

**Revised Policy on Determining Net Requirements of Pacific Northwest
Utility Customers Under Sections 5(b)(1) and 9(c)
of the Northwest Power Act**

Administrator's Record of Decision



Bonneville Power Administration
U.S. Department of Energy

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TABLE OF CONTENTS

Section	Page
I. INTRODUCTION.....	1
A. History of BPA’s 5(b)9(c) Policy.....	2
B. Application and Scope	2
C. Proposed Modifications to the Policy	3
II. RELEVANT STATUTORY PROVISIONS.....	5
A. Section 5(b)(1) of the Northwest Power Act.....	5
B. Section 9(c) of the Northwest Power Act.....	5
C. Section 3(d) of the Regional Preference Act.....	6
III. POLICY DEVELOPMENT PROCESS.....	8
A. Overview of General Comments on the Proposed Revised 5(b)9(c) Policy	8
B. Preliminary Issues Raised in Comments on the Revised 5(b)9(c) Policy Proposal	8
C. Comments Regarding the Clarifications and Suggesting Rules of Interpretation	11
D. Comments Suggesting Changes to the Proposed Revised 5(b)9(c) Policy for Accuracy and Clarity	14
IV. POLICY ON DETERMINING NET REQUIREMENTS	17
A. Issues Pertaining to Section III.A.1(d) of the Revised 5(b)9(c) Policy.....	17
B. Issues Pertaining to Section III.C of the Policy	18
C. Issues Pertaining to Section III.D of the Policy	18
D. Issues Pertinent to Section III.D.4 of the Policy	28
V. SECTION 9(c) POLICY	31
A. Section IV.D of the Policy	31
VI. ENVIRONMENTAL COMPLIANCE	32
VII. CONCLUSION	33
 ATTACHMENT: Revised Policy on Determining Net Requirements of Pacific Northwest Utility Customers Under Sections 5(b)(1) and 9(c) of the Northwest Power Act (First Revision)	

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I. INTRODUCTION

This Record of Decision (ROD) accompanies the Bonneville Power Administration's (BPA) publication of its revised policy regarding the amount of Federal power a utility customer may purchase under a BPA power sales contract pursuant to sections 5(b) and 9(c) of the Pacific Northwest Electric Power Planning and Conservation Act (Northwest Power Act), P.L. 96-501, 16 U.S.C. 839c(b)(1) and 839f(c), and section 3(d) of the Act of August 31, 1964 (the Regional Preference Act), P.L. 88-552, 16 U.S.C. 837b(d). This policy on determining the net requirements of BPA's customers is also referred to as BPA's "Revised 5(b)9(c) Policy."

Since most of BPA's currently effective long-term regional firm Subscription power sales contracts expire on September 30, 2011, it is important that BPA keep in place a policy to guide the agency in making determinations of the net requirements of its utility customers in order to offer Federal power under the statute and new contracts. In July 2007, BPA published its Long-Term Regional Dialogue Final Policy (RD Policy), which is BPA's post-fiscal year (FY) 2011 power marketing strategy. The RD Policy describes BPA's policy approach to offering new contracts to BPA's preference customers. BPA proposed, as an implementing step to the new contracts, a review and modification of certain of its section 5(b) policies on the determination of net requirements based on the utility customer's non-Federal firm resources used to serve its "regional firm power consumer loads."

Under section 5(b)(1) of the Northwest Power Act, whenever requested, BPA is obligated to offer a contract to sell power to each requesting public body, cooperative, and investor-owned utility (IOU) customer to meet the utility's regional firm load minus (net of) the firm and peaking energy of the customer's resources used to serve its regional firm power consumer load. 16 U.S.C. 839c(b)(1). In making this net requirement load determination, BPA has a corresponding duty to apply the provisions of section 9(c) of the Northwest Power Act, 16 U.S.C. 839f(c), and section 3(d) of the Regional Preference Act, 16 U.S.C. 837b(d).

BPA recognizes that the maturing deregulated wholesale power market continues to affect the application and use of non-Federal generation resources and contract resources within the Pacific Northwest. Changes in Federal law and in the laws of some states reflect the evolving wholesale power market and legislative responses to environmental issues. Notable is the development of Renewable Portfolio Standards (RPS) in Oregon and Washington, which require certain utilities to serve a portion of their loads with electricity generated from resources using renewable fuels such as wind or landfill gas. BPA is a Federal agency and not subject to such laws, but BPA is sensitive to the need of its customers to comply with such standards and desires to support their compliance. Thus, the Revised 5(b)9(c) Policy reflects the practical effects of reducing BPA's need to provide separate incentives for the development of renewable resources and BPA's recognition that affected customers may need to continue to apply their RPS-qualifying renewable resources to their regional firm load even if these customers experience load loss.

This ROD addresses the specific changes BPA is making to the Policy on Determining Net Requirements of Pacific Northwest Utility Customers Under Sections 5(b)(1) and 9(c) of the Northwest Power Act (May 2000 Policy) to support the implementation of the RD Policy and the

RD contracts and to address the issues raised by comments in public review of BPA's proposed Revised 5(b)9(c) Policy.

A. History of BPA's 5(b)9(c) Policy

After extensive public processes for review and comment in 1998 and 1999, BPA adopted the May 2000 Policy in a ROD; since then, these documents have provided guidance on the implementation of BPA's Subscription power sales contracts. The Policy contains interpretations of the Regional Preference Act and Northwest Power Act and describes how factual determinations will be made regarding the amount of Federal power public and cooperative utilities and IOUs may purchase from BPA under section 5(b) of the Northwest Power Act; BPA's policy review of exports under section 9(c) of the Northwest Power Act and section 3(d) of the Regional Preference Act; and the tests applicable to customers' sales and the circumstances under which a customer's export of its non-Federal resources outside the Pacific Northwest would have an effect on the customer's firm power purchases from BPA. BPA also reaffirmed its 1994 Non-Federal Participation Section 9(c) Policy (1994 NFP Policy or BPA's Section 9(c) Policy) and the BPA existing determinations made under section 3(d) or 9(c) with only minor modifications, as noted in section IV of the May 2000 Policy.

After publication of the May 2000 Policy, BPA's preference, direct-service industrial (DSI), and IOU customers filed petitions in the U. S. Court of Appeals for the Ninth Circuit challenging BPA's policy. *Goldendale Aluminum Co. et al. v. United States Department of Energy*, case nos. 00-70717, 00-70719, 00-70743, and 00-70778. The parties subsequently entered into settlement discussions, which produced an agreement on clarifications to the May 2000 Policy. In March 2003, the parties, with the exception of Grant PUD, executed a settlement agreement and motion to dismiss based upon BPA adopting the clarifications and making them part of the May 2000 Policy. BPA adopted these clarifications on March 7, 2003, denominated as "Clarifications Issued on BPA's Policy for Determining Net Requirements of Pacific Northwest Utility Customers Under Sections 5(b)(1) and 9(c) of the Northwest Power Act, dated May 23, 2000" ("Clarifications").

In July 2007, BPA released its RD Policy and Record of Decision. The RD Policy proposed specific, limited changes to BPA's May 2000 Policy. Because contracts developed under the RD Policy are the successor contracts to the Subscription contracts, the May 2000 Policy (as revised) and the Clarifications will continue to apply to BPA determinations required for the new Contract High Water Mark (CHWM) power sales contracts, with certain specific changes. To support implementation of the RD Policy and CHWM contracts, including the changes to the proposed May 2000 Policy, BPA conducted a limited-scope review of its May 2000 Policy and Clarifications and has adopted the changes specified below.

B. Application and Scope

Starting October 1, 2011, regional utility customers eligible to purchase power from BPA pursuant to section 5(b) of the Northwest Power Act under the new CHWM contracts will be subject to the Revised 5(b)9(c) Policy issued with this Record of Decision. Prior to that date, the May 2000 Policy and Clarifications will continue to apply without these modifications.

Section II.B.8 of the RD Policy describes the limited changes to the May 2000 Policy and Clarifications that BPA identified as necessary for the implementation of the RD Policy. The proposed changes to the May 2000 Policy and Clarifications are limited to the changes stated in the RD Policy, described in section C, below. BPA did not conduct a more expansive general review of the May 2000 Policy and Clarifications.

C. Proposed Modifications to the Policy

The May 2000 Policy, with Clarifications, is a policy of general application regarding BPA's power sales and customers' purchases of Federal power pursuant to BPA's authorizing statutes, including the Northwest Power Act and the Regional Preference Act. Notwithstanding any language in the May 2000 Policy and Clarifications that might be construed to suggest that they are limited in application to BPA's Subscription contracts, the May 2000 Policy and Clarifications will continue to apply, as revised herein, to BPA's power sales contracts with regional customers after expiration of the Subscription contracts, including the CHWM contracts under the RD Policy.

For its limited-scope review of its May 2000 Policy and Clarifications, BPA provided an opportunity for public review and comment on its proposed Revised 5(b)9(c) Policy. On September 17, 2008, BPA published its proposal to revise the May 2000 Policy and Clarifications, entitled "2008 Proposal for Modifications to BPA's Policy on Determining Net Requirements of Pacific Northwest Utility Customers Under Sections 5(b)(1) and 9(c) of the Northwest Power Act" (2008 Proposal for Modifications), which included the May 2000 Policy with proposed revisions shown in red-line form. BPA closed the two-week comment period on September 26, 2008. Comments responding to the proposed Revised 5(b)9(c) Policy are generally described below in section III.B.

The changes to the May 2000 Policy and Clarifications described in BPA's 2008 Proposal for Modifications are listed below. These changes coordinate with and support BPA's RD Policy and new CHWM contracts.

