

ATTACHMENT A

BONNEVILLE POWER ADMINISTRATION RESPONSE TO COMMENTS

1.	INTRODUCTION.....	1
2.	BACKGROUND	2
2.1	Overview of BPA Rates	2
2.2	Risk Mitigation Tools: Planned Net Revenues for Risk and Cost Recovery Adjustment Clauses	2
2.3	BPA’s Financial Reserves Policy	5
2.4	Implementation of the Financial Reserves Policy	6
2.5	BP-22 RDCs (FY 2022–2023).....	7
3.	PROCESSES LEADING UP TO THE FY 2022 POWER RDC	8
4.	RESPONSE TO COMMENTS.....	11
4.1	Supportive Comments	11
4.2	Objections and Concerns	15
4.2.1	<i>Overview</i>	15
4.2.2	<i>General Objections</i>.....	15
4.2.3	<i>Conservation Funding</i>.....	20
4.2.4	<i>General Fish and Wildlife Funding</i>.....	29
4.2.5	<i>Northwest Power Act Section 4(h)(11)(A)</i>.....	41
4.2.6	<i>Northwest Power Act Section 4(h)(10)(A)</i>.....	45
4.2.7	<i>Litigation Stay</i>	51
4.2.8	<i>Dam Breaching</i>	53
4.2.9	<i>Procedural Issues Regarding Proposed BP-24 Settlement Package</i>	54
5.	NATIONAL ENVIRONMENTAL POLICY ACT ANALYSIS	56

BONNEVILLE POWER ADMINISTRATION RESPONSE TO COMMENTS

1. INTRODUCTION

The Bonneville Power Administration (BPA) is a Federal power marketing administration that owns and operates more than 15,000 miles of high-voltage transmission lines and provides roughly 28 percent of the electric power used in the Pacific Northwest.¹ BPA is self-financing and sets rates for its products and services to recover its costs, consistent with its statutory authorities and obligations.

BPA established its power rates for the FY 2022-2023 period in the 2022 Wholesale Power and Transmission Rate Proceeding (BP-22 Rate Proceeding). In setting power rates in the BP-22 Rate Proceeding, BPA included risk adjustment mechanisms consistent with its Financial Reserves Policy (FRP). BPA sets its rates on a forecast basis. Risk adjustment mechanisms set parameters that allow certain rates to be adjusted within a rate period to respond to actual end-of-year financial conditions. When BPA's financial reserves drop below pre-defined levels, BPA has rate mechanisms (such as the Cost Recovery Adjustment Clause (CRAC) and the Financial Reserves Policy Surcharge (FRP Surcharge)) that automatically increase rates to ensure BPA can recover its costs, including maintaining healthy levels of financial reserves. Conversely, BPA also has rate mechanisms that permit repurposing financial reserves, including reducing rates, when BPA's financial reserves exceed certain pre-defined levels. These mechanisms include the Power Reserves Distribution Clause (Power RDC), which is the subject of this document.²

On November 16, 2022, BPA staff shared their calculation that BPA's financial reserves had exceeded the Financial Reserves Policy upper threshold, triggering the Power RDC rate mechanism for fiscal year (FY) 2022. In this notice, BPA staff also shared their calculation that the RDC Amount was \$500 million, and presented their preliminary proposal for repurposing the Power RDC Amount.

As noted in the Administrator's letter accompanying this document, BPA is adopting staff's proposal. The Power RDC Amount of \$500 million will be applied as follows: (1) a \$350 million dividend distribution to reduce FY 2023 power rates; (2) \$100 million toward debt reduction or revenue financing, with any amount not used to reduce debt or revenue finance left as financial reserves to support BPA's liquidity and/or increase the probability of a 2023 Power RDC Amount; and (3) \$50 million toward addressing, on an accelerated, one-time basis, certain non-recurring maintenance needs of existing fish and wildlife mitigation assets that (i) BPA anticipates would otherwise need to be addressed during future rate periods and (ii) will result in avoidance of those costs in future rate periods. As used here, the term "mitigation assets" are those that BPA determines (a) have resulted in tangible and measurable benefits or improvements for fish and wildlife, and (b) are directly related to mitigating the effects of the construction or ongoing operation of the FCRPS projects.

¹ BPA Facts, available at <https://www.bpa.gov/-/media/Aep/about/publications/general-documents/bpa-facts.pdf>.

² 2022 Power Rate Schedules and General Rate Schedule Provisions, BP-22-A-02-AP01, GRSP II.P ("BP-22 Power GRSP").

Although this Response to Comments was not specifically contemplated by the BP-22 Power and Transmission General Rate Schedule Provisions (GRSPs), due to the volume and nature of comments received on the proposed application of the Power RDC Amount, BPA has prepared this document to provide a reasoned explanation of BPA’s use of the Power RDC Amount for FY 2022. As explained in this Response to Comments, the Administrator finds staff’s proposal is a reasonable implementation of the Power RDC rate mechanism and adopts their recommended uses for the FY 2022 Power RDC.

2. BACKGROUND

2.1 Overview of BPA Rates

BPA is required to market Federal power at rates that are established pursuant to statutory directives. Most fundamentally, BPA’s rates must be set to recover its costs.³ BPA is directed to set rates “with a view to encouraging the widest possible diversified use of electric power at the lowest possible rates to consumers consistent with sound business principles.”⁴ Since BPA is self-financing, the revenue received from ratepayers must be sufficient to fully recover all of BPA’s costs. As a Federal power marketing administration that does not operate for profit, BPA does not incur the cost of paying dividends or a rate of return to equity investors. If expenses exceed revenues, financial reserves will generally be depleted and BPA may need to increase rates to recover its costs. If revenues are greater than expenses over time, financial reserves⁵ will accumulate in the BPA fund.

BPA’s forecast costs are developed through a public process called the Integrated Program Review (IPR). Those forecast costs inform the assumptions about costs BPA must recover in power rates, established through the procedures in section 7(i) of the Northwest Power Act.⁶

2.2 Risk Mitigation Tools: Planned Net Revenues for Risk and Cost Recovery Adjustment Clauses

BPA sets its rates on a forecast basis in an amount projected to be sufficient to pay BPA’s costs. Because rates are set on projections, actual costs and revenues will almost certainly be higher or lower than forecast.

³ Bonneville Project Act of 1937 § 7, 16 U.S.C. § 832f (2020); Flood Control Act of 1944 § 5, 16 U.S.C. § 825s (2020); Federal Columbia River Transmission System Act of 1974 § 9, 16 U.S.C. § 838g (2020) (“Transmission System Act”); Pacific Northwest Electric Power Planning and Conservation Act § 7(a)(1), 16 U.S.C. § 839e(a)(1) (2020) (“Northwest Power Act”).

⁴ Transmission System Act § 9, 16 U.S.C. § 838g (2020); *see also* Flood Control Act § 5, 16 U.S.C. § 825s (2020); Northwest Power Act § 7(a), 16 U.S.C. § 839e(a) (2020).

⁵ Financial reserves (or reserves) refer to “reserves available for risk,” a BPA term representing the amount of unobligated cash, short-term market-based investments, and deferred borrowing. This is distinct from “reserves not for risk” which is a BPA term for obligated or committed cash and investments, generally dedicated to be used for a specific future purpose, *e.g.*, customer deposits for transmission studies.

⁶ 16 U.S.C. § 839e(i) (2020). These projections, however, do not finally determine BPA’s budget levels on any particular program. Additional review of BPA’s budget occurs through the Federal budgetary review process. *See* Administrator’s Final Record of Decision, BP-22-A-02, at 57 (July 2021) (“BP-22 ROD”).

BPA's actual costs and revenues can vary widely from forecasts, with many of these deviations outside BPA's control.⁷ On the Power side, hydrology and power market volatility contribute significantly to the rise and fall in BPA's financial reserves. One of the most difficult areas to forecast in setting BPA's power rates is revenue derived from forecast surplus power sales (also called "secondary sales") over the applicable rate period.⁸ Secondary revenue—its cost and benefit—is allocated to power rates, pursuant to section 7(g) of the Northwest Power Act.⁹ Currently, BPA forecasts net secondary revenue for each upcoming rate period, and includes such forecast as an up-front credit to reduce power rates. Net secondary revenue is particularly volatile, and can result in actual revenue significantly less than or greater than the forecast included in power rates. When estimating this revenue credit for ratemaking, BPA ratemaking studies calculate the forecast standard deviation for BPA's secondary power revenue which, on average, has a forecast standard deviation of around \$200 million.¹⁰

Over the last 16 years (fiscal year 2007 to 2022), actual net secondary revenue was lower than rate case forecasts for secondary sales in about half of the years, with overall actual net secondary revenue \$304 million *below* the sum of rate case forecasts. The annual differences between rate case forecast and actual performance can be significant. For example, in 2010, secondary revenues were \$439 million below rate case forecast, while in 2022 (the current fiscal year) sales were \$625 million above rate case forecast. The volatility with BPA's secondary sales revenues combined with increasing overall costs, has led to higher power rates for BPA firm power customers in most years. The following chart illustrates the unpredictability in BPA's power rates related to secondary sales uncertainty and cost increases over the past decade and a half.

⁷ See BP-22 ROD at 50.

⁸ Surplus power is power that is surplus to BPA's firm obligations under sections 5(b), (c), and (d) of the Northwest Power Act (*see* 16 U.S.C. § 839c(f) (2020)) as well as nonfirm (seasonal) surplus power. Secondary revenues are "net" secondary revenues, meaning they are net of the cost of purchases to address times of power deficits.

⁹ 16 U.S.C. § 839e(g) (2020) ("*[T]he Administrator shall equitably allocate to power rates, in accordance with generally accepted ratemaking principles and the provisions of this chapter, all costs and benefits not otherwise allocated under this section, including, but not limited to, conservation, fish and wildlife measures, uncontrollable events, reserves, the excess costs of experimental resources acquired under section 839d of this title, the cost of credits granted pursuant to section 839d of this title, operating services, and the sale of or inability to sell excess electric power.*") (emphasis added).

¹⁰ The standard deviation is a measure of the amount of variation or dispersion of a set of values. A low standard deviation indicates that the values tend to be close to the center of the set, while a high standard deviation indicates that the values are spread out over a wider range. For BPA, a \$200 million standard deviation means that, on average, most likely modeled outcomes for secondary revenues can range from \$200 million above or \$200 million below BPA's forecast.

	Fiscal Year	Forecast Net Secondary Revenue (nonSlice) in Rates (\$millions)	Modified Actual Trading Floor (\$millions)	Implied Impact on BPA Financial Reserves (\$millions)	Base Power Rate Change Relative to Previous Rate Case
1	2007	\$ 547	\$ 475	\$ (72)	-6.3%
2	2008	\$ 518	\$ 407	\$ (110)	
3	2009	\$ 530	\$ 178	\$ (351)	-1.6%*
4	2010	\$ 460	\$ 21	\$ (439)	7.0%
5	2011	\$ 523	\$ 567	\$ 43	
6	2012	\$ 357	\$ 305	\$ (53)	3.3%
7	2013	\$ 387	\$ 403	\$ 16	
8	2014	\$ 377	\$ 408	\$ 31	7.9%
9	2015	\$ 438	\$ 500	\$ 62	
10	2016	\$ 316	\$ 178	\$ (138)	7.2%
11	2017	\$ 306	\$ 263	\$ (43)	
12	2018	\$ 318	\$ 427	\$ 109	5.5%
13	2019	\$ 289	\$ 136	\$ (153)	
14	2020	\$ 277	\$ 348	\$ 71	0.9%
15	2021	\$ 251	\$ 347	\$ 96	
16	2022	\$ 461	\$ 1,086	\$ 625	-2.6%
Cumulative Impact		\$ 6,356	\$ 6,052	\$ (304)	22.2%

Note: This “Forecast Net Secondary Revenue (nonSlice)” table reflects rate case documented forecast and BPA’s reported loss or gain trading floor actuals. The “Modified Actual Trading Floor” values were calculated as the rate case forecast plus the actual reported gain or loss for the same fiscal year. This approach makes it easier to compare as it removes some of the cross walking complexity caused by augmentation costs and other technical details. However, it also makes it so that the values in the “Modified Actual Trading Floor” values in the chart will not match reported actuals.

*This decrease was largely due to the removal of excess Residential Exchange Program costs pursuant to the remand of the WP-02 rates in *Golden NW Alum. v. Bonneville Power Admin.*, 501 F.3d 1037 (9th Cir. 2007).

Risk Mitigation Packages

In response to this volatility, and to ensure that BPA sets rates to recover its costs consistent with its statutory authorities, BPA has used various risk mitigation mechanisms throughout its history. The two most common mechanisms are Planned Net Revenues for Risk (PNRR) and Cost Recovery Adjustment Clauses (CRACs).

PNRR is a type of risk mitigation cost that is included “up-front” when rates are set, and is recovered during the ensuing rate period as rates are charged. In general, PNRR is a specific dollar value (e.g., \$31 million in BP-22) that is included in the annual revenue requirement to

generate additional cash from rates that will be available to pay any expenses that exceed revenues.

CRACs, on the other hand, are rate mechanisms developed at the time rates are set, but which are designed to increase rates in response to actual conditions *during* the rate period. If rates are producing sufficient revenues to cover costs, these mechanisms do not trigger. If risks become reality, where actual costs are greater than actual revenues, then these mechanisms may trigger to increase rates. This has, at times, resulted in very high within-rate-period increases, such as during WP-02 (power rates for FY 2002–2006), when risk adjustment mechanisms increased power rates by as much as 49.5 percent.

Whether included up-front, or through the future triggering of risk adjustment mechanisms, BPA’s ratepayers produce the revenue through higher rates to mitigate risk and recover BPA’s costs. BPA’s risk mitigation packages have used these tools to balance between higher, more stable rates (*e.g.*, PNRR) and lower, adjustable rates (*e.g.*, CRAC). Whether BPA will use PNRR, CRACs, or some combination of the two to mitigate its rate period risk is determined in BPA’s rate cases.

BPA has also included rate adjustment mechanisms that reduce rates based on actual financial conditions during the rate period. Various versions of these provisions have been around since at least 1987, with the most recent version known as the Dividend Distribution Clause (DDC).¹¹

2.3 BPA’s Financial Reserves Policy

In general, financial reserves accumulate or decline as actual costs and revenue vary from BPA’s rate case forecasts. Financial reserves available for risk, are a “keystone of BPA’s long-term financial health.”¹² Financial reserves are used to meet payment obligations and to provide liquidity; they are an essential safeguard against delay between disbursements and receipts and against short- and long-term financial uncertainty. For many years, BPA did not have a policy establishing a minimum amount of financial reserves that BPA should maintain. As a result, BPA’s agency financial reserves (the total amount of financial reserves BPA held at the agency level) and its business line financial reserves (the financial reserves associated with Power and Transmission Services) fluctuated precariously. The limitations of this policy gap became acute in the FY 2017-2018 rate period, with BPA explaining that its “financial reserves had declined from a high of \$1.2 billion in FY 2008, to a current projection of just over \$395 million in FY 2017.”¹³ Of the projected \$395 million in financial reserves, Power’s share was forecast to be as low as \$2 million.¹⁴ To arrest the precipitous decline in financial reserves, BPA developed the Financial Reserves Policy (FRP) in the BP-18 rate proceeding.

The FRP provides a consistent, transparent, and financially prudent method for determining BPA’s target ranges for financial reserves across Power and Transmission Services and for BPA

¹¹ See BP-22 Power GRSP II.P.

¹² Administrator’s Final Record of Decision, BP-18-A-04, at 197 (July 2017) (“BP-18 ROD”).

¹³ *Id.*

¹⁴ *Id.* at 198.

as a whole.¹⁵ The FRP establishes both lower and upper financial reserves thresholds, and provides guidance on what rate actions BPA should take in response to reserve levels that fall outside of those target ranges.¹⁶

In stating the FRP purpose, BPA found that establishing prudent lower thresholds “helps to maintain BPA’s credit rating, solvency, and rate stability, which is consistent with sound business principles.”¹⁷ On the other side, if financial reserves accumulate, establishing prudent *upper* thresholds “ensures that financial reserves do not grow to unnecessarily high levels but rather are *invested back into the business or distributed as rate reductions*, both of which lower revenue requirement costs.”¹⁸

BPA implements the FRP’s goals through two key ratemaking provisions. First, if either business line’s financial reserves are below the FRP’s lower threshold, an annual rate increase occurs for that business line. Since the BP-20 rate proceeding (FY 2020–2021), BPA has used the FRP Surcharge and the CRAC as the rate mechanisms to achieve these results. Specifically, under the FRP Surcharge, customer rates will increase to recover the lesser of: (1) the amount to return reserves to the lower threshold, or (2) \$15 million per year for Transmission or \$40 million per year for Power.¹⁹ In addition, under the CRAC, if business line reserves fall below \$0, customer rates will increase to restore financial reserves to \$0, subject to certain parameters and caps.²⁰

Second, if financial reserves exceed an upper threshold,²¹ financial reserves may be repurposed for other “high value” uses. Since BP-20, BPA has used the RDC as the rate mechanism to achieve these results. Under the Power RDC (set forth in the BP-22 GRSPs), financial reserves above the upper threshold must be used for “debt reduction, incremental capital investment, rate reduction through a Power Dividend Distribution (Power DD), distribution to customers, or any other Power-specific purposes determined by the Administrator.”²²

2.4 Implementation of the Financial Reserves Policy

Implementation of the FRP has resulted in increases in Power rates in both the BP-18 and BP-20 rate periods. In BP-18, in accordance with the newly adopted FRP, BPA included \$20 million in PNRR in base Power rates. In BP-20, Power financial reserves fell below the lower threshold,

¹⁵ See *id.* BPA administratively separates its operations into two business lines – Power and Transmission. For cost recovery and administrative purposes, BPA calculates and separately tracks the financial reserve of each business line.

¹⁶ *Id.*, Appendix A at A-1.

¹⁷ *Id.* (emphasis added).

¹⁸ *Id.* (emphasis added).

¹⁹ Administrator’s Record of Decision, Financial Reserves Policy Phase-In Implementation, at A-4 (Sept. 2018), available at <https://www.bpa.gov/-/media/Aep/finance/financial-policies/rod-20180925-financial-reserves-policy-phase-in-implementation.pdf>.

²⁰ *Id.* at A-4–A-5.

²¹ To trigger the RDC, financial reserves attributed to a business line must exceed the business line’s upper threshold, and the agency’s overall financial reserves must exceed its upper threshold.

²² BP-22 Power GRSP II.P.

triggering the FRP Surcharge in FY 2020.²³ In FY 2020, the RDC triggered for Transmission (used for debt reduction), and in FY 2021, Power’s financial reserves situation stabilized, triggering an RDC of \$13.7 million for Power, which was used solely for a rate reduction.²⁴

2.5 BP-22 RDCs (FY 2022–2023)

Consistent with the FRP, BPA included three risk adjustment mechanisms applicable to certain products in Power rates in BP-22: the FRP Surcharge, the CRAC, and the RDC. The terms for the Power RDC are established in the 2022 Power Rate Schedules and General Rate Schedule Provisions (GRSPs), Section II(P). These rate mechanisms include provisions for calculating the RDC Amount, calculating and billing potential rate reductions, and a public notification process with opportunity for comment. The rate schedules state:

If the Power RDC quantitative criteria (below) are met, the Administrator will calculate the Power RDC Amount, and determine what part, if any, will be applied to debt reduction, incremental capital investment, rate reduction through a Power Dividend Distribution (Power DD), distribution to customers, or any other Power-specific purposes determined by the Administrator.²⁵

If the Administrator determines that all or part of an RDC Amount will be repurposed to a Dividend Distribution, it will apply from December through September of the applicable year.²⁶ The GRSPs specify which power rates the DD would apply to.²⁷ BPA calculates a “Credit rate” by dividing the amount being used for a Power DD by the sum of billing determinants, based on a forecast of December through September loads.²⁸ This credit rate is applied to certain power rates as a credit on customer billings, and is used to adjust certain other rates.²⁹

In addition to these risk mitigation tools, the BP-22 Power revenue requirement included \$31 million per year of PNRR³⁰ pursuant to a settlement agreement.³¹ Customer rates were increased as compared to power rates without PNRR, increasing the probability that actual revenues would exceed actual costs.

²³ The FRP Surcharge for FY 2020 was suspended in July of 2020 in response to the COVID-19 pandemic. *See* 85 Fed. Reg. 37,445 (June 22, 2020).

