



## Department of Energy

Bonneville Power Administration  
P.O. Box 3621  
Portland, Oregon 97208-3621

GENERAL COUNSEL

December 22, 2004

In reply refer to: L-7

Michael A. Goldfarb  
1150 Market Place Tower  
2025 First Avenue  
Seattle, WA 98121

Dear Mr. Goldfarb:

In a November 16, 2004 letter, you submitted a Freedom of Information Act request, designated as No. 05-010, in which you requested from the Bonneville Power Administration "[a]ll federal regulations, policies, standards and guidelines or other documents used by the Bonneville Power Administration ('BPA') for deciding:

- a. When a BPA decision is 'final' under section 16 U.S.C. §839f(e)(5) of the Northwest Power Act;
- b. When BPA prepares a Record of Decision;
- c. When BPA makes a Record of Decision available to the public or interested parties; and
- d. How the Record of Decision is made available (i.e., mailing, publication in the Federal Register, posting on BPA web site, etc.)."

BPA is hereby providing all records in its possession responsive to the above request. They are:

- a. BPA Policy for Public Involvement (1986);
- b. BPA Policy for Section 6(c) of the Pacific Northwest Electric Power Planning and Conservation Act;
- c. BPA Procedures Governing Bonneville Power Administration Rate Hearings;
- d. Overview of NEPA Review Processes
- e. 10 C.F.R. §1021.315, Records of decision; and
- f. 40 C.F.R. §1505.2, Record of decision in cases requiring environmental impact statements.

BPA has no other documents responsive to this request.

In your original request, you agreed to pay fees up to \$100. In accordance with our agency's FOIA regulations, fees to complete this request totaled \$73.26. You will be invoiced for this amount under separate cover by our accounting department.

If dissatisfied with this response, you may make an appeal within 30 days of receipt of this letter to Director, Office of Hearings and Appeals, Department of Energy, 1000 Independence Ave., S.W., Washington, D.C. 20585. Both the envelope and the letter must be clearly marked "Freedom of Information Act Appeal."

If you have any questions regarding this appeal, you may contact me at (503) 230-4999.

Sincerely,

A handwritten signature in cursive script that reads "Stephen R. Larson".

Stephen R. Larson  
Special Assistant General Counsel

Enclosures



## Department of Energy

Bonneville Power Administration  
P.O. Box 3621  
Portland, Oregon 97208-3621

COPY

GENERAL COUNSEL

February 24, 2005

In reply refer to: L-7

Via Facsimile 202-426-1415

Mr. Robert B. Palmer  
Office of Hearings and Appeals  
U.S. Department of Energy  
1000 Independence Avenue, S.W.  
Washington, DC 20585-0107

Dear Mr. Palmer:

I am responding to the January 14, 2005, appeal by Mr. Michael Goldfarb, representing the Public Utility District No. 1 of Snohomish County, Washington, of the response by the Bonneville Power Administration ("Bonneville") to his FOIA request of November 16, 2004. Mr. Goldfarb submitted three FOIA requests which, together, requested all written and electronic documents, including communications between the Bonneville Power Administration, members of Congress or their staffs, and the Department of Energy concerning P.L. 106-377, Title III, §311 (Energy and Water Appropriations Act of 2001). This particular legislative language lifted a 1986 appropriations act ban on using federal funds to study the transfer of management or control over federal facilities to nonfederal entities ("the study ban") but only with respect to participation by Federal power marketing administrations (PMAs) in the development of regional transmission organizations (RTOs). Bonneville responded to the FOIA request on December 27, 2004 with relevant material. (Attachment 1) Bonneville redacted portions of the documents because this material was, in Bonneville's view, outside the parameters of the FOIA request. Bonneville also withheld five (corrected to four, see below) email communications as attorney-client communications or as attorney work product and one email communication as a deliberative process communication. (Attachment 2)

Mr. Goldfarb claims Bonneville's response is deficient in three ways. Below, I list each of his allegations as well as our response.

**1. Bonneville did not conduct its search in a manner reasonably calculated to uncover all relevant documents.** As the Responsible Official, I identified all employees who might have had involvement in discussions of Section 311 of P.L. 106-377. Because the effort involved the national legislative process, the number of Bonneville employees that may have been involved is quite limited. These were the Administrator and Deputy Administrator; the staff of our Washington, D.C. office in the Forrestal Building; the BPA General Counsel; myself (as the

attorney working on RTO matters); and the two leaders of BPA's RTO project at that time. Personal files of these officials and employees, both electronic and hard copy, were reviewed as were official files.

As evidence for his claim, Mr. Goldfarb cites Bonneville's failure to provide him with any communications between BPA and members of Congress or with the Department of Energy. In fact, we did provide two communications with or from DOE: (1) a July 14, 2000 memo about the legislation from Roger Seifert in our Washington office to various DOE officials, and (2) a May 16, 2000 memorandum from T.J. Glauthier, DOE Deputy Secretary, directing all PMAs to fully participate in the process of developing regional transmission organizations. Additionally, proposed legislative language included throughout the materials provided to Mr. Goldfarb most likely came from congressional staff with whom our Washington staff members were in contact.

The absence of other such communications is not unusual. Bonneville keeps informed and involved with matters of national legislation through its Washington office staff. It would be out of the ordinary for any legislative communications, particularly written, to flow between DOE or congressional staff and BPA except through the Washington office. And the practice of our Washington staff is to avoid maintaining copies of informal written communications with congressional offices or DOE staff. Pursuant to agency-wide policy, BPA emails that are deleted from a user's computer are eliminated from the system after 90 days.

Mr. Goldfarb cites *Truitt v. Dept. of State*, 897 F.2d 540 (D.C. Cir. 1990) for the truism that a federal agency must conduct a reasonable search in response to a FOIA request. In that case, the court held that the State Department did not conduct a reasonable search when it refused to search a file of documents specifically identified by the requesting party in his follow-up letter to the Department's first response. The Department's defense was that the requester had failed to specifically identify the file at issue in his first request. The court stated that, when an agency discovers documents overlooked in the first search, "what is expected of a law-abiding agency is that it admit and correct error when error is revealed" (citing *Meeropol v. Meese*, 790 F.2d 942, 953 (1986)). Here, Bonneville has conducted a reasonable search and has not refused to search relevant files.

## **2. BPA failed to provide copies of communications that were referenced in the material it provided.**

- a. Citing a reference in a June 25, 2000 email to proposed legislative language having been sent to the WAPA Administrator, Mr. Goldfarb points out that Bonneville did not provide a copy of the written communication with WAPA. We found no such written communication the first time we looked. After receiving a copy of Mr. Goldfarb's appeal, I asked Ms. Peggy Olds (referenced in the reported conversation as the likely source of such a written communication) to search again, and she found nothing.
- b. Mr. Goldfarb points out that he did not receive a copy of communications with Bonneville's utility partners in the RTO project ("filing utilities") that are referenced in a May 31, 2000 email of Mark Maher. Again, we did not find a copy of any such

communication. What likely happened was that Mr. Maher distributed, in person at a regular filing utility meeting, copies of the proposed legislative language (which is cited verbatim in the email chain provided to Mr. Goldfarb) to the filing utility representatives without an accompanying memorandum or description.

### **3. BPA may not redact from its response material not encompassed in the FOIA request.**

Much of the material provided to Mr. Goldfarb by Bonneville was comprised of email chains among BPA staff and officials. Portions of these chains did not, in Bonneville's view, fall within the parameters of what was requested. Therefore, Bonneville redacted such material from its response.

A requesting party should not be able to bootstrap its right to obtain information described in a limited request into a right to receive material it did not request but appears in a related document. This needs to be the rule particularly with email conversations that can be protracted and wide-ranging and may involve many different participants and topics.

Mr. Goldfarb specifically requested information related to Section 311 of the Energy and Water Appropriations Act of 2001<sup>1</sup> that authorized PMAs to study and participate in the development of regional transmission organizations. Most of the material that was redacted, as well as other documents that were not turned over, related to parallel efforts to develop legislative proposals to (1) remedy the significant adverse retirement and other impacts that would be suffered by federal employees who elected to leave federal service and work for an RTO *if one were to be formed* and (2) extend the Administrator's Voluntary Separation Incentive program. These are entirely different topics than the one Mr. Goldfarb is probing (and concerning which he has already filed litigation), i.e., whether the lifting of the study ban authorized Bonneville to participate *in the development of an RTO*. Section 311 says nothing about employee matters and neither does the conference report on that section.<sup>2</sup> Though they were separate efforts, the internal discussions concerning employee matters and the effort to lift the study ban often occurred together because they were part of the same legislative cycle and the same appropriations bill.

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<sup>1</sup> "Sec. 311. Notwithstanding any other law, and without fiscal year limitation, each Federal Power Marketing Administration is authorized to engage in activities and solicit, undertake and review studies and proposals relating to the formation and operation of a regional transmission organization."

<sup>2</sup> "Sec. 311. The conference agreement includes language allowing each Federal power marketing administration to engage in activities relating to the formation and operation of a regional transmission organization." House Conference Report 106-698 at 289, 2000 U.S. Code Congressional and Administrative News, vol. 4, p. 1367.

The other material that was redacted involved a November, 2004 question from Allen Burns, the project head of BPA's RTO activities, to Randy Roach about SES financial disclosure requirements in response to a request he received from DOE about his authority to participate as a board member of RTO West. This communication has no relation to Section 311 of P.L. 106-377.

**4. BPA did not adequately describe the basis for withholding documents under the attorney work product privilege and under the attorney-client privilege.**

In our response, we claimed either or both the attorney-client and attorney work product privilege with respect to five email communications. In fact, there are only four such communications. We mistakenly counted one of them twice (items (b) and (e) in the documents listed in our response) because it appeared in two versions of the same email chain. Also, we will drop any claim to the attorney work product privilege because none of the communications were prepared in the expectation of litigation. The attorney-client privilege, however, does apply.<sup>3</sup>

Because these four communications are brief, there is little additional description that can be provided beyond that contained in Bonneville's response to Mr. Goldfarb. They are between Bonneville's General Counsel and internal clients, primarily the head of Bonneville's Washington office, concerning proposed legislative language to lift the study ban. Unlike the *Mead Data Central* case, cited by Mr. Goldfarb, which addressed the confidentiality of factual material incorporated within attorney-client communications, there are no factual components to these communications other than possibly:

- The last two sentences of the 6:17 AM email from Jeffrey Stier (of our Washington office) to Randy Roach.
- The 3:21 PM email from Randy Roach to Jeffrey Stier. However, the attachment to that email containing the four legislative alternatives crafted by Mr. Roach is certainly protected.
- The first and last sentences of the 2:24 PM email from Randy Roach to Jeffrey Stier.

We are willing to provide these portions of the email chain to Mr. Goldfarb. We would also be willing to further explain to Mr. Goldfarb the brevity of these communications and the absence of any other factual information able to be released without disclosing the substance of the privileged communications.

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<sup>3</sup> Though we did not assert this privilege in our response to Mr. Goldfarb, these four communications would also be protected under the deliberative process privilege. "With respect to documents containing legal opinions and advice, there is no doubt a great deal of overlap between the attorney-client privilege component of exemption five and its deliberative process privilege component." *Mead Data Central v. U.S. Dept of Air Force*, 566 F.2d 242, 254, n. 28 (D.C. Cir. 1977).

I would be happy to discuss this further with you on the telephone if you wish. You can reach me at 503-230-4999.

Very truly yours,

A handwritten signature in cursive script that reads "Stephen R. Larson".

