No. 22-70122

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IDAHO CONSERVATION LEAGUE, *et al.*
Petitioners

v.

BONNEVILLE POWER ADMINISTRATION
Respondent

and

PUBLIC POWER COUNCIL, *et al.*
Intervenors

On Petition for Review
of a Final Decision of the
Bonneville Power Administration

PETITIONERS' OPENING BRIEF

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Petitioners Idaho Conservation League, Great Old Broads for Wilderness, and Idaho Rivers United are non-profit organizations recognized by the IRS as Section 501(c)(3) public charities. None has public shares or corporate parents or affiliates with shares.

Date: October 21, 2022

/s/ Andrew R. Missel

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Petitioners Idaho Conservation League, Great Old Broads for Wilderness, and Idaho Rivers United ask this Court to grant their petition for review and remand the Bonneville Power Administration's ("BPA") BP-22 rate decision for violating the Northwest Power Act, 16 U.S.C. § 839 *et seq.* BPA violated the Act by failing to demonstrate "equitable treatment" for fish and wildlife when it set power and transmission rates for the BP-22 rate period, and it failed to take into account the Northwest Power and Conservation Council's ("Council") Fish and Wildlife Program "to the fullest extent practicable" at any point in the BP-22 ratemaking process.

Under the Northwest Power Act, BPA must fund various mitigation measures that "protect, mitigate, and enhance" fish and wildlife harmed by hydroelectric dams in the Columbia Basin. These mitigation measures—including restoration of salmon spawning habitat, acquisition of replacement habitat for wildlife displaced by dam construction, and research and monitoring programs—are a vital part of the comprehensive approach to fish and wildlife restoration adopted in the Act. BPA funds these mitigation measures with money from sales of power and transmission services at rates it sets during biannual ratemaking processes, such as the BP-22 ratemaking at issue here, which covers fiscal years 2022–2023.

In recent years, in response to financial struggles, BPA has attempted to keep its power and transmission rates low by (in its words) "bending the cost curve." In practice, this has entailed setting hard spending caps for fish and

wildlife mitigation and then asking mitigation project sponsors to make do with less. Predictably, this "flat funding" policy has hampered mitigation efforts, forcing the sponsors of mitigation measures—primarily tribes and state fish and wildlife agencies—to cut back on projects and forgo maintenance.

In setting funding levels for the two-year BP-22 rate period, BPA continued its "flat funding" policy, committing to holding fish and wildlife mitigation spending at the same levels as in the previous rate period despite a need for increased funding. BPA did not revisit this decision even after projecting a huge increase in surplus revenue for the BP-22 rate period. Instead, BPA and its customers cut a deal, with customers receiving a reduction in wholesale power rates and BPA receiving access to a stream of money it could use to pay down its debt. Fish and wildlife got nothing.

When Petitioners objected that the BP-22 rate settlement violated the Northwest Power Act's "equitable treatment" mandate and its "fullest extent practicable" requirement, BPA's response was that those provisions of the Act simply don't apply to BPA's decisions about mitigation funding and rates. In BPA's view, it could decide to spend $0 on mitigation efforts such as habitat restoration and still provide "equitable treatment" for fish and wildlife.

This interpretation of the Act is a convenient one for BPA as it attempts to keep costs down, but it flies in the face of the statute's text, structure, and purpose. As BPA itself has recognized in the past, the "equitable treatment" mandate applies to the agency's decisions about mitigation funding and rates. In the BP-22 rate case, however, BPA ignored the "equitable treatment" mandate

and its separate duty to take the Council's Program into account "to the fullest extent practicable" and continued its flat funding policy, undermining vital mitigation efforts and causing harm to fish and wildlife that Petitioners and their members care deeply about.

Because BPA ignored these two key legal duties in setting its BP-22 rates, its final rate decision must be remanded to the agency. In addition, this Court should order BPA to increase funding for certain mitigation measures to remedy the harm caused by the BP-22 decision.

JURISDICTIONAL STATEMENT

This Court has statutory subject-matter jurisdiction over this petition for review because it was timely filed within 90 days of the date that BPA's rate decision became final. 16 U.S.C. § 839f(e)(5); *Golden Nw. Aluminum, Inc. v. BPA*, 501 F.3d 1037, 1055 (9th Cir. 2007); 2-ER-463–69.