²⁴ *See* FY 2021 Power RDC Letter from the Administrator, available at <https://www.bpa.gov/-/media/Aep/rates-tariff/rate-adjustments/2022-2023-adjustments/final-rdc-letter-dec-15.pdf>. BPA received no comments opposing BPA’s implementation of the Power RDC for FY 2021, nor any claims that its implementation was improper or otherwise not consistent with the Northwest Power Act. *See* <https://publiccomments.bpa.gov/CommentList.aspx?ID=428>.

²⁵ BP-22 Power GRSP II.P.

²⁶ *Id.* at II.P.2.

²⁷ *Id.* at II.P.

²⁸ *Id.* at II.P.2.a.

²⁹ *Id.* at II.P.

³⁰ Power Revenue Requirement Study Documentation, BP-22-FS-BPA-02A, at 8, line 39.

³¹ BPA adopted a settlement agreement for the purpose of establishing power and transmission rates for the BP-22 rate period. BP-22 ROD at 11; *see also id.* at Attachment 1 § 1(a).

3. PROCESSES LEADING UP TO THE FY 2022 POWER RDC

BPA holds a public quarterly briefing on the state of its business and financial performance called the Quarterly Business Review (QBR). In accordance with the Power GRSPs,³² BPA posted preliminary forecasts of the Power RDC Amount to its external website throughout FY 2022. At each QBR Technical (QBRT) meeting in FY 2022, BPA noted that an RDC would likely trigger.³³ As the year progressed, the forecast size of potential RDC Amounts increased.³⁴

Meanwhile, on April 27, 2022, BPA held its kickoff workshop to begin discussing issues with stakeholders in the upcoming rate case for the FY 2024-2025 rate period (BP-24 Rate Proceeding). This was followed by BP-24 public workshops on May 25, June 8, June 29, July 13, July 27-28, and August 10.³⁵ In August 2022, BPA paused the BP-24 workshops to initiate discussions with customers regarding the potential for settlement of the BP-24 proceeding. Based on the progress in the settlement discussions, on September 21, 2022, BPA staff submitted a settlement proposal to prospective rate case parties. The BP-24 rates settlement proposal includes proposals for settlement of BP-24 power and transmission rates for FY 2024-2025, the FY 2024–2025 ASC Review process, and the FY 2022 Power RDC.³⁶ Stakeholders were asked to submit their responses to the proposed settlements by noon on October 6, 2022.

The majority of responses either supported or did not oppose moving forward with the proposed settlements. As a consequence, BPA staff recommended the adoption of the terms of the proposed settlements in the BP-24 rates proceeding, the FY 2024–2025 ASC review, and the FY 2022 Power RDC process.

Although negotiated as part of this package, a decision on the Power RDC requires an independent evaluation pursuant to the procedures in the BP-22 rate schedules. Under the proposed settlement, BPA agreed to make the following proposal for the Power RDC Amount:

³² BP-22 Power GRSP II.P.3.a.

³³ Bonneville Power Administration, Q1 Quarterly Business Review Technical Workshop at 22-23 (Feb. 15, 2022), available at <https://www.bpa.gov/-/media/Aep/finance/quarterly-business-review/qbr-2022/FY22-Q1-QBR-Technical-Workshop-FINAL.pdf>.

³⁴ *Id.*; Bonneville Power Administration, Q2 Quarterly Business Review Technical Workshop at 20 (May 17, 2022), available at <https://www.bpa.gov/-/media/Aep/finance/quarterly-business-review/qbr-2022/fy22-q2-qbr-technical-workshop.pdf>; Bonneville Power Administration, Q3 Quarterly Business Review Technical Workshop at 12 (Aug. 16, 2022), available at <https://www.bpa.gov/-/media/Aep/finance/quarterly-business-review/qbr-2022/fy22-q3-qbr-technical-workshop.pdf>.

³⁵ Settlement materials are available at <https://www.bpa.gov/energy-and-services/rate-and-tariff-proceedings/bp-24-rate-case>.

³⁶ BP-24 Rates Settlement Proposal, available at <https://www.bpa.gov/-/media/Aep/rates-tariff/bp-24/bp-24-settlement/bp-24-settlement-proposal/Settlement-AgreementASCPower-RDCBP24-92122.pdf>.

- a. Seventy (70) percent allocated to a Power Dividend Distribution (“DD”) to reduce FY 2023 power rates consistent with the 2022 Power Rate Schedules and General Rate Schedule Provisions (FY 2022–23);
- b. Up to twenty (20) percent allocated to reduce debt or revenue finance, with any amount not used to reduce debt or revenue finance left as financial reserves to support Bonneville’s liquidity and/or increase the probability of a 2023 Power RDC Amount;
- c. Ten (10) percent designated as Reserves Not for Risk to address, on an accelerated, one-time basis, certain non-recurring maintenance needs of existing fish and wildlife mitigation assets that (i) Bonneville anticipates would otherwise need to be addressed during future rate periods and (ii) will result in avoidance of those costs in future rate periods. For purposes of this section, mitigation assets are those Bonneville determines that (a) have resulted in tangible and measurable benefits or improvements for fish and wildlife, and (b) are directly related to mitigating for the effects of the construction or ongoing operation of the FCRPS projects.³⁷

Settlement parties agreed not to challenge or raise adverse comments regarding this preliminary proposal in the RDC process, and agreed not to challenge in any forum BPA’s proposed use of the Power RDC Amount.³⁸ These terms do not prohibit settlement parties from challenging BPA’s final determination on applying the RDC Amount if, after considering public comments, the Administrator’s determination differs from the preliminary proposal.

On November 16, 2022, consistent with BP-22 Power GRSP Section II(P)(3)(b), BPA held a public meeting to discuss the RDC calculation and staff’s preliminary proposal for the FY 2022 Power RDC. BPA staff shared that the Power RDC Amount was calculated to be \$500 million.³⁹

The preliminary proposal for the Power RDC was in accordance with the tentative settlement. That is, \$350 million (70%) allocated to a Power Dividend Distribution, \$100 (20%) million allocated to reduce debt or revenue finance, and \$50 million (10%) designated as Reserves Not for Risk to address, on an accelerated, one-time basis, certain non-recurring maintenance needs of existing fish and wildlife mitigation assets. Staff shared their calculation—pursuant to Power GRSP Section II(P)(2)—that, under the preliminary proposal, the Annual Power Dividend Distribution Credit Rate would be \$7.92/MWh.⁴⁰

On November 18, 2022, BPA published notice in the Federal Register announcing the commencement of the BP-24 Rate Case. The initial proposal was consistent with the terms of the tentative rate settlement.

³⁷ *Id.* at Attachment 2 § 1.

³⁸ *Id.* § 2.

³⁹ Bonneville Power Administration, Q4 Quarterly Business Review Technical Workshop, at 22 (Nov. 16, 2022), available at <https://www.bpa.gov/-/media/Aep/finance/quarterly-business-review/qbr-2022/fy22-q4-qbr-technical-workshop.pdf>.

⁴⁰ *Id.* at 26.

Comments on BPA staff’s proposals for the Power RDC were due December 1, 2022. BPA intended to announce its decision on the application of the Fiscal Year 2022 Power RDC on December 15, 2022—two weeks after receiving comments. BPA received 58 public comments, many of which raised complex statutory and factual issues. Due to the number and significance of these issues and the need to thoroughly analyze them, on December 15, 2022, BPA notified stakeholders that it was delaying issuance of the Power RDC decision until no later than January 6, 2023. This delay was necessary to enable BPA to fully consider and evaluate all comments. In addition, although not contemplated by the Power RDC provisions in the power rate schedules, BPA has prepared this Response to Comments. Under these unique circumstances, a delay in the issuance of the RDC decision is permissible.⁴¹

⁴¹ See, e.g., *Portland Gen. Elec. Co. v. Johnson*, 754 F.2d 1475, 1482 (9th Cir. 1985) (noting “[a] certain latitude must be allowed within which BPA can exercise a degree of business judgment with respect to temporary situations . . .” and permitting BPA “to mold its procedures to the exigencies of the particular case.”) (internal citation omitted).

4. RESPONSE TO COMMENTS

4.1 Supportive Comments

The Public Power Council (PPC), Pacific Northwest Generating Cooperative (PNGC), Western Public Agencies Group (WPAG), Northwest Requirements Utilities (NRU), McMinnville Water and Light (MW&L), and Snohomish PUD (Snohomish) support or do not oppose staff's proposal.⁴²

Clearwater Power Company and Fall River Electric Coop. wrote separately in support of PNGC's positions.⁴³

The following individual customers and the Idaho Consumer Owned Utilities Association (Idaho COU Ass'n) wrote independently in support of PPC's positions, and to communicate the impact of rate relief on their local communities:

- Central Lincoln PUD
- Centralia City Light
- City of Ashland Elec. Utility
- City of Cascade Locks
- City of Milton-Freewater Light and Power
- Clearwater Power Co.
- Columbia River PUD
- Columbia Rural Elec. Ass'n
- Cowlitz PUD
- Emerald PUD
- Fall River Elec. Coop
- Ferry PUD
- Flathead Elec. Coop
- Grant PUD
- Hood River Elec. & Internet Coop
- Idaho COU Ass'n
- Inland Power and Light
- Klickitat PUD
- Kootenai Elec. Coop
- Lewis PUD
- Lower Valley Energy
- Mason PUD
- Midstate Elec. Coop
- Missoula Elec. Coop
- Modern Elec. Water Co.
- Monmouth Power and Light
- Northern Wasco PUD
- Okanogan PUD
- Ravalli Elec. Coop.
- Salmon River Elec. Coop
- Skamania PUD
- United Elec. Coop
- Wahkiakum PUD
- Wells Rural Elec. Coop

Customers' comments consistently referenced the tentative settlement to qualify their support. For example:

- **WPAG:** "From WPAG's perspective, an alternative proposal to distribute all the Power RDC Amount to preference customers in the form of rate relief would have been preferable. It would also be more consistent with BPA's obligation under both §7(g) of

⁴² PPC Comments at 1; PNGC Comments at 1; WPAG Comments at 2; NRU Comments at 2; MW&L Comments at 1; Snohomish Comments at 1.

⁴³ Clearwater Power Co. Comments; Fall River Elec. Coop. Comments.

the Northwest Power Act and Cost Allocation Principle No. 8 of BPA’s Tiered Rate Methodology (“TRM”) to allocate to power rates all costs and benefits from the sale of or inability to sell excess electric power. Nonetheless, we renew and restate our non-objection”⁴⁴

- **Kootenai Elec. Coop:** “It is important to note that KEC does not love the RDC proposal. We simply support and accept it The proposed reimbursement of 70% of those funds to those who made that accumulation possible is, in our opinion, quite low and only marginally supportable.”
- **Northern Wasco PUD:** “Changing the terms of the settlement agreement would be a breach of trust at a time when the region needs it most.”⁴⁵
- **Klickitat PUD:** Supports the proposal “even though we do not in fact agree any funds should be used for fish and wildlife,” arguing that customers “have paid all fish and wildlife costs as mandated. We paid the rates necessary for Bonneville to be financially sound when costs were increasing and surplus funds were low.”
- **McMinnville Water & Light:** “[U]tilities negotiated with BPA in good faith, and agreed to \$350 million distribution knowing that we could have held firm on a distribution of \$500 million.”⁴⁶

Several commenters highlight “the nature of the arrangement between BPA and customers”⁴⁷ where customers have and will pay more when financial results are poor, and must therefore receive the benefit of good years.⁴⁸ PNGC, PPC, Northern Wasco PUD, Emerald PUD, and Hood River Elec. Coop argue that adopting staff’s proposal is essential to maintain faith and trust between BPA and its customers.⁴⁹

Individual customers wrote separately to express the impact rate reductions will have on their communities. Several describe the potential relief to low-income communities, and to a rural agricultural sector hit hard by this difficult financial time.⁵⁰

- **Columbia River PUD:** “A large portion of our members are farmers and or businesses that provide services to the agricultural sector. With the increasing cost of grower inputs, following the original plan for the RDC funds is even more important. In addition, our members who are low income would benefit from the rate relief and assist them with their monthly budgets. In a time of increasing cost and prices on the retail level,

⁴⁴ WPAG Comments at 1-2.

⁴⁵ Northern Wasco PUD Comments at 2.

⁴⁶ McMinnville Comments at 1.

⁴⁷ PNGC Comments at 2.

⁴⁸ PPC Comments at 1-2; PNGC Comments at 2; WPAG Comments at 1; Klickitat PUD Comments at 1; Modern Elec. Comments at 1

⁴⁹ PNGC Comments at 2; PPC Comments at 2; Emerald PUD Comments at 1; Northern Wasco PUD Comments at 2; Hood River Elec. & Internet Coop. Comments at 2.

⁵⁰ Fall River Elec. Coop Comments; Salmon River Elec. Coop. Comments; Cowlitz PUD Comments; Columbia River PUD Comments; Hood River Elec. & Internet Coop. Comments; McMinnville Water and Light Comments.

mitigating the cost for our electricity that we provide our members is particularly important.”

- **Hood River Elec. & Internet Coop:** “Our service area is known for tree fruit agriculture, but over the years it has become one of the most expensive places to live. The per-capita income of our members ranges from \$15,000 to \$35,000 a year, compared with the state average of \$35,000. However, the overall cost of living in our community has become extreme, with housing costs averaging 77% higher than the national average and 27% higher than the state average We need those funds to bring back to our communities to keep rates affordable and stable for our rural consumers who are struggling to meet their basic needs during this difficult financial time.”
- **Salmon River Elec. Coop:** “Every dollar that is proposed for SREC to receive in the settlement is needed. This relief on power costs will mitigate the amount rates will have to increase at our utility. SREC serves lower income communities and any help to help those who struggle to pay their power bill is much appreciated.”
- **McMinnville Water and Light:** “[COUs] typically serve rural areas where annual incomes are below state and national averages.”
- **Cowlitz PUD:** “Cowlitz County communities face ongoing financial challenges given a disproportionate number of residents live in poverty at a rate 25% higher than Washington State as a whole.”

Others emphasize the influence power rates have over local economic development.⁵¹

- **Centralia City Light:** “The effects of COVID-19 have adversely affected the economy of the City of Centralia and other small towns throughout BPA's service territory Holding the line on rates has contributed to new loads with their new jobs choosing Centralia as the site of their new facilities. The forecast amount that the RDC would contribute to CCL should allow us to avoid a rate increase in the near future. If these funds are diverted, it could adversely affect those plans.”
- **Modern Electric Co.:** “In this unprecedented time of inflation and economic uncertainty, these vital funds must be used to provide our customers with that much-needed benefit.”
- **Northern Wasco PUD:** “[Being a preference customer] is the primary reason we can continue to provide safe, reliable, environmentally responsible electric service to our rural community where the COVID pandemic and economic downturn has been very impactful.”

⁵¹ Centralia Comments at 1; Modern Elec. Comments at 1; Northern Wasco PUD Comments at 1; Kootenai Elec. Coop. Comments at 1-2.

Evaluation of Comments and Response

BPA recognizes that, absent settlement negotiations, Power customers would likely have argued that the full Power RDC Amount should have been immediately applied to a power rate reduction. Many supportive comments noted that, but for the broad settlement package, they would not have supported any other uses for the RDC besides rate reduction, and would have asserted rate methodological and statutory arguments in support of their views.⁵² Thus, BPA acknowledges that its Power RDC proposal is being supported because it is part of a compromise, one which many commenters candidly admit “they do not love,”⁵³ due to the provisions for additional debt reduction and fish and wildlife maintenance funding.

The discretion built into the Power RDC rate mechanism allows BPA to consider short- and long-term power benefits when repurposing financial reserves. BPA finds that it is reasonable to use that discretion here to implement the Power RDC as proposed by staff. Staff’s proposal provides short-term benefits to power customers by repurposing financial reserves to reduce BPA’s customers’ rates (as requested by many commenters). This proposal also provides long-term benefits by paying down debt,⁵⁴ and pre-paying for fish and wildlife maintenance and infrastructure, both of which benefit Power customer rates for the long-term by reducing future costs or limiting future expenses. Finally, staff’s proposal also supports a broader settlement of the ASC review processes and the BP-24 rates.

Given the specific provisions of the Power RDC and its context, and the broader benefits of a potential settlement of multiple issues, BPA finds its implementation of the FY 2022 Power RDC is reasonable.

⁵² See, e.g., WPAG Comments at 2; Kootenai Elec. Coop. Comments at 1.

⁵³ Kootenai Elec. Coop. Comments at 1.

⁵⁴ BPA has over \$8.3 billion in debt associated with its Power business line. See Bonneville Power Administration, Federal Columbia River Power System (FCRPS): Total Liabilities to Federal and Non Federal Parties as of 9/30/2021, <https://www.bpa.gov/-/media/Aep/finance/outstanding-long-term-liabilities/2021-liabilities.pdf>.

4.2 Objections and Concerns

4.2.1 Overview

Commenters also raised a number of objections and concerns with the proposed RDC decisions. These comments generally fall into eight categories:

- General Objections
- Conservation Funding
- General Fish and Wildlife Funding
- Northwest Power Act Section 4(h)(11)(A)
- Northwest Power Act Section 4(h)(10)(A)
- Litigation Stay
- Dam Breaching
- Procedural Issues Regarding Proposed BP-24 Settlement Package

BPA considers and responds to these comments below.

4.2.2 General Objections

Public Comments

A number of commenters contend that BPA’s Power RDC proposal should be revised, with less (or none) of it used for power rate reductions, and more (or all) of it used for other purposes. Idaho Conservation League, Great Old Broads for Wilderness, and Idaho Rivers United (ICL), for example, contends BPA should devote “the entire \$500 million” to fish and wildlife mitigation efforts,⁵⁵ National Wildlife Federation Plaintiffs (NWF Plaintiffs) suggests “at least 50”⁵⁶ percent, Yakama Nation suggests 40 percent, while others request “substantially more” be used for fish and wildlife mitigation.⁵⁷ Other commenters suggest BPA repurpose financial reserves to increase BPA funding for other programs, such as energy efficiency.⁵⁸ These comments generally point to the “expansive” discretion given to BPA in the Power RDC rate provision, and suggest BPA use that discretion to revise its proposed implementation as suggested by commenters.⁵⁹

WPAG, while supporting the proposal, argues that distributing the full RDC Amount as rate relief would be “more consistent with BPA’s obligation under both §7(g) of the Northwest Power Act and Cost Allocation Principle No. 8 of BPA’s Tiered Rate Methodology.”⁶⁰ PPC

⁵⁵ ICL Comments at 6.

⁵⁶ NWF Plaintiffs Comments at 1.

⁵⁷ Confederated Tribes of the Umatilla Indian Reservation (CTUIR) Comments at 2; *see also* Nez Perce Comments at 1

⁵⁸ NWEA and NRDC Comments at 3; Washington State Dept. of Commerce (WDC) Comments at 1.

⁵⁹ *See, e.g.*, NWF Plaintiffs Comments at 1; *see also* Nez Perce Comments at 1; CTUIR Comments at 1; Coeur d’Alene Tribe Comments at 1; Oregon Comments at 1; Washington Department of Fish and Wildlife (WDFW) Comments at 1; ICL Comments at 3.

⁶⁰ WPAG Comments at 1.

argues “Single-issue advocates are asking BPA customers to accept a ‘lose – lose’ dynamic on the inherently variable output of the hydro system,”⁶¹ and that customers “must receive the benefits of rare good years in order to truly achieve BPA’s statutory construct of delivering power at cost for non-profit preference customers.”⁶² PNGC argues that “if customer money is used it should have a clear long-term benefit to customers such as directly reducing our long-term obligations (*e.g.*, lowering long-term debt including CGS debt and CGS decommissioning) or creating short-term benefits (*e.g.*, immediate rate relief) or being used for express purposes to preserve and enhance the value of assets such as the FCRPS and FCRTS.”⁶³

Evaluation of Comments and Response

General Context of the FY 2022 Power RDC Process Supports Adopting Staff’s Proposal

The RDC rate schedule, set forth in the General Rate Schedule Provisions, states:

If the Power RDC quantitative criteria (below) are met, the Administrator will calculate the Power RDC Amount, and determine what part, if any, will be applied to debt reduction, incremental capital investment, rate reduction through a Power Dividend Distribution (Power DD), distribution to customers, or any other Power-specific purposes determined by the Administrator.⁶⁴

* * *

If the Power RDC triggers, BPA will notify customers of the preliminary Power RDC Amount and whether the amount will be used to reduce debt, incrementally fund capital projects or other high-value Power purposes, or reduce rates, as soon as practicable⁶⁵

Based on this language, there is little question that Power rate reductions—a Power Dividend Distribution—is an intended and appropriate use of the Power RDC. Paying down debt through capital financing choices, such as “revenue financing,” is also expressly contemplated.⁶⁶ The question raised by commenters is whether these express uses of the Power RDC should be reduced (or eliminated) to fund other programs.