1. A change in the policy on removal of non-Federal resources by a customer to accommodate the application of resources used by a customer to serve its load growth post-FY 2010 and to distinguish those resources from the customer's non-Federal resources that are currently dedicated to serve its load.
2. An accommodation of new notice provisions for the application, and duration of the application, of a customer's non-Federal resources used to serve its post-FY 2010 load growth in the CHWM contract.
3. Modification of the order of a customer's removal of its non-Federal resources in the event of a loss of retail load served by those resources, so that non-Federal resources serving customer load that is above the customer's Rate Period High Water Mark (RHWM) are removed first.
4. Elimination of the current 200 MW renewable resource exception for additions of non-Federal resources by the customer, since such exception is unneeded to encourage development of renewable resources.

5. Certain modifications to define and include terms used in the RD Policy.
6. Certain changes to remove obsolete references to Subscription contracts and to align use of the Declaration Parameters with the RD Policy.

The proposed modifications have been adopted, or modified and adopted, by BPA as revisions in response to public comment, as further described below. Notably, the proposed modification described in paragraph 3, above, has been revised to allow customers a choice in the order of removal of their Above-RHWM Resources. The final Revised Policy on Determining Net Requirements of Pacific Northwest Utility Customers Under Sections 5(b)(1) and 9(c) of the Northwest Power Act (Revised 5(b)9(c) Policy), with changes to the proposed Revised 5(b)9(c) Policy shown in red-line format, appears in Attachment A.

II. RELEVANT STATUTORY PROVISIONS

A. Section 5(b)(1) of the Northwest Power Act

Section 5(b)(1) of the Northwest Power Act obligates BPA to offer to sell power to a requesting utility customer for service to its firm power consumer loads in the Pacific Northwest.

Section 5(b)(1) sets forth the amount of power that is to be sold by the Administrator to meet the firm power load, also known as the net requirements load, of a requesting utility. Section 5(b)(1) provides:

Whenever requested, the Administrator shall offer to sell to each requesting public body and cooperative entitled to preference and priority under the Bonneville Project Act of 1937 and to each requesting investor-owned utility electric power to meet the firm power load of such public body, cooperative or investor-owned utility in the Region to the extent that such firm power load exceeds –

(A) the capability of such entity's firm peaking and energy resources used in the year prior to the enactment of this Act to serve its firm load in the region, and

(B) such other resources as such entity determines, pursuant to contracts under this Act, will be used to serve its firm load in the region.

In determining the resources which are used to serve a firm load, for purposes of subparagraphs (A) and (B), any resources used to serve a firm load under such subparagraphs shall be treated as continuing to be so used, unless such use is discontinued with consent of the Administrator, or unless such use is discontinued because of obsolescence, retirement, loss of resource, or loss of contract rights.

16 U.S.C. 839c(b)(1). Section 5(b)(1) issues addressed by BPA's 5(b)9(c) policy include BPA's determination of a utility customer's net requirement load, the required application and continuing use of a customer's non-Federal generation resources to serve its consumer load, and the conditions under which any resource used by a customer to serve its load may be removed from service to load and replaced by BPA firm power service. The determination of customer resources, and changes to those resources over the term of the BPA power sales contract, affect the power planning and costs of BPA and its customers.

Other applicable statutory provisions may affect the amount of firm power BPA is authorized to sell to its customers under section 5(b)(1). Section 9(c) of the Northwest Power Act and section 3(d) of the Regional Preference Act may limit the amount of firm power that BPA can sell to a customer, depending on the customer's sale or disposition of its own non-Federal resources outside the Pacific Northwest. The application of these provisions does not restrict or limit customers from engaging in the sale or disposition of their resources out of the region; rather, the provisions apply to BPA and may result in limiting the amount of firm power BPA can sell to an exporting customer.

B. Section 9(c) of the Northwest Power Act

BPA must apply section 9(c) whenever it makes a determination regarding the sale or disposition of power from a customer's resources, or the sale of the resource itself, to entities outside the

region. Customers that export or dispose of power or non-Federal generation out of the region face a potential reduction (decrement) in the amount of electric power they can purchase from BPA, unless certain conditions are met.

Section 9(c) of the Northwest Power Act provides, in pertinent part:

* * * The Administrator shall, in making any determination, under any contract executed pursuant to section 5, of the electric power requirements of any Pacific Northwest customer, which is a non-Federal entity having its own generation, exclude, in addition to hydroelectric generated energy excluded from such requirements pursuant to section 3(d) of such Act (16 U.S.C. 837b(d)), any amount of energy included in the resources of such customer for service to firm loads in the region if (1) such amount was disposed of by such customer outside the region, and (2) as a result of such disposition, the firm energy requirements of such customer or other customers of the Administrator are increased. Such amount of energy shall not be excluded, if the Administrator determines that through reasonable measures such amount of energy could not be conserved or otherwise retained for service to regional loads. The Administrator may sell as replacement for any amount of energy so excluded only energy that would otherwise be surplus.

16 U.S.C. 839f(c). In addition, section 9(d) underscores the Congressional desire that the operation of section 9(c) is intended to measure the effect of, not dictate, utility decisions respecting the use of their regional non-Federal resources on BPA's obligations to serve the loads of its Pacific Northwest customers:

No restrictions contained in subsection (c) shall limit or interfere with the sale, exchange or other disposition of any power by any utility or group thereof from any existing or new non-Federal resource if such sale, exchange or disposition does not increase the amount of firm power the Administrator would be obligated to provide to any customer. * * *

16 U.S.C. 839f(d).

C. Section 3(d) of the Regional Preference Act

Under section 3(d) of the Regional Preference Act, a utility customer that sells or disposes of hydroelectric energy out of the region faces a reduction similar to that described in Northwest Power Act section 9(c). As stated in section 9(c), the section 3(d) review additionally and specifically addresses a customer's hydroelectric resources. Section 3(d) provides:

The Secretary, in making any determination of the energy requirements of any Pacific Northwest customer which is a non-Federal utility having hydroelectric generating facilities, shall exclude any amounts of hydroelectric energy generated in the Pacific Northwest and disposed of outside the Pacific Northwest by the utility which, through reasonable measures, could have been conserved or otherwise kept available for the utility's own needs in the Pacific Northwest. The Secretary may sell the utility as a replacement therefor only what would otherwise be surplus energy.

16 U. S.C. 837b(d). Under sections 9(c) and 3(d) BPA is directed to sell only energy that would otherwise be “surplus” as replacement for the exported power. Section 9(c) defines “surplus energy” as “electric energy for which there is no market in the Pacific Northwest at any rate established for the disposition of such energy.” 16 U.S.C. 839f(c), amending 16 U.S.C. 837(c). This statutory limitation prevents BPA from selling firm “net requirements” power under Northwest Power Act section 5(b)(1) to replace a customer’s export sale of non-Federal hydroelectric resources under section 3(d) of the Regional Preference Act or export sales of its other resources under section 9(c).

The preceding discussion is taken from, or is supplementary to, the legal discussion contained in the May 2000 Policy and ROD, the Clarifications, and the 1994 NFP Policy and ROD, which remain applicable to the topics discussed therein.

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III. POLICY DEVELOPMENT PROCESS

A. Overview of General Comments on the Proposed Revised 5(b)9(c) Policy

The 2008 Proposal for Modifications described BPA's proposed changes to the May 2000 Policy and Clarifications, consistent with section II.B.8 of the RD Policy. The specific changes were reflected in a proposed Revised 5(b)9(c) Policy that was included in the Proposal. Seven parties commented on BPA's proposed Revised 5(b)9(c) Policy: Public Power Council (PPC); Northwest Requirements Utilities (NRU); Cowlitz County PUD (Cowlitz); Western Public Agencies Group (WPAG); and, jointly, Seattle City Light, Snohomish PUD, and Tacoma Power (Seattle, *et al.*).

The comment period for the proposed Revised 5(b)9(c) Policy closed after the development of the contract templates but well before the Contracts/Policy ROD was issued and more than two months before the CHWM contracts were signed. The timing issue noted in this ROD resulted in comments from some parties that inadvertently reversed the relationship between roles of the Revised 5(b)9(c) Policy and the CHWM contracts. This is repeatedly addressed in BPA's responses to the parties' comments, herein. It is important to note that while this ROD explains necessary differences between the *roles* of the Revised 5(b)9(c) Policy and the CHWM contracts implemented under that policy, both documents reflect the same policy decisions and are drafted to be in alignment.

The parties' comments reflect a similar range of interests and concerns. Uniformly, the parties noted that the May 2000 Policy and Clarifications are complicated and that multiple documents have to be referenced to understand BPA's policy regarding the development and use of non-Federal resources. BPA previously acknowledged these concerns when developing its 2008 Proposal for Modifications by making the Clarifications and the Declaration Parameters attachments to its proposed Revised 5(b)9(c) Policy. This placed the key 5(b)9(c) policy-related documents under the single cover of the Revised 5(b)9(c) Policy. Nonetheless, the parties still expressed concern that they would have to consult multiple documents to gain a comprehensive view of key policy points. They also stated that the Clarifications and the Declaration Parameters use language unique to the Subscription contracts that was not updated through the proposed Revised 5(b)9(c) Policy.

The broadest comments noted that a 5(b)9(c) policy document that integrated and updated these additional documents would be ideal. *See, e.g.*, NRP080002 at 1-2. As described in further detail below, such a comprehensive revision to the May 2000 Policy and Clarifications was not within the scope of review for the 2008 Proposal for Modifications. BPA did not, and does not at this time, propose to consolidate the Policy and Clarifications.