Petitioners have Article III standing. As demonstrated in the declarations filed concurrently with this brief, Petitioners are nonprofit conservation groups concerned about saving imperiled salmon and steelhead in the Pacific Northwest. They and their members face a credible threat of harm to their recreational, aesthetic, scientific, and other interests, especially their interests related to Idaho's salmon and steelhead that are nearing extinction. That harm is fairly traceable to the funding and rate decisions challenged in this petition, and this Court can remedy or prevent, at least in part, that harm. *See Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 859–61 (9th Cir. 2005) (evaluating standing in the environmental context); *see also Nw. Envt'l Def. Ctr. v. BPA*

(*NEDC 2007*), 477 F.3d 668, 679–81 (9th Cir. 2007) (finding standing in a case challenging BPA's decision to stop funding the Fish Passage Center and transfer its functions to other entities).

ISSUES PRESENTED

1. Did BPA violate § 4(h)(11)(A)(i) of the Northwest Power Act, 16 U.S.C. § 839b(h)(11)(A)(i), when it failed to demonstrate "equitable treatment" for fish and wildlife at the time it set its BP-22 rates?

2. Did BPA violate § 4(h)(11)(A)(ii) of the Act,[1] *id.* § 839b(h)(11)(A)(ii), by failing to take the Council's Fish and Wildlife Program "into account . . . to the fullest extent practicable" when selecting funding levels and setting the BP-22 rates?

STATEMENT OF THE CASE

I. The Northwest Power Act.

This Court has described salmon and hydropower as "the two great natural resources of the Columbia River Basin." *Nw. Res. Info. Ctr., Inc. v. Nw. Power Planning Council* (*NRIC 1994*), 35 F.3d 1371, 1376 (9th Cir. 1994). Unfortunately, these two resources have long been in conflict: "the extensive system of hydroelectric dams in the Columbia River Basin has been a major factor in the decline of some salmon and steelhead runs to a point of near

[1] The full text of § 4 of the Northwest Power Act is set forth in an addendum to this brief.

extinction." *Nw. Res. Info. Ctr., Inc. v. Nw. Power & Conservation Council* (*NRIC 2013*), 730 F.3d 1008, 1011 (9th Cir. 2013) (cleaned up).

This "extensive system of dams" in the Columbia Basin includes both federally-owned and non-federal hydroelectric dams. There are 31 federal hydroelectric dams on the Columbia and its tributaries, each of which is operated by either the U.S. Army Corps of Engineers ("Corps") or the Bureau of Reclamation ("Reclamation"). 2-ER-406. There are more than a hundred non-federal hydroelectric projects in the Basin.

The Corps and Reclamation operate the federal dams in the Columbia Basin, but they do not sell the power generated at the dams. *See, e.g.*, *id.* That task falls to BPA, the federal "power marketing agent" for the Pacific Northwest. BPA, an agency within the Department of Energy, is responsible for "sell[ing] and transmit[ting] wholesale electricity from federal hydroelectric plants, one non-federal nuclear power plant, and other non-federal power plants in the Columbia River basin . . . ." *NEDC 2007*, 477 F.3d at 672. Unlike most federal agencies, "BPA does not receive annual appropriations," but instead deposits the revenue it obtains from power and transmission sales in the BPA fund. *Id.* at 672–73. "BPA then uses the fund to finance its operations." *Id.*

For decades, federal policy concerning the Columbia Basin's hydroelectric system favored power over salmon. But that changed in 1980 with the passage of the Northwest Power Act, 16 U.S.C. § 839 *et seq.*, which "marked an important shift in federal policy." *NRIC 1994*, 35 F.3d at 1377. The Act "ensured the 'equitable treatment' of fish and wildlife[,] [and] it created a new obligation on

the region and various Federal agencies to protect, mitigate, and enhance fish and wildlife." *Id.* at 1377–78. In short, the Act sought to "ma[ke] fish and wildlife a 'co-equal partner' with the hydropower industry." *Id.* at 1378.

To accomplish its purposes, the Act "adopted several innovations." *Id.* Perhaps most notably, the Act set up a new body—the Council—to develop "'a program to protect, mitigate, and enhance' the Columbia Basin's fish and wildlife 'to the extent affected by the development and operation' of the Basin's hydropower system." *Id.* (quoting 16 U.S.C. § 839b(h)(1)(A), *id.* § 839b(h)(10)(A)). The Council is the "hub" of "a pluralistic intergovernmental and public review process" that involves states, Native American tribes, and other stakeholders. *Id.* (cleaned up). Through that process, the Council creates its Fish and Wildlife Program as well as a regional power plan that guides BPA's power planning activities. *See* 16 U.S.C. § 839b.