Stephen R. Larson  
Special Assistant General Counsel  
503-230-4999 (phone)  
503-230-7405 (fax)  
[srlarson@bpa.gov](mailto:srlarson@bpa.gov) (e-mail)

Enclosures

FAX TRANSMITTAL SHEET  
(UNCLASSIFIED DATA ONLY)

2005 MAR 28 AM 6:53



OFFICE OF HEARINGS AND APPEALS  
U. S. DEPARTMENT OF ENERGY  
WASHINGTON, DC 20585-0107

|                               |                        |  |
|-------------------------------|------------------------|--|
| ORIGINATOR:                   | ROBERT B. PALMER       |  |
| TELEPHONE NO: (202) 426- 1449 | FAX NO: (202) 426-1415 |  |

|                       |                |
|-----------------------|----------------|
| ADDRESSEE:            | Joseph Bennett |
| FAX TELEPHONE NUMBER: | 503-230-7405   |

|   |   |
|---|---|
| Pages To Be Transmitted (Including This Transmittal Sheet): | 9 |
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| REMARKS: | Here is a copy of the FOIA decision that we issued to Public Utility District #1 |
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|                                    |     |    |   |
|------------------------------------|-----|----|---|
| CALL ORIGINATOR TO VERIFY RECEIPT: | YES | NO | X |
|------------------------------------|-----|----|---|

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|-----------------------|---------|
| AUTHORIZING OFFICIAL: |         |
| DATE:                 | 3/28/05 |



Department of Energy  
Washington, DC 20585

MAR 24 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Public Utility District #1

Dates of Filing: January 18, 2005  
February 23, 2005

Case Numbers: TFA-0084  
TFA-0089

This Decision concerns two Appeals that were filed by the Public Utility District No. 1 of Snohomish City, Washington (hereinafter referred to as "the District"). The first Appeal (TFA-0084) was filed in response to a determination issued to the District by the Special Assistant General Counsel, Bonneville Power Administration (hereinafter referred to as "BPA"). In that determination, BPA replied to three requests for documents that the District submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. BPA released certain documents in their entirety to the District, and withheld other material pursuant to Exemption 5 of the FOIA. This Appeal, if granted, would require that BPA release the withheld information. In the second Appeal (TFA-0089), the District contests BPA's assessment of fees for processing its requests in Case No. TFA-0084, and five other requests.

The FOIA generally requires that documents held by federal agencies be released to the public on request. However, Congress has provided nine exemptions to the FOIA that set forth the types of information that agencies are not required to release. The FOIA also provides for the assessment of fees for the processing of requests for documents. 5 U.S.C. § 552(a)(4)(A)(i); see also 10 C.F.R. § 1004.9(a). However, the DOE will grant a full or partial waiver of applicable fees if disclosure of the information sought in a FOIA request (i) is in the public interest because it is likely to contribute significantly to public understanding of the activities of the government, and (ii) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii).

**I. Background**

In its FOIA requests, the District sought access to "all written and electronic documents, including communications between BPA, members of Congress (or their staffs) and the [DOE] or any other federal power marketing agencies concerning P.L. 106-377, Title III, § 311 (Energy and Water Appropriations Act of 2001) before and after passage." See November 16, 2004 letters from Michael Goldfarb, Counsel for the District, to Annie Eissler, FOIA Officer, BPA. In its response, BPA identified a number of e-mails and documents as responsive to the District's request. Portions of



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some of the e-mails were redacted from the material provided to the District because they consist of information that is not responsive to the request. In addition, five e-mails were withheld in their entirety under Exemption 5. Those e-mails, all sent on June 22, 2000, were from

1. Randy Roach, General Counsel, to Jeffrey Stier, Vice-President, National Relations, providing legal advice on proposed legislative language;
2. Roach to Stier, with attachment of alternative proposals for legislative language;
3. Stier to Roach, requesting that Roach draft legislative language along the lines cited in the communication;
4. Stier to Roach requesting legal review of suggested change in legislative language; and
5. Stephen Wright, Senior Vice-President, Corporate, to Roach and Stier providing Wright's views and suggestions on various alternatives for legislative language.

In its Appeal of BPA's FOIA determination (Case No. TFA-0084), the District challenges the adequacy of BPA's search for responsive documents and the adequacy of the agency's justification for withholding e-mails one through four. The District also contests BPA's decision to withhold portions of certain communications because they were found to be unresponsive to the District's requests. The District asks that it be provided with any responsive documents that are not properly subject to withholding under Exemption 5 and with an adequate justification for any withheld material.

In its submission in Case No. TFA-0089, the District contends that the BPA incorrectly classified it as a "commercial use" requester, and contests what it claims is BPA's rejection of its request for a fee waiver.

## II. Analysis

### A. Adequacy of the Search

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C., 25 DOE ¶ 80,152 (1995)*. The FOIA, however, requires that a search be reasonable, not exhaustive. "[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials." *Miller v. Department of State, 779 F.2d 1378, 1384-85 (8th Cir. 1985)*; accord, *Weisberg*

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\*/ In its Determination Letter, BPA identified six e-mails as being withheld in full under Exemption 5. However, BPA has informed us that the e-mails identified as (b) and (e) are identical, and that, therefore, only five e-mails were withheld. BPA Response at 4.

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*v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, "[t]he issue is not whether any further documents might conceivably exist but rather whether the government's search for responsive documents was adequate." *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982).

In support of its claim that BPA's search was inadequate, the District points out that it did not receive copies of any communications between BPA and Congress or the DOE concerning the legislation in question. Because "[i]t is unlikely that BPA did not communicate with any members of Congress or with the [DOE] in formulating its plan to get [the] legislation passed," Appeal at 1, the District concludes that BPA's search was deficient. Moreover, the District points out that it did not receive copies of two responsive communications that were referred to in material that the District did receive.

In its February 25, 2005 Response to the District's Appeal (Response), BPA described the search that was performed. Because the subject of the District's requests involved the national legislative process, BPA stated, the number of BPA employees who "may have been involved is quite limited. These were the Administrator and Deputy Administrator; the staff of our Washington, D.C. Office in the Forrestal Building; the BPA General Counsel; [the author of the Response] (as the attorney working on RTO matters); and the two leaders of BPA's RTO project at that time. Personal files of these officials and employees, both electronic and hard copy, were reviewed as were official files." Response at 1-2.

BPA further responds that, contrary to the District's assertion, BPA provided copies of two communications with or from the DOE concerning the legislation in question. Those communications are (1) a July 14, 2000 memorandum about the legislation from Roger Seifert in BPA's Washington, D.C. office to various DOE officials, and (2) a May 16, 2000 memorandum from T.J. Glauthier, DOE Deputy Secretary. The absence of other such communications between BPA and Congress or between BPA and other parts of the DOE is not unusual, BPA states, because matters involving national legislation are handled through the Washington Office, and the practice of that Office is to avoid maintaining copies of informal written communications with congressional offices or DOE staff. BPA e-mails that are deleted from a user's computer are erased from the system after 90 days. Response at 2.

With regard to the District's contention that BPA's search was inadequate because two communications that were referenced in material provided to the District were not located, BPA replied that it conducted another search for these two communications, without success. *Id.* With regard to the second referenced communication, which was between Mark Maher of BPA and certain public utilities, BPA opined that what "likely happened was that Mr. Maher distributed, in person at a regular filing utility meeting, copies of the proposed legislative language (which is cited verbatim in the e-mail chain provided to [the District]) to the filing utility representatives without an accompanying memorandum or description." Response at 3.

After careful consideration of the Appeal and BPA's Response, we conclude that BPA's search was adequate. BPA's description of the scope of the search convinces us that it was reasonably calculated to locate the requested documents. Furthermore, the District's arguments do not lead us

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to believe that a further search would be likely to result in the identification of additional responsive materials. We therefore reject the District's challenge to the adequacy of BPA's search.

### B. BPA's Withholding of Non-Responsive Material

Next, the District contends that BPA lacked the authority to withhold portions of the e-mails provided to the District because they consisted of information that is not responsive to the FOIA requests. However, in *Northwest Technical Resources, Inc.*, 28 DOE ¶ 80,119 (2000), we upheld the withholding of non-responsive information from documents provided to a FOIA requester. The District has not convinced us that our holding in that case is incorrect. E-mail chains, such as those in question here, routinely contain information on a wide variety of subjects. We conclude that BPA properly redacted non-responsive information from the documents provided to the District.

### C. BPA's Application of Exemption 5

Exemption 5 of the FOIA exempts from mandatory disclosure documents which are "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5); 10 C.F.R. § 1004.10(b)(5). The Supreme Court has held that this provision exempts "those documents, and only those documents, normally privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975) (*Sears*). The courts have identified three traditional privileges that fall under this definition of exclusion: the attorney-client privilege, the attorney work-product privilege, and the executive "deliberative process" or "pre-decisional" privilege. *Coastal States Gas Corporation v. Department of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (*Coastal States*). The District does not challenge BPA's withholding of e-mail five under the deliberative process privilege of Exemption 5. Moreover, BPA has now abandoned any reliance on the attorney work product privilege as a ground for withholding e-mails one through four. Response at 4. Therefore, only BPA's application of the attorney-client privilege is at issue here.

The attorney-client privilege protects from mandatory disclosure "confidential communications between an attorney and his client relating to a legal matter for which the client has sought professional advice." *Mead Data Central, Inc. v. United States Department of the Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977). Although it fundamentally applies to facts divulged by a client to his attorney, the privilege also encompasses any opinions given by an attorney to his client based upon, and thus reflecting, those facts, *see, e.g., Jernigan v. Department of the Air Force*, No. 97-35930, 1998 WL 658662, at \*2 (9<sup>th</sup> Cir. Sept. 17, 1998), as well as communications between attorneys that reflect client-supplied information. *See, e.g., Green v. IRS*, 556 F. Supp. 79, 85 (N.D. Ind. 1982), *aff'd*, 734 F.2d 18 (7<sup>th</sup> Cir. 1984) (unpublished table decision). Not all communications between attorney and client are privileged, however. *Clarke v. American Commerce National Bank*, 974 F.2d 127, 129 (9<sup>th</sup> Cir. 1992). The courts have limited the protection of the privilege to those communications necessary to obtain or provide legal advice. *Fisher v. United States*, 425 U.S. 391, 403-04 (1976). In other words, the privilege does not extend to social, informational, or procedural communications between attorney and client. *Government Accountability Project*, 24 DOE ¶ 80,129 at 80,570 (1994).

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Applying these criteria to e-mails 1-4, it is apparent that they consist almost entirely of communications between an attorney (General Counsel Randy Roach) and his client (BPA) in which BPA asks for, and receives legal advice about a legal matter (i.e., proposed legislative language). It is this type of communication that the privilege was designed to protect. However, our review of the e-mails reveals that there are portions that are social, informational or procedural in nature. These portions are not exempt from mandatory disclosure under the attorney-client privilege and must therefore be provided to the District. They are (i) the last two sentences of the 6:17 a.m. e-mail from Jeffrey Stier to Randy Roach (e-mail number three); (ii) the 3:21 p.m. e-mail from Roach to Stier (without the attachment containing the four legislative alternatives authored by Roach) (e-mail number two), and (iii) the first and last sentences of the 2:24 p.m. e-mail from Roach to Stier (e-mail number one).

In its Appeal, the District correctly points out that the privilege applies only to confidential communications, and that BPA's determination did not indicate whether these e-mails were in fact confidential. However, based on representations made to this Office by BPA, we conclude that these e-mails have been treated as confidential by BPA. See memorandum of March 18, 2005 telephone conversation between Steven Larson, BPA and Robert Palmer of this Office. With the exceptions noted above, we conclude that BPA properly applied the attorney-client privilege in withholding the e-mails in question.

#### **D. The Assessment of Fees for Processing the District's FOIA Request**

In its Appeal in Case No. TFA-0089, the District contests what it claims is BPA's January 26, 2005 denial of its request for a fee waiver. In the alternative, the District contends that BPA improperly classified it as a "commercial use" requester for purposes of calculating fees.

Contrary to the District's claim, our review of BPA's January 26 letter convinces us that it was not a final determination of the District's eligibility for a partial or full fee waiver, but was instead a request for more information. The letter states, in pertinent part that upon

review of your FOIA requests, it does not appear that you have met the burden of establishing that you qualify for a reduction or waiver of fees for the requested information. *At this time, we are offering you the opportunity to provide additional information to demonstrate that you qualify for a reduction or waiver of fees.* The FOIA provides for a reduction or waiver of fees, but only if a requester shows that disclosure of the information (1) is in the public interest, because it is likely to contribute significantly to the public understanding of the operations or activities of the government; and (2) is not primarily in the commercial interest of the requester. 5 U.S.C. § 552(a)(4)(A)(iii).