B. Preliminary Issues Raised in Comments on the Revised 5(b)9(c) Policy Proposal

BPA received a number of general comments that do not correspond to specific sections of the Revised 5(b)9(c) Policy. BPA's responses to those comments follow.

Issue 1:

Whether the Revised 5(b)9(c) Policy provides a sufficient basis upon which customers can make decisions regarding the development and use of non-Federal resources.

Parties' Position:

PPC, in a comment endorsed and supported by Cowlitz, WPAG, and Seattle *et al.*, commented that customers need a clear policy for developing, marketing, and bringing non-Federal resources to load without violating the rules that run throughout the Revised 5(b)9(c) Policy. NRP080003, at 2. PPC further opined that the proposed Revised 5(b)9(c) Policy is not an effective tool for facilitating resource development because it does not provide the clarity or specificity that customers need to make their resource decisions. *Id.* at 3. This sentiment was also expressed individually by WPAG and NRU. NRP080004, at 2; NRP080002, at 1.

Evaluation and Decision:

The Revised 5(b)9(c) Policy reflects the limited specific changes to the May 2000 Policy and Clarifications described in the 2008 Proposal for Modifications and the RD Policy to support the implementation of the RD Policy. PPC acknowledged this purpose while advocating for a more comprehensive review. NRP080003, at 1. BPA may in the future undertake such a review but will decline doing so now. The Clarifications from the *Goldendale Aluminum* case settlement were designed to support new customer resource development. The RD Policy and the changes to the May 2000 Policy made here also support new customer resources. BPA believes that the Revised 5(b)9(c) Policy and this ROD, coupled with customers' CHWM contracts, provide the policy and contract guidance necessary for customers to make informed decisions regarding the development and use of non-Federal resources under the implementation of Regional Dialogue. However, BPA acknowledges the complexity of issues related to sections 5(b) and 9(c) of the Northwest Power Act.

BPA has the same goal: to establish a 5(b)9(c) policy that is clear and specific enough that it can be applied and relied on by customers and efficiently administered by BPA. However, a complete review would be an extensive undertaking, and BPA has adopted many of the changes recommended in customers' comments, as described further in this document, improving the clarity of the Revised 5(b)9(c) Policy. Additionally, before November 2009, when customers must decide how they will initially serve Above-RHWM Load, BPA will work with customers in a public process and on a case-by-case basis to provide further information regarding the application of the Revised 5(b)9(c) Policy to customers' development of non-Federal resources.

Issue 2:

Whether the public process on the proposed Revised 5(b)9(c) Policy was sufficient in length to allow customers a meaningful opportunity to review and comment.

Parties' Position:

PPC, in a comment endorsed and supported by Cowlitz, WPAG, and Seattle *et al.*, commented that the two-week review and comment period was insufficient to allow customers to collaborate with BPA to develop a policy that will meet customer needs and promote regional resource development. NRP080003, at 2-3. NRU similarly commented that the time to comment was inadequate and that discussion between customers and BPA as to what would be an adequate policy would have been beneficial. NRP080002, at 2.

Evaluation and Decision:

Over the last few years, BPA has engaged in an extraordinarily collaborative development of the RD Policy and other policies with interested parties. As part of the overall policy development, BPA proposed only minor changes to the May 2000 Policy, which had already been the subject of a previous lengthy public process. Therefore, while the public process conducted for the 2008 Proposal for Modifications may have seemed short, BPA determined that because only minor changes needed to be made there was no need for a longer public process.

The public process conducted for the 2008 Proposal for Modifications was the last of three public processes in which the same specific changes to the May 2000 Policy and Clarifications were presented, comment was received, and BPA's analysis and decisions were published. Previously, in the collaborative development of the RD Policy and the CHWM contract templates, interested parties had the opportunity to question proposals, influence positions, and develop specific language regarding changes to resource removal provisions needed to implement the RD Policy. *Compare* RD Policy ROD, at 45-55; Long-Term Regional Dialogue Contract Policy ROD (CP ROD), at 7-25; and Draft Contract Templates and Comments, at <http://www.bpa.gov/power/pl/regionaldialogue/implementation/Documents/#comment>. This process took place over a period of a year and a half, and parties were provided several months of opportunity to discuss, consider, and collaboratively develop positions on the same substantive matters they have commented upon in response to the 2008 Proposal for Modifications. While BPA recognizes that only the most recent of those public processes was for revising the May 2000 Policy itself, the changes were scoped and refined in extensive previous public processes. As a result, what may appear in isolation to be an abbreviated public process is in actuality the final stage in a series of public processes that defined the scope and features of the 2008 Proposal for Modifications and resultant Revised 5(b)9(c) Policy.

To the extent that parties' comments argue against fundamental issues already decided through the RD Policy ROD and CP ROD (for example, WPAG suggested that no changes to the resource removal provisions from the Subscription contracts are necessary; NRP080004, at 1), such comments effectively seek to revisit issues defined and decided in the RD Policy and CP ROD and further negotiated in developing the CHWM contract templates. The length of the comment period for the 2008 Proposal for Modifications is irrelevant to BPA's decisions on those previously decided issues. Further, BPA acted upon a large number of the comments received on the proposed Revised 5(b)9(c) Policy, as described in this ROD, resulting in an improved and collaboratively developed Revised 5(b)9(c) Policy. For the reasons discussed,

BPA believes that sufficient opportunity was provided for the parties to review and comment on the 2008 Proposal for Modifications.

C. Comments Regarding the Clarifications and Suggesting Rules of Interpretation

Issue 1:

Whether the 2003 Clarifications and Declaration Parameters should be incorporated into the body of the Revised 5(b)9(c) Policy.

Parties' Position:

NRU commented that the proposed Revised 5(b)9(c) Policy is “a piecemeal collection of old and new policy documents” and that the Clarifications should be incorporated into the body of the policy to create a single, coherent policy. NRP080002, at 1. NRU acknowledged that the Clarifications are the result of a legal settlement and could be incorporated into the Revised 5(b)9(c) Policy only as part of a second or modified settlement. *Id.* at 1-2. NRU additionally noted that having the Declaration Parameters as a separate document creates the problem of consulting separate documents to understand the rules associated with resource dedications. *Id.* at 2.

Evaluation and Decision:

BPA acknowledges that having a single policy document would be an aid, but has decided not to integrate the Clarifications. To do so would be an extensive undertaking that could deprive customers of a final 5(b)9(c) policy at a time when they need to be making resource decisions based on that policy. For instance, the development of the May 2000 Policy took 18 months. Because the policy documents relevant to BPA's 5(b)9(c) policy were not in a common location, customers may have found it difficult to determine certain aspects of the policy. BPA believes that including the Clarifications under the same cover as the policy document will greatly assist customers in understanding the terms of the Revised 5(b)9(c) Policy. While there could be some benefit to incorporating the Clarifications into the basic policy document, such incorporation is outside the scope of this limited review and specific proposed modifications to the May 2000 Policy and Clarifications. As NRU itself noted, there are significant logistical issues involved in such a project, including a time-intensive public process and the need to reach consensus among the parties to the legal settlement that resulted in the Clarifications document. *Id.* NRU's proposal may be considered for some future review of the Revised 5(b)9(c) Policy but, other than attaching the Clarifications to the Revised 5(b)9(c) Policy, no further integration into the policy document will be made at this time.

Regarding the NRU comment on the Declaration Parameters, they are part of BPA's Product Catalog that defined BPA services under the Subscription power sales contracts. They will continue to be in effect, as they may be revised, under Regional Dialogue 5(b)(1) power sales contracts. The Declaration Parameters establish a set of guidelines and standards that BPA uses for determining Federal and non-Federal resource output. They are still in effect, and they differ from the Clarifications in that they were not part of the May 2000 Policy and are not part of the

Revised 5(b)9(c) Policy. BPA agrees with NRU’s comment to the extent that having to consult various separate documents to understand the rules surrounding non-Federal resources can be unwieldy, but BPA will not incorporate the Declaration Parameters into the language of the Revised 5(b)9(c) Policy. Consistent with the proposed Revised 5(b)9(c) Policy, for convenience BPA will attach the Declaration Parameters to the Revised 5(b)9(c) Policy as a reference. However, the Declaration Parameters may be reconsidered and changed separately from the Revised 5(b)9(c) Policy. Any changes or updates to the Declaration Parameters attachment are not changes to this Revised 5(b)9(c) Policy.

Issue 2:

Whether the Revised 5(b)9(c) Policy should include a rule of interpretation to adapt to the Regional Dialogue contracts relevant Subscription-related terms used in the Clarifications.

Parties’ Position:

Seattle *et al.* noted that the Clarifications contain language specific to the Subscription contracts and commented that the Revised 5(b)9(c) Policy should include language to adapt the Clarifications to the CHWM contracts. NRP080005, at 5. Seattle *et al.* stated that, among other changes, “BPA Power Sales Agreement” should be read to refer to CHWM contracts, and the Subscription contract “Exhibit C” should be read to refer to “Exhibit A,” the corresponding resource exhibit in CHWM contracts. *Id.*

Evaluation and Decision:

BPA agrees that it would be helpful to address the interpretation of certain terms in the Clarifications that refer to Subscription contracts and Exhibit C, since those terms cannot be plainly read to apply to the CHWM contracts. Therefore, BPA has added a section to the introduction of the Revised 5(b)9(c) Policy devoted to adapting the terms of the Clarifications to the Revised 5(b)9(c) Policy. This modification includes language noting that the definition of “New Resources” provided in section 10(d) of the Clarifications is different from the definition of “New Resources” used in the CHWM contracts.