Congress intended for the Council's Program to "deal with th[e] [Columbia River] and its tributaries as a system," *id.* § 839b(h)(1)(A), reflecting the Northwest Power Act's "comprehensive approach to fish and wildlife protection on the Columbia," *Nw. Envt'l Def. Ctr. v. BPA* (*NEDC 1997*), 117 F.3d 1520, 1533 (9th Cir. 1997). Congress knew that this approach would entail both changes to hydrosystem operations and the implementation of non-operational mitigation measures such as tributary habitat restoration. Michael C. Blumm, *Implementing the Parity Promise: An Evaluation of the Columbia Basin Fish and Wildlife Program*, 14 Envt'l L. 277, 281–83, 312–13 (1984). Accordingly, Congress explicitly authorized the Council to include in

its Program "offsite mitigation" and "enhancement" measures—measures that help protect fish and wildlife populations affected by hydroelectric dams by addressing sources of harm other than the dams. *See* 16 U.S.C. § 839b(h)(5) (providing that "[e]nhancement measures shall be included in the program to the extent such measures are designed to achieve improved protection and mitigation"); *id.* § 839b(h)(8)(A) (similar); *see also* 2-ER-417–19 (discussing offsite mitigation).

In addition to creating the Council and instructing it to prepare a Fish and Wildlife Program, the Northwest Power Act altered the duties of federal agencies so as to better protect fish and wildlife. No agency was more affected by these changes than BPA. First, § 4(h)(10)(A) of the Act gave BPA authority to "use [its] fund and [other] authorities . . . to protect, mitigate, and enhance fish and wildlife to the extent affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries . . . ." 16 U.S.C. § 839b(h)(10)(A). By empowering BPA to use its fund to protect, mitigate, and enhance fish and wildlife, Congress "tapped revenues of the Basin's hydropower system as a source for financing . . . biological restoration." *NRIC 1994*, 35 F.3d at 1378.

Second, § 4(h)(11)(A)(i) of the Act imposed an "equitable treatment" mandate upon BPA and other agencies with responsibility for the hydrosystem, including the Corps, Reclamation, and the Federal Energy Regulatory Commission ("FERC"). That mandate requires BPA to "exercise [its] responsibilities under the Act 'in a manner that provides equitable treatment'

for fish and wildlife." *NEDC 1997*, 117 F.3d at 1525 (quoting 16 U.S.C. § 839b(h)(11)(A)(i)). Relevant here, BPA has stated on several occasions that providing "equitable treatment" for fish and wildlife means providing "operational *and financial* certainty" for fish similar to that afforded to other hydrosystem purposes.[2] Mot. Jud. Not. Ex. B at 15 (emphasis added).

Finally, § 4(h)(11)(A)(ii) of the Northwest Power Act imposed on BPA and other agencies a requirement to "tak[e] into account" the Council's Fish and Wildlife Program "at each relevant stage of decisionmaking processes to the fullest extent practicable . . . ." 16 U.S.C. § 839b(h)(11)(A)(ii).

II. BPA's Rate-Setting Process.

The Northwest Power Act instructs BPA to periodically revise its rates for power and transmission services through a formal ratemaking process. *Id.* § 839e(a), (i). BPA revises its rates every two years. The formal process—often called a "§ 7(i) hearing" after the relevant portion of the Act—begins with BPA publishing a "[n]otice of the proposed rates . . . in the Federal Register with a statement of the justification and reasons supporting such rates." *Id.* § 839e(i)(1). Utilities and other interested parties then participate in a process that includes a hearing or series of hearings, the submission of written

[2] This understanding of the "equitable treatment" mandate is consistent with other statements BPA has made over the years and inconsistent with BPA's current position. Petitioners are submitting several examples of prior BPA statements concerning the meaning of "equitable treatment" as exhibits to their motion for judicial notice. As explained in that motion, these materials are proper for the Court to consider, because they bear on the question of how much deference to give to BPA's current interpretation of § 4(h)(11)(A).

evidence, and even a quasi-discovery practice. *See id.* § 839e(i)(2)–(4); *see also* 85 Fed. Reg. 77,189, 77,189–93 (Dec. 1, 2020) (setting out the BP-22 process).

BPA must set its rates "high enough to ensure that [it] will recover its total costs, including costs associated with 'fish and wildlife measures.'" *Golden Nw. Aluminum*, 501 F.3d at 1049 (quoting 16 U.S.C. § 839e(a), (g)). "This requirement presupposes that BPA knows its costs or, at the very least, that it estimates them 'in accordance with sound business principles.'" *Id.* at 1052–53 (quoting 16 U.S.C. § 839e(a)(1)). That is, BPA must "develop a realistic projection of fish and wildlife costs . . . at the time the rates [a]re set and the cost recovery mechanisms adopted." *Id.* at 1053.