In order to satisfy the public interest, a requester must show each of the following:

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- (A) The subject of the requested records concerns the operations or activities of the government;
- (B) Disclosure of the requested records is likely to contribute to an understanding of government operations or activities;
- (C) Disclosure of the requested records would contribute to an understanding of the subject by the general public; and
- (D) Disclosure of the requested records is likely to contribute significantly to public understanding of government operations or activities.

10 C.F.R. § 1004.9(a)(8)(i). If a requester satisfies the four factors of the public interest, he must then satisfy the commercial interest factor by showing that disclosure of the information is not primarily in his commercial interest. 10 C.F.R. § 1004.9(a)(8)(ii). Factors to be considered in applying these criteria include but are not limited to:

- (A) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so
- (B) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

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We will not proceed further on your FOIA requests until (1) *you provide additional information so that we may evaluate your request for a waiver or reduction of fees, and if denied then* (2) your willingness to pay estimated processing fees, or (3) narrow the scope of your FOIA requests.

January 26, 2005 letter from Annie Eissler, BPA Freedom of Information Officer, to Michael Goldfarb, Counsel for the District (*italics added*).

Under section 1004.8(a) of the DOE's FOIA regulations, a requester may file an Appeal with the Office of Hearings and Appeals "when the Authorizing Official has denied a request for records in whole or in part or has responded that there are no documents responsive to the request consistent with Section 1004.4(d), or when the Freedom of Information Officer has denied a request for waiver of fees . . . ." Because BPA's FOI Officer has not denied the District's request for a fee waiver, the circumstances necessary for an Appeal do not yet exist in Case No. TFA-0089. We will therefore dismiss this Appeal without prejudice to refiling should BPA deny the District's request.

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Accordingly, the District should attempt to demonstrate to BPA that its request satisfies each of the criteria that are set forth in its January 26 letter and reproduced above.

Because the issue of whether BPA properly categorized the District as a "commercial use" requester is likely to arise again in the event that BPA denies the District's fee waiver request, we will address that issue here. The FOIA delineates three types of costs--"search costs," "duplication costs," and "review costs"--and places requesters into one of three categories that determine which of these costs a given requester must pay. If a requester wants the information for a "commercial use," it must pay for all three types of costs incurred. In contrast, educational institutions and the news media are required to pay only duplication costs, and all other requesters are required to pay search and duplication costs but not review costs. 5 U.S.C. § 552(a)(4)(A)(ii); 10 C.F.R. § 1004.9(b).

The District argues that because it is a non-profit, publically owned utility, its requests are "not for a use or purpose that furthers a commercial, trade, or profit interest." Appeal in Case No. TFA-0089 at 2. Accordingly, the District contends that it falls under the "all other requesters" category. However, the District's status as a non-profit is not dispositive of this issue. Many non-profits engage in trade or commerce, and BPA could have properly concluded that the information requested would be put to a use that would further a commercial or trade interest. As a public utility, the District is engaged in the business of selling electricity and water to its customers. Depending on the manner in which the District intends to use the material that it requested, BPA could have properly concluded that the FOIA requests were made in furtherance of the District's commercial interests.

However, it is not clear that BPA considered the manner in which the District would use the requested information in concluding that the District is a commercial use requester. BPA has informed us that it reached this conclusion because "we know our customers." See memorandum of March 3, 2005 telephone conversation between Joseph Bennett, BPA and Robert Palmer, OHA Staff Attorney. It therefore appears that BPA may have based this decision solely on its knowledge of the District's business activities without considering the manner in which the District intended to use the material requested. Section 1004.2(c) of the DOE's FOIA regulations provides, however, that "in determining whether a requester properly belongs in [the commercial use] category, agencies must determine how the requester will use the documents requested." Therefore, if BPA denies the District's request for a fee waiver, it should also consider the use to which the District will put the information obtained in making its determination as to the proper fee category for the District's request.

It Is Therefore Ordered That:

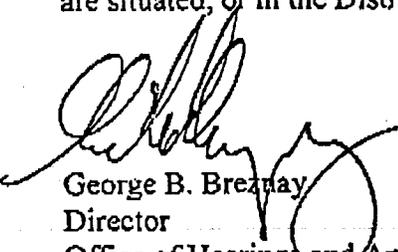
- (1) The Freedom of Information Act Appeal filed by Public Utility District #1, OHA Case Number TFA-0084, is hereby granted as set forth in paragraph (2) below, and is in all other respects denied.
- (2) BPA shall promptly release the following to the District: (i) the last two sentences of the 6:17 a.m. e-mail from Jeffrey Stier to Randy Roach; (ii) the 3:21 p.m. e-mail from Roach to Stier (without

- 8 -

the attachment containing the four legislative alternatives authored by Roach), and (iii) the first and last sentences of the 2:24 p.m. e-mail from Roach to Stier.

(3) The Freedom of Information Act Appeal filed by Public Utility District #1, OHA Case Number TFA-0089, is hereby dismissed without prejudice to refiling upon the issuance of a final fee waiver determination by BPA.

(4) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.



George B. Brennan  
Director  
Office of Hearings and Appeals

---

Date: MAR 24 2005



# INVOICE

Invoice:  
Invoice Date:  
Page:

FOI-00047  
December 30, 2004  
1 of 1

Please Remit To:  
BONNEVILLE POWER ADMIN  
FILE NO. 74038  
P.O. BOX 60000  
SAN FRANCISCO CA 94160-4038

Customer No: 11565  
Payment Terms: NET 30  
Due Date: January 31, 2005

LAW OFFICES OF MICHAEL A. GOLDFARB  
1150 MARKET PLACE TOWER  
2025 FIRST AVENUE  
SEATTLE WA

**AMOUNT DUE: 73.26 USD**

*To ensure that your account is credited properly, please include the invoice number on your check and/or enclose a copy of the invoice with your payment. Thank You.*

For billing questions, please call: SHERRY S. BROOKSHIRE  
503-230-3305

Original

| Line | Description  | Quantity | UOM | Unit Amt | Net Amount |
|------|--------------|----------|-----|----------|------------|
| 1    | SEARCH COSTS | 1.00     | EA  | 73.26    | 73.26      |

Subtotal: 73.26

**AMOUNT DUE: 73.26 USD**

AMOUNT DUE BONNEVILLE POWER ADMINISTRATION  
FOR BONNEVILLE FOIA REQUEST # 05-010.

Invoice CC's:  
Official File - CG-4  
Debra Smiley - KDP-7

Unpaid balance after the due date will accrue interest at a rate of 1 percent per month, unless otherwise stated in the contract or agreement. You have the right to inspect the records and obtain a review, within BPA, of the determination of this indebtedness. All debts are subject to collection under applicable Federal Laws.

|   |
|---|
| For Internal Use  |
| INVOICE CC'S:<br>D. SMILEY - C-4<br>OFFICIAL FILE - CIP-4 |

12/28/04

# Fee Computation Sheet for Commercial-use Requesters (Law Firms, etc.)

(to be filled out by Authorizing Official  
if fees exceed the \$15 minimum)

FOIA # 05-010

NOTE: Staff working on this FOIA are to charge their time to the ABM of LSEA along with their own program Work Order number on their T&A.

**1. Cost of search**  
(includes time needed for designated employees to search for requested materials/time spent putting info onto a disk - cannot charge for time to produce copies)

*+ Review*

Number of Search Hours: 1

Hourly Rate: (employee salary plus 16%) 70.61

TOTAL SEARCH COSTS: 70.61

**2. Reproduction costs**

Number of Copies: 53

TOTAL REPRO COSTS: 2.65  
(multiply by \$.05/page)

**3. Review Costs**  
(Legal Services / Supervisory Review)

Number of Review Hours: \_\_\_\_\_

Hourly Rate: (employee salary plus 16%) \_\_\_\_\_

TOTAL REVIEW COSTS: \_\_\_\_\_

**4. Special Mailing Charges**  
(express mail or fast-mail charges that are requested by the customer are to be charged to the customer.)  
Specify type of service below:  
\_\_\_\_\_

TOTAL MAIL COSTS: N/A

TOTAL ALL COSTS: 73.26

Requester Name: Law Office of Michael A. Goldfarb

Requester Address: 1150 Market Place Tower  
2025 First Ave  
Seattle, WA 98121

Phone: 206.374.7090

Fax: \_\_\_\_\_

**IMPORTANT:** This form must be completed and returned to the FOIA office, routing KDP-7, along with an electronic copy of the closing letter and 2 copies of responsive documents, within the FOIA response deadline.



# INVOICE

**Invoice:** FOI-00048  
**Invoice Date:** December 30, 2004  
**Page:** 1 of 1

Please Remit To:  
 BONNEVILLE POWER ADMIN  
 FILE NO. 74038  
 P.O. BOX 60000  
 SAN FRANCISCO CA 94160-4038

**Customer No:** 11565  
**Payment Terms:** NET 30  
**Due Date:** January 31, 2005

LAW OFFICES OF MICHAEL A GOLDFARB  
 1150 MARKET PLACE TOWER  
 2025 FIRST AVENUE  
 SEATTLE WA

**AMOUNT DUE: 73.26 USD**

*To ensure that your account is credited properly, please include the invoice number on your check and/or enclose a copy of the invoice with your payment. Thank You.*

For billing questions, please call: SHERRY S. BROOKSHIRE  
 503-230-3305

Duplicate

| Line | Description  | Quantity | UOM | Unit Amt | Net Amount |
|------|--------------|----------|-----|----------|------------|
| 1    | SEARCH COSTS | 1.00     | EA  | 73.26    | 73.26      |

Subtotal: 73.26

**AMOUNT DUE: 73.26 USD**

AMOUNT DUE BONNEVILLE POWER ADMINISTRATION  
 FOR BONNEVILLE FOIA REQUEST # 05-011, 012, and  
 013.

Invoice CC's:  
 Official File - CG-4  
 Debra Smiley - KDP-7

Unpaid balance after the due date will accrue interest at a rate of 1 percent per month, unless otherwise stated in the contract or agreement. You have the right to inspect the records and obtain a review, within BPA, of the determination of this indebtedness. All debts are subject to collection under applicable Federal Laws.

|   |
|---|
| For Internal Use<br><br>INVOICE CC'S:<br>D. SMILEY - C-4<br>OFFICIAL FILE - CIP-4 |
|---|



# CREDIT INVOICE

Invoice:

FOI-00048CR

Invoice Date:

December 30, 2004

Page:

1 of 1

Please Remit To:

BONNEVILLE POWER ADMIN  
FILE NO. 74038  
P.O. BOX 60000  
SAN FRANCISCO CA 94160-4038

Customer No:

11565

Payment Terms:

NET 30

Due Date:

January 31, 2005

LAW OFFICES OF MICHAEL A GOLDFARB  
1150 MARKET PLACE TOWER  
2025 FIRST AVENUE  
SEATTLE WA

**AMOUNT DUE:**

**(73.26) USD**

*To ensure that your account is credited properly, please include the invoice number on your check and/or enclose a copy of the invoice with your payment. Thank You.*

Original Invoice:

FOI-00048

Prior Adjustment:

FOI-00048

For billing questions, please call: SHERRY S. BROOKSHIRE  
503-230-3305

Duplicate

| Line | Description  | Quantity | UOM | Unit Amt | Net Amount |
|------|--------------|----------|-----|----------|------------|
| 1    | SEARCH COSTS | (1.00)   | EA  | 73.26    | (73.26)    |

Subtotal:

(73.26)

**AMOUNT DUE:**

**(73.26) USD**

AMOUNT DUE BONNEVILLE POWER ADMINISTRATION  
FOR BONNEVILLE FOIA REQUEST # 05-011, 012, and  
013.

(Billed for incorrect amount, should be \$300)

Unpaid balance after the due date will accrue interest at a rate of 1 percent per month, unless otherwise stated in the contract or agreement. You have the right to inspect the records and obtain a review, within BPA, of the determination of this indebtedness. All debts are subject to collection under applicable Federal Laws.