Issue 3:

Whether the Revised 5(b)9(c) Policy should include a rule of interpretation to give priority to the Clarifications over the Revised 5(b)9(c) Policy.

Parties’ Position:

Seattle *et al.* commented that the Revised 5(b)9(c) Policy should include language that, in the event of a conflict between terms of the Clarifications and the Revised 5(b)9(c) Policy, the Clarifications will prevail, since BPA cannot unilaterally modify the terms of the Clarifications. NRP080005, at 4-5.

Evaluation and Decision:

BPA views the Clarifications as addressing issues that parties to litigation specifically raised in settlement discussion. The range of topics is not as broad as the May 2000 Policy, since only certain topics were addressed. The Revised 5(b)9(c) Policy also focuses on a more specific set of issues. BPA intends to read all three policy documents together. If there is a conflict, BPA intends to resolve the conflict so that BPA policy is harmonized overall. While BPA recognizes that the Clarifications is a separate document attached to the Revised 5(b)9(c) Policy, the two documents comprise a single policy. Additionally, no single document, including the Clarifications, can address every potential issue. Therefore, it would not be a good policy choice to give the Clarifications document a blanket superior status to other policy expressions that may more specifically address the issue of authority or that may also apply to a particular issue or an aspect of an issue.

BPA agrees with the comment to the extent that BPA cannot unilaterally modify the terms of the Clarifications document, which is the result of a legal settlement. However, it is within the Administrator's authority to determine the intent and application of a policy that is consistent with the settlement and reflects his or her interpretation of BPA's governing statutes. In the case of gaps, or a perceived conflict in terms between the Clarifications and Revised 5(b)9(c) Policy documents, an evaluation will be conducted on a case-by-case basis, considering the facts and context of the perceived misalignment of the terms in the documents. Guidance may be sought through examination of both the Clarifications and the Revised 5(b)9(c) Policy documents and, if needed, previous BPA policy decisions, provisions of relevant 5(b) power sales contracts, relevant statutes, and so on. Accordingly, BPA declines to include a rule of interpretation in the Revised 5(b)9(c) Policy that grants priority to the language of the Clarifications.

Issue 4:

Whether the Revised 5(b)9(c) Policy should include rules of interpretation to give priority to the language of the CHWM contracts over the Revised 5(b)9(c) Policy.

Parties' Position:

NRU commented that the Revised 5(b)9(c) Policy should include language that in the event of a conflict of terms between the Revised 5(b)9(c) Policy and the CHWM contracts, the CHWM contract language should prevail, citing examples of potential ambiguities between the two documents. NRP080002, at 2. The potential ambiguities cited include resource removal provisions in the Revised 5(b)9(c) Policy that do not include the Existing Resources "in lieu of" renewable Above-RHWM Resource removal provision from the Load Following contracts. *Id.*

Evaluation and Decision:

BPA understands NRU's concerns and shares the desire for clarity and consistency of terms between contracts and policy documents. Resource removal is one of the specific topics that this

Revised 5(b)9(c) Policy addresses; see section C below. The potential ambiguities cited in NRU's comment have been addressed individually through changes to the proposed Revised 5(b)9(c) Policy.

BPA has made this revised policy consistent with the general terms in the CHWM contract. However, the contracts contain individual terms for each customer, and BPA is not willing to subordinate its overall policy to the contract. A general rule of interpretation that places the CHWM contract in a position superior to that of the Revised 5(b)9(c) Policy could potentially make a nullity of portions of the policy. As discussed in the previous issue, BPA intends to read all three policy documents together. If there is a conflict, BPA intends to resolve the conflict so that BPA policy is harmonized overall.

A suggestion with a similar effect as that made by NRU was made in the comments to the May 2000 Policy, whereby the May 2000 Policy would have been made an exhibit to the Subscription contract. *See* May 2000 Policy ROD, at 10. In its response BPA noted that certain contract provisions have as their purpose to implement the May 2000 Policy, but the Policy is the Administrator's interpretation of relevant statutes and may be changed independent from the power sales contracts. *Id.* While the power sales contract executed pursuant to section 5(b)(1) between BPA and a customer may provide the most detailed language regarding, for example, non-Federal resource removal rights, the contract does not provide superior authority. The basic hierarchy of sources of authority that govern BPA's power sales and the determination of a preference customer's net requirements are, first, BPA's governing statutes; then the Administrator's policy interpreting those statutes; and then the section 5(b)(1) power sales contracts. Thus, in the first instance, the contracts must comport with both statute and policy. BPA will not agree to include language in the Revised 5(b)9(c) Policy that would allow contractual language to prevail over law and policy in the event of a conflict. Indeed, in the event of a conflict that is of great import or significance and that substantively affects BPA and its customers, the most reasonable approach would be to address the problem at that time by either modifying the policy or amending the contract if mutually agreed. However, such a situation is not anticipated, since the Revised 5(b)9(c) Policy and the CHWM contracts have been drafted to be in alignment.

D. Comments Suggesting Changes to the Proposed Revised 5(b)9(c) Policy for Accuracy and Clarity

BPA received several comments with essentially editorial suggestions that parties stated would make the Revised 5(b)9(c) Policy easier to read or with requests for BPA to clarify language in the proposed Revised 5(b)9(c) Policy. Those comments are addressed in this section. Comments that included substantive issues or raised the need for BPA to address a substantive issue are addressed in sections IV and V.

Issue 1:

Whether section IV.A of the proposed Revised 5(b)9(c) Policy should be modified to delete references to out-of-date contracts and parties.

Parties' Position:

Seattle *et al.* commented that section IV.A of the proposed Revised 5(b)9(c) Policy contains obsolete language that refers to the offering of post-2001 power sales contracts and that states that BPA anticipates the IOUs will take power under those contracts, and that such language should be deleted. NRP080005, at 4.

Evaluation and Decision:

BPA agrees that the described language is obsolete and has deleted it in developing the final Revised 5(b)9(c) Policy.

Issue 2:

Whether BPA should incorporate the “editorial” comments of Seattle, Snohomish, and Tacoma in the Revised 5(b)9(c) Policy.

Parties' Position:

In its comments, Seattle *et al.* suggested the following changes to the proposed Revised 5(b)9(c) Policy that it categorized as “editorial comments”:

1. In the Background section of the proposed Revised 5(b)9(c) Policy (page 1 of 18), the second sentence should be shifted to the past tense, so that it makes sense in the context of the Revised 5(b)9(c) Policy looking back to what the predecessor (May 2000) 5(b)9(c) Policy did. (“The May 2000 Policy provided BPA’s interpretation”; “provided guidance on implementation...”; and “described how certain factual determinations would be made....”)
2. In the section entitled “The Revised Policy” (page 4 of 18), it appears that the reference to “October 12” in the first sentence of the first paragraph should be a reference to “September 12.” Also, in the final version of the Revised 5(b)9(c) Policy, the word “proposed” in the second sentence of this same paragraph should be deleted.
3. In section III.A(b) of the proposed Revised 5(b)9(c) Policy (pages 7-8 of 18), the first sentence uses the defined term “Existing Resources,” but the sentence that follows it uses the phrase “resources dedicated to load prior to October 1, 2006.” For consistency and clarity, the reference should be to “Existing Resources” in both sentences.
4. It would be helpful if section III.D.1(g) (page 12 of 18) made it clearer that the reference to “coordinating planning allowed under section III.A.1(e)” is intended to point to “coordinating planning allowed under the Declaration Parameters as referenced in section III.A.1(e).” While the Declaration Parameters allow annual updating of hydroelectric resource capability in accordance with the PNCA, there is nothing in section III.A.1(e) itself that actually speaks to coordinated planning processes.
5. In section IV.B.6(b)(2) of the proposed Revised 5(b)9(c) Policy (page 16 of 18), there is a reference to “all Section 5(b)(1)(A) and 5(b)(1)(B) thermal resources that are currently

dedicated by a utility in any customer's firm resource exhibit." The term "currently" in a document such as this tends to become increasingly ambiguous with the passage of time. It would be clearer to refer instead to "all thermal Existing Resources."

6. Provisions in the Declaration Parameters that are obsolete (such as references to Subscription contracts, OY 2001, and an exception for new renewable resources) should be updated to avoid confusion.

Evaluation and Decision:

BPA appreciates the diligence of Seattle *et al.* in their review of the proposed Revised 5(b)9(c) Policy, as demonstrated by these and other comments they provided. The comments uniformly strive to increase the readability and accuracy of the Revised 5(b)9(c) Policy. Each editorial comment listed above is addressed individually, as follows:

1. As of the date of issuance of the Revised 5(b)9(c) Policy (March 2009), the May 2000 Policy will still be in effect. Thus, using past tense in portions of the Background section that refer to the May 2000 Policy would be incorrect.
2. BPA agrees that the date should read September 12 rather than October 12. BPA does not agree that the word "proposed" should be deleted, because the sentence is correct as written, although the verb in that sentence should be past tense.
3. BPA agrees that "Existing Resources" should be used consistently and has adopted the suggested edits.
4. BPA agrees that the phrase "the Declaration Parameters as referenced in" should be added to the sentence.
5. BPA does not agree that this provision of the policy needs to be changed. Section IV.B.6(b)(2) clarifies the application of section 9(c) to thermal resources. The word "currently" is important, because it denotes temporally the effective BPA power sales contract in which the customer's designated 5(b)(1)(A) and/or (B) resources dedicated to serve its load are identified. BPA does not agree that it becomes ambiguous over time. Seattle's suggestion would limit the scope of the phrase to cover only those resources that were dedicated at the time of execution of the contract and not later-dedicated resources. BPA means to memorialize the customer's section 5(b)(1)(A) and (B) resource dedications made presently and in the future, which then makes clear the load and resource obligations of both BPA and the customer.
6. BPA recognizes the value in removing obsolete language from documents when practical. However, the Declaration Parameters are not part of the Revised 5(b)9(c) Policy, and updating the Declaration Parameters was not part of the scope of the 2008 Proposal for Modifications. BPA may conduct a future public process to update the Declaration Parameters but will not change them as part of developing this Revised 5(b)9(c) Policy.

