

Northwest Power and Conservation Council  
Fish Passage Center  
December 14, 2005

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**NORTHWEST ENVIRONMENTAL DEFENSE CENTER**  
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December 14, 2005

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VIA FACSIMILE AND U.S. MAIL

Melinda Eden, Chair  
Northwest Power and Conservation Council  
Council Central offices  
851 SW Sixth Avenue, Suite 1100  
Portland, OR 97204  
503-222-5161  
fax 820-2370

Re: Fish Passage Center

Dear Ms. Eden:

I write on behalf of the Northwest Environmental Defense Center ("NEDC") regarding the Fish Passage Center. NEDC and its members are concerned about the protection and enhancement of native fish in the Pacific Northwest and compliance with all laws. The Council will be in violation of the Northwest Power Act should it decide not to continue to fund the Fish Passage Center consistent with the Council's program to protect and enhance fish.

Section 839b(h)(5) of the Northwest Power Act requires that the Council develop a program to protect, mitigate, and enhance fish and wildlife ("the Program") on the basis of recommendations, supporting documents, and views and information obtained through public comment and participation, and consultation with the agencies, tribes, and customers. The Act further mandates, in Section 839b(h)(10)(A), that the Administrator shall use the Bonneville Power Administration fund to protect, mitigate, and enhance fish and wildlife "in a manner consistent with . . . the program adopted by the Council under this subsection . . ." The Program, as amended in 2003 (mainstem amendments), addressed the Fish Passage Center and its tasks in detail. A failure to fund the Fish Passage Center is not consistent with the Program, and, therefore, a violation of Section 839(h)(10)(A) of the Northwest Power Act.

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Moreover, Section 839b(h)(10)(D)(i) of the Act mandates that the Council "shall appoint an Independent Scientific Review Panel (Panel) . . . to review projects proposed to be funded through that portion of Bonneville Power Administration's (BPA) annual fish and wildlife budget that implements the Council's fish and wildlife program." Who better than an independent scientific panel to determine the necessary information and provider of that information to implement the Program? To the extent the Council fails to seek input from the Panel, the Council will be in violation of the Act.

The Council's webpage states that "[i]n November 2005, the US Congress passed legislation (House Report 109-275), which forbids BPA from making additional obligations in support of the Fish Passage Center."<sup>1</sup> This statement is legally inaccurate. The language in the House Report 109-275 is not legislation and is not binding upon the Council. The starting point in discerning congressional intent is the existing statutory text. Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 438 (1999). The only language that could constitute legislation, and that resulted from the discussion of Bonneville Power Administration funding, does not prohibit funding of the Fish Passage Center.<sup>2</sup> The language is plain and are the only words of Congress. The Report language is merely legislative history, which can aid a court in interpreting statutory language, where the court finds the language ambiguous, but it is not legislation itself. United States v. Missouri Pac. R. Co., 278 U.S. 269, 278 (1929) ("Where doubts as to the meaning of a statute exist, reports of committees of Congress and statements by those in charge of the measure, and other like extraneous matter, may be taken into consideration to aid in ascertaining legislative intent; but where language of statute is clear, and construction according to its terms does not lead to absurd or impracticable consequences, words employed are to be taken as final expression of meaning intended, and legislative history may be noticed only in confirmation of such meaning, and not to take away from significance thereof"); Lamie v. U.S. Trustee, 540 U.S. 526, 536 (2004) (interpreting the plain meaning of the statute "since that approach respects the words of Congress. In this manner we avoid the pitfalls that plague too quick a turn to the more controversial realm of legislative history").

On behalf of NEDC, I urge the Council to comply with the Northwest Power Act and continue to fund the Fish Passage Center.

Sincerely,



Stephanie M. Parent, Esq.  
Board Member  
NEDC

<sup>1</sup> [http://www.efw.bpa.gov/Integrated\\_Fish\\_and\\_Wildlife\\_Program/programsolicitation.aspx](http://www.efw.bpa.gov/Integrated_Fish_and_Wildlife_Program/programsolicitation.aspx)

<sup>2</sup> "Expenditures from the Bonneville Power Administration Fund, established pursuant to Public Law 93-454, are approved for official reception and representation expenses in an amount not to exceed \$1,500. During fiscal year 2006, no new direct loan obligations may be made."