For Internal Use

Invoice CC's:  
Official File - CG-4  
Debra Smiley - KDP-7

Department of Energy  
Bonneville Power Administration

POLICY FOR PUBLIC INVOLVEMENT

AGENCY: Bonneville Power Administration (BPA), DOE.

ACTION: Notice of Final Policy. BPA File No.: PI-1.

SUMMARY: BPA is adopting a Policy for Public Involvement which affirms the public involvement practices in which it currently engages. A Notice of Intent and Proposed Policy with Request for Comment was issued on March 12, 1986. The Policy for Public Involvement revises the Procedure for Public Participation in Major Regional Power Policy Formulation. The policy applies to public involvement for major regional power policies and other BPA actions. It contains general objectives, required procedures, and optional activities for informing and involving the public. The Policy for Public Involvement will help the public to anticipate and participate in BPA's decisionmaking processes and will assist BPA in consistently providing appropriate opportunities for interaction with the public.

Responsible Official: Donna L. Geiger, Public Involvement Manager, is the official responsible for developing the policy.

DATES: This policy is effective immediately.

ADDRESSES: Additional copies of the final policy may be obtained from Donna L. Geiger, Public Involvement Manager, Bonneville Power Administration, P.O. Box 12999, Portland, Oregon 97212. The Official Record for the development of the policy may be viewed at the Public Involvement office, Bonneville Power Administration, 1002 NE. Holladay Street, Portland, Oregon.

FOR FURTHER INFORMATION CONTACT: Teresa M. Cunningham, Public Involvement staff, at the above address or the following telephone numbers (voice/TTY): 503-230-3478 from Portland; 800-452-8429 from Oregon outside of Portland; or 800-547-6048 from California, Idaho, Montana, Nevada, Utah, Washington, and Wyoming. Information may also be obtained from:

Mr. George E. Gwinnutt, Lower Columbia Area Manager, Suite 288, 1500 Plaza Building, 1500 NE. Irving Street, Portland, Oregon 97232, 503-230-4551.

Mr. Ladd Sutton, Eugene District Manager, U.S. Federal Building, Room 206, 211 East Seventh Avenue, Eugene, Oregon 97401, 503-687-6959.

Mr. Terence G. Esvelt, Puget Sound Area Manager, Room 250, 415 First Avenue North, Seattle, Washington 98109, 206-442-4130.

Mr. Wayne R. Lee, Upper Columbia Area Manager, U.S. Courthouse, Room 561, West 920 Riverside Avenue, Spokane, Washington 99201, 509-456-2518.

Mr. George E. Eskridge, Montana District Manager, 800 Kensington, Missoula, Montana 59801, 406-329-3060.

Mr. Ronald K. Rodewald, Wenatchee District Manager, P.O. Box 741, Wenatchee, Washington 98801, 509-662-4377.

Mr. Thomas V. Wagenhoffer, Snake River Area Manager, West 101 Poplar, Walla Walla, Washington 99362, 509-522-6225.

Mr. Robert N. Laffel, Idaho Falls District Manager, 531 Lomax Street, Idaho Falls, Idaho 83401, 208-523-2706.

Mr. Frederic D. Rettenmund, Boise District Manager, 550 West Fort Street, Room 376, Boise, Idaho, 83724, 208-334-9137.

SUPPLEMENTARY INFORMATION:

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I. Background.

The Pacific Northwest Electric Power Planning and Conservation Act of 1980 (Pacific Northwest Power Act) directs BPA to conduct a thorough program to inform and involve the public of the Pacific Northwest in those electric power and conservation issues which concern it. In addition, the National Environmental Policy Act of 1969, as amended, requires that BPA seek and consider public views on environmental impacts of its actions. Other Federal statutes and Executive Orders may also require BPA to conduct some type of public involvement depending upon the circumstances. BPA has moved to meet these mandates through a wide range of activities designed to explain BPA activities and elicit public recommendations.

It is BPA's intent to continue to provide appropriate opportunities for the public to participate in BPA's decisionmaking processes. This commitment to public involvement responds to the fundamental right of all citizens to participate in the decisions of their government. BPA has found that the best interests of both public policy and prudent business practice have been served by directly involving BPA's constituencies in its decisionmaking process.

A. Current BPA Public Involvement Activities. BPA's public involvement activities span a wide range of issues, publics, and processes. In each, the goal is to offer vehicles for public participation that are appropriate to the resources of the interested public, the complexity of the subject, and the impacts of the action involved.

BPA has provided public involvement opportunities in the development of a number of major regional power policies. Examples of such policies are: BPA's Billing Credits Policy, Customer Service Policy, Transmission Policy, and the Fish and Wildlife Consultation Procedures.

BPA has also involved the public in many other important issues. These actions include: determinations on significant regional issues; annual planning activities; development of generic contracts; program development; research and development projects; and the planning, construction, and

maintenance of transmission facilities. Some specific examples of these activities are BPA's Direct Service Industries Options Study, Resource Strategy, Load Forecast, Long-Term Conservation Contracts, Model Conservation Standards Implementation Program, and Fall River-Lower Valley Reinforcement Project. Many different public involvement techniques have been used in these actions. Some involved symposiums or town hall meetings. Others used roundtable discussions, workshops, and technical work groups to reach specific publics. In some situations, a more informal approach was appropriate and techniques such as open houses and contacts with landowners were used.

In addition to these public involvement activities, BPA conducts regular consultations with its customers; State, local, and tribal governments; public utility commissions; interest groups; and others. These discussions are informal and may include issues which are in some stage of public involvement at the time of the consultation. As such, these exchanges may be an important part of the public involvement efforts on specific issues.

B. Other Procedures for Special Activities. The Pacific Northwest Power Act requires very specific public involvement procedures for the acquisition of major power resources [sec. 6(c)] and the establishment of rates [sec. 7(i)]. It also requires consultation with certain publics concerned with fish and wildlife issues [sec. 4(h)(11)(B)]. No administrative procedures have been established yet for the acquisition of major power resources. BPA has further defined the procedures for establishing rates in its Procedures Governing Bonneville Power Administration Rate Hearings (51 FR 7611, March 5, 1986) and has used these procedures in subsequent rate cases. BPA has published procedures (50 FR 23173, May 31, 1985) for consulting with fish and wildlife agencies, Indian tribes, and hydroelectric project operators on fish and wildlife issues in the management and operation of Federal hydroelectric facilities. All of these procedures are referenced in the Policy for Public Involvement.

C. Development of Policy for Public Involvement. Subsequent to adoption of the Procedure for Public Participation in Major Regional Power Policy Formulation (46 FR 26368, May 12, 1981), BPA greatly expanded both the number and kinds of opportunities available for the public to participate in its actions. BPA also identified several ways in which that procedure could be strengthened. As a result, on March 12, 1986 (51 FR 8624), BPA published a Notice of Intent and Proposed Policy with Request for Comment. The Proposed Policy for Public Involvement was a revision of the Procedure for Public Participation in Major Regional Power Policy Formulation.

The comment period on the proposed policy extended from March 12 through April 18, 1986, and was subsequently reopened on request to receive comments at a meeting with leaders of public interest groups on April 22, 1986. Twenty written comments and 12 oral comments were received on the proposed policy from 29 organizations and individuals.

A Staff Evaluation of the Official Record, which summarizes and evaluates the comments, and contains staff recommendations was prepared. In addition, a Record of Decision was written which describes the Administrator's decisions on each issue and the reasons for those decisions. Both of these documents are part of the Official Record for the development of the Policy for Public Involvement. This record may be viewed at BPA's Public Involvement office.

## II. Text of Policy for Public Involvement:

### POLICY FOR PUBLIC INVOLVEMENT

#### SECTION I. PURPOSE.

The purpose of this policy is to affirm the Bonneville Power Administration's commitment to insure widespread public involvement in the formulation of regional power policies and other appropriate actions. The procedures described in the policy will clarify for the public how it can expect to be informed of actions under consideration by BPA and to take part in the deliberations leading to BPA's decisions. The procedures will also guide BPA in consistently providing appropriate opportunities for interaction with the public on such matters.

#### SECTION II. OBJECTIVES.

Through this policy, BPA intends to provide the public with the fullest information practicable on BPA policy and program development, to provide early and effective opportunities for the public to express its opinions and concerns, and to consider the views and information presented by the public prior to reaching decisions.

The procedures contained in this policy necessarily reflect the flexibility reserved for the Administrator by law. By preserving this flexibility, it is not the intent of the policy to limit unnecessarily the extent of public involvement, but rather to preserve the Administrator's discretion to act quickly when necessary and to conduct routine business without cumbersome procedural requirements.

#### SECTION III. SCOPE.

This policy applies to major regional power policies as described in Section V and to other BPA actions as described in Section VI.

A. The policy does not apply to:

1. Interpretive rulemaking;
2. Rules of internal agency organization, procedure, or practice;
3. Policies for which another exclusive procedure is required by law or regulation, or for which the Administrator has established alternative procedures that supersede this policy.

a. BPA ratemaking, Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. 96-501, sec. 7(i). This exclusive procedure is set forth in the Procedures Governing Bonneville Power Administration Rate Hearings, (51 FR 7611, March 5, 1986.)

b. Acquisition of a major resource, Pacific Northwest Electric Power Planning and Conservation Act, Pub. L. 96-501, sec. 6(c). This statute describes a process that includes public notice and comment, development of a record, and review by the Northwest Power Planning Council and appropriate committees of Congress. BPA has not yet developed specific procedures to implement this provision.

B. This policy may apply in addition to procedures that have been established for special activities, such as the Fish and Wildlife Consultation Procedures (50 FR 23173, May 31, 1985). These procedures describe how BPA will consult with Columbia River Basin fish and wildlife agencies, Indian tribes, and hydroelectric project operators as it fulfills its responsibilities in the management and operation of the Federal Columbia River Power System hydroelectric facilities. The consultation procedures provide for combining and coordinating the Fish and Wildlife Consultation Procedures and the public involvement procedures for developing major regional power policies.

#### SECTION IV. DEFINITIONS.

- A. Administrator. The Bonneville Power Administrator.
- B. Customer. A person or entity having a direct relationship with BPA as the result of contractual arrangements for the purchase, exchange, transfer, assignment, or sale of electric power and energy, related services, or transmission capability to, with, or from BPA.
- C. Decision Document. A document which describes the decisions made on a major regional power policy, the information considered, and the reasons for the decisions.
- D. Interested Person. Any person, group, or entity with an interest in the proposed action or decision.
- E. Major Regional Power Policy. An agency statement of future effect and general applicability designed to implement, limit, or prescribe policy which the Administrator identifies as involving major regional power issues. The term major regional power policy does not include the development and execution of particular agreements, contracts, or other instruments between BPA and its customers, except for those generic agreements, contracts, or other instruments which the Administrator identifies as establishing major regional power policy.
- F. Public. Affected or interested persons; organizations; or groups; including but not limited to BPA customers; officials of local, State, and Indian tribal governments; and officials of other Federal agencies.
- G. Public Comment Forum. A meeting for which public notice is given and during which oral comments are presented to BPA.
- H. Public Information Program. A program using a variety of techniques, designed to inform the public of BPA actions, policies, or decisions.
- I. Public Involvement. Informal as well as systematic opportunities for members of the public to know about and express their opinions on possible BPA decisions or actions. The term "public involvement" is considered to be synonymous with "public participation," and is the term normally used within BPA.
- J. Public Involvement Program. A program of activities, using a variety of techniques, to inform the public of proposed BPA actions or decisions and to provide opportunities for the public to express opinions and make recommendations which BPA considers before taking actions or making a decision.

K. Public Meeting. Opportunities for BPA to exchange information and views with the public in person. These meetings may involve a few or many persons and take such forms as briefings, workshops, symposiums, or roundtable discussions.

L. Public Record. Except as otherwise expressly provided by law, the compiled and indexed records which document the development of a major regional power policy.

SECTION V. PUBLIC INVOLVEMENT PROCEDURES FOR MAJOR REGIONAL POWER POLICIES.