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IV. POLICY ON DETERMINING NET REQUIREMENTS

The Revised 5(b)9(c) Policy provides guidance, together with the May 2000 Policy and the Clarifications, that BPA will use in determining the customers' net requirements. This section addresses comments directed at BPA's application of section 5(b) of the Northwest Power Act and is organized by section reference of the Revised 5(b)9(c) Policy.

A. Issues Pertaining to Section III.A.1(d) of the Revised 5(b)9(c) Policy

Issue:

Whether, under Regional Dialogue, the language of section III.A.1(d) of the proposed Revised 5(b)9(c) Policy regarding the addition of non-Federal resources to serve a customer's load is no longer relevant due to the language of section III.C.

Parties' Position:

Seattle *et al.* argued that the classification of customers' non-Federal resources as either Existing Resources or Above-RHWM Resources makes the discussion in section III.A.1(d) of the Revised 5(b)9(c) Policy regarding adding customer non-Federal resources dedicated to serve load "superfluous." Seattle *et al.* argued that discussion of applying non-Federal resources beyond those identified as Existing Resources should occur in Section C of the Revised 5(b)9(c) Policy, which addresses addition and removal of Above-RHWM Resources. NRP080005, at 2.

Evaluation and Decision:

BPA developed section III of its May 2000 Policy from its legal interpretation of section 5(b)(1) as stated in BPA's 1994 Non-Federal Participation Capacity Ownership Contracts and Section 9(c) Policy. The interpretation presents two categories of non-Federal customer resources that are applied by customers to serve their load under BPA power sales contracts. The first category includes resources a customer is required to apply because they are resources that were being used to serve load prior to December 5, 1980, the effective date of the Northwest Power Act. These resources are known as section 5(b)(1)(A) resources, and the Northwest Power Act requires that they continue to be applied unless such a resource is determined to have been permanently discontinued. The second category includes resources the customer has identified as applied to its load under a BPA contract after December 5, 1980, under section 5(b)(1)(B). The May 2000 Policy and ROD contain extensive discussion of customer comment on BPA's interpretation pertaining to sections 5(b)(1)(A) and (B). BPA is not changing its interpretation by adoption of the RD Policy, the Tiered Rate Methodology (TRM), or the CHWM contracts. BPA cannot amend the statutory designation for these resources.

BPA has developed a distinction in the 5(b)(1)(B) resources that a customer uses to serve its consumer load under the CHWM contract so that the customer's addition of resources may coordinate with 1) the terms of the TRM, 2) the contract provisions on temporary removal of a resource due to loss of load, and 3) BPA determinations under this policy and Northwest Power Act section 5(b)(1) regarding the permanent discontinuance of resources. To that end, BPA has

identified a subset of resources as “Above-RHWM Resources,” which will all be section 5(b)(1)(B) resources when the resource is identified and added to list of resources serving the customer’s load under the terms of the CHWM contract.

BPA declines to adopt the changes proposed by Seattle *et al.* These changes could result in confusion between policy provisions that are the Administrator’s interpretation of the governing statutes relevant to the Revised 5(b)9(c) Policy and contract- and rate-based constructs that cannot and do not supplant or redefine BPA’s statutory obligations under the Northwest Power Act to serve regional firm consumer load.

BPA disagrees with the notion that section III.A(d) is rendered “superfluous” by the concepts of Existing Resources and Above-RHWM Resources. The defined terms “Existing Resources” and “Above-HWM [or “New”] Resources” in the Revised 5(b)9(c) Policy are primarily distinctions of customer resources under the TRM constructs of the Regional Dialogue policy, with corresponding provisions, such as temporary resource removal for load loss, that are within the discretion of the Administrator to grant. Section III.A.1(d) of the Revised 5(b)9(c) Policy is essentially unchanged from the May 2000 Policy and addresses the statutory conditions for addition of a customer’s non-Federal resources under section 5(b)(1)(B) of the Northwest Power Act. The addition of non-Federal resources by a customer during the contract term is not permitted under this provision. May 2000 Policy ROD, at 44. In contrast, section III.C of the Revised 5(b)9(c) Policy describes an exception to this restriction for 5(b)(1)(B) resources that has been created for Above-RHWM Resources. Section III.C states the conditions upon which the Administrator is granting consent for the addition (and *temporary* removal) of Above-RHWM Resources during the term of a 5(b)(1) power sales agreement under Regional Dialogue. Accordingly, BPA declines to adopt the changes proposed in the comment.

B. Issues Pertaining to Section III.C of the Policy

BPA received one comment from parties related to section III.C of the policy proposal. It is addressed in section IV.A, herein.

C. Issues Pertaining to Section III.D of the Policy

Issue 1:

Whether language specifying customers’ non-Federal resource removal rights should be included in section III.D of the Revised 5(b)9(c) Policy.

Parties’ Position:

WPAG commented that including language in the policy that describes customer resource removal rights is not a good policy choice for two reasons. NRP080004, at 2. First, WPAG contended, reciting resource removal provisions in the contract and again, in more general terms, in the policy would give rise to ambiguity between the two documents. *Id.* Second, WPAG claimed, such a structure would create an additional administrative hurdle should BPA and

customers agree to change resource removal provisions during the term of the contract, because the policy would have to be changed, in addition to amending the contract. *Id.*

Evaluation and Decision:

Clarity and simplicity are valid policy goals. However, BPA disagrees with WPAG's basic premise that the policy should not contain, in more general terms, subject matter that is addressed in detail in the contracts. WPAG's comment ignores the fact that BPA's current 5(b)9(c) Policy already addresses the conditions and circumstances for temporary removal of a customer's resource from service to load due to load loss. The current policy on resource removal was adopted as guidance for the Subscription power sales contracts, and those contracts contain terms that implement the policy. It is not the other way around that the policy implements the contract. BPA already has a policy on temporary resource removal for load loss but has proposed certain modifications to the conditions for removal that will apply under the CHWM contract; therefore, BPA is modifying the policy. WPAG mistakes that BPA has no current policy when BPA's proposed change is to bring its current policy in line with its CHWM contract terms. It is not BPA's intent that the contracts direct policy, but that BPA's policy is implemented by the contracts. It is BPA's intent that the Revised 5(b)9(c) Policy and CHWM contracts were drafted to be in alignment.

For a policy to contain guidance and terms at a broader level than the terms of a contract, subject to the same statute that the policy is interpreting, is consistent with the fundamental roles of and relationship between statutes, policy, and contracts. While it is a worthy goal not to have ambiguities or conflicts between contracts and policy documents, stripping away common provisions from the policy is the wrong approach to achieving the goal. WPAG gives no specific example of what type of change might be needed, and BPA has already conducted extensive discussion and review of this issue in the public processes outlined above. BPA believes that it has addressed the policy concerns that customers have expressed and that the contracts contain appropriate terms that are consistent with and coordinate with the modified policy.

If the policy contained no description of resource removal rights or the exact same terms as the CHWM contracts, it would provide no guidance as to the Administrator's interpretation of governing statutes in the event that the contract terms require clarification. Uniformity of application is better ensured through the policy provisions.

Accordingly, BPA will retain the portions of the proposed Revised 5(b)9(c) Policy describing customer resource removal rights, modified in response to certain other comments as described further in this section of the ROD.

Issue 2:

Whether there is a demonstrable need to modify the resource removal rights that BPA provided to customers under the Subscription power sales contracts.

Parties' Position:

WPAG commented that the resource removal rights provided in the Subscription contracts have been used successfully and with no apparent conflict with the May 2000 Policy and Clarifications. NRP08002, at 1-2. WPAG contended that the proposed Revised 5(b)9(c) Policy modifies those resource removal rights to be more restrictive without BPA showing a demonstrable need to do so. *Id.*

Evaluation and Decision:

BPA's May 2000 Policy provides for the Administrator to give consent for the temporary removal of a customer's non-Federal resource(s) dedicated to serve the customer's load under its contract if the customer has lost load for a Contract Year. *See* section III.D.2. The Administrator's consent is granted only to the extent and in the amount of a loss of load, and then only for that year. The customer must make the resource available in the next contract year if the load returns. The current Subscription contracts contain a provision implementing this policy on customer resource removal.

First, it is important to note that a customer's resource removal "rights" exist only to the extent that the Administrator grants discretionary consent to the temporary removal of a customer's non-Federal resources. Otherwise, those customer resources are required to be applied to a customer's firm regional load under sections 5(b)(1)(A) and (B) of the Northwest Power Act. BPA's proposed modification of its resource removal policy actually provides a greater degree of resource removal rights under Regional Dialogue for a customer's non-Federal resources serving a portion of the customer's regional firm load—the Above-RHWM Load—than was provided generally under the Subscription contracts. This policy modification addresses a concern raised by customers on the risks a customer takes in providing non-Federal resources based on a forecast of load that does not materialize as expected, that is, a load loss, and is consistent with BPA's policy goal of encouraging the development of new non-Federal resources in the region. RD ROD at 52-53.