Commenters argue that the Power RDC rate schedule, which states the RDC Amount may be used for “any other Power-specific purposes determined by the Administrator,” grants the Administrator broad discretion to repurpose financial reserves under the Power RDC. In line with that discretion, staff proposed to use 10 percent of the Power RDC Amount (\$50 million) towards non-recurring, one-time fish and wildlife infrastructure and maintenance that would

⁶¹ PPC Comments at 2.

⁶² *Id.* at 1.

⁶³ PNGC Comments at 2.

⁶⁴ BP-22 Power GRSP II.P.

⁶⁵ *Id.* at II.P.3.b.

⁶⁶ Revenue financing is a term of art referring to the use of current revenues to pay for an asset that could otherwise be financed with debt. The effect of this practice is to avoid incurring debt.

otherwise need to be addressed in future rate periods.⁶⁷ Commenters point to this proposal as indicating BPA has “broad discretion” to use RDC funds and, as such, they request that BPA use that discretion to further reduce (or entirely eliminate) rate reductions for power customers and repurpose the eligible financial reserves to fish and wildlife programs or additional energy efficiency funding.⁶⁸

BPA agrees that this provision gives the Administrator authority to determine “Power-specific” uses of the RDC Amounts. That discretion must, however, be read in accordance with the context and purpose of BPA’s statutory authorizations, the structure of the power sales agreement and rate methodology of BPA’s current rates, and the Financial Reserves Policy (which created the parameters of the FY 2022 Power RDC).⁶⁹ Viewed in that context, BPA’s proposal to repurpose the FY 2022 Power RDC Amount in the manner specified in staff’s proposal is reasonable and consistent with the design, structure, and intent of the RDC rate mechanism.

First, at its core, the Power RDC affirms the cost-based nature of BPA’s power rates, safeguarding that customers that pay for the fully allocated cost of the Federal power system also receive the benefits of that system. BPA’s governing statutes direct it to set rates “at the lowest possible rates to consumers consistent with sound business principles.”⁷⁰ Consistent with this directive, BPA’s firm power customers (the vast majority of which are preference customers) pay rates that recover all of the costs of the Federal power system.⁷¹ BPA credits against these costs a forecast amount of surplus revenue, reducing power rates. At the time the BP-22 rates were set, BPA included a reasonable forecast of its surplus revenue. Actual surplus revenues, however, significantly exceeded those forecasts. If BPA had been able to forecast the record-high FY 2022 secondary revenue during the BP-22 rate case, those additional revenues would have been used to benefit power rates in any of a number of ways, (*e.g.*, pay down debt, mitigate risk, fund items that would otherwise be planned for a future rate period) but most likely as a rate credit against BPA’s costs. This is because, under section 7(g) of the Northwest Power Act, secondary revenue is to be allocated to power rates.⁷² Returning these funds back to firm power

⁶⁷ BP-24 Rates Settlement Proposal, Attachment 2 § 1.c.

⁶⁸ See ICL Comments at 4 (entire \$500 million to fish and wildlife); *see also, e.g.*, NWF Plaintiffs Comments (50%), Yakama Nation Comments (40%); Northwest Energy Coalition (NWECC) and Natural Resources Defense Council (NRDC) (NWECC and NRDC) Comments at 1 (10% to EE).

⁶⁹ *See, e.g., PNGC v. DOE*, 580 F.3d 792, 823 (9th Cir. 2009) (“BPA’s governing statutes restrain BPA’s activities even when, on a pure policy basis, those policies have much to recommend them.”)

⁷⁰ 16 U.S.C. § 838g (2020); *see also* Flood Control Act § 5, 16 U.S.C. 825s (2020); Northwest Power Act § 7(a), 16 U.S.C. § 839e(f) (2020).

⁷¹ *See e.g.*, 16 U.S.C. § 839e(a)(1) (requiring BPA to establish rates to recover its “total system costs. . .”); § 839e(b)(1) (requiring BPA to set rates for “general requirements” and IOU exchange loads, and allocating the costs of the Federal Base System and (as needed) other resources to this rate pool); § 839e(g) (equitably allocating to power rates “all costs and benefits not otherwise allocated under” section 7 of the Northwest Power Act).

⁷² 16 U.S.C. § 839e(g) (2020) (“[T]he Administrator shall equitably allocate to power rates, in accordance with generally accepted ratemaking principles and the provisions of this chapter, *all costs and benefits not otherwise allocated under this section, including*, but not limited to, conservation, fish and wildlife measures, uncontrollable events, reserves, the excess costs of experimental resources acquired under section 839d of this title, the cost of credits granted pursuant to section 839d of this title, operating services, and *the sale of or inability to sell excess electric power.*”)

customers (the customers paying BPA’s rates) as described in the FY Power 2022 RDC is both reasonable and consistent with BPA’s statutory ratemaking directives.

Second, the structure and scope of BPA’s long-term 20-year Regional Dialogue (RD) power sales contracts in connection with the Tiered Rates Methodology (which governs the rates used in those contracts) also support using the Power RDC Amount in a manner that benefits power rates. The principle of assigning the benefits (and cost) of selling surplus power, *i.e.*, secondary revenue, to power rates is a component of the Tiered Rates Methodology (TRM). BPA power customers are contractually required to pay for power they buy from BPA at rates that recover the costs of the Federal power system. The contracts do not provide customers with an exit or off-ramp right and they cannot avoid paying BPA’s costs by displacing BPA power sales with other cheaper sources of energy. This is the “take or pay” component of the BPA-customer arrangement. The RD contract in conjunction with the TRM tie these customers’ rates to BPA’s financial performance, meaning power customers are both exposed (and benefited) by the volatility in BPA’s costs and revenues. If BPA’s costs go up or revenues go down BPA customers make up the difference through higher rates. The flip side to this situation is also true: if BPA’s costs go down, or if its revenues go up, power customers experience the resulting benefit in the form of rate stability or even rate reductions. It is because of this close connection between the upside and downside of BPA’s costs and revenues that BPA agreed to enter into long-term power sales agreements on the basis of a TRM that includes the principle that, “[a]s a consequence of the customers’ contractual take-or-pay obligation” BPA will set rates that include all forecast secondary revenue as a credit against properly allocated costs.⁷³ Thus, BPA agrees that “the nature of the arrangement between BPA and customers”⁷⁴ is another reason to repurpose financial reserves for rate reduction under the Power RDC.

Third, the context in which the RDC mechanism itself was developed further supports that using the FY 2022 Power RDC Amount to benefit power rates as proposed by BPA staff is appropriate and reasonable. The RDC is one component of the broader Financial Reserves Policy (FRP), which provides guidance in managing BPA’s financial reserves available for risk. BPA’s net secondary revenue is particularly high risk, making reliable cost recovery very difficult absent risk mitigation.⁷⁵ Because of these broad financial risks, BPA uses risk adjustment mechanisms, such as those called for by the FRP. When financial reserves fall below certain thresholds, other mechanisms (the FRP Surcharge and CRAC) trigger to automatically increase power rates. Conversely, when financial reserves exceed certain thresholds, the RDC triggers and BPA considers repurposing such reserves to reduce rates or other Power-specific high-value purposes. These “give and take” aspects of the FRP were intended to work in tandem, which reflects BPA’s statutory obligation to set rates as low as possible consistent with sound business principles. The Purpose section of the FRP discusses this relationship when it describes the need for a minimum (“lower”) financial reserves threshold in order “to maintain BPA’s credit rating, solvency, and rate stability, which is consistent with sound business principles.”⁷⁶ It then

⁷³ Tiered Rates Methodology, BP-12-A-03, at 4.

⁷⁴ PNGC Comments at 2.

⁷⁵ See Section 2.2 (Risk Mitigation Tools: PNRR and CRACs), where the volatility in BPA’s secondary revenue and rates is described.

⁷⁶ BP-18 ROD, Appendix A, at A-1.

describes the other side of this equation, noting the FRP’s upper thresholds “[ensure] that financial reserves do not grow to unnecessarily high levels but rather *are invested back into the business or distributed as rate reductions*, both of which lower revenue requirement costs.”⁷⁷

As noted earlier in this document, BPA has taken rate action under the FRP to increase power rates on two occasions, replenishing BPA’s financial reserves when the lower financial reserves threshold had been exceeded. Now that the flip side to this financial situation has occurred, it is reasonable and consistent with the intent and design of the RDC to return a significant portion of the Power RDC Amount back to Power customers through a rate reduction. In short, the FY 2022 Power RDC should not be viewed in isolation, but as one element of a risk mitigation package to address financial reserves volatility, counterbalanced by mechanisms that automatically increase power rates when actual costs exceed revenues.

Fourth, BPA’s proposal to repurpose 10 percent of the RDC Amount to Reserves not for Risk for one-time, non-recurring fish and wildlife maintenance fits squarely within the scope and design of the RDC and the expectation that the provision would be used to benefit “Power-specific purposes” or “other high-value Power purposes.” Specifically, BPA’s proposal is to set aside financial reserves to enable an accelerated response to certain maintenance needs of existing fish and wildlife mitigation assets, rather than scheduling that maintenance work—and its associated costs—in future rate periods. This provides customer rate benefits by avoiding the addition of these costs to future revenue requirements, and lowering BPA’s overall cost by investing in improvements now rather than risk more expensive repairs in the future. In this way, BPA staff’s proposal adheres to the purpose and objective of the RDC, which is to use financial reserves for “other high-value Power purposes.” Here, that purpose is setting aside funds now for one-time, non-recurring fish and wildlife maintenance and infrastructure projects that would otherwise come due in a future rate period.⁷⁸

Fifth, BPA’s use of the RDC Amount is reasonable because it supports BPA efforts to achieve settlement of two other processes—namely its Average System Cost review process and the BP-24 rates. The Average System Cost process has already concluded without objections and the rates developed in that process are complete. The BP-24 rate process is ongoing, and the decision on whether that rate proposal will be adopted must wait for the completion of the rate case. But the broad support for the BP-24 settlement proposal before the commencement of the rate case strongly suggests that the proposal will likely lead to a rate case settlement. In general, settling rates can be a desirable outcome because it limits the number of issues to be addressed in rate cases, and here it would result in BPA’s power customers not opposing this RDC decision, BPA’s ASC review process, or BPA’s BP-24 rate proposal. Undoubtedly, when considering which “high value Power purposes” to propose for this RDC—and the respective percentages of the RDC Amount that such purposes might receive—there were numerous potential variations

⁷⁷ *Id.* (emphasis added).

⁷⁸ BPA’s reshaping of these funds is still subject to Congressional revision through the federal budgetary process. Thus, BPA’s RDC proposal for fish and wildlife is best viewed as earmarking certain financial reserves for fish and wildlife infrastructure projects that BPA intends to include in its future budget proposals to Congress. While BPA believes these funds would best be spent in this way, Congress has the ultimate say on whether these funds are actually expended. *See* BP-22 ROD at 57.

with short- and long-term benefits. But the particular RDC proposal that staff advanced is one that had enough support to make a rate settlement with BPA’s customers likely, and thus facilitate the benefits that attend such settlements. It is reasonable and consistent with BPA’s settlement authority to implement the Power RDC in a manner that supports settlement, meets multiple agency objectives, is consistent with the terms of the Power RDC, within the Administrator’s discretion, and is otherwise consistent with the law.⁷⁹

Based on the foregoing, BPA’s implementation of the RDC as described in staff’s proposal conforms to the scope, purpose, intent, and objectives of the RDC mechanism.

4.2.3 Conservation Funding

Public Comments

To “ensure that BPA’s RDC application is consistent with the Administrator’s obligations under the Northwest Power Planning and Conservation Act,” Northwest Energy Coalition (NVEC) and the Natural Resources Defense Council (NRDC) recommend that “BPA modify the proposal to include a commitment to reinvest 10 percent (\$50 million) of the Power RDC into energy efficiency.”⁸⁰ They assert that BPA’s proposed “RDC application is inconsistent with the [Northwest] Power Act because it does not reinvest any of the revenues in the resource that made the windfall possible: energy efficiency.”⁸¹

Specifically, NVEC and NRDC cite the Northwest Power Act requirements that (1) “[i]n order to effectuate the priority given to conservation measures and renewable resources under this chapter, the Administrator shall, to the maximum extent practicable . . . acquire conservation measures and renewable resources [and] implement conservation measures,”⁸² and (2) “[n]otwithstanding any acquisition of resources pursuant to this section, the Administrator shall not reduce his efforts to achieve conservation”⁸³

NVEC and NRDC also assert “BPA is not currently meeting its energy efficiency obligations to the region,” noting that the Northwest Power and Conservation Council indicated BPA’s conservation was 30% (150 aMW) below the Council’s 2016–2020 7th Power Plan targets, while investor-owned utilities exceeded their target by 10%.⁸⁴

NVEC, NRDC, and the Washington Department of Commerce (WDC) argue their proposals could make up for BPA failing to meet the Council’s conservation target under the 7th Plan,⁸⁵ and for inadequate conservation cost forecasts for the BP-24 rate period.⁸⁶

⁷⁹ See Bonneville Project Act of 1937 § 2(f), 16 U.S.C. § 832a(f) (2020).

⁸⁰ NVEC and NRDC Comments at 1.

⁸¹ *Id.*

⁸² Northwest Power Act § 6(e)(1), 16 U.S.C. § 839d(e)(1) (2020).

⁸³ *Id.* § 6(b)(5), 16 U.S.C. § 839d(b)(5) (2020).

⁸⁴ NVEC and NRDC Comments at 2.

⁸⁵ *Id.*; WDC Comments at 1-2.

⁸⁶ NVEC and NRDC Comments at 2; WDC Comments at 1-2.

NWEC and NRDC assert that acquiring additional conservation would be consistent with Federal and state policies, and that practical considerations favor increased conservation acquisition.⁸⁷

Evaluation of Comments and Response

As described in section 1, over the past year, BPA’s financial reserves increased, triggering the Power RDC rate adjustment mechanism. That mechanism is a component of BPA’s Financial Reserves Policy and risk mitigation within BP-22 rates. The RDC, in turn, provides BPA with certain discretion to repurpose the eligible financial reserves for “Power-specific purposes” that are “high-value.”⁸⁸ Commenters do not challenge BPA’s proposal to return a substantial portion of the Power RDC to Power customers as a rate reduction or to reduce debt and front-load funding for certain fish and wildlife maintenance costs.⁸⁹ Rather, they contend that BPA should, and in fact must, use some of these revenues to BPA’s Conservation program (also referred to as “energy efficiency”), which in their view “has made the windfall possible.”⁹⁰

BPA agrees that additional investments in conservation could be a “high-value” purpose to utilize the Power RDC Amount. That use, however, is not required. The Administrator has discretion to decide whether to repurpose financial reserves for potential use for the conservation program. Given the context for this year’s Power RDC, as described below, BPA finds that its implementation of the RDC is reasonable and appropriate.

Not Including Conservation Funding As a Use for the FY 2022 Power RDC Is Reasonable

As described in section 4.2.2 (General Objections), BPA’s implementation of the Power RDC falls squarely within the text, purpose, and scope of the RDC’s terms and within the broader context of BPA’s statutory authorities, the RD contracts and Tiered Rate Methodology, and its financial policies. Thus, given the specific provisions of the RDC and its context, and the potential settlement of multiple issues, BPA finds that its implementation of the FY 2022 Power RDC is reasonable and does not need to be modified.

Moreover, BPA does not agree that funds from the Power RDC need to be repurposed for its conservation program. BPA has a robust Energy Efficiency program and allocates on average \$129 million annually to develop and acquire conservation savings across the region. That program is fully funded and BPA’s power rates are set to recover this program’s projected costs over the rate period.⁹¹ BPA has met its FY 2022 obligations, including to its conservation program, and BPA stands ready to meet its conservation funding commitments.⁹² To the extent

⁸⁷ NWEC and NRDC Comments at 2-3.

⁸⁸ BP-22 Power GRSP II.P; *see also* BP-18 ROD, Appendix A, at A-2.

⁸⁹ NRDC Comments at 1.

⁹⁰ *Id.*

⁹¹ *See Bonneville Power Admin.*, 178 FERC ¶ 61,211 (Mar. 24, 2022). BPA’s BP-24 rates are still in process.

⁹² The FY22 RDC Amount was calculated based on financial reserves levels only after closing the FY22 books. Each year, the transactions recorded for the fiscal year and the resulting financial statements undergo a thorough audit; FY22 was no different. BPA paid the US Treasury, which is last priority, indicating everything with a FY22

the costs of BPA's conservation exceeds its rate case forecast, BPA has multiple layers of risk mitigation that can be employed to ensure BPA recovers its costs and meets its obligations.⁹³ Adding additional funding to this program through the Power RDC is, therefore, unnecessary, and implementing the Power RDC as proposed will not harm BPA's ability to meet its conservation commitments.

Furthermore, BPA does not view it as a prudent business decision to make significant changes to its conservation program in response to one-time, uncertain financial events, like the triggering of this year's Power RDC. Whether BPA decides to expand its conservation program involves broad policy implications that can impact other processes, such as BPA's resource planning, load and resource forecasting, ratemaking, and multiple other areas of BPA's business. It also involves many non-BPA parties. Certain conservation savings are achieved by BPA's power customers independent of BPA's acquisition of conservation under Energy Conservation Agreements. BPA also funds activities of non-power customer organizations, such as Northwest Energy Efficiency Alliance, which contributes to the development of market changing energy efficiency measures. Because of the far-reaching implications of this program, the acquisition of resources, including conservation, is undertaken on a forward-planning basis as part of BPA's Resource Program process, and is not generally modified by or interactive with the implementation of BPA's rates or rate mechanisms. BPA views this separation as a sound business practice, and finds it is prudent to continue to separate its resource acquisition decisions from its ratemaking proceedings or risk adjustment mechanism processes. That is particularly the case here given the short duration of the RDC review process, and the limited opportunities for review and consideration of such policy questions. This is not to say BPA would never utilize a Power RDC to fund conservation measures. As with BPA's fish and wildlife proposal, there may be instances where setting aside funds would be warranted in preparation for future anticipated infrastructure or maintenance needs.⁹⁴ For this year's Power RDC implementation, however, BPA does not see such a need and finds its decision is reasonable given its current business situation.

Commenters argue that BPA must return some of this revenue back to the conservation program because it was that program that created the current surplus. BPA agrees that its robust conservation program is *one* of the multiple prudent actions BPA has taken over many years to experience high revenues in FY 2022. However, several other factors have also played a key—if not a greater—role in the current revenue situation, not least of which is high market prices at times when BPA had both water to supply generation and surplus power to sell. The combination

due date was paid. Additionally, in any given year there are accruals, which account for expenses incurred but not yet paid, and revenue earned but not yet received. BPA considers these accruals in its Reserves for Risk calculation, removing the net of these two amounts from the RFR, upon which the RDC Amount is based. Therefore, the RDC Amount reflects any accrued expenses and revenues as well. There are no outstanding, unpaid FY22 obligations to be accounted for before applying the RDC Amount.

⁹³ See BP-22 ROD at 35 (describing six lines of risk mitigation).

⁹⁴ To be clear, BPA spending proposals are, ultimately, subject to review by Congress. See BP-22 ROD at 57.

Although Congress generally does not alter BPA spending levels when submitted in the federal budgetary process, changes are possible and, in fact, have occurred in the past, particularly related to conservation funding. See, e.g., Energy and Water Development Appropriations Act of 2002, Pub. L. 107-66, Nov. 12, 2001, Sec. 316 (limiting BPA's ability to fund certain energy efficiency services). Thus, even if BPA were to earmark some of the Power RDC Amount as additional money to fund its conservation measures, that revision would not necessarily mean that additional funding would be forthcoming for BPA's conservation program.

of these factors, and BPA’s overall gross revenues exceeding its costs, has resulted in the current financial reserves situation. Repurposing these financial reserves to reduce BPA’s customers’ rates, pay down debt, and pre-pay for fish and wildlife maintenance and infrastructure, provides BPA and its customers with both short-term and long-term benefits, as well as limiting litigation by increasing the chances of a settlement of the BP-24 rates.