A. Decision to Formulate a Policy and Notice of Intent. When the Administrator decides to formulate a major regional power policy, the Administrator shall publish a notice of intent to formulate the policy. The purpose of the notice of intent is to offer to interested persons the opportunity to make recommendations on the policy to be developed. Notice shall include the following:

1. The subject of the proposed policy;
2. An explanation of the need for and the probable effect of the policy with a statement of available information on these issues;
3. The legal authority under which the policy is being developed;
4. An indication of the extent to which other existing policies might be affected by the development of the new policy;
5. A request for written recommendations for BPA's use in formulating or revising the policy;
6. The time limit for the receipt of such recommendations; and
7. The name, address, and telephone number of the BPA official who will receive them.

The Administrator may combine the notice of intent with either the notice of policy alternatives or the notice of proposed policy.

B. Notice of Policy Alternatives. Where determined appropriate, the Administrator may issue a notice describing and requesting comment on possible alternatives for a proposed policy. Information obtained in response to the notice of intent and other information available to BPA may be used to identify these alternatives. Public comment on the alternatives will assist BPA in preparing a proposed policy. The notice of policy alternatives shall include:

1. The text of the policy alternatives;
2. The dates, times, and locations of any scheduled public meetings;
3. Information on procedures by which interested persons may participate in any public meetings;
4. A request for written comments on the policy alternatives;
5. Any time limits for receipt of such comments;
6. The name, address, and telephone number of the BPA official(s) to contact for further information; and
7. Any other information considered necessary.

C. Notice of Proposed Policy. After the period for receipt of recommendations stated in the notice of intent or for comments on the notice of policy alternatives, the Administrator shall publish a notice of the proposed policy. The notice shall include:

1. The text of the proposed policy;
2. An indication of the probable extent to which other existing policies may be affected by the proposed policy;
3. The dates, times, and locations of scheduled public comment forums and/or public meetings;
4. Information on procedures by which interested persons may participate in public comment forums or meetings;
5. A request for written comments on the Policy;
6. Any time limits for receipt of such comments;
7. The name, address, and telephone number of the BPA official(s) to contact for further information; and
8. Any other information considered necessary.

D. Public Comment Forums. One or more public comment forums shall be scheduled on the proposed policy so that interested persons may present their views on the proposed policy in person.

The Administrator shall determine the number, dates, locations, and time of day of such forums. Notice of the forums shall be published either as part of the notice of proposed policy or in a separate notice. The notice shall include:

1. The name, subject, and purpose of the policy;
2. The date(s), time(s), and place(s) for the forums;
3. Information on any available material which discusses the need for the policy and effects which the policy may have;
4. The time period for receipt of comments;
5. The names, addresses, and telephone numbers of BPA officials from whom additional information can be obtained; and
6. Other material which is considered necessary.

BPA shall offer interested persons the opportunity for oral presentation of views, data, and arguments. Persons who wish to speak at public comment forums should, before the forum, notify the BPA Public Involvement Manager or the Area or District Manager of the locality in which the forum will be held. This will permit preparation of a tentative schedule of participants. Time limitations may be established for oral presentations to assure that all interested persons who desire to speak will have an opportunity to do so. Interested persons with similar views, data, and arguments may be required to consolidate their comments.

A verbatim transcript of these comments is ordinarily prepared and included in the record of the hearing. When a transcript is not prepared, a detailed summary of the hearing is made instead. During the period in which a major regional power policy is being developed, transcripts or summaries of public comment forums shall be available for review at the Area or District office in the locality where the forum is held. Copies of the transcripts or summaries of forums shall also be available for review in BPA's Public Involvement office. The transcript or summary of the forum, as well as any written comments, documents, or exhibits submitted at the forum, shall be placed in the Public Record.

E. Public Meetings. The Administrator may determine the need for public meetings in addition to the public forum(s) specified above.

The subjects and purposes, dates, times, and locations of the meetings shall be announced. Meeting notices may also describe the format of the meeting, and the nature of the participation opportunities which may be offered.

These meetings may serve a number of purposes, including:

1. Providing information regarding the proposed policy or alternatives;
2. Permitting a detailed public review and exchange of information regarding technical data or methodology;
3. Providing an opportunity for public comment at interim stages in the decisionmaking process; and
4. Other purposes determined by the Administrator to be consistent with this Policy for Public Involvement.

A transcript is ordinarily not prepared for these meetings. A summary may be prepared, and may be mailed to meeting participants with an invitation to comment upon the summary or submit additional public comments, documents, or exhibits. The meeting summary, if prepared, and any subsequent comments, documents, and exhibits shall be placed in the Public Record.

F. Time Allowed for Public Recommendations or Comment and for Notice of Public Comment Forums and Meetings. Whenever practicable, the Administrator shall allow at least 30 days for the public to submit written recommendations in response to a notice of intent and to offer comments on a notice of policy alternatives and notice of proposed policy.

Whenever practicable, the Administrator shall allow at least 15 days advance notice of public comment forums and public meetings.

G. Decision Document. Following the comment period on a notice of proposed policy, a decision document shall be completed. The decision document shall be signed by the Administrator and made a part of the public record. The decision document shall include:

1. A description of the proposed action;
2. A summary of the comments received on the proposed action;
3. An evaluation of the proposed action and of other alternatives which have been recommended or identified by the public or BPA;
4. The Administrator's decision; and
5. A concise summary of the reasons for the decision.

H. Notice of Final Policy. BPA shall publish a notice of any final policy. The policy shall become effective on the date of the publication of the notice unless otherwise specified.

I. Methods of Public Notification and Contact. Notices of intent, policy alternatives, proposed policy, public comment forums, final policy, and, whenever practicable, notices of public meetings shall be published in the FEDERAL REGISTER, or elsewhere if so determined by the Administrator. In addition, the Administrator may send a written announcement to persons who

have previously expressed an interest in the development of a major regional power policy, or to persons who, in the opinion of the Administrator, could reasonably be expected to have such an interest. The Administrator may also direct that an announcement be made in one or more general circulation newspapers in the BPA marketing area or through other effective means of publicity, as necessary or desirable.

In addition to written notice, the Administrator may initiate contact in person or by telephone with interested persons to inform them of opportunities to submit recommendations or comments.

J. Combination of Other Required Notices with Policy Notices. The Administrator may combine notices required by other laws and regulations with notices pertaining to major regional power policies.

K. Procedures for Expedited Decisionmaking.

1. Any or all procedures provided for in Section V do not apply when the Administrator for good cause finds that such notice and public involvement are impracticable, unnecessary, or contrary to the public interest. The Administrator shall incorporate such a finding and a brief statement of the reasons for this finding in any policy that is issued.

2. When such a finding is made, the Administrator may choose to adopt an interim policy specifying the period of time for which it will remain in effect.

3. In adopting an interim or a final policy, BPA shall be guided by the following principles:

a. Those procedures which the Administrator determines are practicable shall be completed.

b. To the extent practicable, alternative means of providing notice, informing the public, and providing opportunities for comment shall be used.

4. If an interim policy is adopted, the applicable procedures for major regional power policies shall be followed in adopting the final policy.

L. Public Record. The records which document the development of a major regional power policy shall be compiled and indexed in a public record. The public record shall include the following:

1. All FEDERAL REGISTER or other notices provided for by these procedures;

2. The transcripts or summary prepared for the record of oral comments taken at public comment forums;

3. Any transcripts or summaries prepared for the record of oral comment taken at public meetings;

4. Written comments, data, and questions of public record and BPA's replies to these items;

5. The decision document; and

6. Any other information that is determined by the Administrator to be relevant.

The public record shall be available for inspection or copying.

SECTION VI. PUBLIC INVOLVEMENT FOR OTHER BPA ACTIONS.

A. Other BPA Actions for Which the Administrator May Conduct Public Involvement. The Administrator may determine that it is appropriate to conduct public involvement on other selected BPA actions. Such other actions may include:

1. Formulation of policies which are not major regional power policies;
2. Planning activities and the development of plans related to areas such as energy conservation, renewable resources and other generating resources, fish and wildlife resources, and the transmission system;
3. Development and implementation of programs related to areas such as energy conservation, renewable and other generating resources, fish and wildlife resources, and the transmission system; and
4. Other BPA actions related to major regional power issues.

B. Factors for Determining the Appropriate Level of Public Involvement.

In determining the appropriate level of public involvement as well as the provision of notice and comment for other BPA actions, the Administrator may take into account pertinent factors such as:

1. The precedential nature of the action;
2. Whether and when public support is required for effective implementation of the contemplated action;
3. The effect on BPA and its customers;
4. The impact of the proposed action on the public;
5. The particular segment(s) of the public which can be expected to be interested in the action;
6. The level of public interest;
7. The time available for public involvement; and
8. The existence of previous or concurrent public involvement activities on similar actions.

SECTION VII. RELATIONSHIP TO NATIONAL ENVIRONMENTAL POLICY ACT (NEPA).

To the maximum extent practicable, BPA shall implement the public involvement procedures described in this policy and the procedures required by the National Environmental Policy Act concurrently and in a complementary fashion. In order to minimize the impact on the public's resources, joint notices shall be issued and combined meetings shall be held whenever possible.

### III. Explanation of Policy Provisions.

The policy contains nearly all of the procedural requirements which were contained in the Procedure for Public Participation in Major Regional Power Policy Formulation, with some modifications. In addition, the policy describes the types of other BPA actions for which the Administrator may conduct public involvement and the factors for determining the appropriate level and type of public involvement.

This section provides some background information on the meaning of the policy provisions. It also describes how the final policy revises the Procedure for Public Participation in Major Regional Power Policies and how the final policy differs from the proposed policy. A summary of the public comments received on the proposed policy and BPA's evaluation of the comments is contained in the Staff Evaluation of the Official Record, Proposed Policy for Public Involvement.

Section I. Purpose. The statement of purpose reflects the revised scope of the policy and describes the benefits of the policy to both the public and BPA. To clarify the actions covered by the policy, the proposed "commitment to insure widespread public involvement in the formulation of regional power policies" has been expanded in the final policy to include "and other appropriate actions."

Section II. Objectives. This is a new section which outlines how and why BPA intends to involve the public. The extent of and reasons for the flexibility retained by the Administrator are also described.

Section III. Scope. The scope of the policy has been revised to cover major regional power policies and other BPA actions. Alternative or joint coverage of actions by other procedures for public involvement is explained and the citation for the Procedures Governing Bonneville Power Administration Rate Adjustments has been updated. The language of the proposed policy has been changed slightly to include among the areas not covered by the policy, those policies for which a regulation establishes another exclusive procedure.

Section IV. Definitions. Terms which have a particular meaning for the policy are defined.

A. Administrator. [No change.]

B. Customer. In response to a comment on the proposed policy, "exchange" has been added to the list of identifying arrangements between BPA and its customers. This term was inadvertently omitted from the proposed policy.

C. Decision Document. This document combines and replaces the functions of the evaluation of the record and record of decision which were required by the previous procedure. The purpose of this new document is to streamline the presentation of this information by reducing the redundancy of the evaluation of the record and the record of decision. For ease of use, the final policy has been changed to include the description of the decision document's contents within Section V which pertains to major regional power policies.

D. Interested Person. [No change.]

E. Major Regional Power Policy. This definition has been expanded to cover generic agreements, contracts, or other instruments between BPA and its customers which, while not policies, nevertheless establish major regional power policy.

F. Public. This definition has been added to explain a basic term that is used throughout the policy.

G. Public Comment Forum. This is a new definition which describes a particular kind of public meeting in which BPA receives public comments in person. The language of the proposed definition, which explained when a detailed summary of a public comment forum would be prepared instead of a verbatim transcript, has been moved to Section V of the policy.

H. Public Information Program. This definition has been added to differentiate a public information program from a public involvement program. In a public information program, the goal is to make information available to the public.

I. Public Involvement. This definition has been added to explain a term which is basic to the policy.

J. Public Involvement Program. This is a new definition. In a public involvement program, information is provided to the public and opportunities are provided for the public to express its views and recommendations.

K. Public Meeting. This term has been added to describe a type of activity which BPA frequently uses in addition to public comment forums.

