

# Murphy & Buchal



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BY FIRST CLASS MAIL

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Dear Council Members:

I write on behalf of the Columbia Snake Irrigators Association and the Eastern Oregon Irrigators Association, whose members groan under the weight of increasing electricity prices and decreasing water availability, subjects over which you exercise considerable influence through the mainstem amendments now under consideration. We understand that issues have arisen concerning the scope of your authority to reform the Fish and Wildlife Program given (1) the Ninth Circuit's opinion in *Northwest Resource Information Center, Inc. v. Northwest Power Planning Council*, 35 F.3d 1371 (9<sup>th</sup> Cir. 1994) (the "Tang decision"), and (2) the National Marine Fisheries Service's biological opinion concerning operation of the Federal Columbia River Power System (FCRPS). As demonstrated below, these documents do not

constrain the Council's authority with respect to any reasonably contemplated mainstem amendments, but they do impose important procedural obligations upon the Council.

### **The Council's Statutory Mission and the Tang Decision**

The Tang decision imposes a very strong obligation upon the Council to explain any deviations from fish and wildlife measures proposed by the Region's fish and wildlife agencies and Tribes. It does not, however, limit the Council's substantive authority to reject even unanimous opinions from the agencies and Tribes concerning elements of the program.

In interpreting the Tang decision, two critical factors are often overlooked. The first is the distinction between *holdings* of the Court and *dicta*— remarks by the Court that were not essential to the Court's precise holding and do not bind future Ninth Circuit panels. The precise holding of the Tang decision is that § 4(h)(7) of the Northwest Power Act

“. . . requires the Council to explain, in the Program, a statutory basis for its rejection of recommendations. The Council failed to do so here with respect to the recommendations of agencies and tribes and was, therefore, not in accordance with the NPA. As a consequence, we remand this matter to the Council with instructions that it comply with the written statutory explanation requirement of § 839b(h)(7).” 35 F.3d at 1386 (citations and footnote omitted).

The Court repeatedly emphasized that it was not *holding* that the Council had abused its discretion under the Northwest Power Act, or failed to give proper deference to the fishery agencies and Tribes. *Id.* at 1386, 1389. While the Court proceeded nonetheless to offer a lengthy discussion of statutory construction issues to “aid the parties' efforts on remand”, *id.* at 1386, all this portion of the opinion is *dictum*, including the discussions of the degree of “deference” owed to fishery agency and Tribal recommendations.

More importantly, the Northwest Power Act has been twice amended since 1994 in ways that undermine the central premises of the Court that provoked its *dicta*. First, in 1996 Congress added § 4(h)(10)(D) to the Northwest Power Act (P.L. 104-206, § 512), establishing the Independent Scientific Review Panel (ISRP). In so doing, Congress flatly rejected the notion that fishery agency and Tribal input was sufficient, stating that “independent scientific review would remove any suggestion of a conflict of interest in prioritizing programs, and *add an important element of independent scientific review to the Council decisionmaking process*”. H. Rep. No. 104-782, 104<sup>th</sup> Cong., 2d Sess. 104 (Sept. 12, 1996) (emphasis added).

The important role of the ISRP undermines the central premise of the Tang decision: that “Congress recognized . . . that fish and wildlife issues were, and should be, outside the expertise of the Council . . .”. 35 F.3d at 1388. In 1999, Congress removed a sunset provision on § 4(h)(10)(D) and also enacted a new § 7(n). P.L. 106-60, § 316 (Sept. 30, 1999). The new § 7(n) attempted to rein in BPA's fish spending, perceived as a threatening to burden BPA customers in defiance of the original Congressional intent that the Fish and Wildlife

Program “should not be a burden on consumers of the region”. H. Rep. No. 96-976, Pt. I, 96<sup>th</sup> Cong., 2d Sess. 57 (May 15, 1980).

In any event, whether or not the Council still owes a high degree of deference to the Region’s fishery agencies and Tribes, notwithstanding its ability to draw upon the ISRP and other sources of scientific information, deference is not outcome-determinative. To the contrary, the Northwest Power Act directs the Council to “include in the program measures which *it determines*” meet the statutory criteria. 16 U.S.C. §839b(h)(6) (emphasis added). The legislative history confirms that the Council “is not asked to rubber-stamp any recommendation”. H. Rep. No. 96-976, Pt. I, at 57.

### **Explaining Disagreement with the Fish Managers on Flow and Spill**

With regard to the flow and spill measures in the current amendments, the Council’s authority to reject agency and tribal demands for higher flows and spills comes first from the Council’s power to reject recommendations that are not “based upon, and supported by, the best available scientific knowledge”. 16 U.S.C. § 839b(h)(6)(B). As the Act’s sponsor ultimately explained, “it is clear that th[is] criterion . . . requires a certain amount of judgment by the council . . .”. 126 Cong. Rec. H10683 (daily ed. Nov. 17, 1980) (Rep. Dingell).<sup>1</sup>

It will be particularly important for the Council to have very clear findings concerning disagreement over flows because of the § 4(h)(6) criterion that the Program “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”. For example, the Council can fairly categorize cutbacks in spring flow augmentation as adaptive management in light of learning from the Council’s 1994 “Mainstem Passage Experimental Program”, which was designed to test the explicit “Hypothesis I” concerning flow and survival.