Staff’s Proposal Does not Violate the Northwest Power Act

Commenters argue that by not repurposing financial reserves to additional conservation measures, BPA is violating sections 6(b)(5) and 6(e) of the Northwest Power Act, both of which highlight BPA’s duties to acquire conservation resources. As such, these commenters contend BPA should reduce the amount for rate reduction and use at least 10 percent of the RDC Amount for conservation to comply with the Northwest Power Act.⁹⁵

Contrary to the comments made by NWEAC and NRDC, the Northwest Power Act neither directs nor obligates BPA to repurpose financial reserves to fund or acquire additional resources, including conservation. Commenters argue that BPA must repurpose a share of the Power RDC to acquire conservation measures to comply with section 6(b)(5) of the Northwest Power Act, which provides that the Administrator “shall not reduce his efforts to achieve conservation”⁹⁶ BPA agrees that, when deciding whether to acquire additional resources to meet its contractual firm power obligation to supply electric power, due consideration and priority should be given to acquire cost-effective conservation. That provision does not apply here. The decision BPA is making here is not how or whether to acquire a resource. Nor is BPA proposing to “reduce” its efforts to obtain conservation, nor modify the resource mix it uses to serve its customers’ loads. Rather, in this action, BPA is deciding how to implement a rate mechanism that involves repurposing financial reserves consistent with criteria in a rate schedule. As described above, the RDC process is not the forum to evaluate BPA’s resource acquisition decisions, and addressing those issues within this process would encroach on other BPA processes that are specifically designed to guide BPA’s resource planning. BPA intends to continue acquiring and achieving conservation for both this rate period and the BP-24 rate period as informed by its Resource Program, and guided by the Council’s plan. The statutory language identified by commenters does not apply to BPA actions when implementing a rate action, such as the Power RDC, and sound business reasons support separating BPA’s resource selection processes from its ratemaking proceedings or risk adjustment mechanism processes.

Commenters further argue that section 6(e)(1) requires BPA to use the RDC Amount for conservation. That provision is also inapposite to the RDC decision at issue here. The immediate contextual purpose for this obligation is “to effectuate the priority given to conservation measures and renewable resources under this chapter.”⁹⁷ That is, under Section 4(e)(1), the Council’s plan shall “give priority to resources which the Council determines to be cost-

⁹⁵ NWEAC and NRDC Comments at 3.

⁹⁶ 16 U.S.C. § 839d(b)(5) (2020).

⁹⁷ 16 U.S.C. § 839d(e)(1) (2020).

effective.”⁹⁸ Conservation is given first priority,⁹⁹ and—when considering which resources are cost-effective—conservation is given a 10% credit.¹⁰⁰ This is what BPA has been doing and will continue to do. The RDC triggering does not change BPA’s compliance with this provision. Conservation is BPA’s priority resource for acquisitions. The RDC in no way reduces BPA’s acquisition of conservation, and conservation savings will continue to accrue. BPA’s decision to repurpose financial reserves does not lower the priority of acquiring conservation or prioritize other resources over conservation. BPA takes into account planned amounts of conservation that can be achieved before it acquires power from other resources. Actual revenue being higher than forecast costs does not require BPA to revise its resource acquisitions.

To support their argument that BPA is not meeting the requirement of acquiring conservation measures “to the maximum extent practicable,” commenters note that “BPA is not currently meeting its energy efficiency obligations to the region,” contending that “BPA’s conservation achievement fell far short of the Council’s 7th Plan targets [*i.e.*,] 30% (150 aMW) below target levels, while investor-owned utilities exceeded their respective target by 10 percent.”¹⁰¹ Commenters also note “a substantial fraction of potential energy efficiency investments become lost opportunities if not acquired when available.”¹⁰² WDC makes a similar point, proposing that “[i]nvesting in long term energy efficiency improvements will give BPA the rare chance to make up for [the] lost opportunity for its customer utilities and ratepayers” to address a “shortfall in BPA’s share of the . . . 7th Power Plan conservation target.”¹⁰³ WDC “understand[s] that there is a significant discrepancy between” the Council’s and BPA’s assessment, with the Council showing a 155 aMW shortfall versus BPA’s reported 50 aMW shortfall.¹⁰⁴ WDC also “understand[s] that the COVID pandemic may have made EE acquisitions slower, more difficult, and potentially more expensive during the last biennium of the 7th Plan implementation period.”¹⁰⁵ WDC believes “it is prudent to plan more carefully for contingencies [*e.g.*] BPA may have been able to avoid some portion of its shortfall had it had the flexibility to, for example, increase the incentives available for measures.”¹⁰⁶

BPA looks to the Council’s Plan when developing its acquisitions of conservation measures, and makes those determinations in a manner consistent with the Plan “as determined by the Administrator.”¹⁰⁷ However, BPA does not agree that identifying differences between the conservation savings BPA has achieved and the Council’s Plan targets demonstrates BPA is “not currently meeting its energy efficiency obligations to the region” and therefore must revise its

⁹⁸ *Id.*

⁹⁹ Northwest Power Act § 4(e)(1), 16 U.S.C. § 839b(e)(1) (2020).

¹⁰⁰ *Id.* § 3(4)(D), 16 U.S.C. § 839a(4)(D) (2020).

¹⁰¹ NWECC and NRDC Comments at 2.

¹⁰² *Id.*

¹⁰³ WDC Comments at 1.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 2.

¹⁰⁷ See 16 U.S.C. § 839d(b)(1) (2020) (“Except as specifically provided in this section, acquisition of resources under this chapter shall be consistent with the plan, as determined by the Administrator.”); see also 16 U.S.C. § 839d(a)(1) (2020) (“The Administrator shall acquire such resources through conservation, implement all such conservation measures, and acquire such renewable resources which are installed by a residential or small commercial consumer to reduce load, as the Administrator determines are consistent with the plan . . .”).

Power RDC proposal. In fact, BPA has had significant achievements with its conservation program in the face of unprecedented challenges. The reasons for the differences between the Council’s targets and BPA’s conservation program are multifaceted, and importantly for this discussion, not due to lack of funding.¹⁰⁸

The Council’s 7th Power Plan was released February 2016 with a prospective plan covering 2016–2021. The Plan included a target for BPA to achieve 581 aMW of conservation during the Plan period.¹⁰⁹ In a presentation to the Council, BPA calculates it achieved 537.5 aMW,¹¹⁰ and explained that, “[i]n light of the unprecedented challenges of recent years, we consider our achievements hard-won despite falling just short of the overall Power Plan goal”¹¹¹ In particular, achieved conservation savings slowed in 2020 and 2021 due to the COVID pandemic and the transforming lighting market.¹¹² This slowdown was part of a larger trend in decreasing conservation programmatic savings,¹¹³ which has steadily declined from over 70 aMW in 2017 to about 30 aMW in 2020.¹¹⁴

To the extent BPA’s conservation savings fall short of the Council’s Plan’s targets, that alleged shortfall is not due to inadequate funding. The COVID pandemic made it difficult to physically implement conservation measures on end-user property. Additionally, due to the region’s success in implementing conservation through lighting measures, remaining conservation measures are relatively more expensive and difficult to achieve.¹¹⁵ The reality of this changing landscape for conservation acquisitions is reflected in the Council’s 2021 Plan, which is including less conservation than in previous plans.¹¹⁶ It is due to these on-the-ground issues that additional conservation measures were not achieved.

Much of the funding BPA had previously made available for conservation acquisition was not spent because customers could not implement sufficient measures. BPA acquires conservation directly from its customers under Energy Conservation Agreements (ECAs). Under these contracts, BPA power customers implement approved conservation measures, submit project

¹⁰⁸ To be clear, BPA does not concede that it *must* meet the targets identified by the Council’s Plan. The statutory language maintains the Administrator’s role in determining resource acquisition decisions. *See* 16 U.S.C. § 839d(b)(1) (2020); 16 U.S.C. § 839d(a)(1) (2020). For purposes of this discussion, BPA merely explains the basis for these differences, which goes to show that BPA is making concerted efforts to acquire conservation “consistent with” the Council’s Plan.

¹⁰⁹ Bonneville Power Administration, Energy Conservation Annual Review 2021 at 16 (Aug. 2022) (Energy Conservation Annual Review 2021), available at <https://www.bpa.gov/-/media/Aep/energy-efficiency/policy/bpa-energy-conservation-annual-review-fy2021.pdf>.

¹¹⁰ *Id.* at 21.

¹¹¹ *Id.* at 16.

¹¹² *Energy Efficiency at BPA*, Bonneville presentation to Northwest Power and Conservation Council, at 5 (Nov. 8, 2022), available at https://www.nwccouncil.org/fs/18102/2022_11_1.pdf.

¹¹³ Programmatic savings refer to Bonneville’s acquisition of conservation directly from its customers.

¹¹⁴ *Energy Efficiency at BPA* at 5.

¹¹⁵ Energy Conservation Annual Review 2021 at 2.

¹¹⁶ Northwest Power and Conservation Council, The 2021 Northwest Power Plan, Draft Plan Summary at 2-3 (Sept. 7, 2021), available at <https://www.nwccouncil.org/sites/default/files/2021-6.pdf> (“The 2021 Plan includes less efficiency than past plans, which underscores the high achievements of the last 40 years. Much of the inexpensive efficiency has been achieved, and what remains is close to the price of power from the least-expensive generating resources.”).

invoices and supporting documentation, and BPA pays these customers to acquire the resulting conservation. After the BP-18 rate period, approximately \$4.7 million remained unspent. After BP-20, approximately \$5.8 million remained unspent.

Notably, however, the ECAs allow for a “Carryover Amount,” where an amount of unused implementation budget may carry forward to increase a customer’s available implementation budget for the following rate period.¹¹⁷ BPA provides this flexibility to move unused Energy Efficiency Incentive (EEI) budgets from one rate period in order for the funds to be utilized in the next rate period. Due to this provision, the actual value that was truly unspent because it exceeded the carryover rules, averaged only 0.018% of the total rate period implementation budgets (less than one-quarter of one percent).¹¹⁸ Further, customers may transfer a portion of their implementation budget to other BPA customers. This allows customers who are unable to implement cost effective measures in their load to redirect funds to those who can. In these ways, available funding already exists to implement conservation measures that may have slowed in recent years. Accordingly, BPA concludes that additional funds would be unlikely to achieve the increase in conservation that commenters seek.

Commenters’ concerns with BPA not meeting the Council’s conservation target is also largely moot now that the Council has issued its new 2021 Plan.¹¹⁹ The 2021 Plan accepts present circumstances in developing a plan from 2022 through 2027. The new goals are not incremental to first achieving some “shortfall” from the prior Plan. In this way, acquiring conservation consistent with the 2021 Plan is “mak[ing] up” for any “lost opportunit[ies.]”¹²⁰ And BPA’s conservation acquisition reflects the new 2021 Plan. BPA’s 2022 Resource Program identifies a 299 aMW goal¹²¹ for BPA from 2022–2027, consistent with the 2021 Power Plan’s recommendation for BPA of 270–360 aMW.¹²² Separate from the Power RDC process, BPA is developing an “Action Plan” that will detail what actions BPA will undertake to acquire conservation consistent with the 2021 Plan as determined by the Administrator. BPA regularly updates its Action Plan to respond to current circumstances.

¹¹⁷ Customers have the ability to transfer up to 10% of their initial Implementation Budget or up to \$50,000 of their available Implementation Budget, whichever is greater.

¹¹⁸

	Initial EEI Implementation Budget	Remaining Budget	Carryover Allowed	Unspent Value	Unspent Value as % of Initial Budget
BP-18	\$137,630,000	\$4,697,403	\$4,689,592	\$7,810	0.006%
BP-20	\$129,000,000	\$5,854,065	\$5,815,966	\$38,100	0.028%

¹¹⁹ Northwest Power and Conservation Council, The 2021 Northwest Power Plan (Mar. 10, 2022) (2021 Power Plan) available at https://www.nwcouncil.org/media/filer_public/4b/68/4b681860-f663-4728-987e-7f02cd09ef9c/2021powerplan_2022-3.pdf.

¹²⁰ WDC Comments at 1.

¹²¹ The 2022 Resource Program has a time horizon that begins in 2024, and suggests BPA acquire 223 aMW of conservation in its least cost portfolio. See 2022 Resource Program at 23, available at <https://www.bpa.gov/-/media/Aep/power/resource-program/2022-resource-program.pdf>. Combining this with BPA’s forecast acquisition of 76 aMW in FY 22 and FY23 results in a total of 299 aMW by 2028. The Resource Program also includes a high policy scenario of 245 aMW, resulting in a range of 299-321 aMW by 2028.

¹²² 2021 Power Plan at 97.

While outside the scope of the RDC process, BPA notes that it agrees with WDC that it is prudent to plan for contingencies.¹²³ However, doing so is not simply a matter of increasing the financial incentives for conservation through actions like repurposing financial reserves through the Power RDC. In BPA’s Action Plan, BPA intends to explore refining measure offerings; revising program plans; developing goals, milestones, and resources; and considering the Action Plan a living document. BPA is also exploring ideas to improve its conservation acquisition structure in post-2028 long-term power sales contracts. As BPA stated in its Energy Conservation Annual Review 2021, the challenges BPA is facing “brought to the forefront important conversations about enhancing program accessibility. We thought more critically about how to capture the true value of conservation, including energy, non-energy and capacity benefits, and how to identify the type, timing and geographical location of energy savings to best achieve the conservation called for in the Northwest Power and Conservation Council’s 2021 Northwest Power Plan and BPA’s 2022 Resource Program.”¹²⁴ Important conversations and decisions will continue to occur outside the RDC process.

BP-24 IPR and Rate Case Estimates Do Not Require Revisions to the FY 2022 Power RDC

Some commenters assert that BPA’s “current proposed EE budget” is insufficient.¹²⁵ For example, NWECC and NRDC state, “BPA’s actual and planned expenditures for energy efficiency are proposed to be flat in BP-24 (FY 2024–25) compared to BP-22, and only 5% above BP-18 levels.”¹²⁶ NWECC and NRDC assert that “[s]tandstill expenditures for conservation put the region at risk”¹²⁷ WDC makes a similar comment. WDC recommends “BPA use a portion of the Power RDC amount to increase its energy efficiency program budgets during the 2021 Power Plan implementation period, beginning in the BP-24 rate period.”¹²⁸ WDC argues that, “[l]ooking forward, BPA should ensure that its budgets are set sufficiently to allow acquisition of all of the cost-effective conservation in its service area identified in the 2021 Power Plan consistent with the high-end of the Council’s regional target, which is 750–1000 aMW.”¹²⁹ Further, “[f]unding for the remaining weatherization in BPA’s footprint should be dedicated annually.”¹³⁰ “BPA should work closely with Council staff in developing its EE Action Plan and budgets to ensure they are sufficient to achieve these savings before finalizing the EE budget in the BP-24 rate case.”¹³¹

BPA disagrees that either (1) its current cost projection for its conservation program is insufficient; or (2) that the Power RDC should be repurposed to make up for any such alleged deficiency. For purposes of rates, BPA has already developed its projection of conservation costs in the BP-24 IPR Process and does not intend to revisit those estimates as part of the RDC process. BPA notes that its conservation cost forecast reflects its target of achieving 299 aMW during the 2021 Plan time period, and includes a 2.4% increase for the rate period due to the

¹²³ WDC Comments at 2.

¹²⁴ Energy Conservation Annual Review 2021 at 3.

¹²⁵ NWECC and NRDC Comments at 2.

¹²⁶ *Id.*

¹²⁷ WDC Comments at 2.

¹²⁸ *Id.* at 1-2

¹²⁹ *Id.* at 1.

¹³⁰ *Id.*

¹³¹ *Id.* at 2.

forecast rising cost of conservation acquisitions necessary to meet this target. These forecasts include the projected cost of acquiring conservation through cost-effective weatherization measures. As noted earlier, BPA’s target is in line with the Council’s 2021 Plan for the region to achieve 750–1,000 aMW, of which BPA is to achieve 270–360 aMW. The BP-24 IPR Initial Publication noted that “[c]onservation acquisitions are informed by the needs of BPA’s customers, the Council’s 2021 Power Plan, BPA’s 2022 Resource Program and the 2022–2027 Energy Efficiency Action Plan, currently under development. Adjustments to the scale and type of efficiency measures needed to best meet BPA’s resource needs will be reflected in the final Action Plan.”¹³² Following public comments, the BP-24 IPR Closeout Report concluded that BPA anticipates it will be able to deliver on its conservation goals.¹³³ BPA sees no need to revisit those estimates as part of this process, nor does BPA find that it would be reasonable to repurpose a portion of the Power RDC for this purpose.

Moreover, BPA does not see a need to change its forecast of conservation costs (or prepare for additional conservation costs) simply because of the size of the Power RDC Amount. Revenues and costs are not interdependent, and a change in revenue does not create a corresponding change in the agency’s underlying costs.¹³⁴ BPA set its BP-22 rates to recover its conservation costs, and will set its BP-24 rates to recover its future conservation costs. The fact that BPA’s actual revenues diverge from BPA’s rate case estimates does not increase (or decrease) BPA’s overall conservation measure obligations.

State and federal policies and practical considerations do not Require Changes to the FY 2022 Power RDC

NWEC and NRDC note that “energy efficiency is a key element of the Biden Administration’s climate and clean energy strategy, which BPA plays a critical role in implementing in the region,” and that “changes in state and federal energy policies, markets, technology innovation and the impacts of climate change strongly favor a greater effort to acquire energy efficiency.”¹³⁵ NWEC and NRDC describe negative impacts that they claim will occur, absent increased funding for conservation, including “missing out on the reliability, affordability, and emissions reduction benefits that energy efficiency and conservation provide to customers” and “reduc[ing] the long-term financial health of BPA, its customers and end-users throughout the region.”¹³⁶

BPA agrees that conservation has many benefits, which BPA has described in its IPR conservation presentation. BPA has concluded that its projected investments in conservation are sufficient to recognize these benefits. Guided by the Council’s 2021 Plan and consistent with its statutory authorities, BPA projects it will invest, on average, \$129 million per year over the next

¹³² Bonneville Power Administration, Integrated Program Review, Initial Publication at 29 (June 2022), available at <https://www.bpa.gov/-/media/Aep/finance/integrated-program-review/bp-24-ipr/bp-24-initial-ipr-detailed-publication-20220610.pdf>.

¹³³ Bonneville Power Administration, Integrated Program Review, Closeout Report at 2 (Oct. 2022), available at <https://www.bpa.gov/-/media/Aep/finance/integrated-program-review/bp-24-ipr/bp-24-ipr-closeout-report.pdf> (“BP-24 IPR Closeout Report”).

¹³⁴ *Id.* at 12 (citing BP-22 ROD at 44-45).

¹³⁵ NWEC and NRDC Comments at 2-3.

¹³⁶ *Id.*

rate period to recognize the benefits of conservation. BPA has concluded that additional conservation acquisition through repurposing Power financial reserves is not required.

BPA remains committed to implementing its conservation program consistent with its statutory mandates. BPA also notes that producing carbon-free energy from existing Federal assets can support Federal and state carbon reduction initiatives. While not part of the RDC decision, BPA notes it will continue to work collaboratively with its partners regarding energy policies and changes in the energy market.

4.2.4 General Fish and Wildlife Funding

Public Comments

PPC, PNGC, WPAG, NRU, McMinnville, and Snohomish support or do not oppose staff's proposal, including the portion of the RDC that would be repurposed for maintenance of fish and wildlife facilities.

Some commenters would like BPA to increase the amount of Power RDC that would be repurposed for fish and wildlife mitigation. ICL argues "BPA should devote the entire \$500 million Power RDC to fish and wildlife mitigation efforts."¹³⁷ NWF Plaintiffs propose BPA "allocate at least 50% of the Power RDC funds"¹³⁸ The Yakama Nation "requests that BPA use at least 40% of the FY22 RDC funds"¹³⁹ The Coeur d'Alene Tribe, Spokane Tribe of Indians, Nez Perce Tribe, CTUIR, Kootenai Tribe of Idaho, State of Oregon, and Washington Department of Fish and Wildlife (WDFW) propose BPA significantly increase the amount to be used for fish and wildlife investments.¹⁴⁰ Some of these commenters also suggest that the eligible end uses of the Power RDC should be broadened to include more general fish and wildlife mitigation purposes beyond the proposed maintenance of existing fish and wildlife mitigation assets.

Evaluation of Comments and Response

The comments that express concern or object to the RDC proposal generally advocate for increasing the proportion of the Power RDC Amount that would be repurposed to fish and wildlife, with commenters providing various rationales for doing so. BPA addresses those comments below.