L. Public Record. This new term is used for the agency record to avoid confusion with official records which are prepared for judicial review. As recommended in comments on the proposed policy, the description of the contents of the public record have been revised to clarify that, when prepared for the record, transcripts or summaries of public comment forums will always be included in the record as well as any transcripts or summaries of public meetings.

#### Section V. Public Involvement Procedures for Major Regional Power Policies.

A. Decision to Formulate a Policy and Notice of Intent. The Administrator decides which BPA actions are major regional power policies. While the policy does not include any specific criteria for making this determination, the Administrator typically considers the nature of the policy, the magnitude of its effect and the extent of the public sectors which will be impacted. Preliminary informal contacts by BPA with potentially affected publics can assist the Administrator in the determination of which actions are major regional power policies.

The wording of this part has been adjusted to indicate that the decision and notice requirements apply only to major regional power policies. The description of alternate ways that notice may be given has been moved into subsection I., Methods of Public Notification and Contact.

The proposed content of the notice of intent to formulate a policy has been revised to specify that the explanation of "the need for and the probable effect of the policy" should also include "a statement of available information on these issues" as was required by the previous procedures. Also, the proposed policy's requirement that notice be published in the FEDERAL REGISTER or elsewhere has been moved to subsection I. Finally, the proposed language on combining the notice of intent with the notice of policy alternatives or with the notice of proposed policy has been incorporated in this section.

B. Notice of Policy Alternatives. This is a new part. In the development of certain major regional power policies, it may be appropriate for BPA to obtain helpful advice for the preparation of proposed policies by first seeking comments on alternatives for framing the policy. All policy development processes may not lend themselves to this step. The final policy revises the proposed policy by adding a description of what the notice of policy alternatives shall contain. The final policy also places the requirement that the notice of policy alternatives be published in the FEDERAL REGISTER or elsewhere in subsection I.

C. Notice of Proposed Policy. This part describes when a notice of proposed policy will be issued and the contents of such a notice. In the final policy, the requirement that the notice of proposed policy be published in the FEDERAL REGISTER or elsewhere has been moved to subsection I.

D. Public Comment Forum. This part describes all requirements for conducting public comment forums. The Procedure for Public Participation in Major Regional Power Policy Formulation has been revised by moving the language on other means of making notices available to subsection I., by modifying the request for advance notice of participation in a comment forum, and by deleting the requirement that the responsible official must act as or appoint a chairman of the forum. BPA officials who are responsible for the development of a policy may still attend and chair public comment forums even though the section does not contain a specific reference to their role.

Information on the preparation of transcripts and detailed summaries that was contained in the proposed definition of the term has been moved to this subsection. The final policy also clarifies that local BPA offices will only retain transcripts or summaries of comment forums during the development of a major regional power policy and places the requirement that the notice of policy alternatives be published in the FEDERAL REGISTER or elsewhere in subsection I.

E. Public Meetings. This is a new part which describes alternative ways that BPA can interact with the public in addition to public comment forums. In response to a comment, the final policy clarifies that public meetings can be used to exchange technical information. Also, as with other notice requirement, the description of how BPA will notify the public of meetings has been moved to subsection I.

F. Time Allowed for Public Recommendations or Comment and for Notice of Hearings and Meetings. This new part describes the length of time which BPA will ordinarily allow for written comments and for notice of hearings and meetings. These are minimum periods of time. Whenever possible, BPA will provide earlier notices. BPA will also consider special requests for extensions of time in which to submit comments.

G. Decision Document. This document contains essentially the same information as the previously required evaluation of the official record and the record of decision which it replaces. Though not required by the policy, BPA may circulate all or parts of the decision document in draft form for public comment. BPA has found that this practice can help to ensure that BPA has fully understood and adequately evaluated comments which have been submitted. In the final policy, this part includes a description of the contents of the decision document.

H. Notice of Final Policy. This action concludes the development of a major regional power policy.

I. Methods of Public Notification and Contact. In the final policy, this new part contains all requirements for providing notice and includes information on how BPA will use publications, direct mail, and personal contact to give this notice.

J. Combination of Other Required Notices with Policy Notices. This part has been added to the final policy to explain that, when it is desirable to do so, the Administrator may combine other required notices with notices specified for major regional power policies.

K. Procedures for Expedited Decisionmaking. Under the Procedure for Public Participation in Major Regional Power Policy Formulation, BPA could only waive the requirements for major regional power policies when an emergency situation existed. The final Policy for Public Involvement permits the use of expedited procedures under more circumstances. These circumstances are still expected to be rare. For example, a sudden and short-lived opportunity to make a regionally beneficial decision, where that decision establishes a major regional power policy, would be the type of situation in which fulfilling all procedural requirements for major regional power policies would be impracticable. That is, a delay in the decision would make it impossible to capture the economic benefit of the decision. Similarly, an emergency situation, such as a sudden finding that a resource or utility practice could endanger the public, could also make any delay in a decision contrary to the public interest.

Several changes were made to the proposed language of this part. One simplifies the wording which describes how a decision is made to use an expedited procedure. Another substitutes the word, "impracticable," as used in the Administrative Procedure Act, for the proposed "impractical." No change in meaning is intended. Finally, the proposed procedure has been revised to require the Administrator to fulfill all practicable public involvement procedures and use alternative means of informing and involving the public before a final policy is issued as well as before an interim policy is adopted.

L. Public Record. This part has been added to describe the purpose and contents of the record for development of a major regional power policy.

Section VI. Public Involvement for Other Actions. This section is included in the policy to reflect the full range of public involvement activities which BPA currently undertakes and which it intends to continue. BPA's practice has been to inform and involve the public on many issues which are not defined as major regional power policies. The section describes the types of actions for which the Administrator may conduct public involvement and the factors for determining the appropriate level and type of public involvement activities which may be most appropriate and effective.

A. Other BPA Actions for Which the Administrator May Conduct Public Involvement. The Administrator may also determine that it is appropriate to conduct public involvement on actions other than major regional power policies. Such other actions may include:

1. Formulation of policies which are not major regional power policies. Certain policies may affect future BPA actions but may not be identified as major regional power policies. The development of BPA's Conservation Cost-Sharing Principles is an example of how BPA can involve the public in discussion of a policy which is not a major regional power policy.

2. Planning activities and the development of plans related to areas such as energy conservation, renewable and other generating resources, fish and wildlife resources, and the transmission system. BPA develops regular plans to guide its decisions. These plans include projections for the power demands which BPA anticipates, the resources which must be acquired to meet these demands, changes or additions which are required to the transmission system, and other activities which occur on a cyclical basis. Information provided by the public may assist BPA in the preparation of these plans.

3. Development and implementation of programs related to areas such as energy conservation, renewable and other generating resources, fish and wildlife resources, and the transmission system. Once basic policies and action plans are in place, BPA develops and carries out specific programs. These programs include research and development activities, the acquisition of energy conservation and other energy resources, and construction and maintenance of transmission facilities. These programs affect specific publics and may be improved by information provided by the public.

4. Other BPA actions related to major regional power issues. These actions typically involve one-time decisions which have a major impact upon BPA or the region. They are not, however, expressed in a formal policy document which is adopted to guide future actions. Decisions to pursue new marketing opportunities, to explore the feasibility of special programs, and to reach agreements having significant economic impacts are examples of these types of actions.

B. Factors for Determining the Appropriate Level of Public Involvement. Once a decision has been made that the public should be involved in a particular issue or action, the specific ways in which the public will be informed and encouraged to participate must be determined. To be most effective, these methods should relate closely to the type of activity concerned and the process which will be followed to reach a final decision. The wide range of actions which are covered in the category of Other BPA

Actions precludes definition of a single public involvement process which will suit all situations. For this reason, certain factors which may bear on the selection of appropriate public involvement techniques have been identified.

Issued in Portland, Oregon on July 18, 1986.

/s/ PETER T. JOHNSON

Peter T. Johnson  
Administrator

**RECORD OF DECISION**  
**POLICY FOR PUBLIC INVOLVEMENT**

Prepared by  
Bonneville Power Administration  
U.S. Department of Energy  
July 1986

## Introduction

This Record of Decision describes the decisionmaking process used by the Administrator of the Bonneville Power Administration (BPA) in developing the Policy for Public Involvement. The process involved careful consideration of all comments received on the proposed Policy for Public Involvement, and of policy options identified by BPA staff.

On March 12, 1986, BPA published a notice of its intent to develop a Policy for Public Involvement and issued a proposed policy for public review and comment (51 FR 8624). The proposed policy was a revision of the Procedure for Public Participation in Major Regional Power Policy Formulation (46 FR 26368, May 12, 1981).

The comment period on the proposed policy extended from March 12 through April 18, 1986, and was subsequently reopened on request to receive comments at a meeting of interest group leaders on April 22, 1986. Twenty written comments and 12 oral comments were received on the proposed policy from 29 organizations and individuals.

The Record of Decision is specified by the Procedure for Public Participation in Major Regional Power Policy Formulation. The record states the issues for decision, summarizes the proposed policy and alternatives identified by public comments and BPA staff, and describes the Administrator's decisions and the reasons for the decisions. The reasons for the decisions are generally based on the "Staff Evaluations" in the Staff Evaluation of the Official Record, Proposed Policy for Public Involvement. For a fuller discussion of the rationale behind the decisions, please see that document.

## ISSUES FOR DECISION

### Issue No. 1: General Comments on Public Involvement

#### a. Issue

Will the policy as proposed encourage meaningful involvement of the public? Should BPA conduct special early consultations with its customers, State and local governments, and other Federal agencies? Should standards be established for evaluating public comments? Should BPA provide funding to public interest groups to assist them in participating in BPA's decisionmaking processes? Should the policy include additional specific techniques for informing and involving the public?

#### b. Proposed Policy

The proposed policy contains general statements, specific requirements, and optional practices for involving the public in major regional power policies and other BPA actions.

#### c. Comments Received

A number of commenters offered general reactions to the proposed policy. Some felt that the proposed policy would provide effective opportunities for public participation. Others expressed the view that the proposed policy was too cautious and that it allowed the Administrator too much discretion.

Several commenters recommended that BPA provide special public involvement opportunities for its customers, other Federal agencies, and State and local governments. One expressed concern that special interests influenced BPA decisions disproportionately and that some measures should be established to prevent this.

A few commenters urged BPA to provide funds to public interest groups which participate in BPA's decisionmaking processes. One commenter stated that ratepayer funds should not be used for this purpose since those who have an interest in BPA's decisions will get involved without BPA funding.

A number of specific public involvement techniques were suggested by commenters. These techniques included: a regular summary of policy development plans and activities, issue forums and background seminars, improved notice of grant opportunities, periodic evaluations of public involvement processes, more efficient distribution of materials to persons outside of the region, more readable documents, and coordination of public comment periods.

#### d. Decision

Retain the language of the proposed policy except for modifications on specific issues.

e. Reason for the Decision

The policy strikes an appropriate balance between BPA's self-imposed requirements for involving the public and preservation of the Administrator's appropriate discretion to determine when and how the public should be involved in BPA's decisionmaking.

In its basic requirements for public involvement, the policy should not distinguish among the various groups of interested persons and organizations. Beyond the minimum requirements for public involvement, however, BPA strives to maintain appropriate contacts with its customers, other Federal agencies, State and local governments, and other interested parties and to provide opportunities for each group to participate in BPA's decisionmaking.

The issue of funding for public interest groups does not fall within the scope of the Policy for Public Involvement. As new information is presented on the issue, BPA will consider it outside of this policy development process.

Many of the suggestions for specific public involvement techniques are outside of the scope of the policy.

Issue No. 2: Authority and Scope

a. Issue

What legal authorities should be referenced as the basis for the policy? Should the stated purpose of the policy be expanded? Should additional types of actions be covered by or included in the policy?

b. Proposed Policy

The Proposed Policy for Public Involvement does not reference any laws which mandate or authorize the policy. The background information which introduces the policy does, however, list the Pacific Northwest Electric Power Planning and Conservation Act of 1980 (Pacific Northwest Power Act) and the National Environmental Policy Act of 1969, as amended, (NEPA) as containing directives or requirements upon which BPA's overall public involvement program is based.