BPA could decide on fish and wildlife spending levels for an upcoming rate period during the § 7(i) hearing itself; nothing in the Northwest Power Act precludes such an approach. In fact, in the early days of the Act, BPA took the position that "[i]nformation respecting the expenditures to be made or revenues to be forfeited for the protection, mitigation, and enhancement of fish and wildlife during the rate period must be integrated into th[e] [§ 7(i)] hearing process and made a part of the hearing record." Mot. Jud. Not. Ex. D at 3.

In recent years, though, BPA has taken a different tact: it first develops spending levels for fish and wildlife mitigation (and other activities) during an informal process called Integrated Program Review ("IPR"), which is conducted before the § 7(i) hearing. The spending levels developed during IPR are then used as inputs in the formal rate case—specifically, they are part of BPA's "revenue requirement." 2-ER-239–40.

III. BPA's Recent Efforts to Control Costs.

During the 2010s, BPA's "power customers . . . expressed significant concerns that BPA's recent pattern of rising costs and rates [wa]s unsustainable." 2-ER-285. Customers "noted that the resurgence of competition in power markets w[ould] provide them with alternatives when their long-term wholesale power contracts with BPA expire in 2028." *Id.*

In the face of this threat, BPA adopted its 2018–2023 Strategic Plan in January 2018. The Strategic Plan set out four goals intended to make BPA more competitive in the energy market. 2-ER-288. The Plan then laid out objectives intended to help BPA fulfill these goals, including Objective 1a—"improve cost management discipline"—and Objective 3c, which set out BPA's current "flat funding" policy for fish and wildlife spending. 2-ER-291–95, 302–04.

The Strategic Plan explained that, to meet Objective 1a, BPA would be "taking aggressive steps to manage the rising costs of operating the federal power and transmission systems, starting by establishing a cost-management goal to keep the sum of program costs, by business line, at or below the rate of inflation through 2028." 2-ER-291–95. To meet this cost-management goal, the Strategic Plan "initiat[ed] a new approach for setting spending levels during [IPR]. . . . . Instead of BPA's past practice of determining program costs through a bottom-up approach, BPA will set firm cost constraints at the start of the process in alignment with this cost-management objective." *Id.*

As for the flat funding goal of Objective 3c, the Strategic Plan stated that "BPA intends to manage its fish and wildlife program costs (direct expense and

capital costs) at or below the rate of inflation, inclusive of any new obligations that may emerge from litigation or subsequent commitments in current or future biological opinions." 2-ER-304.

In 2018, BPA commenced its first IPR and rate case under the new Strategic Plan, known as the BP-20 rate case. During that process, BPA elected to spend nearly $30 million less each year than it had been spending on fish and wildlife mitigation efforts. 2-ER-309.

IV. The Council's Fish and Wildlife Program Addendum.

As BPA started implementing its Strategic Plan, the Council began the process of amending its Fish and Wildlife Program. The Program is largely focused on non-operational (that is, not having to do with the operation of the federal hydrosystem) mitigation measures such as habitat restoration, installation of fish screens, predator management, and research and monitoring. 2-ER-442–43. As this Court has explained, the reason the Council's Program is focused on non-operational measures is that the ESA has provided constraints on how the federal hydrosystem is operated. *NRIC 2013*, 730 F.3d at 1014. Many non-operational measures in the Program are designed to benefit ESA-listed salmon and steelhead. *E.g.*, 2-ER-328 (describing efforts to reduce avian predation of ESA-listed fish).

During the comment process for amending the Program, many tribes, state fish and wildlife agencies, and other entities expressed frustration to the Council about BPA's "flat funding" policy—its policy of holding mitigation funding levels flat, as formally adopted in the Strategic Plan. *See* 2-ER-331;

2-ER-375–76, 380–83.

For instance, "the Shoshone Bannock Tribes commented with concern that [BPA's] budget cuts in the interests of budget efficiencies [we]re impacting day-to-day operations . . . .." 2-ER-381. Likewise, the Columbia River Inter Tribal Fish Commission—a coalition of four tribes—told the Council that "the reality of capped/flatlined budgets means funding 'new' or 'emerging' priorities requires shifting or reducing money currently addressing ongoing priority measures." 2-ER-383.