How BPA's Financial Reserves Accumulated in FY 2022

Some commenters assert that BPA's fiscal year 2022 revenues were realized at the expense of fish and wildlife, and therefore the RDC proposal should distribute more funds to fish and

¹³⁷ ICL Comments at 6; *id.* at 1-2, 4.

¹³⁸ NWF Plaintiffs Comments at 1.

¹³⁹ Yakama Nation Comments at 1.

¹⁴⁰ Coeur d'Alene Tribe Comments at 1; Spokane Tribe of Indians Comments at 1; Nez Perce Comments at 1; CTUIR Comments at 2; Kootenai Tribe of Idaho Comments at 1; Oregon Comments at 2; WDFW Comments at 1.

wildlife. For example, CTUIR, Oregon, and WDFW argue that negotiated dam operations did not maximize benefits for fish, allowing additional revenue to be generated and, in turn, pushing BPA reserves to a level where this RDC was triggered.¹⁴¹

To clarify, in FY 2022 financial reserves accumulated because the revenue BPA received from its customers was greater than its actual costs. Although overall revenues during FY 2022 were higher than forecast, these revenues were largely attributed to a combination of historically high market prices for power and the shape of the rivers' runoff during the spring months of 2022, not as a result of any decision-making on operations related to fish. In fact, the operations that were agreed to in the Term Sheet for Stay of Preliminary Injunction Motion and Summary Judgment Schedule ("2022 Agreement") for the *NWF, et al. v. NMFS, et al.* (3:01-cv-00640-SI) litigation resulted in a *loss* of revenue as compared to the proposed action consulted upon under the Endangered Species Act in 2020 primarily due to increased spill operations that resulted in less generation. All parties to the 2022 Agreement recognized that the Agreement provided "a compromise while the Parties work together to develop and begin implementing a long-term comprehensive solution[.]"¹⁴²

Oregon's comment goes on to argue that "BPA's significant excess revenues . . . indicate much more could have been done for fish without risking cost-efficient power operations."¹⁴³ But power costs were not a primary consideration that went into development of the 2022 operations; the United States Government (USG) approach to operations in the 2022 Agreement was developed based on important considerations of the multiple purposes of the CRS, including potential negative impacts to bull trout, salmon and steelhead, human health and safety, navigation and power and transmission reliability. All of these factors were critical considerations for the USG, rather than a narrow focus on "cost-efficient power operations." Additional constraints were negotiated by all the parties to be in place during the spring in an effort to maintain effective adult fish passage where challenges under high spill conditions had been identified, not to increase the cost effectiveness of the spill operation. In addition, BPA's actual revenues were not known at the time the parties agreed to these operations or BPA set its rates. The actual market conditions that created FY 2022 revenues were unprecedented.¹⁴⁴

Moreover, that BPA generated additional revenue did not change BPA's underlying fish and wildlife obligations. Revenues and costs are not interdependent, and a change in revenue does not create a corresponding change in the agency's underlying obligation to fish and wildlife.¹⁴⁵

The Spokane Tribe of Indians characterizes the RDC as a "windfall," and argues "these funds are available because of 'savings' made possible by not fully funding and addressing mitigation needed to tackle the externalities of the FCRPS."¹⁴⁶ As explained above, FY 2022 revenues are largely attributed to market prices and water conditions. To the extent that BPA's financial reserves contain any past fish and wildlife funding that was made available by BPA, but not

¹⁴¹ CTUIR Comments at 1-2; Oregon Comments at 2; WDFW Comments at 1.

¹⁴² *NWF et al. v. NMFS et al.*, 3:01-cv-00640-SI (D.Or., Oct. 21, 2021), ECF 2411. ("Term Sheet for Stay of Preliminary Injunction Motion and Summary Judgment Schedule").

¹⁴³ Oregon Comments at 2.

¹⁴⁴ See Section 2.2 (Risk Mitigation Tools: PNRR and CRACs).

¹⁴⁵ BP-24 IPR Closeout Report at 12 (citing BP-22 ROD at 44-45).

¹⁴⁶ Spokane Tribe of Indians at 1.

expended by fish and wildlife project contractors, that amount is negligible compared to the \$50 million that BPA now proposes to distribute to fish and wildlife.

For example, BPA's Fish and Wildlife Program (F&W Program) expense budget for FY 2022 was \$247.5 million; the F&W Program's actual expenditures were \$235 million. Therefore, BPA's F&W Program expenditures were \$12.5 million below BPA's FY 2022 budget. Of this amount, approximately \$5 million of these unspent funds will be moved forward into the BPA F&W Program's budget for use in FY 2023, as allowed by the agency's internal "carryover" policy for internal programs within a rate period. The remaining \$7.5 million in unspent fish and wildlife mitigation funding from FY 2022 is in contrast to the \$50 million that BPA now proposes to distribute from agency reserves for fish and wildlife purposes. In addition, separate from BPA's internal "carryover" policy, BPA has certain contractual commitments to make other unspent funds from prior years' fish and wildlife budgets available for mitigation expenditures. For instance, the cumulative amount of committed but unexpended funds under BPA's various Fish Accord agreements has grown over the duration of the agreements and continues to be available for future fish and wildlife mitigation by Fish Accord partners.

Certain comments characterize BPA's RDC proposal as facilitating "lower spending amounts in future rate periods," and argue that is a "dismissal of any serious effort to meet BPA's fish and wildlife funding responsibilities . . ." ¹⁴⁷ BPA respectfully disagrees. The RDC funds will pay now for one-time costs that BPA expects will arise in future rate periods. By funding those actions now, BPA will avoid having their costs added to future rate periods, but this is not the same as requiring a reduction in base spending amounts in those future years. Prefunding planned maintenance work means less risk that the relevant assets may fail and cause more costly future repairs. It also allows BPA to consider whether to accelerate other planned maintenance in future rate periods. The work that is done now will inform BPA's capital investment prioritization process through Strategic Asset Management Plans and Asset Plans, which will be reflected in future IPR cost forecasts.

Finally, CTUIR stated that "when BPA's unanticipated FY21 revenue was approximately \$368 million, BPA chose not to allocate any of that revenue towards fish and wildlife needs, and returned it all to the BPA customers in rate reductions." ¹⁴⁸ BPA clarifies that, while the 2021 RDC Amount was repurposed entirely for rate reduction, the amount of that reduction was \$13.7 million. ¹⁴⁹

The Fact that Commenters Identify Various Fish and Wildlife "Opportunities" for using the RDC Does Not Make Such "Opportunities" BPA's Legal Obligation, nor does it Compel Revisions to the FY 2022 Power RDC Proposal.

Several commenters that advocate for a greater portion of the Power RDC Amount to be repurposed for fish and wildlife mitigation, or for expansion of eligible fish and wildlife uses, argue that numerous opportunities exist related to fish and wildlife mitigation. ¹⁵⁰ In identifying

¹⁴⁷ NWF Plaintiffs Comments at 3.

¹⁴⁸ CTUIR Comments at 2.

¹⁴⁹ See FY 2021 Power RDC Letter from the Administrator.

¹⁵⁰ See, e.g., ICL Comments at 3; Coeur d'Alene Tribe Comments at 1.

such opportunities, many commenters assert that BPA can, should, or must seize those opportunities, whether by increasing the amount of Power RDC funding that is repurposed for fish and wildlife or selecting a broader range of fish and wildlife actions that would be eligible to receive such funding. BPA's legal obligations set the basis for BPA's fish and wildlife funding actions. Viewed in that context, BPA finds its Power RDC decision is reasonable and complements its existing obligations.

As explained next, BPA's legal duties are not created by the existence of the fish and wildlife opportunities identified by commenters, nor expanded due to BPA's actual revenue exceeding rate case forecasts, nor constrained by BPA's decision for how to use the Power RDC Amount.

First, the existence of general fish and wildlife needs does not *create* a legal obligation for BPA to address those particular needs. There is no legal requirement for BPA to use this particular RDC process, or the particular financial reserves in the RDC Amount, to pursue actions that would address them. BPA has the discretion to select how it will apply the available RDC Amount. As noted earlier, BPA has a solid and sound rationale for the RDC decision it has put forward here.¹⁵¹

Second, an increase in BPA's revenues does not *expand* BPA's legal obligations to fund fish and wildlife mitigation. Stated another way, simply because BPA has money to spend, does not mean BPA's fish and wildlife mitigation obligations should (or must) also increase. While BPA uses funding to address its fish and wildlife mitigation obligations, the availability of revenue does not determine the extent of BPA's fish and wildlife mitigation obligations. Just as a lack of revenue would not decrease those obligations, an influx of revenue does not increase those obligations. The Northwest Power Act provides as much when directing BPA to set rates to recover its "total system costs."¹⁵² In other words, BPA always retains the obligation to recover, by way of rate setting, its fish and wildlife program costs—whatever their scope. If Congress, a Court, or BPA concludes that implementation of a particular program is required by BPA's legal obligations, then BPA would pay for those costs, and recover them in the ordinary course of ratemaking. It is, then, the legal obligation that must come first; the means of funding that obligation (whether by recovering it through rates, paying through available financial reserves liquidity, or funding it through a rate mechanism like the RDC) comes second.

Third, BPA's use of the Power RDC Amount in no way *constrains* BPA's ability to meet its legal obligations to fund BPA's fish and wildlife program (including potentially new obligations). Simply because specific mitigation actions are not selected in the RDC process does not mean those actions are *precluded* by this RDC decision. A rate adjustment mechanism such as the RDC is not designed or equipped to select the specific mitigation projects to receive funding. Moreover, BPA need not earmark some or all of the Power RDC to determine whether certain actions can be funded. If new obligations arise or discretionary actions are selected, BPA's rates are prepared to recover those costs.¹⁵³ BPA's implementation of the Power RDC does not diminish BPA's ability to either recover its costs or to take on new or modified fish and wildlife obligations in the future.

¹⁵¹ See Section 4.2.2 (General Objections).

¹⁵² 16 U.S.C. § 839e(a)(2)(B).

¹⁵³ BP-22 ROD at 35 (describing six lines of risk mitigation to address cost uncertainty and new obligations).

Some comments argue that BPA must use the RDC as an opportunity to address unmet fish and wildlife obligations that the commenters assert are BPA’s responsibility. These comments, however, make broad assertions to either general mitigation obligations,¹⁵⁴ or outcomes that are not clearly BPA’s responsibility to achieve, such as overall recovery or restoration of fish populations, or the general “needs” of fish and wildlife.¹⁵⁵ BPA discusses these alleged responsibilities further in the sections below. Moreover, BPA finds it prudent to focus on fish and wildlife programs or policies that are clearly BPA’s responsibility. The proposal BPA adopts here does just that and is consistent with the language, intent, objectives, and context of the RDC rate mechanism.

In the sections below, BPA evaluates and responds to the fish and wildlife mitigation opportunities identified in comment letters.

1. Address imperiled status of fish stocks

Several commenters argue that BPA should use more of the RDC Amount—or all of it—to ensure restoration or recovery of fish populations, or to achieve broad regional abundance goals.¹⁵⁶ In contrast, PPC states, “[i]t must be acknowledged that current mitigation efforts are working – this includes strong (in some case record) returns this year that allowed for increased harvest.”¹⁵⁷

BPA’s obligations are established by statute and do not address all factors that affect salmonid populations. BPA’s responsibility is to protect, mitigate, and enhance fish and wildlife to the extent affected by development and operation of federal hydropower facilities.¹⁵⁸ But fish populations are significantly affected by a host of factors—*e.g.*, predation, development, harvest, land use, ocean conditions—in addition to the federal hydropower impacts for which BPA has a legal duty to mitigate. The recovery or rebuilding of salmonid populations is likewise dependent on appropriately addressing those other factors.¹⁵⁹

¹⁵⁴ See, *e.g.*, Yakama Nation Comments at 1 (alleging “established but unfulfilled mitigation obligations”).

¹⁵⁵ See, *e.g.*, *id.* at 2 (“until [regional fish population goal is met], BPA must use its funds and authorities to the greatest extent practicable to recover impacted Columbia Basin fish stocks.”); ICL Comments at 1, 3–4; *see also id.* at 2–3 (citing Council Fish and Wildlife Program provisions that BPA has consistently questioned its responsibility for).

¹⁵⁶ See, *e.g.*, ICL Comments at 2–3; CTUIR Comments at 1; Yakama Nation Comments at 1.

¹⁵⁷ PPC Comments at 2.

¹⁵⁸ See 16 U.S.C. § 839b(h)(10)(A) (2020).

¹⁵⁹ BP-24 IPR Closeout Report at 11 (citing BP-22 ROD); Letter from Scott Armentrout, Exec. V.P., Bonneville Power Admin. to NW Power and Conservation Council (June 22, 2020), *available at* <https://app.nwcouncil.org/uploads/2018amend/comments/1392/Final%20Council%20Addendum%20Pt%201%20Cover%20Ltr%20and%20Comments%202020.06.22.pdf> (“Bonneville Comments to Council”).

2. *Keep track with the rate of inflation*

Others argue that BPA’s fish and wildlife funding has not kept track with inflation, and that the RDC allows an opportunity to catch up.¹⁶⁰ The general assertion that BPA’s fish and wildlife spending on the whole must match inflation assumes that the effect of mitigation spending is a direct result of the level of funding expended. This fails to account for project-level complexities and implementation decisions that can create efficiencies and cost-savings without sacrificing mitigation output.¹⁶¹ Ultimately, BPA’s fish and wildlife spending levels are dictated by the costs of the mitigation that BPA undertakes; those costs can be driven by numerous factors, including inflation, but planning for expenditures to simply follow inflation indices would be an overly simplistic approach to projecting expected spending levels.

Moreover, a divergence between the rate at which fish and wildlife costs increase and the rate of inflation does not imply a *de facto* deficiency that BPA must make up, and certainly does not require BPA do so through the RDC rate mechanism. There is no requirement that BPA first repurpose financial reserves to fish and wildlife mitigation in an amount equal to the difference between BPA’s prior budgets (which were based on before-the-fact projected costs) and the actual rate of inflation before considering other uses of the RDC funds. Ultimately, BPA deals with the effects of inflation as they come, and as appropriate within individual projects in light of their mitigation deliverables and lifecycle.¹⁶² As a case in point, BPA has factored in inflation in developing the forecast for F&W Program costs for the BP-24 rate period, resulting in an overall increase in program cost by 8.7 percent.¹⁶³

Further, there are additional tools BPA can use to help deal with the effects of inflation, even without rigidly conforming agency budgets to actual inflation levels. Examples of these tools include carrying over unspent programmatic fish and wildlife mitigation funds from one year of a rate period to the next, and meeting BPA’s contractual commitments to keep past unspent funding available for current and future mitigation expenditures under the Fish Accord agreements.

3. *Re-visit past funding decisions or the adequacy thereof*

Similarly, some commenters also contend that BPA’s current and historical fish and wildlife funding has generally been inadequate, and describe the Power RDC as an “opportunity” to make up for these alleged deficiencies.¹⁶⁴ Some commenters assert that past mitigation or mitigation spending has resulted in “established but unfulfilled mitigation obligations.”¹⁶⁵ Several commenters ask BPA to use the Power RDC Amount to increase its funding for various purposes, arguing BPA’s past funding decisions were insufficient. They argue BPA should meet

¹⁶⁰ See, e.g., Spokane Tribe of Indians Comments at 1; CTUIR Comments at 2; Yakama Nation Comments at 2; ICL Comments at 4; Kootenai Tribe of Idaho Comments at 1.

¹⁶¹ BP-24 IPR Closeout Report at 12-13.

¹⁶² See *id.* at 13-14 (explaining that each mitigation project—and its associated funding—is unique, with different objectives and work elements that change or end over time).

¹⁶³ See *id.* at 12-13; *id.* at i.

¹⁶⁴ ICL Comments at 3.

¹⁶⁵ Yakama Nation Comments at 1.

these alleged obligations before repurposing financial reserves to other uses. In support of their views, these commenters describe BPA’s past and current fish and wildlife investments as leaving “unfulfilled mitigation obligations,” or being otherwise insufficient given fish and wildlife needs.¹⁶⁶

Other commenters, however, object to BPA using the Power RDC Amount for increased fish and wildlife funding (beyond staff’s proposal) contending BPA’s power rates already collect sufficient fish and wildlife costs to meet BPA’s obligations.¹⁶⁷

BPA’s fish and wildlife program expenditures and budgets have fluctuated over the years, which is to be expected. BPA’s fish and wildlife project budgets do not move up or down in perfect sync; each project is unique with different objectives and elements that can change, or even end, over time. Regardless of fish and wildlife project budget levels in prior years—and any constraints, changes to implementation sequencing, or re-prioritization among projects or project work elements that may have resulted—BPA plans its mitigation spending based on forecasted work. For example, BPA has projected an increase in fish and wildlife expenditures in the BP-24 rate period in response to the expected higher cost of fish and wildlife work that will occur in the next rate period.¹⁶⁸ In addition to focusing on these expected future costs, BPA does not, however, also need to provide a retrospective, dollar-for-dollar reinstatement of past budget adjustments in order to address work expected in the future. Moreover, given that the Fish and Wildlife Program historically has not fully utilized all available funds in a fiscal year,¹⁶⁹ and that BPA regularly works with its partners to re-allocate certain unspent funds across projects, and sometimes across budget years, to address project priorities, BPA does not find this retrospective focus on past work and past budgets to be a compelling reason to alter its RDC proposal.

Some commenters assert that past mitigation or mitigation spending has resulted in “established but unfulfilled mitigation obligations.”¹⁷⁰ Regardless of whether this is the case (and BPA does not concede that it is), BPA has concluded that implementation of the RDC rate mechanism is the wrong forum in which to determine the extent, if any, of BPA’s unmet fish and wildlife mitigation obligations.

BPA has also considered commenters’ general call to supplement BPA’s fish and wildlife budget with funds from the RDC to address alleged outstanding mitigation obligations. After reviewing the comments, BPA disagrees there is any gap in the adequacy of its existing mitigation compliance—or that its mitigation compliance can be reduced to a dollar-figure at all—that needs to be solved for at this time, and certainly not that BPA is obliged to resolve here through the Power RDC.

¹⁶⁶ Coeur d’Alene Tribe Comments at 1-2; Spokane Tribe of Indians Comments at 1; Kootenai Tribe of Idaho Comments at 1; NWF Plaintiffs Comments at 1-2; ICL Comments at 1-3; Yakama Nation Comments at 2; Oregon Comments at 2;

¹⁶⁷ PPC Comments; WPAG Comments; PNGC Comments; McMinnville Comments; Snohomish Comments; Kootenai Elec. Coop. Comments; Klickitat Comments.

¹⁶⁸ BP-24 IPR Closeout Report at 14.

¹⁶⁹ *See, e.g.*, BPA Presentation to Northwest Power and Conservation Council, at 3 (Nov. 15, 2022), available at https://www.nwccouncil.org/f/18095/2022_11_fl.pdf.

¹⁷⁰ Yakama Nation Comments at 1.

4. *Add new or expanded mitigation to BPA's F&W Program portfolio*

Some commenters ask BPA to expand its existing fish and wildlife mitigation work or establish wholly new mitigation initiatives—many of which appear to be long-term efforts—because the RDC presents an opportunity that should or must be seized to provide additional increments of support for fish and wildlife. Others, however, state “we do not think customer money that results from current rates should serve as an open checkbook for more programs,” and “[i]f more programs are needed, they should be driven by science and appropriate funding mechanisms”¹⁷¹ PNGC, PPC, and their members state they are committed to responsible, scientific efforts to mitigate for Columbia River Systems Operations on fish and wildlife, consistent with BPA’s statutory requirements.¹⁷² They argue BPA ratepayers already meet their responsibilities through the current BP-22 power rates, and observe that fish and wildlife mitigation costs typically amount to over \$600 million per year, or roughly one quarter to one third of the power rates they pay.¹⁷³

Whether BPA could potentially fund further fish and wildlife mitigation is not the issue; this is because, when BPA expends funds, it must consider whether such expenditures address underlying obligations. As to the possibility of starting new initiatives or expanding long-running existing projects, BPA finds that the one-time nature of the RDC counsels against using it to create long-term ongoing obligations. This is particularly true given the unpredictability of the RDC and the revenue uncertainty described earlier.¹⁷⁴ BPA’s fish and wildlife proposal under the Power RDC is a sound business decision in that it is limited in scope (*i.e.*, “one-time, non-recurring”), and pertains to existing commitments that are “anticipated” to be addressed in future rate periods. Thus, earmarking some funds to these one-time actions that do not expand or commit BPA funds through projects that might continue indefinitely into the future is a reasonable choice given the scope and purpose of the Power RDC rate mechanism. BPA does not consider it prudent to introduce entirely new, potentially long-term fish and wildlife costs simply because BPA has (at present) a one-time increase in its revenues. There is no guarantee that BPA will have future RDCs to fund expanded fish and wildlife programs. In addition, as noted above, BPA’s budget, including its F&W Program budget, is subject to Congress’s ultimate authority to approve BPA funding.¹⁷⁵ Express Congressional expenditure approval is needed for construction of capital fish facilities that exceed \$2.5 million, and have a useful life of over 15 years.