The proposed policy states that its purpose is to affirm BPA's commitment to insure widespread public involvement in the formulation of regional power policies.

The proposed policy lists certain actions which are not covered by the policy. These are: interpretive rulemaking; rules of internal agency organization, procedure, or practice; and policies for which another exclusive procedure is required by law, or for which the Administrator has established alternative procedures that supersede the policy.

The proposed policy does not contain a procedure for evaluation and revision of the policy in the future.

c. Comments Received

Several comments addressed various aspects of the authority and scope of the policy. One suggested that other legal mandates for public involvement, besides the Pacific Northwest Power Act and NEPA should be listed as the basis for BPA's public involvement program. One requested that the purpose of the policy be expanded to include more than involvement of the public in regional power policies. One commenter stated that the policy should apply to interpretive rulemaking since many of BPA's final procedures are interpretive rulemaking and without this coverage important public involvement may not occur. Finally, one recommended that the policy should contain a procedure for evaluating the policy in the future and revising it if necessary.

d. Decision

Revise the Background to the policy to include an acknowledgement that other Federal statutes and Executive Orders may require BPA to conduct some kind of public involvement.

Revise the policy's statement of purpose to include "other appropriate actions" in addition to the formulation of regional power policies.

Maintain the same basic public involvement procedural requirements for all groups of interested persons.

e. Reasons for the Decision

In addition to the Pacific Northwest Power Act, NEPA, and the Administrative Procedure Act, BPA has some responsibilities for public involvement under the Intergovernmental Cooperation Act of 1968, Executive Order 11988, (for actions in a floodplain) and Executive Order 11990, (actions in wetlands). Other Federal statutes may also require public involvement depending upon the particular circumstances.

The statement in the proposed policy that its purpose is to affirm BPA's commitment to widespread public involvement in the formulation of regional power policies was not intended to limit public involvement opportunities to specific policy statements.

The proposed policy does not apply to interpretive rulemaking because such rulemaking is specifically exempted by the Administrative Procedure Act.

A specific procedure for evaluation and revision is not necessary. If problems or inadequacies become apparent they can be brought to the attention of the official responsible for the policy, and the policy can then be revised.

Issue No. 3: Definitions

a. Issue

Should the definition of "customer" be revised? Should certain definitions be added?

b. Proposed Policy

The proposed policy defines "customer" as: "a person or entity having a direct relationship with BPA as the result of contractual arrangements for the purchase, transfer, assignment, or sale of electric power and energy, related services, or transmission capability to, with, or from BPA." The Procedure for Public Participation in Major Regional Power Policy Formulation defines "customer" as: "A person or entity having a direct relationship with BPA as the result of contractual arrangements for the purchase, exchange (underlining added), transfer, assignment, or sale of electric power and energy, related services, or transmission capability to, with, or from BPA."

Many other phrases, which do not have a meaning different from ordinary usage, are not defined in the proposal.

c. Comments Received

One commenter recommended that the word, "exchange," be restored to the list of identifying characteristics of a customer.

Another commenter suggested that definitions for "alternative means of providing notice," "reasonable time," and "emergency situation" be added to the policy.

d. Decision

Revise the definition of the term, "customer," to include the word, "exchange," as used in the same definition in the Procedure for Public Participation for Major Regional Power Policy Formulation.

Definitions for the terms, "alternative means of providing notice," "reasonable time," and "emergency situation" should not be added to the policy.

e. Reasons for the Decision

The word, "exchange," was inadvertently omitted from the definition of "customer" in the proposed policy.

"Alternative means" has no special meaning except "other than the usual ways." This could include telephone conversations, personal contacts, or any other method of communication that accomplishes the goal set by the policy.

The terms, "reasonable time" and "emergency situation," are not used in the final policy and so definitions are not necessary.

Issue No. 4: BPA Determination of Major Regional Power Policies and Other Actions

a. Issue

Should the policy include criteria by which the Administrator determines whether actions are major regional power policies or other BPA actions?

b. Proposed Policy

The proposal states that the Administrator determines when an agency statement of future effect and general applicability, generic agreement, contract, or other instrument constitutes a major regional power policy. No criteria are included for this determination. Similarly, the policy includes a general description of the types of activities which may fall under the category of other BPA actions but does not define criteria for determining which actions are other BPA actions.

c. Comments Received

A number of commenters stated that BPA should adopt specific guidelines for determining when actions are major regional power policies or other BPA actions. Without such criteria, they felt that the Administrator's decisions could be arbitrary and that the public would not have adequate information. Two of these commenters suggested some standards for the determination. These standards covered financial, operational, general economic, environmental, and contractual impacts on BPA and its customers in the Northwest and other regions. Two other commenters identified two types of actions that should always be considered major regional power policies. These actions were contracts of a significant nature and sales of major blocks of power. There were several recommendations for BPA to solicit public comment on its determination of what is and is not a major regional power policy and for the policy to contain an appeal procedure to this determination and some mechanism for BPA reconsideration.

d. Decision

Criteria by which the Administrator determines whether actions are major regional power policies or other BPA actions should not be added to the policy language. However, explanatory language to the policy should be revised to indicate the general types of considerations which typically guide these decisions.

e. Reasons for the Decision

The adoption of specific guidelines for determining which actions are major regional power policies and which are other BPA actions would complicate and limit the factors that BPA could take into account in making this determination.

Issue No. 5: Major Regional Power Policies--Public Notice

a. Issue

① What method should BPA use to notify the public of actions in regard to major regional power policies? ② What period of time should BPA allow for the public to submit written recommendations or comments and for notice of public comment forums and public meetings? ③ Who should be notified of BPA issues and actions?

b. Proposed Policy

The proposed policy requires or allows, depending on the action, the Administrator to publish notices of policy-related actions or activities in the FEDERAL REGISTER or elsewhere if that is determined to be more appropriate. The proposed policy also provides alternate methods that can be used to notify the public.

In the proposed policy, BPA states that whenever practicable, the Administrator shall allow at least 30 days for the public to submit written recommendations or comments and allow at least 15 days advance notice of public comment forums and public meetings.

The proposed policy expresses a commitment "to insure widespread public involvement" in its general statement of purpose and in Additional Methods of Public Notification and Contact states that written announcements may be sent to "persons who have previously expressed an interest in the development of a major regional power policy, or . . . could be reasonably expected to have such an interest." Other sections of the policy that deal with public notice do not discuss particular segments of the public which should be notified.

c. Comments Received

Those who commented on the methods that BPA should use to notify the public generally recommended that BPA use other methods in addition to publication in the FEDERAL REGISTER and that some guidelines should be provided on what forms of notice BPA would use in specific situations.

Comments on the length of time which BPA will strive to allow for notice of comment opportunities and meetings were mixed. Some stated that the 30- and 15-day periods were helpful minimums; others requested longer periods or flexibility in the length of time depending on the issue.

One commenter stated that public participation in issues affecting local governments should be limited to those local governments whose jurisdictions are served by BPA customers.

d. Decision

Retain the policy language as proposed regarding the methods of public notice that will be used, the time periods allowed for notice, and the persons who will be notified of various issues and actions.

e. Reasons for the Decision

Because of the variety of situations requiring public notice, it would be impractical to create specific guidelines on when BPA should use the FEDERAL REGISTER, direct mail, newspapers, personal contact, etc.

The 30 and 15-day time periods for notice of comment opportunities and meetings, respectively, are minimums that BPA hopes to allow to the extent possible. In most cases, BPA will try to provide longer periods of time. In addition, BPA would consider requests for extensions of these time periods in special situations.

Limitation of public participation in issues affecting local governments to those local governments which are served by BPA customers would not fulfill BPA's mandate "to insure widespread public involvement in the formulation of regional power policies . . . ." Where an issue has a special effect on a particular local government, BPA will assure that the public and BPA customers within the jurisdiction of that local government are given full notice and effective opportunities to participate in any decisionmaking process.

#### Issue No. 6: Major Regional Power Policies--Notice of Intent

a. Issue

What information should be contained in the notice of intent? Should the notice of intent be combined with the notice of proposed policy?

b. Proposed Policy

The proposed policy states that when a decision has been made to develop a major regional power policy, the Administrator is to publish a notice of the intent to develop such a policy. The required contents of the notice include (1) the subject of the policy, (2) an explanation of the need for and likely effect of the policy, (3) the legal authority for developing the policy, (4) information on the effect which the policy may have on other existing policies, (5) a request for written recommendations, and (6) the time limit and address for submitting recommendations. The proposed policy also contains a provision for combining the contents of the notice of intent and the notice of proposed policy.

c. Comments Received

Only two commenters addressed the notice of intent. One suggested that the notice should identify who is likely to be affected by the policy so that they can recommend alternatives to the policy. This commenter also suggested that the risks in implementing a policy should be identified early in the policy development process. Finally, this same commenter expressed concern that combining the notice of intent and the notice of proposed policy could reduce the time allowed for involvement of the public at the "front end" of the process. Another commenter requested that the policy retain the requirement in the Procedure for Public Participation in Major Regional Power Policy Formulation that a notice of intent include a description of available information on the subject of the policy.

d. Decision

Revise the required contents of the notice of intent to include: "an explanation of the need for and the probable effect of the policy with a statement of available information on these issues."

Retain the policy provision for combining the notice of intent and the notice of proposed policy.

e. Reasons for the Decision

Information on who is likely to be affected by the policy, the risks of implementing the policy, and available information on the subject of the policy are already covered by the proposed policy's requirement that the notice include "an explanation of the need for and the probable effect of the policy."

A "statement of available information on the need for and the probable effect of the policy" could be useful to the public and was not intended to be excluded from the notice of intent.

Certain policies may not require separate opportunities to respond to the notice of intent and to the notice of proposed policy. Combining these notices does not imply that adequate opportunities for the public to participate will not be provided.

Issue No. 7: Major Regional Power Policies--Notice of Policy Alternatives

a. Issue

Should the policy contain a provision for a notice of policy alternatives?

b. Proposed Policy

The proposed policy contained a new section on an optional notice of policy alternatives.

c. Comments Received

Only a few commenters addressed this issue. All but one supported the use of a notice of policy alternatives. They felt that the practice would encourage creative suggestions from the public at a stage when BPA would be most receptive to them. One commenter expressed a preference for BPA developing its preferred alternative for the policy and then submitting it to the public for their evaluation. The commenter was concerned that an array of alternatives would be less than honest if BPA really had a preferred alternative.

d. Decision

Retain the proposed policy provision for an optional notice of policy alternatives.

e. Reasons for the Decision

The use of a notice of policy alternatives can provide useful information to BPA for the development of a proposed policy.

Issue No. 8: Major Regional Power Policies--Public Comments

a. Issue

How many public comment forums should be held on a proposed policy, and where should they be held? Who should make comments at public comment forums, and what procedures should they follow? Should BPA arrange for persons who cannot attend a public comment forum to review the transcript or summary of the forum before written comments on the proposed policy are due? Should there be more opportunities for the public to review comments which have been submitted to BPA? Should the policy include a standard for determining when a summary, rather than a verbatim transcript, may be prepared for a public comment forum? Should persons who speak at a public comment forum have an opportunity to review the summary or transcript of the forum before it becomes part of the record? Should the official who is responsible for developing the policy be required to be present at public comment forums?

b. Proposed Policy

According to the proposed policy, at least one public comment forum should be held on a major regional power policy which has been proposed. Additional forums may be held if it is determined that they are appropriate.

The proposed policy states that public comment forums are held to give interested persons the chance to present their views in person. Persons who wish to comment at a forum are encouraged to notify the local BPA manager before the forum so that a schedule of commenters can be prepared. The proposal notes that BPA may establish time limits for individual commenters to ensure that all who wish to comment can do so. In addition, the proposal states that commenters with similar views, data, and arguments may be required to consolidate their presentations.