One "emerging priority" that was the subject of much discussion during the Council's amendment process was the need 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." 2-ER-325–26. In its final Addendum to the Fish and Wildlife Program, the Council noted that "[t]hese losses have been severely under-addressed and under-mitigated" and called on BPA to "begin a comprehensive effort over the next five years to intensify, expand, and then sustain the mitigation effort for this part of the basin." *Id.* Though the Council expressed "general[] support" for BPA's commitment to managing fish and wildlife costs, it opined that closing the "obvious gap in program implementation" for mitigation above Grand Coulee/Chief Joseph could require BPA to increase spending in the short term. 2-ER-330–31.

BPA did not deny that its "flat funding" policy would affect funding for fish and wildlife mitigation projects. On the contrary, BPA told the Council that

"its budget ha[d] limited flexibility to accommodate new or expanded work, and also only a limited capacity for maintenance of past investments . . . ." 2-ER-375.

In October 2020, the Council released its final Addendum. The Addendum acknowledged that, "over time, persisting with flat budgets begins to force [mitigation] project sponsors to make cuts that undermine the ability to perform the substantive work and meet project and program objectives." 2-ER-331. In general, the Council expressed concerns about the possible negative effects of BPA's "flat funding" policy and implored BPA to take steps to avoid such effects. 2-ER-330–32.

V. The CRSO EIS.

In July 2020, BPA, the Corps, and Reclamation released the Columbia River System Operations Environmental Impact Statement ("CRSO EIS"). The CRSO EIS was prepared pursuant to an order entered by the U.S. District Court for the District of Oregon as part of the long-running litigation over the operation of the federal hydrosystem in the Columbia Basin. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 184 F.Supp.3d 861 (D. Or. 2016).

In the CRSO EIS, the three agencies examined different alternatives for "operations, maintenance, and configuration" of 14 federal hydroelectric projects in Idaho, Montana, Oregon, and Washington, collectively called the Columbia River System. 2-ER-408. In developing those alternatives, the agencies considered different combinations of operational and structural measures to help fish—"operational" measures being defined as measures "involving a change in how water is stored or released at the projects or how juvenile fish

are transported around the projects" and "structural measures" being defined as measures "involving a physical change to the project such as installation of a feature in the spillway or modifying fish ladders." 2-ER-410–11.

With limited exceptions, the agencies did not consider different options for implementing non-operational/structural mitigation measures; rather, the agencies more or less assumed that the same set of non-operational mitigation measures would take place under all alternatives. *See* 2-ER-415. Notably, BPA did not make decisions regarding funding levels for non-operational mitigation projects as part of the CRSO EIS process. 2-ER-432–33.

VI. The BP-22 Rate Case.

A. The IPR Process.

In June 2020, BPA commenced the IPR process for the BP-22 rate period. In its Initial Publication, BPA announced that it was "committed to supporting [its] strategic plan . . ., and will maintain flat budgets [for fish and wildlife mitigation projects] in relation to the BP-20 average" for the BP-22 period. 2-ER-261. BPA explained that it would search for "efficiencies" and prioritize certain projects over others in order to meet its cost objectives, and that such actions were necessary given "fixed budgets, ongoing commitments, and emerging issues." 2-ER-272–75.

Petitioners submitted comments on the Initial Publication in which they urged BPA to "reassess its costs" because its proposed spending on fish and wildlife mitigation was "too low to allow for compliance with the agency's legal

obligations." 2-ER-277–78. Petitioners and the Nez Perce Tribe urged BPA to increase funding for the Lower Snake River Compensation Plan ("LSRCP"), a set of hatchery projects administered by the U.S. Fish and Wildlife Service. 2-ER-278–79.[3]

BPA issued its IPR "Closeout Report" in September 2020. In the Closeout Report, the BPA Administrator reiterated BPA's commitment to the Strategic Plan. *See* 1-ER-179 ("[T]he final spending levels I am adopting today . . . support the 2018–2023 Strategic Plan objective of holding the sum of program costs, by business line, at or below the rate of inflation through 2028."). For fish and wildlife mitigation funding, BPA adhered to its "flat funding" policy from the Strategic Plan and adopted spending levels for the BP-22 period identical to the levels for the BP-20 rate period—an effective reduction in funding given the lack of any inflationary adjustment. 1-ER-190. BPA declined to increase funding for the LSRCP. *Id.*