Several commenters request that BPA hold back some or all of the Power RDC Amount to address emerging regional priorities, such as fish losses above Grand Coulee and Chief Joseph

¹⁷¹ PNGC Comments at 2.

¹⁷² *Id.* at 1-2; PPC Comments at 1-2; Klickitat Comments at 1.

¹⁷³ *Id.*

¹⁷⁴ Section 2.2 (Risk Mitigation Tools: PNRR and CRACs)

¹⁷⁵ BP-22 ROD at 57.

dams.¹⁷⁶ BPA has previously responded to this request in its BP-24 IPR evaluation of comments.¹⁷⁷ As noted there:

[T]he breadth of issues implicated by this topic extends well beyond the scope of the Council's Program or Bonneville's responsibility. It also necessarily involves additional key entities, namely the U.S. Army Corps of Engineers and the Bureau of Reclamation, which can be seen in the 2020 Addendum to the Council's Program directing its recommendations to "Bonneville and others" to continue to make progress on this front. To that end, these agencies and other elements of the federal government recently committed to take the issue up in a separate process: "Specific to reintroduction, the Administration commits to developing and implementing a plan to explore providing full support for and funding of Phase II reintroduction actions as well as other reintroduction efforts in the Upper Columbia River."¹⁷⁸

If reintroduction or other mitigation programs become a component of BPA's obligations, BPA's rates retain multiple risk mitigation features to recover the costs associated with such a program.¹⁷⁹ Until that happens, however, BPA finds that it is premature to earmark financial reserves for these yet-to-be-defined obligations when the focus of the RDC rate mechanism is to use the eligible funds to "[invest] back into the business or distributed as rate reductions."¹⁸⁰

One commenter also asks BPA to consider funding specific projects with the funds it has earmarked for fish and wildlife maintenance, and requests an analysis on whether the amount set aside is "sufficient."¹⁸¹ BPA appreciates the suggestions, and will consider the projects it believes appropriate through its normal contracting and evaluation process.

5. *Expand scope of RDC Uses*

Several commenters argue that the RDC is an opportunity for a broader range of fish and wildlife mitigation investments than what BPA staff has proposed, and that BPA should accordingly expand the scope of eligible fish and wildlife uses for the RDC. Commenters argue that BPA should use the RDC Amount to make up for flat funding, to expand existing projects, to fund

¹⁷⁶ ICL Comments at 2-3; NWF Plaintiffs Comments at 3.

¹⁷⁷ BPA does not agree or concede that inclusion of a measure, recommendation, or any other provision in the Council's Program amounts to a *de facto* mitigation obligation for BPA. See Bonneville Power Administration, Comments on Draft 2020 Addendum to the Columbia River Basin Fish and Wildlife Program at 4-9 (Oct. 18, 2019) available at <https://app.nwcouncil.org/uploads/2018amend/comments/1341/Final%20Bonneville%20Comments%20on%20Draft%20Council%20Addendum%202019.10.18.pdf>; see generally Bonneville Power Administration, Comments on Revised Part One of the 2020 Addendum to the Columbia River Basin Fish and Wildlife Program (June 22, 2020) available at <https://app.nwcouncil.org/uploads/2018amend/comments/1392/Final%20Council%20Addendum%20Pt%201%20Cover%20Ltr%20and%20Comments%202020.06.22.pdf>; see also Columbia River System Operations (CRSO) Environmental Impact Statement (EIS) Record of Decision (ROD) at 50-52, available at <https://www.nwd.usace.army.mil/CRSO/>.

¹⁷⁸ BP-24 IPR Closeout Report at 15; see also *id.* at 14 (describing efforts BPA has initiated with the Spokane Tribe of Indians in response to Council Program provisions regarding increased mitigation in the Upper Columbia).

¹⁷⁹ See BP-22 ROD at 35.

¹⁸⁰ BP-18 ROD, Appendix A at A-1.

¹⁸¹ Kootenai Tribe of Idaho Comments at 1.

new projects, and to address mitigation beyond maintenance and upgrades, even if doing so means higher ongoing fish and wildlife program expenses.¹⁸² Commenters request funding for certain projects, or assert projects could be readily identified.¹⁸³

BPA finds that the use of a portion of the RDC Amount on fish and wildlife asset management—such as hatcheries—is sound for several reasons.

To begin, the fish and wildlife use that BPA proposes with this RDC (*e.g.*, hatchery maintenance) is directly responsive to and in alignment with numerous requests that fish managers (including many of the commenters here) have repeatedly brought to BPA’s attention over the last several years and in various forums. For example, in urging BPA to increase its investments in asset management, the Yakama Nation recently emphasized the importance of timely responsiveness to the maintenance needs of fish screens and hatcheries:

Hatchery and Screen maintenance are crucial to mitigating for on-going fish abundance losses from the configuration and operation of the hydrosystem, and those losses bear directly on treaty fishing rights and the well-being of tribal people in real time. The longer the maintenance is deferred, the greater is the loss, and the expenses to be included in the IPR must include the expediting of these maintenance actions.¹⁸⁴

BPA has received similar requests to address growing hatchery maintenance needs from other entities, including the Council and the Lower Snake River Compensation Plan hatchery operators.¹⁸⁵

Also, BPA finds it sensible to ensure that the needs of existing mitigation infrastructure—the product of past F&W Program mitigation investments—are provided for before deciding to further expand the mitigation effort and add new mitigation assets.

¹⁸² ICL Comments at 2-4; Coeur d’Alene Tribe Comments at 1-2; CTUIR Comments at 1-2, 4; WDFW Comments at 1.

¹⁸³ Nez Perce Comments at 1, Attachment B; Kootenai Tribe of Idaho Comments at 1; CTUIR Comments at 2; Yakama Nation Comments at 1; WDFW Comments at 1; NWF Plaintiffs Comments.

¹⁸⁴ Yakama Nation Comments on BP-24 Integrated Program Review, at 5 (June 25, 2022), *available at* <https://publiccomments.bpa.gov/CommentList.aspx?ID=440>.

¹⁸⁵ *See* Northwest Power and Conservation Council, Decision on Anadromous Fish Habitat and Hatchery Project Review, at 11–12 (Apr. 5, 2022) (“Bonneville should establish a systematic approach to provide for sufficient funds that support the Asset Management Strategic Plan for non-recurring maintenance needs and adequate annual preventive maintenance support for Program investments associated with fish screens, lands and hatcheries. Doing so will ensure the integrity of the Program’s past investments is maintained and that investments are able to continue to deliver their intended benefit to fish and wildlife over time.”) *available at* https://www.nwcouncil.org/fs/17709/2022_04_4.pdf; Lower Snake River Compensation Plan Presentation to Northwest Power and Conservation Council (July 14, 2020), (seeking support for “obtaining adequate funding for non-routine maintenance of LSRCP facilities beginning with 2022-23”) *available at* https://www.nwcouncil.org/sites/default/files/2020_0714_f1.pdf; *see also* Letter from U.S. v. Oregon Policy Committee to BPA, Bureau of Reclamation, and Corps of Engineers (Feb. 13, 2020) (requesting BPA and other agencies’ participation in a hatchery operations, maintenance, and modernization forum to address needed upgrades, repairs, and maintenance) (on file with BPA).

Similarly, rather than using a single year's strong revenue returns to create new projects or mitigation efforts with a potential to go on indefinitely, BPA finds it prudent to address one-time non-recurring costs (such as facility maintenance) with one-time funds that are not guaranteed to materialize on a recurring basis. In addition, the cost of these actions is likely to be greater in the future, so it makes good sense as a matter of sound business practice to address some of those needs with cash that is available at this time rather than waiting until needed repairs become more extensive and potentially arise at a time when cash-on-hand is more limited.

In addition, maintenance of existing fish and wildlife mitigation assets from past investment is rated as the top "emerging priority" in the Council Program, as discussed further in section 4.2.6 (Northwest Power Act Section 4(h)(10)(A)).

The Coeur d'Alene Tribe states that there is no reason for limiting funding to maintenance of hatchery projects only, and believes that BPA should use the RDC as an opportunity to "reduce [BPA's] litigation risk and liability" from claims the Coeur d'Alene Tribe has brought in a lawsuit by setting aside the RDC to fund fish and wildlife actions as a part of litigation settlement. The United States Government, including BPA, is in current discussions with the Coeur d'Alene Tribe and others to explore a long-term solution for issues raised in that litigation; while the specific outcome or actions that will result from these discussions are still under development, BPA does not see a need to hold the RDC funding aside to address such potential actions before they are known and agreed upon. BPA understands that these discussions may result in costs that BPA will need to recover, and that doing so would require the agency to make funding available.

6. *Augment Fish Accord Funding*

The Yakama Nation calls on BPA to use a portion of the RDC amount to "provid[e] true inflationary adjustments for Yakama Nation's existing Fish Accord projects, and support[] new fisheries restoration work . . ." ¹⁸⁶ Yakama Nation cites the Fish Accord commitments, which provides that "in the case of strengthening Bonneville financial circumstances and in recognition of [historical] budget reductions agreed to by the Treaty Tribes [in 2018] . . . the Treaty Tribes may call on Bonneville to voluntarily increase funding or expenditures," and asserts that, in response to its request, "BPA provided nominal inflationary adjustments that were not commensurate with actual and projected inflation rates, and refused to fund new Yakama Nation fisheries projects . . ." ¹⁸⁷

Budgets for BPA-funded fish and wildlife projects—including those for the Yakama Nation's Fish Accord projects—are the result of bilateral negotiations with the entities that implement the projects. The projects and associated budgets for upcoming fiscal years were the subject of recent Fish Accord negotiations with the Yakama Nation--BPA and the Yakama Nation reached agreement on Fish Accord projects and budgets a few short months ago. Those budgets more than made up for the historical budget reductions referenced in the Yakama Nation's comment here. They also included increases for inflation, limited in part by unspent funds from prior years of the Fish Accord agreement, which remain available for expenditure. These factors

¹⁸⁶ Yakama Nation Comments at 2.

¹⁸⁷ *Id.*

informing the propriety of further inflation increases continue to be relevant now as they were in recent budget negotiations. And given that final execution of this Fish Accord agreement is still pending and under consideration with some of the prospective signatories, BPA finds no reason to reopen Fish Accord budget negotiations—that only recently concluded—as part of this RDC decision.

Budgeting for fish and wildlife projects is a matter ultimately to be addressed between BPA and the project implementer through the BPA F&W Program’s annual start-of-year budget/contracting procedures, and in accordance with budget rules negotiated in any applicable agreements, such as the Fish Accord agreement. Budget adjustments or requests for increases should be discussed and considered through those processes and by the parties’ appropriate points-of-contact and subject-matter experts.

7. Reconsider strategic plan / cost management goals

Some commenters continue to disagree with BPA’s 2018 Strategic Plan cost management goal, and assert that the agency’s recent revenue levels suggest that the relevance or importance of such cost management goals is now diminished.¹⁸⁸

The BP-24 IPR Closeout Report explained that BPA’s attempt to adhere to cost management goals, consistent with its Strategic Plan, does not supersede its obligations to mitigate for the impacts of the FCRPS on fish and wildlife.¹⁸⁹ Notably, BPA’s BP-24 IPR cost forecast for fish and wildlife mitigation increased by 8.7 percent.¹⁹⁰ The inflation rates BPA used for its programmatic costs ranged from approximately 2.5 percent to 4.4 percent. The existence of a cost management goal does not require BPA to hold additional financial reserves in expectation that actual costs will exceed forecasts.

8. Address Concerns Related to Equity

Several comments raised questions or concerns about equity in the use of RDC funds, either as to the proportion that fish and wildlife would receive as compared to other uses, or with respect to which entities would receive fish and wildlife funding from the RDC, or both. While some of these comments cite to the “equitable treatment” provision of the Northwest Power Act, 16 U.S.C. § 839b(h)(11)(A)(i), others raise more general equity concerns. The equitable treatment provision is a specific statutory duty that BPA discusses in a separate section, below.¹⁹¹ This subsection addresses the more general comments concerning equity.

For example, the Coeur d’Alene Tribe’s comment letter asserts the Tribe’s entitlement to an equitable portion of mitigation funding and suggests that BPA owes mitigation for negative impacts to the Tribe.¹⁹² BPA notes, however, that its legal mitigation duty under the Northwest

¹⁸⁸ See, e.g., ICL Comments at 1-3, 5; Spokane Tribe of Indians Comments at 1; CTUIR Comments at 2; WDFW Comments at 1.

¹⁸⁹ BP-24 IPR Closeout Report at 12.

¹⁹⁰ *Id.* at i.

¹⁹¹ See Section 4.2.5 (Northwest Power Act Section 4(h)(11)(A)).

¹⁹² Coeur d’Alene Tribe Comments at 1.

Power Act is owed to fish and wildlife affected by development and operation of federal hydropower facilities in the Columbia River basin, not to any particular region, political entity, or community.¹⁹³ Nonetheless, BPA appreciates that the Tribe’s comment letter acknowledges the recent and ongoing progress between BPA and the Tribe to find new opportunities to address fish and wildlife mitigation in a way that advances the Tribe’s priorities and interests. BPA looks forward to continued efforts on this front.

Similarly, the Spokane Tribe of Indians’ comment states that “Bonneville’s trust responsibility and the Biden Administration’s focus on environmental justice demand a different outcome on the use of [RDC] funds”—namely a greater investment in expanded fish and wildlife mitigation in the Upper Columbia region, as well as investment in efforts to reintroduce salmon to the Upper Columbia region blocked by Grand Coulee and Chief Joseph dams.¹⁹⁴ BPA recognizes that this is a matter of great importance for the Tribe. BPA further acknowledges its general trust responsibility as part of the federal government, and is currently engaged in ongoing discussions, alongside other elements of the United States Government with the Tribe and others, to explore the actions that the Tribe’s comment recommends. The RDC proposal does not limit BPA’s continued participation in those discussions nor prejudge any outcome from those discussions. However, BPA notes that the statutes BPA administers do not create a specific trust responsibility to undertake the specific actions recommended by the Tribe’s comment.

4.2.5 Northwest Power Act Section 4(h)(11)(A)

Public Comments

A number of comments contend that BPA’s implementation of the FY 2022 Power RDC is inconsistent with sections 4(h)(11)(A)(i) and (ii) of the Northwest Power Act. ICL argues BPA must provide “equitable treatment” for fish and wildlife and must also take into account “the Council’s Fish and Wildlife Program ‘to the fullest extent practicable’” when making decisions that affect implementation of the Program.¹⁹⁵ ICL contends that rate implementation decisions, such as how to repurpose the FY 2022 Power RDC Amount, trigger these requirements, with which BPA has not complied. NWF Plaintiffs make a similar comment, stating BPA’s proposed use of the FY 2022 Power RDC fails to meet “substantive and procedural requirements” of section 4(h)(11)(A).¹⁹⁶ Another commenter, Yakama Nation, states “the equitable treatment and consistency principles of the Northwest Power Act support an equitable RDC distribution for fisheries mitigation needs.”¹⁹⁷ The Nez Perce Tribe comments that BPA “has authority and discretion, individually and certainly as an agency of the United States, to treat fish and wildlife . . . equitably—which a 10 percent allocation plainly is not—and should do so now.”¹⁹⁸

¹⁹³ See 16 U.S.C. § 839b(h)(10)(A); see also BP-24 IPR Closeout Report at 16 n.10.

¹⁹⁴ Spokane Tribe of Indians Comments at 1.

¹⁹⁵ ICL Comments at 4.

¹⁹⁶ NWF Plaintiffs Comments at 3.

¹⁹⁷ Yakama Nation Comments at 1.

¹⁹⁸ Nez Perce Comments at 1.

Evaluation of Comments and Response

As BPA explained in the BP-22 Administrator’s Record of Decision, the “equitable treatment” requirement of § 4(h)(11)(A)(i) and the considerations called for in § 4(h)(11)(A)(ii) apply to the “operation” and “management” of the Federal hydroelectric facilities.¹⁹⁹ These provisions do not apply to rate decisions or funding for fish and wildlife programs. BPA’s FY 2022 Power RDC decision implements a rate mechanism that addresses whether and how to repurpose financial reserves and does not impact the operations or management of the Federal system. This decision, therefore, does not implicate sections 4(h)(11)(A)(i) or (ii).

Moreover, even if those statutory provisions applied here, BPA’s implementation of the Power RDC would satisfy their requirements. First, in relation to section 4(h)(11)(A)(i) and “equitable treatment,” BPA’s Power RDC decision repurposes financial reserves to certain fish and wildlife projects. Fish and wildlife is the *only* class of programmatic spending afforded funds from the Power RDC Amount.²⁰⁰ As described earlier, secondary revenues are a type of revenue that is normally allocated to power rates as a rate credit,²⁰¹ and the RDC expressly contemplates returning such revenues back to customers.²⁰² Accordingly, it would have been wholly consistent with the provisions and purpose of the Power RDC to return all of the funds as a power rate reductions.²⁰³ Moreover, BPA has multiple other programs that it funds that may have been eligible for additional funding through the RDC funds, but BPA did not propose to increase, and is not increasing, funding for these programs.²⁰⁴ Nevertheless, BPA exercised its discretion under the RDC to provide accelerated funding only for its fish and wildlife program.²⁰⁵ BPA finds that this proposal shows fish and wildlife are being treated in a manner that is “equitable” when compared to other programmatic spending, and therefore, would satisfy section 4(h)(11)(A)(i) if it applied.

Second, in regards to section 4(h)(11)(A)(ii), the RDC decision reflects BPA’s appropriate consideration of the Council’s Program and its top emerging priority.²⁰⁶ Also, the example cited

¹⁹⁹ See BP-22 ROD, Chapter 4; *see also* BPA’s filings in the case of *Idaho Conservation League v. Bonneville Power Admin.*, No. 22-70122 (9th Cir.).

²⁰⁰ Even if the equitable treatment duty applies in the context of funding, BPA is not convinced that “equitable treatment” means an equal financial share that would require the use of the RDC funds must be “equally” applied to fish and wildlife when compared to other uses. Some commenters appear to agree with this interpretation. *See* ICL Comments at 6 (noting BPA should provide no rate relief with the Power RDC and instead “devote the entire \$500 million Power RDC amount to fish and wildlife mitigation efforts.”).

²⁰¹ *See* 16 U.S.C. § 839e(g).

²⁰² *See* BP-22 Power GRSP II.P.

²⁰³ Which, in fact, BPA did when implementing the Power RDC in FY 2021. *See* Section 2.4 (Implementation of the Financial Reserves Policy).

²⁰⁴ *See* Section 4.2.3 (Conservation Funding).

²⁰⁵ The \$50 million from the Power RDC will be included BPA’s budget levels submittals to Congress, which, as BPA has noted in other forums, *see* BP-22 ROD at 57, is subject to the federal budgetary review process. While BPA expects these amounts not to change, BPA’s RDC decision for fish and wildlife does not override Congress’s authority to revise BPA’s proposed spending. Further, the \$50 million “set aside” in this process does not finally determine the programs or recipients of these funds. Final decisions on funding will occur through the contracting process that BPA must undergo when choosing contractors, vendors, and other partners who implement BPA’s fish and wildlife program.

²⁰⁶ *See* Section 4.2.6 (Northwest Power Act Section 4(h)(10)(A)).

by the commenter (“finally heed[ing] the Council’s call to ‘increase substantially the mitigation implementation’ above Grand Coulee and Chief Joseph dams”)²⁰⁷ is underway with the Tribes that implement mitigation work in that area—namely Spokane Tribe of Indians and Coeur d’Alene Tribe. The fact that that particular provision of the Program is being addressed through processes other than the RDC rate mechanism does not mean it must also be addressed through the RDC. Indeed, the upper Columbia mitigation effort demonstrates how selection of appropriate fish and wildlife mitigation actions is an iterative process between BPA’s program staff and the implementing entities. Those processes, rather than rate processes such as the RDC, are better designed or equipped to provide that sort of policy decision or implementation direction.