Second, this modification of BPA's policy on resource removal accommodating this risk will not be effective until customers begin taking service under the CHWM contracts on October 1, 2011. Until that date, BPA's May 2000 Policy will continue to apply to a customer's resource removals under its Subscription contract. Although the comments did not make a distinction, BPA presumes that WPAG's comment is directed at the right a customer will have to remove resources under the CHWM contracts for those resources denominated as Existing Resources. BPA's policy for the resources that are denominated Existing Resources in the CHWM contract is indeed a limited version of the consent provided in the May 2000 Policy and implemented by the Subscription contracts. The limitation on customer removal of Existing Resources reflects differences between Subscription and CHWM contracts, the RD Policy, and the TRM.

WPAG's comment fails to acknowledge the major difference in service provided under the Subscription Policy and contracts and the RD Policy and CHWM contracts; that is, the changes in the contract terms and the rate design that are at the heart of Regional Dialogue. The rate design and structure for the TRM developed under the RD Policy required BPA to revisit the

resource removal policy and contract provisions to, among other things, accommodate the changes in risk that a customer will face from load loss, which are different from those under Subscription. BPA's consent to temporarily remove resources due to load loss under the Subscription contracts was primarily driven by a policy consideration of preserving BPA sales revenues. It also provided customers purchasing Slice plus Block or the Block product alone a device to mitigate their take-or-pay obligation on their planned purchase of power from BPA in the event of non-materializing load. May 2000 ROD at 80-83; May 2000 Policy, section III.D.2. Thus, from a policy perspective, the financial effect on other customers of permitting temporary resource removal by a customer to the extent of its loss of load for a year was anticipated to be limited, since it usually did not result in market-rate replacement power costs.

Under the RD Policy, BPA has addressed these economic issues in the TRM and by other terms of the CHWM contracts rather than by a resource removal policy. The TRM includes take-or-pay mitigation measures for power purchase obligations at Tier 1 rates in the form of credits against load shaping charges. The contracts implement this mitigation device. Additionally, purchasers of BPA's Block product have their purchase commitments reset annually, as opposed to the long-term purchase commitments under the Subscription contracts, reducing BPA's revenue risk and the take-or-pay risk for those customers. See section 5.2 of the TRM (TRM-12-A-02) regarding the load shaping charge and section 4.3 of the Block Contract Template at http://www.bpa.gov/power/pl/regionaldialogue/implementation/Documents/2008/2008-11-10_Slice-Block_Template.doc, regarding Block purchase obligation adjustments. Accordingly, the primary policy drivers regarding the customer's use of its Existing Resources under the CHWM contracts and TRM are not the same as those described above under the Subscription contracts. Thus, the policy reason for allowing temporary resource removal to the same extent as under the Subscription contracts no longer exists.

A customer's non-Federal resource removal rights, even though temporary, inherently raise the rates paid by other customers by imposing additional cost of service on BPA. RD ROD at 51. Removal of Existing Resources under the CHWM contract would continue the existing imbalance between the value received by customers with Existing Resources and those customer that have no non-Federal resources to remove in the event of load loss. Under the Subscription contracts, this imbalance was significant. Therefore, under the CHWM contracts BPA is mitigating this imbalance by limiting when and to what extent a customer's Existing Resource may be removed. Even without adopting the TRM, BPA would have expected to make a change in customers' resource removal provisions on a forward-looking basis when the Subscription contracts expire. These financial considerations are more fully discussed in the RD Policy and ROD.

The changes noted above in rate structure and service terms, and the change in policy considerations, reflect fundamental differences from the provisions of the Subscription contracts. BPA will no longer permit some customers to remove dedicated non-Federal resources temporarily and obtain greater access than other public customers to BPA's low-cost load service. Accordingly, BPA has limited its consent for the temporary resource removal rights for Existing Resources. This limitation allows Block and Block with Slice customers the ability to adjust resource amounts in the event of a retail load loss that occurs after the initial net requirement calculation for the first year of a rate period. BPA is providing this right to increase

the planning certainty for these customers regarding what BPA power amounts will be provided at Tier 1 rates during the rate period. Limited resource removal rights will still assist a customer to make economic choices in its non-Federal resource use and will provide retail consumers with rate stability. BPA provides this benefit largely as a convenience to customers in what are expected to be limited circumstances: where a customer's net requirement load is reduced to below its RHW and below its net requirement load for the first year of the rate period.

Finally, BPA also recognizes the need for some of its customers to comply with newly enacted state Renewable Portfolio Standards (RPS) requirements and believes that these modified resource removal rights, together with other terms on resource removal discussed in issue 4 below, will allow a utility the flexibility to manage its compliance with such laws. Accordingly, the Administrator will consent to a limited, temporary resource removal right for Existing Resources. BPA finds this modification of temporary resource removal rights appropriate in light of the changes in rate design and product features under the RD Policy and BPA's statutory requirement that customers continue to apply the non-Federal resources they have dedicated under section 5(b)(1) to serve their regional firm consumer load.

Issue 3:

Whether section III.D.2 of the proposed Revised 5(b)9(c) Policy should be modified to allow removal of Existing Resources for longer than one year, for qualifying loss of load, if a rate period has a duration of more than two years.

Parties' Position:

Seattle *et al.* commented that BPA had included language in section III.D.2 (section III.D.3 in the final Revised 5(b)9(c) Policy) to permit removal of Existing Resources "in the second or subsequent years" to accommodate rate periods that may be longer than two years, but had not included corresponding language to allow the resource removal to "persist in subsequent years (if the load loss giving rise to the removal persisted)." NRP080005, at 3-4.

Evaluation and Decision:

Although Seattle is correct that rate periods may vary in their duration, BPA's TRM is based on planned rate cases every two years after the initial "transition" period. *See* TRM, section 1.1. BPA has generally had two-year rate periods, but rate periods have been as long as five years. Were BPA proposing to adjust rates under the TRM on a basis other than every two years, then specific language coordinating resource removal in this policy and in the contracts would be considered. However, Seattle's proposed language to allow the removal to "persist into subsequent years," even if conditional, would raise the risk of the removal becoming at least long-term or permanent instead of temporary. The policy and equity concerns discussed in the preceding response to comments would be increased for longer-term removals. Such a result is inconsistent with BPA's intent that the Administrator's consent is only temporary and conditional and the policy balance discussed above. The suggested language is also ambiguous

in meaning as to load forecast in multiple years, and BPA believes that a year-by-year look at load better suits the intent of the Administrator's consent to removal.

Following the plain text of the language in section III.D.2 of the proposed Revised 5(b)9(c) Policy results in a year-to-year determination of whether a customer's resources may be removed from service to a customer's regional firm load due to loss of load. The Administrator's consent to resource removal as described in section III.D.2 is limited to periods of one year. The one-year periods may run subsequent to each other, but each year a customer's right to remove its resources must be determined anew, and if the retail load returns, then so too must the resource. This position is unchanged from BPA's May 2000 Policy as applied to the Subscription contracts. *See* May 2000 Policy ROD, at 83-84, and Clarifications, at 3-4, regarding requirement for short-term sales of removed resources. Accordingly, BPA declines to adopt the suggested change, as it would effectively result in a right to "rolling removal" of resources for multiple years, which is neither within the balance of impacts discussed above, consented to by the Administrator, nor permitted under the Revised 5(b)9(c) Policy.

Issue 4:

Whether the Revised 5(b)9(c) Policy should include a provision that permits the removal of Existing Resources in lieu of removing renewable Above-RHWM Resources, consistent with the CHWM contract template.

Parties' Position:

Seattle *et al.* commented that section III.D.2 (Removal of Non-Federal Resources) of the proposed Revised 5(b)9(c) Policy should include a resource removal feature described in the CHWM contracts, through which a customer may remove an Existing Resource in lieu of a renewable Above-HWM Resource if the customer is using the renewable resource to fulfill a state or Federal renewable resource standard or other comparable legal obligation. NRP08005, at 4. NRU commented that the proposed Revised 5(b)9(c) Policy "incorrectly references or characterizes" the CHWM contract language, citing, *inter alia*, the absence of the same resource-removal language. NRP08002, at 2.

Evaluation and Decision:

BPA acknowledges that some utilities will be subject to state standards for application of renewable resources during the term of the CHWM contract. BPA agrees that this policy should allow an "in lieu" option to allow a customer, on qualifying load loss, to remove an Existing Resource in the place of a renewable Above-RHWM Resource that is being used to meet an RPS requirement or similar legal obligation. Such resource removal would be in the same amount and for the same duration as the customer's eligibility to remove the new renewable resource. However, BPA cannot address what would qualify as a "comparable legal obligation," as that concept is undefined, and would have to have more specific information on both the nature of the obligation and the means of compliance. BPA also cannot address potential future Federal legislation in this policy. BPA agrees with the comment of Seattle *et al.* that including language

describing the referenced resource removal provision in the Revised 5(b)9(c) Policy would reduce the potential for ambiguity between the Revised 5(b)9(c) Policy and corresponding provisions of the CHWM contracts.

BPA is not subject to state RPS requirements, but recognizes the public policy goals of such legislated programs. BPA has provided this specific flexibility in resource removal so as not to frustrate the goals of those state statutes as applied to BPA utility customers. *See* CP ROD, at 21. In doing so, BPA does not imply or recognize any authority of state statutes to supersede or modify BPA's governing Federal statutes and related policies. BPA disagrees with the characterization of NRU that the proposed Revised 5(b)9(c) Policy language misrepresents the CHWM contract language because, as discussed throughout this ROD, BPA's policies represent the Administrator's interpretation of BPA's governing statutes. The Revised 5(b)9(c) Policy is not a mere repository for contract terms and, conceptually, contracts can contain details not included in a relevant policy but yet can be consistent with the policy. As stated previously, the CHWM contract includes terms that implement this Revised 5(b)9(c) Policy, and those terms may both be more specific and vary slightly from the policy expression. The Revised 5(b)9(c) Policy gives guidance to the contract, and not the other way around.