B. The § 7(i) Rate Hearing.

BPA published notice in the Federal Register of the BP-22 rate hearing (*i.e.*, the § 7(i) hearing) on December 1, 2020. 85 Fed. Reg. at 77,189. Soon after, BPA released its initial proposal for power and transmission rates for the rate period. As part of its proposal, BPA revealed that it was "facing a unique issue [in the BP-22] rate period: a potentially large power rate decrease." 2-ER-200. According to BPA, "this projected decline in power rates present[ed]

[3] The Nez Perce Tribe's comments can be found on BPA's website: https://publiccomments.bpa.gov/CommentList.aspx?ID=394

BPA with unique and important opportunities that will have both near-term and long-term consequences." *Id.*

The potential decrease in power rates was made possible in large part by an unexpectedly large secondary surplus revenue forecast—over $100 million per year more than in the previous rate period.[4] 2-ER-213; 2-ER-217. This forecast was developed after IPR was completed. 1-ER-56.

BPA identified "two general opportunities" created by the projected boon in surplus revenue: "allow rates to produce a 4.5 percent reduction" or "hold rates flat (that is, at the same level as BP-20), and use the incremental revenue to support BPA's long-term strategic and financial objectives." 2-ER-201. In its initial proposal, BPA staff recommended doing the latter, which would entail "includ[ing] in power rates an amount of revenue financing up to . . . $95 million per year or capped at $190 million for the rate period." 2-ER-204. This "revenue financing" money would be used to pay for capital investments, helping preserve BPA's Treasury borrowing authority. 2-ER-204–05.

When developing its initial proposal, BPA did not reconsider the fish and wildlife mitigation funding levels set during IPR in light of the projected boon in surplus revenue. 1-ER-56, 69. After intervening in the rate case, Petitioners urged BPA to do so, pointing out that the unexpectedly large revenue forecast

[4] Secondary surplus revenue is revenue BPA gets from selling surplus power—power that is not needed to meet BPA's obligations. "Most surplus power is sold to Pacific Northwest and California markets under short-term power sales that allow for flexible negotiated prices, or under longer-term contracts." BPA 2021 Annual Report at 45 (Nov. 2021), *available at* https://www.bpa.gov/about/finance/-/media/aep/finance/annual-reports/ar2021.pdf

presented the agency with a third "general opportunity": spend more money on fish and wildlife mitigation without having to raise rates. 2-ER-220–22. BPA refused to consider this opportunity, adhering to its "flat funding" policy.

Eventually, BPA and most of the parties to the rate case reached a settlement. The settlement provided that (1) power rates would decrease by roughly 2.5 percent from BP-20 levels and (2) BPA would use up to $40 million per year for power revenue financing. 1-ER-4, 100. In other words, BPA and its customers roughly split the difference between what BPA wanted (flat power rates and $95 million per year in power revenue financing) and what its customers wanted (a 4.5 percent rate reduction and no revenue financing).

Petitioners objected to the settlement. Petitioners argued that the settlement violated the Northwest Power Act because BPA had failed to abide by the "equitable treatment" mandate and the "fullest extent practicable" requirement of § 4(h)(11)(A) when deciding on fish and wildlife funding levels and setting the BP-22 rates.

BPA rejected these arguments and proposed adopting the settlement agreement in a Draft Record of Decision ("Draft ROD"). 1-ER-104. Notably, BPA asserted in the Draft ROD that § 4(h)(11)(A) doesn't even apply to "BPA's budgeting or expenditures for fish and wildlife mitigation." 1-ER-133.

In response to the Draft ROD, Petitioners filed a "Brief on Exceptions" in which they responded to BPA's rejection of their arguments and clarified those arguments where appropriate. 2-ER-223–32. As they had in earlier rate case filings, Petitioners pointed out that many BPA-funded mitigation projects are

in need of more funding and that species those projects benefit—particularly Idaho salmon and steelhead—are in a precarious state. 2-ER-226–28; *see also* 2-ER-388–90 (Council meeting minutes referenced in Petitioners' Brief on Exceptions).

On July 28, 2021, BPA issued its Final Record of Decision ("Final ROD" or "BP-22 ROD"). The Final ROD did not deviate from the Draft ROD's proposed decision to adopt rates based on the settlement reached between BPA and its customers. The Final ROD again rejected Petitioners' arguments that the BP-22 settlement violated § 4(h)(11)(A) of the Northwest Power Act, asserting that § 4(h)(11)(A) applies only to decisions concerning "[hydroelectric] project configuration, flow management, spill operations, and water quality management," as well as BPA's "power marketing actions." 1-ER-34, 37.