The proposed policy states that a verbatim transcript is ordinarily prepared for public comment forums but when a transcript is not prepared, a detailed summary is made instead.

c. Comments Received

Two commenters discussed the number and location of public comment forums. One recommended that forums be held in each State which may be affected by a policy and that additional forums should be held upon request or the reasons for denying the request provided. The other commenter encouraged BPA to hold more than the one required public comment forum if requested.

One commenter stated that public testimony should be limited to the people that are served by a utility that purchases at least one-half of its power requirements from BPA. Several other comments discussed procedures for commenters at public comment forums. Two supported the proposed elimination of the previous 3-day notice requirement for oral presentations at comment forums. One recommended that persons who wish to speak should be able to arrange an allotment of time in advance. This would ensure that those who must travel long distances to a comment forum will have an opportunity to comment. Two commenters expressed concern that requiring persons with similar views to consolidate their presentations could discourage public participation.

One commenter was concerned with making written comments from persons outside of the region, who cannot attend comment forums, more meaningful. The recommendation was to extend the deadline for written comments so that transcripts or summaries of comment forums can be sent to these persons before written comments are due to BPA. Another commenter urged BPA to provide more opportunities for the public to review and comment on comments submitted to BPA.

Several suggestions were made regarding the documentation of public comment forums and the participation of the official who is responsible for developing the policy. One of these recommended that a standard be provided for deciding when a summary rather than a verbatim transcript would be prepared for a comment forum. Two others requested that participants in a comment forum be given an opportunity to review a summary for accuracy before it is made part of the record. One recommended that the official responsible for a policy attend the public comment forums and chair them as often as possible.

d. Decision

Retain the proposed policy language on public comments and public comment forums.

e. Reasons for the Decision

In practice, BPA often exceeds the minimum of one required public comment forum. In addition, BPA would consider requests for additional forums or forums in particular locations.

Restricting comment at public comment forums to persons who are served by certain utilities would not respond to BPA's responsibility to insure widespread public involvement in the development of major regional power policies.

The elimination of the 3-day notice provision for persons who wish to speak at public comment forums should encourage public participation in these forums. Persons who wish to speak are still urged to notify the local BPA manager some time before the start of the forum in order to help arrange an efficient meeting. The provision in the policy that BPA may require persons with similar views to consolidate their comments is appropriate to permit the full range of comments to be heard in situations where a large number of persons wish to speak and many of these would have similar comments.

The situations which could result in a summary of a public comment forum being prepared instead of a transcript are likely to be infrequent and difficult to predict; therefore, a standard for making this determination is not practical.

While there is value to the public and to the official responsible for developing a policy for that official to attend public comment forums, this may not always be possible.

#### Issue No. 9: Major Regional Power Policies--Public Meetings

a. Issue

Should public meetings be held to exchange technical information? How can public meetings be made more convenient and effective?

b. Proposed Policy

The proposed policy provides that BPA may hold public meetings in addition to public comment forums. These meetings may serve a number of purposes.

c. Comments Received

One commenter requested that the policy include among the purposes for public meetings the exchange of technical information. Several other commenters made suggestions regarding the scheduling of meetings. These were: that there be fewer meetings but that these cover more than one issue, that BPA try to avoid scheduling meetings on different issues at the same time, and that different levels of government should work together on meetings that concern common issues. On the conduct of the meetings, commenters recommended less formal arrangements for the meeting rooms, brief but effective presentations by BPA staff, and efficient use of BPA staff at public meetings.

d. Decision

Revise the purposes for which public meetings may be held to include the exchange of technical information.

e. Reasons for the Decision

The exchange of technical information is one appropriate reason for holding a public meeting.

Details for scheduling and planning public meetings do not need to be included in the policy.

Issue No. 10: Major Regional Power Policies--Expedited Decisionmaking

a. Issue

Under what circumstances should BPA use an expedited procedure to make decisions, and what should be the characteristics of such a procedure?

b. Proposed Policy

The proposed policy permits the Administrator to make an interim or final decision without fulfilling all public involvement procedures for major regional power policies when completing these procedures would be impractical, unnecessary, or contrary to the public interest. Before adopting an interim policy, BPA is to provide whatever opportunities for public involvement are feasible. The interim policy must specify the length of time that it will remain in effect. When a final policy is developed after the adoption of an interim policy, all procedural requirements must be followed.

c. Comments Received

Many commenters expressed concern that the policy did not provide specific criteria or examples of when expedited procedures might be used. It was their belief that the procedures should be employed only in rare and compelling situations when irreparable harm would be done to the public or when the need for action could not be foreseen. The commenters appeared to fear that without controlling criteria, BPA might abuse the expedited procedures and make significant decisions with little or no public consultation.

Some of the commenters suggested ways that the expedited procedures could be modified to make them more acceptable. These suggestions included: explaining the reasons for using expedited procedures in detail rather than briefly as proposed, soliciting public comment on the decision to use an expedited procedure, limiting the amount of time that an interim policy can remain in effect, requiring complete or partial fulfillment of public involvement procedures before a final policy is issued, and adding a procedure for the public to appeal the use of an expedited procedure. One commenter suggested that the term, "good cause shown," be defined.

d. Decision

Revise the explanatory material on the policy to make it clear that expedited procedures are intended to be used only in rare situations.

For situations in which a final policy is adopted immediately, add language to the policy to require BPA to be guided by the goals of completing public involvement procedures that are practicable and, where possible, to use alternative means of providing notice and public involvement opportunities.

Revise the language describing how the decision to use expedited procedures is made to more clearly express the intent of the policy.

Replace the term, "impractical," with "impracticable."

e. Reasons for the Decision

Specific criteria for expedited decisions would be difficult to formulate, would require interpretation in individual circumstances, and could hamper the appropriate use of expedited procedures.

The use of the term, "brief statement," to describe the reasons for using expedited procedures is taken from the Administrative Procedure Act and does not imply that necessary information will not be included in the statement. The suggestion that BPA should announce and solicit comment on its intention to use an expedited procedure would negate the purpose of the procedures, namely, to permit a speedy decision. Also, the establishment of a maximum length of time that an interim decision could remain in effect would be difficult to do in advance of the particular situation.

A requirement that some public involvement be required before a final policy is issued under expedited procedures would also negate the purpose of the procedures. However, it is appropriate for BPA to attempt to fulfill those public involvement procedures that are practicable or seek to use alternative means of informing and involving the public before a final policy is issued. Finally, an appeal procedure for expedited procedures would be impractical since a final policy would most likely be issued only when an interim policy would not be appropriate and in such cases the decision could not be reversed.

The term, "for good cause shown," is used in the section of the proposed policy which describes how a decision is made to use an expedited procedure. The term, "for good cause shown," is unclear and should be revised to better express the intent that the Administrator, when there is a good reason, may conclude that all normal public involvement procedures should not be fulfilled. In addition, the term, "impractical," should be replaced by "impracticable," to be more consistent with the corresponding language of the Administrative Procedure Act.

Issue No. 11: Major Regional Power Policies--Documentation of Policy Development

a. Issue

What should the record of major regional power policy development be called? How and within what time frame should the record be completed? What should be the contents of the record? Should the Staff Evaluation of the Official Record and the Record of Decision be combined into one document?

b. Proposed Policy

The proposed policy requires that a "public record" of materials documenting the development of a major regional power policy should be created. The public record is to contain all notices provided for by the policy; any transcripts or summaries of public comment forums; any summaries of public meetings; written comments, data, and questions of record and BPA's replies; the decision document; and any other relevant information. The decision document is a document which describes how and why a decision was made on a major regional power policy. The decision document includes a description of the proposed action, a summary of the public comments on the proposal, an evaluation of the proposal and other identified alternatives, the Administrator's decision, and a concise summary of the reasons for the decision.

c. Comments Received

One commenter recommended that the name of the record not be changed from "official record" to "public record" since "public" record might imply that the record was not judicially reviewable.

Two commenters made recommendations on the process of preparing the record and the decision document. One urged that the policy include a statement that BPA will try to complete its decision documents and arrive at final decisions within a reasonable period of time. Another suggested that the policy require the circulation of draft decision documents for public comment.

Regarding the content of the record, one commenter stated that the record should include every document seen and every contact made by the decisionmaker. Another comment was that the decision document should provide detailed summaries of public comments and indicate in adequate detail whether or not they were accepted and the reasons for the decision. There was also a comment that where transcripts of public comment forums or public meetings exist, they should automatically become part of the record. Similarly, one commenter pointed out that the reference to "any" transcripts or summaries of public comment forums should be changed to "the" transcripts or summaries since one or the other is required for public comment forums.

Several comments supported the combination of the evaluation of the official record and the record of decision as a change that would save time and money. One commenter advised against the combined document stating that it would create the appearance that the Administrator may not consider some alternative courses of action and that it would deny the public access to staff recommendations.

d. Decision

Retain the proposed name, "Public Record," for the record of the policy development process.

Revise the description of the contents of the public record to include:

"2. The transcript or summary of oral comments taken at public comment forums;" and "3. Any transcripts or summaries prepared for the record of oral comment taken at public meetings."

e. Reasons for the Decision

In regard to the name of the record, there is no intent to imply that the "public record" is not judicially reviewable in the same way that the "official record" has been.

A requirement to complete decision documents and final decisions within a reasonable period of time would have little precise meaning since, depending on the magnitude of the policy, the length of time that would be reasonable could vary widely. Requiring that all draft decision documents be circulated for comment could be impracticable or unnecessary for some policies.

Since the proposed policy requires that the record include specific policy-related documents and "any other information that is determined by the Administrator to be relevant," it is not necessary to add an additional requirement that every document seen and every contact made, that is related to the policy under development, be included or documented in the record. Likewise, the policy already requires that the decision document contain a summary of public comments, an evaluation of those comments, and BPA's decision on whether to adopt them or not. In addition, the complete text of all public comments can be obtained from BPA.

The suggestion to refer to "the" rather than "any" transcripts or summaries of public comment forums is a useful clarification since either a transcript or a summary must be prepared for such forums.

Combining the evaluation of the official record and the record of decision will expedite preparation of the decision document and completion of the policy development process. It will not limit the alternative courses of action considered by the Administrator since the evaluation of all of these alternatives would be included in the decision document presented to the Administrator for approval.

Issue No. 12: Other BPA Actions

a. Issue

What type of public involvement procedures should be used for other BPA actions, and what actions should fall into this category?

b. Proposed Policy

The proposed policy describes general categories of other BPA actions for which public involvement may be conducted. Eight factors are listed to illustrate the type of factors that may be considered in determining the kind of public involvement opportunities that may be appropriate for Other Actions.

c. Comments Received

Only a few commenters addressed the issue of Other BPA Actions by itself. Of those who did, one expressed general agreement with the extension of the policy to cover other BPA actions. Another commented that the procedures for other BPA actions should be more like those for major regional power policies. Two other commenters stated that BPA should establish a regular and timely public review process on its budget. Many other commenters dealt with the issue of public involvement on other BPA actions in terms of their recommendations for identifying when procedures for major regional power policies would apply. See Issue No. 4. These commenters generally expressed a preference for the detailed major regional power policy procedures over the flexible procedures for other BPA actions.

d. Decision

Retain the policy language as proposed for Other BPA Actions.

e. Reasons for Decision

Adoption of a procedure for Other BPA Actions that resembles the procedure for Major Regional Power Policies would restrict flexibility in designing appropriate public involvement activities for a wide range of actions that are not Major Regional Power Policies. The fact that detailed procedures are not specified for Other BPA Actions does not imply that extensive public involvement may not be conducted on a wide range of issues if called for by the nature of the action.

Issue No. 13: Public Involvement and NEPA

a. Issue

What should the policy require regarding the National Environmental Policy Act of 1969, as amended (NEPA)?

b. Proposed Policy

The proposed policy requires BPA to coordinate the implementation of the policy with procedures required by NEPA to the maximum extent possible. The purpose of the requirement is to minimize impacts on the public's resources.

c. Comments Received

Two comments discussed the policy's relationship to NEPA. One stated that NEPA requirements should always be implemented, and one requested that the policy clarify when BPA had the lead agency role or the role of cooperator in fulfilling NEPA requirements.

d. Decision