The experimental data obtained from such experiments has falsified the hypothesis that small increases in flow provide any measurable benefit to survival—the obvious “biological objective”. The Council must take care, of course, to avoid adopting impossible-to-achieve biological objectives, particularly in light of the Congressional declaration that “suitable environmental conditions [were] *substantially obtainable* from the management and operation of the Federal Columbia Power System and other power generating facilities on the Columbia River and its tributaries”. 16 U.S.C. § 839(6) (emphasis added); *see also* 126 Cong. Rec. E5105 (daily ed. Dec. 1, 1980) (Rep. Dingell notes that “[t]he bill cannot and should not undo the power developments of the past”). The Council need not provide a perfect environment for fish, only a workable one within the constraints posed by the existence and efficient operation of the dams.

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<sup>1</sup> Ironically, Rep. Dingell also observed that the statutory Program criteria “are intended to provide guidance to the Council and are not intended to provide a legal basis for challenging the program of the Council”. 126 Cong. Rec. H10683 (1980).

Flow advocates may point to a fragment of the legislative history stating that “the quantity or quality of the data should not serve as a basis for turning down any recommendation”, H. Rep. No. 96-976, Pt. I, at 56. This language comes from the Commerce Committee Report, addressing an earlier version of the statute, which was removed from the jurisdiction of the Commerce Committee to produce a more balanced approach on fishery issues in the final bill. M. Early & E. Krogh, *Balancing Power Costs and Fisheries Values Under the NPA*, 13 U. Puget Sound L. Rev. 281, 303 (1990). More importantly, it would be irrational to interpret language urging the Council not to wait until data was conclusive as a straightjacket that prevents the Council from changing the program where data ultimately refutes the hypothesis that particular measures are required to mitigate adverse effects on salmon.

The Council can also support decisions to reduce flow and spill by reference to the statutory duty to assure an “adequate, efficient, economical and reliable power supply”. 16 U.S.C. §§ 839(2), 839b(h)(5). For example, the legislative history of the Act confirms that Congress expected the Council’s Program “will explore alternative methods by which fish migration can be improved without unnecessary spillage of water”. H. Rep. 96-976, Pt. II, 96<sup>th</sup> Cong., 2d Sess. 44 (1980). To the extent that the Council wishes to justify rejection of agency and Tribal recommendations for power reasons, however, the Council should amend that portion of its mainstem amendments addressing the Council’s obligation to “assure an adequate, efficient, economical and reliable power supply”. As presently drafted, those amendments may unfortunately be read to suggest that this statutory command is all but irrelevant.

Finally, the Council can even support decisions to reduce flow and spill by finding that such measures are excessive to the Council’s duty to “to protect, mitigate, and enhance fish and wildlife affected by the development, operation and management of [hydropower] facilities”. 16 U.S.C. §§ 839b(h)(5), 839b(h)(8)(B). If the adverse effect of small reductions in flow or spill is too small to be measured, “mitigation” obviously does not require the expenditure of these incremental amounts of flow or spill. Again it is important to remember that the Northwest Power Act was “not intended to create any new obligations with respect to fish and wildlife”. H. Rep. No. 96-976, Pt. II, at 38; *see also id.* at 44 (“enhancement is not a new or additional obligation, but a means of fulfilling existing protection and mitigation obligations”)

Insofar as the plain language of the Act requires the Council to explain rejection of agency and Tribal recommendations “as part of the program”, 16 U.S.C. § 839b(h)(7), and the Tang decision emphasized the failure of “the *Program itself* . . . to explain any basis, much less a statutory basis, for the Council’s decisions rejecting recommendations of fishery managers”, 35 F.3d at 1386 (emphasis added), it may be important for the Council to offer its explanations in the Program, and not merely in a set of findings crafted after the fact.

### **The Role of the Endangered Species Act**

As a legal matter, the Council is not directly constrained by the Endangered Species Act (ESA) because it is not a federal agency subject to interagency consultation requirements under the ESA, *see* 16 U.S.C. § 839b(a), nor can it reasonably be regarded as engaging in any activities that “take” listed species in violation of the Act, insofar as its role is advisory to agencies and entities that may “take” listed species, *see* 16 U.S.C. § 839b(h)(11)(A)(ii) (federal agencies must take the Program “into account at each relevant stage of their decisionmaking to the fullest extent practicable”). In this sense the NMFS biological opinion is advisory as well. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.15(a) (“Following the issuance of a biological opinion, the Federal agency shall determine whether and in what manner to proceed with the action in light of its section 7 obligations and the Service’s biological opinion”).

In substance, then, both the Council and NMFS provide *advice* to BPA, the Corps and the Bureau concerning hydropower and reservoir operations, which those agencies must consider, just as the Council must consider the recommendations of the fishery agencies and Tribes. Arguably, given the Northwest Power Act’s insistence upon a holistic, multi-species management approach, the federal action agencies would be more justified in following the recommendations of the Council rather than NMFS—provided they conclude that adopting the Council’s recommendations would not jeopardize the continued existence of any listed species.

### **Conclusion**

A thorough and adequate explanation in the Council’s Program explaining any disagreements with the fishery agencies and Tribes (including the NMFS biological opinion) will enable the Council to discharge its legal responsibilities under the Northwest Power Act while providing improved guidance to the Region’s hydropower operators.

Sincerely,

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JLB

cc: Steve Wright  
John Shurts  
Bob Lohn