VII. Proceedings Before FERC and this Petition for Review.

Following the issuance of the BP-22 ROD, BPA filed its BP-22 rates with FERC for approval. *See* 16 U.S.C. § 839e(a)(2). This Court's precedents indicate that FERC lacks authority to address the fish and wildlife issues raised in the BP-22 rate case. *See Golden Nw. Aluminum*, 501 F.3d at 1050–51 (discussing FERC's limited role in approving BPA's rates). However, to ensure they exhausted administrative remedies, Petitioners intervened in the FERC proceeding and filed a protest asking FERC to disapprove the BP-22 rates.

FERC approved BPA's rates over Petitioners' protest on March 24, 2022, concluding that "[BPA's] compliance with its environmental review and fish and wildlife protection obligations is . . . outside the scope of [FERC's] review . . . ."

178 FERC ¶ 61,211 (Mar. 24, 2022). After Petitioners' rehearing request was constructively denied on May 9, 2022, they timely filed this petition for review. 2-ER-463–69.

VIII. On-the-Ground Effects of BPA's Flat Funding Decision.

BPA enjoyed a very financially successful fiscal year 2022, pulling in hundreds of millions of dollars more than expected in revenues.[5] Cutter Decl. Ex. 3 at 4. As of August 11, 2022, BPA projected that it would end the fiscal year with $836 million in net revenue—$664 million more than projected in the rate case. *Id.* Meanwhile, BPA's flat funding policy has remained in effect, with total spending in line with the levels set during IPR. *Id.*

Given the rampant inflation of the last year, flat funding is taking an increasingly harsh toll on BPA-funded fish and wildlife mitigation projects. In comments submitted to the Council on March 8, 2022, the Washington Department of Fish and Wildlife ("WDFW"), which carries out several BPA-funded mitigation projects, stated that it is "unable to implement some of the highest priorities in the Council's . . . program" due to BPA's flat funding. Cutter Decl. Ex. 8 at 2. The Fish Passage Center, which provides invaluable research and expertise to hydrosystem operators and fisheries managers, has repeatedly told BPA that it cannot continue to function under the flat funding policy. Cutter Decl. Ex. 9 at 1–13. And in its April 15, 2022 recommendations to BPA on funding habitat and hatchery programs to benefit anadromous fish, the

[5] The post-decisional events described in this subsection are provided to support Petitioners' Article III standing and the propriety of their requested relief.

Council stated that:

> Fish and wildlife managers and project sponsors continue to raise concerns with the Council over the ever-rising disparity between available budgets and the cost of implementation. Some project budgets . . . have been held flat with no inflation adjustments for as much as 15 years. . . . . Despite the persistence and creativity of project sponsors, some have reached a tipping point where the on-the-ground mitigation work must be cut back.

Cutter Decl. Ex. 6 at 10.

STANDARD OF REVIEW

Under the Northwest Power Act and the APA, this Court must "consider whether BPA's rate determination is supported by 'substantial evidence in the rulemaking record.'" *Golden Nw. Aluminum*, 501 F.3d at 1051 (quoting 16 U.S.C. § 839f(e)(2)). "In addition, [this Court] may not approve a rate determination if [it] determine[s] that it represents BPA action that is arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law. That is, [this Court] must assess whether BPA relied on improper factors, failed to consider an important aspect of the question, offered an explanation for its decision that runs counter to the evidence before [it], or [rendered a decision that] is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* at 1051 (cleaned up).

SUMMARY OF THE ARGUMENT

BPA violated the Northwest Power Act in two distinct ways when setting power and transmission rates for the BP-22 rate period. First, BPA failed to demonstrate "equitable treatment" for fish and wildlife when it set rates, violating § 4(h)(11)(A)(i) of the Act. Second, BPA failed to take the Council's Program into account "to the fullest extent practicable" when deciding on fish and wildlife mitigation funding levels and setting rates, in violation of § 4(h)(11)(A)(ii).

BPA did not attempt to satisfy these legal requirements during the BP-22 process, taking the position that § 4(h)(11)(A) of the Act categorically does not apply to its decisions about mitigation funding levels and rates. This Court should reject that reading, because it flies in the face of the Northwest Power Act's text, structure, history, and purpose—and BPA's own prior interpretations.

BPA's decision to continue its flat funding policy and its refusal to take advantage of the projected boon in secondary surplus revenue to benefit fish will have a "significant impact" on fish and wildlife. Accordingly, BPA was required to demonstrate "equitable treatment" at the time it finalized its BP-22 rate decision. BPA utterly failed to do so.