The FY 2022 Power RDC Does Not Significantly Impact to Fish and Wildlife

“BPA’s duty to demonstrate compliance with the mandate [of equitable treatment] matures only when BPA makes a final decision that significantly impacts fish and wildlife.”²⁰⁸ BPA disagrees that this FY 2022 Power RDC decision “significantly impacts” fish and wildlife

First, as explained above, the only decision being made in the FY 2022 Power RDC decision in relation to fish and wildlife is how to repurpose financial reserves for future use subject to the criteria described above. Specifically, the FY 2022 Power RDC decision provides that BPA will set aside 10 percent (\$50 million) of the eligible financial reserves as “Reserves Not For Risk,” meaning it is held in the BPA fund but earmarked as not available to be used for general risk mitigation needs. This is an action that holds financial reserves for future use consistent with the criteria in the RDC decision; this action, however, does not result in any changes to the operation or management of the federal hydroelectric facilities. In this way, the FY 2022 Power RDC does not “significantly impact” fish and wildlife because it does not affect the operation or management of the federal hydroelectric facilities.

Second, commenters suggest that BPA’s decision “significantly impacts” fish and wildlife because BPA could have spent *more* of the Power RDC for its fish and wildlife program, and chose not to. As one commenter puts it: whether BPA decides to spend “\$50 million, or \$5 million, or \$0, or \$500 million of the RDC amount on fish and wildlife mitigation will have a ‘[significant] impact’ on fish and wildlife, triggering BPA’s duty to show equitable treatment.”²⁰⁹ In other words, these commenters apply an “opportunity cost” theory to section 4(h)(11)(A)(i): any decision to spend money on anything *other than* fish and wildlife also “significantly impacts” fish and wildlife because those funds *could have* been spent on fish and wildlife, but were not.

This interpretation would lead to the unreasonable result that virtually every financial decision BPA makes would need to be evaluated for compliance with “equitable treatment.” Every day,

²⁰⁷ ICL Comments at 5 (referring to the Northwest Power and Conservation Council, Columbia River Basin Fish and Wildlife Program 2014, 2020 Addendum at 38-39 (Oct. 20, 2020), available at https://www.nwcouncil.org/media/filer_public/2e/0b/2e0b888c-8854-4495-ba0d-fa19e5667676/2020-9.pdf)

²⁰⁸ *Confederated Tribes of Umatilla Indian Rsrv. v. Bonneville Power Admin.*, 342 F.3d 924, 931 (9th Cir. 2003).

²⁰⁹ ICL Comments at 4.

BPA is faced with financial choices, many of which involve millions of dollars. These choices span the spectrum of business decisions, from deciding whether to make a long-term power purchase, to whether to purchase equipment now or later, to whether to hire new employees. Congress recognized the need for the Administrator to have flexibility to make these choices efficiently and in a sound, business-like manner, and therefore, afforded the Administrator substantial discretion.²¹⁰

Under commenters' interpretation, the discretion afforded the Administrator to perform these duties in a business-like fashion would be all but lost as the mere presence of a financial choice would "significantly impact" fish and wildlife, triggering an "equitable treatment" review. This outcome would exist because BPA *could* always choose to forego its current priorities (whether it be hiring additional employees, building a new turbine, upgrading old facilities, paying down debt, or providing a rate reduction) in favor of additional fish and wildlife funding. The end result would be that *every* business and financial choice before BPA would need to be evaluated under "equitable treatment," paralyzing BPA's financial and business decisions. BPA finds no support in its statutes, legislative history, or any case law for this outcome.²¹¹

Citing to a few words selectively and narrowly excerpted from a 12-year-old BPA document, one commenter argues that the equitable treatment mandate of the Northwest Power Act imposes a "standard" that requires BPA to provide "'financial certainty for fish and wildlife' on par with the certainty afforded to other hydrosystem purposes."²¹² The full context of the discussion of

²¹⁰ See, e.g., Bonneville Project Act § 2(f), 16 U.S.C. § 832a(f) (2020) (providing Administrator broad authority and discretion to contract and make settlements upon "such terms and conditions and in such manner as he may deem necessary"); Transmission System Act, 16 U.S.C. § 838g (noting BPA must set rates "at the lowest possible rates to consumers consistent with sound business principles. . ."); Northwest Power Act, § 9(b), 16 U.S.C. § 839f(b) (2020) (noting "the Secretary of Energy, the Council, and the Administrator shall take such steps as are necessary to assure the timely implementation of this chapter in a sound and business-like manner."); *Ass'n of Pub. Agency Customers v. Bonneville Power Admin.*, 126 F.3d 1158, 1171 (9th Cir. 1997) ("The statutes governing BPA's operations are permeated with references to the 'sound business principles' Congress desired the Administrator to use in discharging his duties."). Legislative history confirms this discretion:

'[The] legislative history [of the statutes governing BPA's operations] reflects a congressional recognition of the significant role played by BPA in the Pacific Northwest, and an effort to enable this organization to operate in a businesslike fashion and to free it from the requirements and restrictions ordinarily applicable to the conduct of Government business. The transfer of the functions of BPA from the Department of the Interior to the Department of Energy is not intended to diminish in any way the authority or flexibility which is a requisite to the efficient management of a utility business.'

S. Rep. No. 164, 95th Cong., 1st Sess. 30 (1977), *reprinted in* 1977 U.S.C.C.A.N. 854, 883.

²¹¹ Indeed, even when the equitable treatment mandate applies, the Ninth Circuit's precedent makes clear that the standard is not to be used in the paralyzing manner commenters here suggest. In *Confed. Tribes of the Umatilla Indian Reservation v. Bonneville Power Admin.*, 342 F.3d 924, 931 (9th Cir. 2003) the court stated: "The equitable mandate of 16 U.S.C. § 839b(h)(11)(A)(i) does not require every BPA decision to treat fish and wildlife equitably. For example, BPA may make some decisions that place power above fish, so long as on the whole, it treats fish on par with power. In other words, even if [the challenged action] disadvantages fish, Petitioners must show much more. They must show that, overall, BPA treats fish second to power." (internal citations omitted).

²¹² ICL Comments at 5 (quoting BPA's Willamette River Basin Memorandum of Agreement Regarding Wildlife Habitat Protection and Enhancement Record of Decision at 24 (Oct. 22, 2010)).

equitable treatment in that prior document shows that the commenter has over-read this statement:

The MOA Supports Equitable Treatment for Fish and Wildlife

The Northwest Power Act requires that BPA exercise its FCRPS management responsibilities “in a manner that provides equitable treatment for . . . fish and wildlife with the other purposes for which such system and facilities are managed and operated.” The Council describes equitable treatment as “meet[ing] the needs of salmon with a level of certainty comparable to that accorded the other operational purposes.” Historically, BPA and the other Action Agencies have provided equitable treatment on a system-wide basis by operating the FCRPS consistent with the operational guidelines in the Council’s Fish and Wildlife Program and relevant Biological Opinions. The MOA supports BPA’s commitments in the Willamette biological opinions by incorporating an Action Agencies’ plan for implementing RPA 7.1.3. In addition, the MOA accounts for 1000 acres of operational impacts to wildlife from the Willamette dams, and provides funding for mitigation of those impacts. Overall, power production from the Willamette dams is not a dominant purpose compared to the dams’ flood control, recreation, and fish and wildlife purposes, and flood control is the Corps’ operational priority over power production. Consequently, the MOA in combination with the Willamette BiOps provides a higher level of financial certainty for fish and wildlife, further solidifying BPA’s efforts to manage the FCRPS equitably for wildlife and power.²¹³

As the full section of that document shows, BPA’s consideration of equitable treatment was in regards to “operational” purposes and guidelines—that is, how the hydroelectric dam facilities are operated to provide balanced benefits for fish. Separate efforts to fund habitat protection work—the subject of the cited agreement—can naturally complement and bolster (*i.e.*, “support” or help to “further solidify”) the equitable treatment actions provided by operation and management of the dams. The equitable treatment provision of Northwest Power Act § 4(h)(11)(A) does not, however, include a “standard” to provide financial certainty for fish and wildlife.

4.2.6 Northwest Power Act Section 4(h)(10)(A)

Public Comments

ICL argues “BPA’s FY2022 RDC proposal does not comply with § 4(h)(10)(A) of the [Northwest Power] Act, which requires that BPA’s actions be ‘consistent with’ the Council’s

²¹³ Bonneville Power Administration, Administrator’s Record of Decision, Willamette River Basin Memorandum of Agreement Regarding Wildlife Habitat Protection and Enhancement Between the State of Oregon and the Bonneville Power Administration at 23–24 (Oct. 22, 2010), available at <https://www.bpa.gov/-/media/Aep/about/publications/records-of-decision/2010-rod/rod102210final.pdf> (citations omitted).

Fish and Wildlife Program.”²¹⁴ ICL asserts the proposal is inconsistent with the Program because the proposal does not (1) mitigate for losses above Grand Coulee and Chief Joseph dams or (2) fund other “emerging priorities.”²¹⁵

Evaluation of Comments and Responses

Generally, BPA does not find it necessary to consider whether implementation of a power rate mechanism—such as this RDC—comports with the Northwest Power Act § 4(h)(10)(A) requirement for BPA to protect, mitigate, and enhance fish and wildlife in a manner consistent with the Council’s fish and wildlife program. Rate mechanisms are not the means by which BPA conducts its fish and wildlife mitigation. That is, a rate action (in this case, designating an amount of financial reserves as available for specified future uses) does not implement fish and wildlife mitigation measures. However, regardless of whether § 4(h)(10)(A) applies here, because this topic was raised in comments, and given that BPA’s RDC proposal would set aside funds for eventual use on actions related to fish and wildlife mitigation, BPA offers the following discussion of the RDC proposal in light of the comment’s assertion under § 4(h)(10)(A).²¹⁶

ICL gives two reasons for its position that BPA’s RDC proposal is inconsistent with the Council’s Fish and Wildlife Program:

- the proposal ignores the Program’s requirement that BPA “[i]mplement a broad suite of actions to mitigate for the complete loss of anadromous fish and the losses to other fish and wildlife species in the Lake Roosevelt and Spokane River areas above Grand Coulee and Chief Joseph dams”; and
- the proposal does not help BPA fund other “emerging priorities” in the Program, such as expanded predator management, additional sturgeon and lamprey measures, and improvement of floodplain habitats.²¹⁷

BPA has considerable discretion to determine how it will follow the Council Program’s guidance. The Council’s Program does not establish “requirements” for BPA.²¹⁸ Under section 4(h)(10)(A) of the Northwest Power Act, BPA has a general duty to protect, mitigate, enhance fish and wildlife “in a manner consistent with” the Program. In addition, under the statute, the Council’s Program is to consist of “measures”—not requirements—and BPA’s duties with respect to those measures are framed in terms of “consistency” and Council

²¹⁴ ICL Comments at 5.

²¹⁵ *Id.* at 5-6.

²¹⁶ Although providing this discussion and evaluation in response to comments, BPA does not concede that rate mechanisms—such as the RDC—or their implementation are subject to the Northwest Power Act § 4(h)(10)(A) requirement that BPA to protect, mitigate, and enhance fish and wildlife in a manner consistent with the Council’s fish and wildlife program, the Council’s power plan, and the purposes of the Act. BPA doubts that rate mechanisms are subject, or even amenable, to this provision, for the reasons noted in the text accompanying this footnote, at a minimum. Regardless, because the discussion *infra* shows that the RDC proposal is consistent with the Council’s Program, there is no need to discuss this theoretical issue further.

²¹⁷ ICL Comments at 5–6.

²¹⁸ *See id.*

“recommendations.”²¹⁹ As the U.S. Court of Appeals for the Ninth Circuit has explained, the Council’s authority “with respect to fish and wildlife measures is constrained; the Council can guide, but not command, federal river management.”²²⁰ “[I]n the end [BPA] has final authority to determine its own decisions.”²²¹

Regardless, the category of fish and wildlife mitigation actions that BPA proposes to undertake with financial reserves repurposed under the RDC (e.g., hatchery maintenance) is consistent with relevant content in the Council’s Program.

The Council’s 2014 Program established as its top “emerging priority” the “maintenance of the assets that have been created by prior program investments.”²²² In its “investment strategy,” the 2014 Program described the history of “substantial investment by the ratepayers of the Northwest and the nation’s citizens”:

For example, over the last three decades Bonneville and the other program implementers have made substantial investments in a wide variety of physical structures [e.g., fish hatcheries and related facilities²²³] and land acquisitions to benefit fish and wildlife.²²⁴

In the 2014 Program, the Council also observed that “[t]here is a growing need throughout the Columbia River Basin to protect or upgrade these investments as facilities age or become obsolete, structural standards change, and extreme-event damages accumulate.”²²⁵ The Council reaffirmed the asset management priority in its 2020 Addendum to the Program.²²⁶ In addition,

²¹⁹ See, e.g., 16 U.S.C. § 839b(h)(10)(A) (2020); *id.* § 4(h)(10)(D).

²²⁰ *Nw. Res. Info. Ctr., Inc. v. Nw. Power Planning Council (NRIC 1994)* 35 F.3d 1371, 1378-79 (9th Cir. 1994) (citing 16 U.S.C. §§ 839b(h)(10), 839b(i), 839b(j)).

²²¹ *Nw. Res. Info. Ctr. v. Nat’l Marine Fisheries Serv.*, 25 F.3d 872, 874 (9th Cir. 1994).

²²² Northwest Power and Conservation Council, Columbia River Fish and Wildlife Program 2014 at 116 (Oct. 2014), available at https://nwcouncil.org/sites/default/files/2014-12_1.pdf (“2014 Program”).

²²³ See *id.* at 323 (“The Council received a coordinated set of recommendations from fish and wildlife agencies and tribes recommending that the Council ensure that adequate long term funding for operation and maintenance be available for fish screens, hatcheries, wildlife area management plans, and other major program investments and capital improvements for resident and anadromous fish.”).

²²⁴ *Id.* at 114.

²²⁵ *Id.* In general, BPA does not agree that it has a duty to adhere to all policies, goals, or strategies—such as the “investment strategy”—that the Council includes in the F&W Program to the extent that such provisions are extraneous to the fish and wildlife mitigation “measures” that the Northwest Power Act envisions as actionable Program content. See generally 16 U.S.C. § 839b(h)(2)-(8) (2020); see Bonneville Power Administration, Comments on Draft 2020 Addendum to the Columbia River Basin Fish and Wildlife Program at 8–9; see also CRSO EIS ROD at 50-52. This is particularly true for Program provisions that purport to direct the use of federal budgets, contracting, or other similar matters where authority properly belongs to BPA, not the Council. However, while not binding on BPA, BPA does review and at times agrees with the suggested guidance in such Program provisions. That is the case here, where BPA finds the asset management focus of the Council’s investment strategy to be prudent. Thus, BPA discusses it here to demonstrate its awareness of the provision and show that BPA’s proposal to use RDC funding for maintenance of fish and wildlife mitigation assets is in alignment; this does not, however, suggest that BPA has a legal duty to comply or act consistent with content in the Council’s Program that does not adhere to statutory process, standards, or scope. See, e.g., 16 U.S.C. § 839b(h)(2)-(8) (2020).

²²⁶ See Northwest Power and Conservation Council, Columbia River Basin Fish and Wildlife Program 2014, 2020 Addendum at 37, 44 (Oct. 20, 2020) (discussing ongoing importance of “an asset management strategy to preserve

the Council’s latest Anadromous Fish Habitat and Hatchery project review resulted in the following recommendation to BPA: “provide for sufficient funds that support . . . non-recurring maintenance needs and adequate annual preventive maintenance support for Program investments associated with fish screens, lands and hatcheries . . . [to] ensure the integrity of the Program’s past investments is maintained and that investments are able to continue to deliver their intended benefit to fish and wildlife over time.”²²⁷ Thus, the priority need for maintenance of existing infrastructure (such as hatcheries) from past mitigation investments in the Council’s Program is emphatic. BPA’s proposal to use RDC funds for that purpose is consistent with this recommendation.

In fact, BPA’s RDC decision provides a robust near-term infusion of funding for this need. In recent years, aside from asset maintenance that was planned for specific facilities through the statements of work in their annual contracts, the general asset management funding that BPA set aside for F&W Program facilities was approximately \$500,000. In response to the Program’s asset management emphasis and other calls for increased effort in this area, BPA has projected an approximately \$2 million per year increase in spending on fish hatchery and fish screen maintenance in the upcoming rate period (fiscal years 2024 and 2025). The additional \$50 million from the RDC for the same purpose is on top of that planned increase, and will enable a significant jump start on such asset management actions.

Other Council processes and comments confirm that BPA’s RDC proposal for hatchery maintenance is consistent with the Council Program. The Council itself commented favorably on BPA’s proposal to use \$50 million of the RDC for maintenance of fish and wildlife mitigation assets, and gave no indication that doing so would somehow amount to an inconsistency with its Program.²²⁸ Members of the Council’s Fish and Wildlife Committee, including the committee Chair, likewise voiced their support for BPA’s proposal during the November 2022 F&W Committee meeting.²²⁹

the benefits to fish and wildlife realized by program investments”), *available at* https://www.nwcouncil.org/media/filer_public/2e/0b/2e0b888c-8854-4495-ba0d-fa19e5667676/2020-9.pdf.

²²⁷ See Decision on Anadromous Fish Habitat and Hatchery Project Review at 11–12.

²²⁸ See Northwest Power and Conservation Council Comments at 1 (citing same asset management Program priorities that BPA noted above).

²²⁹ Audio Recording, Northwest Power and Conservation Council, Fish & Wildlife Committee Meeting, at 16:35–18:05 (Nov. 15, 2022) (16:42 - 17:28 - Chair Allen – “we appreciate that commitment [of proposed RDC funding for assets] . . . This new infusion is going to make a tremendous difference. Appreciate that very much.”; 17:35 - 18:03 Member Norman – “appreciate that . . . that is a high priority . . . a major contribution to fish and wildlife. I know it’s preliminary, it’s a recommendation at this point in time but hopefully . . . it comes to bear . . . certainly needed and I think we can certainly connect the dots in terms of what you get out of those assets for the basin and fish and wildlife in general.”), *available at* <https://nwcouncil.box.com/shared/static/wq19r2wnfs76atfw967albzfd6lz4m7l.mp4>; *see also* Northwest Power and Conservation Council Comments on BP-24 Integrated Program Review at 2, *available at* <https://publiccomments.bpa.gov/CommentList.aspx?ID=440> (expressing appreciation for BPA’s projected increase in asset management during the 2024–25 rate period and emphasizing the importance of protecting the Program’s mitigation investments and assets); Independent Economic Analysis Board, “Long-Term Cost Planning for the Fish and Wildlife Program,” Task No. 211, Document IEAB 2015-1 at 3 (Sept. 12, 2015) (recommending, as top priority, implementation of “an asset management process for the major physical assets of the Fish and Wildlife Program”), *available at* <https://www.nwcouncil.org/reports/long-term-cost-planning-for-the-fish-and-wildlife-program/>. BPA recognizes that the Council’s comment letter on the RDC included a general reminder about additional implementation priorities that the Council continues to support;

The commenters instead focus on two provisions of the Council’s Program that are beyond the scope of RDC’s repurposing financial reserves to fish and wildlife mitigation. On this basis, they argue that BPA’s proposal is “inconsistent” with the Program. This objection is misdirected. That the RDC proposal responds only to some—not *all*—of the Council’s Program does not make the RDC decision in any way “inconsistent” with the Program. It is immaterial that a portion of the RDC Amount has not been earmarked for *other* Council Program elements or measures. That decision by no means suggests that the uses it *has* been set aside for, or the ultimate site-specific decisions, are in any way inconsistent with the Council’s Program. According to the commenter’s logic, any time BPA opts to use an additional increment of funding for fish and wildlife mitigation, that decision is “inconsistent” with the Council’s Program unless it assures that *all* of the Council’s Program—which includes hundreds upon hundreds of “measures”²³⁰—is addressed. This is an illogical and unworkably stringent standard. BPA doubts that Congress could have intended such an impractical requirement with a statutory provision that simply requires BPA to “protect, mitigate, and enhance fish and wildlife . . . in a manner consistent with the [Council’s program]”²³¹

BPA does not claim that its RDC decision is meant to address all of BPA’s fish and wildlife funding obligations; clearly BPA does not propose to rely on the RDC to fulfill the entirety of its fish and wildlife mitigation responsibilities, or as the source of funding for the full suite of its mitigation projects. Those are implemented through annual projects and BPA’s full fish and wildlife mitigation program. A power rate adjustment mechanism such as the RDC would be an odd and cramped context in which to consider BPA’s consistency across that full range. The commenters also ignore that BPA has the option to use RDC funding for hatchery facilities that are not connected to the Council’s Program at all, such as the Lower Snake River Compensation Plan (LSRCP),²³² and thus are not even subject to the Program “consistency” requirement of Section 4(h)(10)(A) of the Northwest Power Act.