Issue 5:

Whether limits for resource removal for Above-RHWM Resource load loss and customers' or BPA's remarketing of Tier 2 purchase obligation amounts in section III.D.2 can be implemented as described in the proposed Revised 5(b)9(c) Policy.

Parties' Position:

Seattle *et al.* commented that the description of the load limit for Above-RHWM Resource removal and BPA's remarketing of Tier 2 purchase obligation amounts is linked to a dependent factor (net requirements) that appears to set up an unsolvable loop for the calculation of the limit. *See* NRP080005, at 2-3.

Evaluation and Decision:

BPA acknowledges that a literal reading of the calculation method referenced in Seattle *et al.*'s comment is potentially confusing because it does not distinguish between the two uses of the term "net requirements." The proposed language was meant to refer to, first, an initial net requirement calculation, and then a recalculated net requirement amount. However, this was not specifically described in the proposed language. Seattle *et al.* recommends using the language from section 10.2 of the Load Following contract template. This language avoids referencing net requirements as one of two limiting factors when calculating the allowed amount of resource removal for a customer's Above-RHWM Load loss and remarketing of Tier 2 purchase obligation amounts. *Id.*

While BPA agrees that the language of the contract template better states the limit at issue for that class of purchaser, BPA declines to import the contract provision itself. The language is

specific to the Load Following contract and would not be correctly applied to a customer's BPA service under Block or Block with Slice contracts.

Partially in response to Seattle *et al.*'s comment, BPA has substituted the following alternate description for section III.D.2 of the Revised 5(b)9(c) Policy for calculating the limit at issue:

a) Block and Slice with Block CHWM Contracts

Under the CHWM contract for Block and Block with Slice customers, BPA's annual determination may find that a customer's Preliminary Net Requirement is less than its contracted amount of BPA power to be purchased for the next contract year. In this case, the customer may elect to remove Above-RHWM Resources from use for its regional firm load for a period of one year, have BPA remarket its purchase obligations at Tier 2 rates, or a combination of both. This may continue until (a) the total of the resources removed and BPA purchase obligations remarketed equals the amount that the customer's purchase obligations at Tier 2 rates plus its RHWM exceeds its Preliminary Net Requirement, or (b) until all Above-RHWM Resources have been removed and all the customer's purchase obligations at Tier 2 rates have been remarketed by BPA.

b) Load Following CHWM Contracts

Under the CHWM contract for Load Following customers, BPA's RHWM Process load forecast may indicate that a customer's net requirement for a Fiscal Year of a Rate Period is less than its contracted amount of BPA power to be purchased in that Fiscal Year. In this case, the customer may elect to remove Above-RHWM Resources from use for its regional firm load for that Fiscal Year or exercise contractual mitigation measures to reduce its BPA purchase obligations at Tier 2 rates. This may continue until (a) the total of the resources removed and reduction of purchase obligations equals the amount that the customer's purchase obligations at Tier 2 rates plus its Above-RHWM Resources exceeds its Above-RHWM Load, or (b) until all Above-RHWM Resources have been removed and no BPA purchase obligations at Tier 2 rates remain.

Above-RHWM Resource removal for all customers shall be such that the annual shape of the resource shall be maintained, as required by the customer's CHWM contract. Any Above-RHWM Resource that is removed for the Fiscal Year must be made available in the next Fiscal Year to serve any planned Above-RHWM Load increases.

* * * * *

Issue 6:

Whether section III.D.2 correctly describes resource removal for Above-RHWM Resources for customers purchasing the Load Following, Block, and Block with Slice products.

Parties' Position:

Seattle *et al.* commented that the description of resource removal rights for Above-RHWM Resources treats Load Following and [Block with] Slice customers differently and inconsistently with the terms of the current contract templates. NRP08005, at 3. Seattle *et al.* recommended using specific replacement language that describes such resource removal rights for customers purchasing the Load Following, Block, and Block with Slice products “as permitted in their respective CHWM Contracts,” in the shape of the removed resource as required by the CHWM contract. *Id.* The suggested language also describes the contract provisions that address the removal of Above-RHWM Resources and remarketing of Tier 2 Rate purchase amounts in basic terms. *Id.*

Evaluation and Decision:

The RD policy, TRM, and Product Guide make a distinction in the use of resource removal for different classes of purchasers given the balancing of interests noted in the preceding responses. Thus, the terms in BPA’s Load Following contracts differ from those in BPA’s other power sales contracts for several reasons, including because the way actual load is served by BPA differs from the way BPA provides service based on a planned load for other products. The comment of Seattle *et al.* is correct in stating that the Revised 5(b)9(c) Policy provides resource removal rights for Load Following customers that are different from those for customers taking other products and buying power on a planned basis. Seattle *et al.* apparently would not have those differences called out in the Revised 5(b)9(c) Policy. Rather, Seattle *et al.* suggested that BPA’s policy should point to the contract provision alone for customers purchasing different products to determine their resource removal rights, and the policy should only include a sentence describing what the contracts state.

BPA’s final Revised 5(b)9(c) Policy is based on the Administrator giving consent and describes the purpose, conditions, and extent of the Administrator’s consent regarding temporary removal of a customer resource from serving load. BPA is not obligated to provide consent, and the Policy sets the parameters for the type of consent given and the distinctions in that consent for different products. Without that consent, no contract right would exist. BPA declines to fully adopt the Seattle *et al.* proposed language, because simply describing or incorporating contract provisions is not consistent with the role of a policy as the Administrator’s interpretation of authorizing statutes. BPA does not believe it necessary to entirely replace the language in the proposed Revised 5(b)9(c) Policy identified by Seattle *et al.* However, BPA has incorporated some of the suggested language to more clearly describe temporary Above-RHWM Resource removal rights. The revised language is set forth in BPA’s response to Issue 5 above.

Issue 7:

Whether BPA should clarify proposed language in section III.D.2 that is intended to restrict resource removal rights in amounts corresponding to any applied 9(c) decrement.

Parties' Position:

Seattle *et al.* commented that it did not understand the meaning of proposed language regarding a reduction in BPA's firm power obligation due to a customer's export of non-Federal power, which states, "[i]n such cases, a customer's potential resource removal rights will be reduced in the same amount as the reduction to BPA's obligation to provide power"; Seattle *et al.* requested clarification. NRP080005, at 4.

Evaluation and Decision:

In certain instances under section 9(c) of the Northwest Power Act and section 3(d) of the Regional Preference Act, BPA is prohibited from selling firm power to a customer as a replacement for non-Federal hydro or other power that a customer has sold outside the region. In such instances, BPA reduces the amount of its firm requirement power sold to the customer under its 5(b)(1) contract with BPA. Details of BPA's policy and legal interpretation of these statutory provisions and BPA reductions or "decrements" under the above statutory provisions were presented in BPA's May 2000 Policy ROD and BPA's 1994 NFP Policy. Here, in the above-referenced language, BPA is coordinating any reduction of its obligation to supply firm requirements power to the customer under those statutory provisions with the resource removal terms of the CHWM contracts. This coordination will ensure that BPA does not provide firm power to replace a customer resource inconsistent with the statutory requirement of sections 9(c) and 3(d).

The CP ROD discussed this issue at some length. *See* CP ROD at 24-25. The purpose of a decrement is to reduce the amount of power at Priority Firm Power (PF) rates that BPA provides to a customer under a CHWM contract in the amount and duration of an export of power from the region, consistent with BPA's May 2000 Policy and Clarifications. Because the statutory prohibition operates against BPA's sale of firm requirements power to a customer, BPA does not want to permit the customer's use of a resource removal right to circumvent the determination or application of a 9(c) decrement against BPA's obligation on a customer's net requirement. A customer's right to temporarily remove a resource can result in an increase of BPA's obligation to supply firm power for a year. The purpose of a 9(c) decrement is to reduce BPA's firm power obligation, but a customer's resource removal could result in less or no net decrease in BPA's obligation to serve load. Therefore, there is a need to coordinate these statutory decrements and Administrator's consent for resource removal.

BPA has revised the language in the proposed Revised 5(b)9(c) Policy identified in the comment of Seattle *et al.* to state the principle that if BPA has imposed a 9(c) decrement to reduce a customer's net requirement, then BPA's consent to remove is conditioned on the resource removal rights not supplanting a 9(c) or 3(d) decrement in BPA's load obligation. Thus, resource removal cannot be used such that BPA's determination of the customer's net requirement is not reduced in the amount of the decrement. To achieve this end, in many cases, a customer's resource removal rights will be "frozen" by an amount equal to the amount of the decrement. In other words, a customer in any year would have to have load loss in excess of the decrement amount to be able to remove any amount of its dedicated resources. Resource removal provisions can be complicated, and this principle is intended as a guideline for

interpreting any description of a customer's resource removal rights, either in a 5(b)(1) power sales contract or in the Revised 5(b)9(c) Policy.

Issue 8:

Whether a decrement to a customer's eligibility to purchase power under section 9(c) of the Act and the Revised 5(b)9(c) Policy should first be applied to power priced at the lowest of the tiered PF rates.

