities within the Yakima River Basin, and to accept funds from any entity, public or private, to design, construct, operate, and maintain such facilities."

CROSS REFERENCES

Adjustment of power rates to include surcharges, see 16 USCA § 839e.

Adoption of plan or amendments by Council as final action subject to judicial review, see 16 USCA § 839f.

Conservation and resource acquisition, see 16 USCA § 839d.

"Council" defined, see 16 USCA § 839a.

Purchase and exchange sales of power, replacement of power sold subject to this section, see 16 USCA § 839c.

Purchase of electric power from Bonneville Power Administration fund on short term basis to meet Administrator's obligations under subsec. (h) of this section, see 16 USCA § 838i.

Separability of provisions, see 16 USCA § 839h.

LIBRARY REFERENCES

American Digest System

Electricity k1, 9(1), 11(1).

Key Number System Topic No. 145.

United States k35, 40, 41, 63.

Key Number System Topic No. 393.

Encyclopedias

Electricity, see C.J.S. §§ 1, 5, 16, 24, 28.

United States, see C.J.S. §§ 35, 37 to 41, 62 to 64, 85.

Law Review and Journal Commentaries

Constitutionality of binational panel review in Canada-U.S. free trade agreement. Gordon A. Christenson and Kimberly Gambrel, 23 Int'l Law. 401 (1989).

Northwest Power Act's institutional innovations and unfulfilled promises. Michael C. Blumm, 2 J.Env'tl.L. & Litig. 165 (1987).

NOTES OF DECISIONS

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1. Environmental impact statement

Given Bonneville Power Administration's statutory duty both to conserve energy use and to preserve fish and wildlife, Power

Administration's failure to prepare environmental impact statement demonstrating that agency had considered all significant alternatives in connection with its offers of long-term contracts for power delivery pursuant to this chapter violated both the National Environmental Policy Act, section 4321 et seq. of Title 42, and the Administrative Procedures Act, sections 551 et seq. and 701 et seq. of Title 5. *Forelows on Board v. Johnson*, C.A.9 1984, 743 F.2d 677, certiorari denied 106 S.Ct. 3293, 478 U.S. 1004, 92 L.Ed.2d 709.

2. Site banking

Northwest conservation and electric power plan, which was promulgated pursuant to 16 U.S.C.A. § 839b(d), does not advocate banking of sites by individual utilities, but rather, proposes banking of projects that have been selected by power planning council and Bonneville power authority as potentially needed by authority to serve regional needs. *Idaho Power Co. v. F.E.R.C.*, C.A.9 1985, 767 F.2d 1359.

3. Forecasts

Decision of Pacific Northwest Electric Power and Conservation Planning Council to use four separate, 20-year forecasts of electric demands, each with separate resource needs, and to define as cost effective any conservation measure with marginal costs less than four cents/kwh in current dollars based on finding that last resource to be acquired under high-growth forecast would be coal generating plant capable of producing electricity at cost of slightly over four cents per kilowatt hour was not unreasonable response to Council's statutory directive [16 U.S.C.A. § 839b(e)(3)(A), (f)(1)]. *Seattle Master Builders Ass'n v. Pacific Northwest Elec. Power and Conservation Planning Council*, C.A.9 1986, 786 F.2d 1359, certiorari denied 107 S.Ct. 939, 479 U.S. 1059, 93 L.Ed.2d 989.

4. Fish and wildlife--Generally

Northwest Power Act did not require Department of Energy (DOE), through Bonneville Power Administration (BPA), to dedicate portion of water for fish when it entered into agreements with Canada and several electric utilities governing rights to water stored behind hydroelectric dams on Columbia River system in Canada; vast majority of BPA's share of storage capacity was unallocated, and BPA could well decide that its responsibilities to provide equitable treatment would require it to use reasonable portion of that water for benefit of fish. *Northwest Environmental Defense Center v. Bonneville Power Admin.*, C.A.9 1997, 117 F.3d 1520.