BPA is aware of these additional Program priorities and will continue to work with the Council and mitigation project implementers to address additional priorities as appropriate.

²³⁰ 2014 Program, Appendix S (Responses to Recommendations and Comments).

²³¹ 16 U.S.C. § 839b(h)(10)(A) (2020).

²³² The LSRCP hatchery facilities were constructed by the U.S. Army Corps of Engineers with congressional appropriations; upon their completion and at the direction of Congress, jurisdiction and control of the facilities passed to the U.S. Fish and Wildlife Service, along with responsibility to administer the LSRCP program. *See* Pub. L. No. 94-587 § 102, 90 Stat. 2917, 2921 (Oct. 22, 1976); Water Resource Development Act of 1986, P.L. 99-662, § 856, 100 Stat. 4082 (Nov. 17, 1986); Chief of Engineers, Lower Snake River Fish and Wildlife Compensation Plan, Washington and Idaho Special Report, 2–3 (Mar. 6, 1985), *available at* <https://www.fws.gov/sites/default/files/documents/Special%20Report.PDF>. BPA is responsible for the “power share” of LSRCP costs, and has discretionary authority to provide funding for such costs directly to the Secretary of the Interior in amounts “that the Bonneville Power Administrator determines to make available” 16 U.S.C. § 839d-1. BPA can also address its power share responsibility for LSRCP by repaying the U.S. Treasury for any congressional appropriations to the USFWS for the LSRCP, in which case BPA recovers the cost of such reimbursements through its power rates after the appropriations are made. *See* Bonneville Power Administration, Integrated Program Review 2, Closeout Report at 10 (Apr. 2021), *available at* <https://www.bpa.gov/-/media/Aep/finance/integrated-program-review/bp-22-ipr/20210430-IPR-Cose-Out-Letter-Report.pdf>.

The commenters also suggest that the Power RDC Amount to be used for fish and wildlife mitigation is insufficient, and relatedly, that by not using more of the Power RDC Amount, BPA is acting inconsistently with section 4(h)(10)(A) because BPA *could* repurpose more of the RDC Amount to implement additional portions of the Council’s Program. This concern is premised on commenters’ unsupported view that BPA is obliged to fund additional fish and wildlife mitigation measures whenever faced with any financial choice. BPA has explained before that the potential to spend more on fish and wildlife mitigation does not translate to a requirement that BPA do so, particularly when the proposed additional expenditure is not mandated by statute and when BPA has found its existing mitigation efforts adequate to satisfy its responsibilities.²³³ BPA finds no support in its statutes, legislative history, or any case law to support commenter’s position, and as discussed above, the nature and purpose of the RDC counsel against such course.

Still, it is true that the proposed uses for the RDC Amount would not make funds available for the specific Council Program provisions that the commenter cites (*i.e.*, increased mitigation in the upper Columbia and “other emerging priorities”). But as explained above, the Council Program does not establish “requirements” for BPA to fund. In addition, BPA is engaged in ongoing discussions with fish and wildlife project managers to consider whether and how to appropriately address these provisions of the Council’s Program. BPA has made progress identifying and providing for some such additional actions through the normal course of business with these entities. Addressing these provisions with or through the RDC process is not necessary.

More importantly though, BPA’s duty for “consistency with” the Council’s Program is best understood as a requirement for consistency across the totality of fish and wildlife mitigation that BPA funds.²³⁴ BPA’s duty under the Northwest Power Act is not, and cannot be, to implement the full suite of Council Program recommendations in every action BPA takes. Further, satisfying the consistency requirement of Northwest Power Act § 4(h)(10)(A) does not depend on BPA funding each and every action contained within the Council’s Program, which, in the Council’s own estimation, number in the many hundreds, including numerous measures that are inactive, held in reserve, or alternative.²³⁵ Had Congress intended to impose a statutory duty requiring implementation of the entirety of the Council Program, or exactly as stated in the Program, it would have used clear statutory language much more prescriptive than “in a manner consistent with.”²³⁶ Instead, the Ninth Circuit has recognized the flexibility and discretion that

²³³ See BP-22 ROD at 48–49.

²³⁴ Cf. *Nw. Envtl. Def. Ctr v. BPA*, 117 F.3d 1520, 1533 (holding that other of BPA’s fish and wildlife duties under the Northwest Power Act are properly considered “on a system-wide basis”).

²³⁵ 2014 Program at 114 (“The Council’s program contains hundreds of measures at the basinwide, mainstem and subbasin levels.”); *id.* at 108 (noting that some subbasins measures have “not yet been implemented, and stand as a pool of possible measures for implementation in future years.”); *id.* at 112 (“[T]he program is not a vehicle to guarantee funding for a particular project, entity, or individual. The fact that a specific measure is included in the program, even as referenced in a biological opinion or accord, does not by itself constitute a funding obligation....”); see also *id.* at 118–25 (describing Council procedures for pursuing implementation of measures); *id.* at app. S, 300-01 (noting that the Council Program includes “many tools” that can address underlying mitigation).

²³⁶ 16 U.S.C. 839b(h)(10)(A).

the statute provides federal agencies with respect to the advisory guidance of the Council's Program.²³⁷

Finally, the statutory provision that ICL cites to demands a broader view than their comment offers. That is, § 4(h)(10)(A) requires BPA to protect, mitigate, and enhance fish and wildlife in a manner consistent not only with the Council's program, but also with the Council's Power Plan, and—significantly here—the purposes of the Northwest Power Act.²³⁸ Those purposes include assuring the Northwest of an adequate, efficient, economical, and reliable power supply,²³⁹ and incorporate by reference the duties established under other statutes bearing on the Federal Columbia River Power System.²⁴⁰ Among these other statutory duties is the directive to set rates “with a view to encouraging the widest possible diversified use of electric power at the lowest possible rates to consumers consistent with sound business principles.”²⁴¹ As a result, to the extent that § 4(h)(10)(A) may be implicated by this RDC decision, so too are the statutory directives concerned with providing low cost power. Viewed in that context, BPA's RDC proposal is consistent with the broader range of considerations that § 4(h)(10)(A) compels.

4.2.7 *Litigation Stay*

Public Comments

NWF Plaintiffs assert “the uses to which BPA allocates these funds directly impact the future of salmon and steelhead species that are the subject of the *NWF v. NMFS* case and the federal commitments that form the basis for the current stay of that case.”²⁴² They argue staff's proposal “undermines the ‘whole of government’ commitment to develop and implement a comprehensive solution that can restore Columbia and Snake River salmon to healthy abundance.”²⁴³

Nez Perce Tribe argues that “BPA's proposed allocation . . . conflicts with the August 4 Mediation Commitment of the Biden Administration,”²⁴⁴ specifically Commitment 4.²⁴⁵ Nez

²³⁷ See *Nw. Res. Info. Ctr., Inc. v. Nw. Power Planning Council (NRIC 1994)* 35 F.3d 1371, 1378-79 (9th Cir. 1994) (finding that Council's authority “with respect to fish and wildlife measures is constrained; the Council can guide, but not command, federal river management.”) (citing 16 U.S.C. §§ 839b(h)(10), 839b(i), 839b(j)); *Nw. Res. Info. Ctr. v. Nat'l Marine Fisheries Serv.*, 25 F.3d 872, 874 (9th Cir. 1994) (“[I]n the end [BPA] has final authority to determine its own decisions.”).

²³⁸ 16 U.S.C. § 839b(h)(10)(A).

²³⁹ *Id.* § 839(2) (2020).

²⁴⁰ *Id.* § 839b(h)(10)(A) (2020).

²⁴¹ See Transmission System Act § 9, 16 U.S.C. § 838g (2020); see also Flood Control Act § 5, 16 U.S.C. 825s (2020); Northwest Power Act § 7(a), 16 U.S.C. § 839e(f) (2020).

²⁴² NWF Plaintiffs Comments at 1.

²⁴³ *Id.* (citing *NWF v. NMFS*, ECF 2423-2 (Exh. 2)).

²⁴⁴ Nez Perce Tribe Comments at 1.

²⁴⁵ *Id.*, Attachment A at 2 (“The Administration commits to collaborating with sovereigns and other stakeholders and to immediately exploring appropriated or otherwise available short- and long-term funding opportunities and actions identified by Plaintiffs and other regional stakeholders— including addressing unmitigated Tribal needs, avoiding future issues with respect to creating inequities, and actions supporting salmon and other fisheries and fish and

Perce Tribe asserts “BPA has authority and discretion, individually and certainly as an agency of the United States, to treat fish and wildlife and ‘unmitigated Tribal needs’ equitably – which a 10 percent allocation plainly is not – and should do so now.”²⁴⁶

Yakama Nation argues (1) that staff’s proposal “flies in the face of BPA’s commitment to identify short term funding and action opportunities to support fisheries objectives, and demonstrates a lack of commitment to the principles identified in the US Government’s stay agreement;” and (2) that “BPA’s unilateral decision-making process about how surplus revenues would be applied for fish and wildlife mitigation fails to support federal obligations and commitments to work collaboratively with Tribal fisheries co-managers and respect their technical and cultural expertise.”²⁴⁷

Scott Levy of bluefish.org describes the “Stay of Litigation,” and implies BPA’s “surplus revenue is being siphoned away – for an unsubstantiated ‘high-value purpose’ – for no better reason than to assure it is NOT available for the Administration to maintain its commitment to salmon recovery.”²⁴⁸

Evaluation of Comments and Response

BPA appreciates the ongoing participation of the states, Tribes, and other entities in discussions associated with the Columbia River System (CRS) litigation and stay extension. BPA remains committed to supporting the Biden Administration in the development of a durable long-term strategy to restore salmon and other native fish populations; to honoring Federal commitments to Tribal Nations; to delivering affordable and reliable clean power; and to meeting the many resilience needs of stakeholders across the region. Those discussions are occurring in multiple forums, and are designed to address issues related to the status of salmon and steelhead, and the future of these species. As discussed in sections 4.2.2 (General Objections) and 4.2.4 (General Fish and Wildlife Funding), repurposing financial reserves to provide accelerated funding to existing mitigation commitments is an administrative and financial action that supports BPA’s fish and wildlife program while also providing longer-term ratepayer benefits.

BPA has followed the process for the RDC rate mechanism established in the GRSPs in the BP-22 rate case.²⁴⁹ The RDC is subject to a rate schedule provision that establishes a specific process to determine the amount of funds available for the RDC and criteria on the use of those funds. Because of the rate schedule restrictions on both the calculation and use of those funds,

wildlife programs and infrastructure that can be implemented in 2023 and subsequent years. The Administration understands that this commitment will require ensuring adequate funds are available for agreed upon short- and long-term measures. By December 1, 2022, the Administration agrees to identify those short-term funding, operational, and other actions that can be implemented in 2023 based on actual and projected funding available from sources across the federal Departments and Agencies.”)

²⁴⁶ *Id.* at 1.

²⁴⁷ Yakama Nation Comments at 3.

²⁴⁸ Levy Comments at 2.

²⁴⁹ *Cf.* Yakama Nation Comments at 3 (describing the RDC process as “BPA’s unilateral decision-making process”). BPA also delayed its decision in order to fully consider and evaluate the many comments received, and chose to provide this written response to comments.

the use of the RDC Amount falls outside the scope of the discussions associated with the CRS litigation and stay extension.

BPA's rates are set to recover its projected fish and wildlife costs. In the event that additional fish and wildlife mitigation costs arise that are BPA's legal responsibility, BPA would meet those additional obligations through available liquidity, risk adjustment mechanisms, and revenue from rates set in future processes.

4.2.8 Dam Breaching

Public Comments

Grace argues BPA should use the RDC Amount “to breach the four lower Snake River dams” because doing so “is inarguably the highest value purpose in BPA’s realm.”²⁵⁰ Grace asserts breaching will lower power costs, increase grid reliability, make room on the transmission grid for renewable power, eliminate methane from reservoirs, and support salmon recovery.²⁵¹

Scott Levy also advocates that the RDC Amount be made available for lower Snake River dam removal.²⁵² Mr. Levy argues that BPA’s inclusion of depreciation expense in revenue requirements means “[t]he money for LSR breaching is already in BPA’s books.”²⁵³

Evaluation of Comments and Response

As discussed in the Columbia River System Operations Environmental Impact Statement (CRSO EIS), breaching the four lower Snake River dams requires congressional authorization and appropriations as well as additional studies on avoiding or minimizing any potential adverse effects. BPA, the U.S. Army Corps of Engineers, and the Bureau of Reclamation do not have the authority to override decisions of Congress, remove congressionally-authorized purposes, or appropriate Federal monies outside of the decisions outlined in Congressional annual Congressional appropriation bills.²⁵⁴

BPA must also correct Mr. Levy’s understanding of depreciation in relationship to the Lower Snake River dams. BPA includes depreciation in its revenue requirement to recognize the loss of value of its assets as they are used and age. This is a conventional rate making approach that is recognized and accepted by FERC. The funds associated with depreciation are not then held in

²⁵⁰ Grace Comments at 1.

²⁵¹ *Id.*

²⁵² Levy Comments at 1-2.

²⁵³ *Id.*

²⁵⁴ See e.g. CRSO Final EIS, Appendix T, Public Comment Report, Comment 6940 No. 5 at T-1035, Comment 31968 No. 10 at T-1108 (July 2020), available at <https://www.nwd.usace.army.mil/CRSO/Final-EIS/>; see also U.S. Army Corps of Engineers, Engineering Regulation (ER) 1165-2-119 Water Resources Policies and Authorities, Modifications to Completed Projects (Sept. 20, 1982), available at https://www.publications.usace.army.mil/Portals/76/Publications/EngineerRegulations/ER_1165-2-119.pdf; U.S. Army Corps of Engineers, ER 1105-2-100, Appendix G, Section III Post Authorization Changes (June 30, 2004), available at https://www.publications.usace.army.mil/portals/76/publications/engineerregulations/er_1105-2-100.pdf.

an account for future use. “Depreciation” is not the name of a cost-of-removal trust fund intended to be held to pay for the retirement of an asset. Depreciation is associated with the original value of an asset.

The financing of the asset’s retirement is an entirely separate decision. There is regularly a difference between the outstanding debt associated with financing an asset and the accumulated depreciation of that asset, but this does not create one account to somehow fund the other.

In fact, Congress anticipated such differences. BPA’s debt must be repaid within a 50-year period, but the service life over which an asset is retired may be longer than that. Hydro projects, for instance, have a 75-year service life but a 50-year repayment period. This means that the repayment of a \$100 debt would average \$2 per year, but depreciation would only be \$1.33 per year. These are comparative costs, not additive ones. In this case, depreciation alone would not produce sufficient cash to meet BPA’s debt repayment obligation, so BPA would need to produce the additional cash elsewhere, either by raising rates or from depreciation associated with other hydro facilities.

Further, the Grand Coulee Third Powerhouse Act of 1965 ratified the concept of single basin accounting, which focuses on the revenues, expenses, and cash needs of the FCRPS as a whole.²⁵⁵ In other words, the revenues of a single project are not allocated or assigned to the costs of that project. All of the cash generated by including depreciation expense in the revenue requirement is available to meet all of BPA’s cash needs, primarily debt repayment. In this sense, there is no direct association between the depreciation that accrues in one year for a single project with the debt associated with that project that may or may not be repaid in that year.

4.2.9 Procedural Issues Regarding Proposed BP-24 Settlement Package

Public Comments

WPAG and Mason PUD assert that BPA must revisit the decision on the RDC if BPA does not adopt the proposed settlement in the BP-24 rate proceeding.²⁵⁶ Mason PUD states “[o]ur position of supporting BPA’s proposed use of the RDC funds would then change to being non-supportive.”²⁵⁷ WPAG states, if BPA fails to reopen the RDC process, then WPAG’s non-objection should be deemed automatically rescinded, and WPAG’s position would then be that, per Northwest Power Act § 7(g) and the TRM, the entire RDC Amount must be used to reduce rates in FY 2023.²⁵⁸

PNGC and Fall River Rural Electric Cooperative state “that the current BP-24 schedule would cut off customer comments and/or objections to the settlement on Dec 9th, meaning any material

²⁵⁵ See Grand Coulee Dam – Third Powerplant Act, 16 U.S.C. § 835j (2020).

²⁵⁶ WPAG Comments at 2; Mason PUD Comments at 1.

²⁵⁷ Mason PUD Comments at 1.

²⁵⁸ WPAG Comments at 2.

pivot away from the proposed settlement would be procedurally and substantively unreasonable.”²⁵⁹

Evaluation of Comments and Response

The comments about procedural issues primarily focus on the relationship of the RDC decision to the proposed BP-24 Rates Settlement in the BP-24 rate proceeding. As described in the background section, the terms of the proposed settlement of the RDC were part of a larger package that included settlement proposals for the BP-24 rate proceeding and the FY 2024–2025 Average System Cost review process as well. Although this decision to adopt staff’s proposal for the RDC addresses one aspect of that package, the BP-24 rate proceeding is a separate process from the RDC review, and the proposal to adopt the BP-24 Rates Settlement will be addressed in the BP-24 rates proceeding.

Changes to the procedural schedule in the BP-24 rate proceeding have rendered moot the concerns that the deadline for objections to the BP-24 Rates Settlement would fall before BPA’s decision on the RDC.²⁶⁰ The BP-24 Hearing Officer granted requests from BPA and parties in BP-24 to extend that deadline.²⁶¹ That deadline now falls after this decision.

WPAG and Mason PUD urge BPA to revisit and reopen the RDC decision if BPA does not adopt the proposed settlement in the BP-24 proceeding.²⁶² As explained above, the BP-24 rate proceeding is a separate process to address staff’s FY 2024–2025 rate proposals. BPA staff’s proposal is consistent with the package that includes the terms of the proposed BP-24 rates settlement, but that proposal is not at issue in the RDC review process. In addition, the RDC decision is a final agency action that marks the end of the RDC review process. BPA does not intend to revisit this decision in the future. With respect to WPAG’s alternative position in its comments, section 4.2.2 (General Objections) of this document explains that the RDC decision reasonably provides customers a combination of near- and longer-term benefits, consistent with 7(g) and the purpose of the FRP.

²⁵⁹ PNGC Comments at 2; Fall River Rural Elec. Coop. Comments at 3.

²⁶⁰ *See id.*

²⁶¹ *See* Order Extending Deadline for Objections to BP-24 Rates Settlement, BP-24-HOO-06 (Dec. 19, 2022).

²⁶² WPAG Comments at 2; Mason PUD Comments at 1.

5. NATIONAL ENVIRONMENTAL POLICY ACT ANALYSIS

Consistent with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq.*, BPA has assessed the potential environmental effects that could result from repurposing funds under the Power Reserves Distribution Clause (RDC).

Repurposing financial reserves under the Power RDC is administrative and financial in nature and does not require BPA to take any action that would have a potential effect on the environment. The Power RDC would be repurposed for: (1) a dividend distribution to reduce FY 2023 power rates; (2) debt reduction or revenue financing; and (3) addressing non-recurring maintenance needs of existing fish and wildlife mitigation assets.

The individual fish and wildlife needs identified for non-recurring maintenance funding under the Power RDC would be funded under separate contracts or cooperative agreements as actions are identified. When these specific actions are identified, actions would undergo site-specific environmental review, including NEPA analysis, as appropriate.

Repurposing financial reserves under the RDC is purely administrative and financial in nature and does not require BPA to take any action that would have a potential effect on the human environment. The use of funds under the RDC also falls within a class of actions excluded from preparation of an Environmental Assessment or Environmental Impact Statement under NEPA. More specifically, the use of funds under the RDC would be consistent with BPA's Financial Reserves Policy and the BP-22 Rate Proceeding, and any funding towards actions that would impact the physical environment would undergo site-specific environmental review as appropriate. BPA has prepared a categorical exclusion determination memorandum that documents this categorical exclusion from further NEPA review, which is available at BPA's website: <https://www.bpa.gov/learn-and-participate/public-involvement-decisions/categorical-exclusions>.