Parties' Position:

WPAG questioned whether it is proper that a decrement applied under section 23.6.1 of the CHWM contract should be applied to a customer's eligibility to purchase power from BPA at Tier 1 rates, noting that it was not discussed during the compressed contract discussion period. NRP080004, at 2. Similarly, PPC, in a comment endorsed and supported by Cowlitz, WPAG, and Seattle *et al.*, stated that there needs to be further discussion regarding whether a decrement is applied against eligibility to purchase power at Tier 1 rates, Tier 2 rates, or a combination of both. These parties opined that the topic was not given appropriate consideration during the contract negotiation process. NRP080003, at 2.

Evaluation and Decision:

Section 23.6.3 of the CHWM contracts establishes that, during the term of the contracts, decrements under sections 3(d) and 9(c) will first be applied to eligibility to purchase power that would otherwise be provided at Tier 1 Rates, as defined in that contract. Because sections 3(d) and 9(c) do not identify any specific BPA rate treatment regarding the application of a reduction (decrement) in BPA's firm power obligations to the customer, BPA did not propose any in either the TRM or the Revised 5(b)9(c) Policy. Sections 3(d) and 9(c) affect BPA's firm power obligation and how much firm power BPA may sell to the customer. They do not address the price at which power is sold or tie a reduction or decrement in BPA's load obligation to a rate treatment. The rate at which BPA sells power to a customer to meet BPA's remaining firm power obligation is a separate consideration from the application of sections 3(d) and 9(c) and is not within the scope of the Revised 5(b)9(c) Policy.

D. Issues Pertinent to Section III.D.4 of the Proposed Revised 5(b)9(c) Policy

Issue:

Whether the Administrator's consent for the removal of a customer's non-Federal resource should be included in section III.D.4 as a condition under which BPA will make additional amounts of Federal power available to serve the customer.

Parties' Position:

Seattle *et al.* noted that section III.D.4 of the proposed Revised 5(b)9(c) Policy (section III.D.4(c) of the final policy) states that BPA will make available additional amounts of Federal power to a customer under a section 5(b)(1) contract when that customer's generating or contractual resources are no longer required to be used for the customer's load because of statutory discontinuance (citing section III.B). NRP080005, at 4. However, Seattle *et al.* stated, section III.B does not include consent of the Administrator as a valid reason for discontinuance, even though section 5(b)(1) of the Northwest Power Act provides for such consent. *Id.* Seattle *et al.* requested one of two potential remedies: (1) modify section III.B to add Administrator consent, or (2) add a phrase at the end of the penultimate sentence of section III.D.4 that states "or as agreed to by the Administrator."

Evaluation and Decision:

Section 5(b)(1) of the Northwest Power Act provides in pertinent part:

In determining the resources which are used to serve a firm load, for purposes of subparagraphs (A) and (B), any resources used to serve a firm load under such subparagraphs shall be treated as continuing to be so used, unless such use is discontinued with the consent of the Administrator, or unless such use is discontinued because of obsolescence, retirement, loss of resource, or loss of contract rights.

Section III.D.4 of the proposed Revised 5(b)9(c) Policy provided that BPA will sell replacement power to a preference customer in the event of "statutory discontinuance" of a customer's non-Federal resource, as provided in section III.B. BPA has previously determined such an event to mean the *permanent* discontinuance of customer resources due to obsolescence, retirement, loss of resource, or loss of contract rights. May 2000 Policy section III.B (adopted without change in the Revised 5(b)9(c) Policy). Seattle *et al.* noted that the consent of the Administrator is not listed in Section III.B of the Revised 5(b)9(c) Policy, although it is listed in the statute. BPA reads section 5(b)(1) of the Northwest Power Act as describing the consent of the Administrator as a condition separate from the four events that comprise statutory discontinuance. The Administrator is granted discretion by the statute as to whether and what type of consent for the removal of a resource is granted. The concepts differ importantly in the respect that statutory discontinuance for the four causes is permanent, while the Administrator may consent to either temporary removal or permanent discontinuance of a customer resource. Accordingly, for clarification purposes only, the final Revised 5(b)9(c) Policy adds "discretionary consent of the Administrator" to section III.D.4, rather than to section III.B.¹ As discussed further herein, this addition does not modify BPA's past policy or practice in any fashion.

Neither BPA's May 2000 Policy nor the Revised 5(b)9(c) Policy provides any blanket consent for the permanent or temporary discontinuance of a non-Federal resource a customer has been using to meet its load. In the May 2000 Policy, BPA did not define specific terms and conditions

¹ This change also aligns section III.D.4 with sections III.A.1(a) and III.A.1(b)(i), which consider the removal of a customer's non-Federal resource with Administrator's consent when determining the amount of power that BPA will offer for sale to a customer under a section 5(b)(1) power sales contract.

for providing the Administrator's consent to the permanent discontinuation of customer resource. It was noted in the related ROD that (1) the Administrator's consent to removal of a non-Federal resource is at the Administrator's discretion, (2) the provision of such consent is case-specific and dependent on the particular facts and circumstances of each request, and (3) nothing in the statute prohibits the Administrator from limiting his or her consent to requests for resource removal. May 2000 Policy ROD, at 56. This position is consistent with the language of section 5(b)(1) of the Northwest Power Act.

BPA's intent was that the customer would continue to use its non-Federal resources that it had applied to meet its regional load under the Subscription contracts, unless a resource was permanently discontinued for one of the four specific reasons cited in the statute or in limited, specific cases involving the Administrator's consent. *Id.*; *see also examples* at 70 and 74. That intent is unchanged under the Revised 5(b)9(c) Policy and also applies to any additional non-Federal resources that customers apply to load after September 30, 2006, that fall under section 5(b)1(B) of the Northwest Power Act.

BPA's May 2000 Policy and ROD do define the conditions and terms for the Administrator's consent to a *temporary* discontinuance of a customer's resource when the customer has a loss of load. BPA will continue to include the Administrator's consent for customers to temporarily remove a resource, as revised above, as part of the Revised 5(b)9(c) Policy.

BPA declines any suggestion that it should give a general Administrator's consent to the permanent discontinuance of a customer resource. BPA has amended section III.D.4(c) solely to avoid any appearance that the section may fail to reflect all the relevant terms of section 5(b)(1) of the Northwest Power Act. BPA will not define in the final Revised 5(b)9(c) Policy a general set of conditions for the Administrator to exercise such consent for permanent discontinuance of a customer resource.

If BPA receives a request for consent to permanently discontinue a customer resource, then BPA will evaluate the individual circumstances of the request and may choose at that time to define the conditions for consent to the specific request. Such a policy determination would be of general interest to all BPA customers, since BPA's other customers may be affected by the permanent removal of a customer resource and BPA supplying the replacement power. In evaluating the request for the Administrator's consent, BPA would also have to consider whether there was any conflict with section 9(c) or section 3(d) obligations to reduce BPA obligations to supply firm power. For the foregoing reasons, BPA will consider any such request on a case-by-case basis and only after regional comment on the proposed removal.

V. SECTION 9(c) POLICY

A. Section IV.D of the Policy

BPA received no customer comment on this proposed change. The Subscription 9(c) study was performed under the May 2000 Policy, and BPA does not intend to update or revise that study at this time for Regional Dialogue. Accordingly, Section IV.D, the Subscription 9(c) Study, was deleted from the Revised 5(b)9(c) Policy as proposed, because it is obsolete.

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VI. ENVIRONMENTAL COMPLIANCE

BPA has evaluated the potential for environmental effects related to the Revised 5(b)9(c) Policy, consistent with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 et seq. The revisions include: (1) adjustment of the policy on customers' non-Federal resources; (2) accommodation of new contract notice provisions for customers' non-Federal resources; (3) modification of the order of removal of customers' non-Federal resources in the event of a loss of load; (4) elimination of the current 200 MW renewable resource exception for additions of non-Federal resources by the customer; and (5) editorial modifications in other provisions. These actions are primarily administrative in nature and accordingly would not be expected to result in environmental effects. Furthermore, these actions do not represent a significant change in policy choices already made in previous BPA processes, such as BPA's adoption of its Long-Term Regional Dialogue Policy. The Revised 5(b)9(c) Policy is intended to assist in implementing the already-adopted RD Policy and CHWM contracts. Finally, should there be attenuated shifts in consumer or utility behavior resulting from the Revised 5(b)9(c) Policy, namely shifts in customer approach to resource and transmission development, the environmental effects associated with such shifts have been assessed and described in BPA's Business Plan Environmental Impact Statement (DOE/EIS-0183, June 1995), and are consistent with BPA's Market-Driven approach adopted in its August 1995 Business Plan ROD (*see* Determination of BPA Firm Loads, Business Plan EIS Section 2.4.1.4). Therefore, this Revised 5(b)9(c) Policy falls within the scope of the Market-Driven Alternative that was evaluated in the Business Plan EIS and adopted in the Business Plan ROD.

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VII. CONCLUSION

I have considered fully the comments received from parties in response to BPA's proposed Revised 5(b)9(c) Policy. This record of decision incorporates by reference and is in support of my approval of the attached Revised 5(b)9(c) Policy. This policy will take effect on October 1, 2011, in coordination with the delivery of service under BPA's CHWM power sales contracts. The policy and ROD will provide guidance not only to BPA, but also to BPA's customers and the public regarding statutory compliance under the executed Regional Dialogue CHWM contracts.

Issued in Portland, Oregon, on March 19, 2009.

/s/ Stephen J. Wright
Administrator and Chief Executive Officer

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ATTACHMENT A

**Revised 5(b)9(c) Policy
(Changes from proposed Revised Policy in red-line format)**