Pacific Northwest Electric Power and Conservation Planning Council's final amendments to Columbia River Basin Fish and Wildlife Program failed to incorporate sound biological objectives contemplated by Northwest Power Act, despite council's claim that program's salmon population doubling goal, rebuilding targets, and performance measures demonstrated adoption of sound biological objectives; doubling goal, which set no firm deadline, was untelling policy statement, and none of those framework elements appeared to have guided council in evaluating alternative recommendations and measures, rather than in conveying and estimating effectiveness of measures already adopted. *Northwest Resource Information Center, Inc. v. Northwest Power Planning Council*, C.A.9 1994, 35 F.3d 1371, certiorari denied 116 S.Ct. 50, 516 U.S. 806, 133 L.Ed.2d 15.

Bonneville Power Administration (BPA) erred in its final policy dealing with compensation claims under the Pacific Northwest Electric Power Planning and Conservation Act (PNEPPCA) when it decided that only those measures to protect, mitigate, and enhance fish and wildlife specifically described in the

Columbia River Basin Fish and Wildlife Program are compensable; statute does not limit compensable measures to those measures mentioned specifically in the program, and requires only that a measure be something that results from federal agency taking the program into consideration at each relevant stage of decision-making process, in exercising its responsibilities consistent with the Act and other applicable law. Public Utility Dist. No. 1 of Douglas County v. Bonneville Power Admin., C.A.9 1991, 947 F.2d 386, certiorari denied 112 S.Ct. 1759, 503 U.S. 1004, 118 L.Ed.2d 422.

Provision of Northwest Power Act requiring consideration of the Northwest Power Planning Council's Columbia River Basin Fish Wildlife Program at "each relevant stage" of the licensing process applied solely to fish and wildlife located on the Columbia River and its tributaries and therefore was inapplicable to determining the validity of the Federal Energy Regulatory Commission's issuance of preliminary permits for hydroelectric projects in the Snohomish River Basin. Washington State Dept. of Fisheries v. F.E.R.C., C.A.9 1986, 801 F.2d 1516.

Under Northwest Power Act, Federal Energy Regulatory Commission was required to consider fish and wildlife program promulgated by Northwest Power Planning Council before issuing preliminary permits for particular hydroelectric power projects along the Salmon River. National Wildlife Federation v. F.E.R.C., C.A.9 1986, 801 F.2d 1505.

5. ---- Losses and costs, fish and wildlife

With regard to section of the Pacific Northwest Electric Power Planning and Conservation Act (PNEPPCA) entitling nonfederal electric power projects on the Columbia River and its tributaries to compensation for monetary costs and power losses resulting from measures to protect fish and wildlife which are imposed on

the projects by federal agencies, Bonneville Power Administration's interpretation of the term "impose" to include only affirmative action required of utilities by federal agencies is consistent with language of the statute, and is therefore reasonable; thus, phrase does not include within its ambit actions which impose upon nonfederal projects passive burdens such as the release of additional water. Public Utility Dist. No. 1 of Douglas County v. Bonneville Power Admin., C.A.9 1991, 947 F.2d 386, certiorari denied 112 S.Ct. 1759, 503 U.S. 1004, 118 L.Ed.2d 422.

6. ---- Cost-benefit of measures, fish and wildlife

Northwest Power Act did not require Pacific Northwest Electric Power and Conservation Planning Council to perform critical cost-benefit analysis of each measure of Columbia River Basin Fish and Wildlife Program; fish and wildlife measure could not be rejected solely because it would result in power losses and economic costs, and council had to assess overall power and economic impacts so that program did not cause inadequate, inefficient, uneconomical and unreliable power supply. Northwest Resource Information Center, Inc. v. Northwest Power Planning Council, C.A.9 1994, 35 F.3d 1371, certiorari denied 116 S.Ct. 50, 516 U.S. 806, 133 L.Ed.2d 15.

7. Attorney fees

Although wildlife federations were entitled to attorney fees on claim that Federal Energy Regulatory Commission failed to consider Fish and Wildlife Program promulgated by Northwest Power Planning Council prior to issuing seven preliminary permits, federations were not entitled to attorney fees on claims that were unreachd at trial, since unreachd claims were based on separate statutes and sought different relief. National Wildlife Federation v. F.E.R.C., C.A.9 1989, 870 F.2d 542.

16 U.S.C.A. § 839b

16 USCA § 839b

END OF DOCUMENT