BPA also should have complied with § 4(h)(11)(A)(ii)'s requirement to take the Council's Fish and Wildlife Program into account "to the fullest extent practicable" during the BP-22 ratemaking process, because there was at least one "relevant stage" during that process. By failing to take the Council's Program into account at any point, BPA violated § 4(h)(11)(A)(ii).

Accordingly, this Court should hold that BPA violated the Northwest

Power Act by failing to show "equitable treatment" and/or failing to take the Council's Program into account "to the fullest extent practicable" and remand to BPA to address its errors. In addition, this Court should order BPA to provide additional funding for fish and wildlife mitigation measures that have suffered from underfunding as a result of the unlawful BP-22 decision.

ARGUMENT

I. Section 4(h)(11)(A) of the Northwest Power Act Applies to BPA's Fish Mitigation Funding and Rate Decisions.

The threshold legal issue in this case concerns the scope of § 4(h)(11)(A) of the Northwest Power Act. That provision imposes two distinct requirements relevant here: the "equitable treatment" mandate of § 4(h)(11)(A)(i) and the "fullest extent practicable" requirement of § 4(h)(11)(A)(ii):

> The Administrator and other Federal agencies responsible for managing, operating, or regulating Federal or non-Federal hydroelectric facilities located on the Columbia River or its tributaries shall—
>
> (i) exercise such responsibilities consistent with the purposes of this chapter and other applicable laws, to adequately protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by such projects or facilities in a manner that provides equitable treatment for such fish and wildlife with the other purposes for which such system and facilities are managed and operated; [and]
>
> (ii) exercise such responsibilities, taking into account at each relevant stage of decisionmaking processes to the fullest extent practicable, the program adopted by the Council under this subsection. . . . .

16 U.S.C. § 839b(h)(11)(A).

BPA's position is that § 4(h)(11)(A) "does not apply to BPA's budgeting or expenditures for fish and wildlife mitigation," 1-ER-33, nor its rate decisions, 1-ER-46. Rather, according to BPA, § 4(h)(11)(A) applies only to BPA's decisions about matters such as "[hydropower] project configuration, flow management, spill operations, and water quality management," as well as BPAs "power marketing responsibilities." 1-ER-34, 37. BPA's interpretation is incorrect.

A. The Northwest Power Act's Text, Structure, Purpose, and Historical Context Support Petitioners' Reading.

A court must construe a statute "as a symmetrical and coherent regulatory scheme and fit, if possible, all parts into an harmonious whole." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (cleaned up). Construing § 4(h)(11)(A) to cover BPA's decisions regarding mitigation funding and rates allows the pieces of the Northwest Power Act to fit "into an harmonious whole"; BPA's construction, on the other hand, renders parts of the law self-defeating or ineffective. Furthermore, construing § 4(h)(11)(A) to apply to mitigation funding and rate decisions furthers the purposes of the Northwest Power Act. *See Rojas v. FAA*, 989 F.3d 666, 672 (9th Cir. 2021) (en banc) ("as is always true when interpreting statutes, statutory context and purpose matter").

Statutory Text

The first thing to note about § 4(h)(11)(A) is the breadth of the terms Congress chose to describe the covered activities: "managing, operating, or regulating." Each of these terms, read in a vacuum, could mean a wide variety

of things. Accordingly, their meaning must be determined by examining the surrounding statutory context as well as other related statutes. *See, e.g.*, *Brown & Williamson*, 529 U.S. at 132 (noting that "the meaning . . . of certain words or phrases may only become evident when placed in context"). Consulting related statutes is particularly appropriate here because Congress "expressly required 'textual consistency'" in the Northwest Power Act—"that is, th[e] [Act's] provisions, together with other applicable laws, specifically including environmental laws, [should] be construed in a consistent manner." *NRIC 1994*, 35 F.3d at 1378 (citing 16 U.S.C. § 839). When read in context and in light of related statutes, the term "managing" is best construed to include BPA's funding of measures to mitigate for effects of the hydrosystem on fish and wildlife.

Neither "managing," "operating," nor "regulating" is defined in the Northwest Power Act, but Congress used the word "operate" (or its gerund or noun forms) in several earlier statutes granting the Corps and Reclamation authority over federal hydroelectric projects. *See, e.g.*, 16 U.S.C. § 832 (authorizing the Corps to "complete[], maintain[], and operate[]" the Bonneville Project); 43 U.S.C. § 593a (authorizing Interior to "construct[], operat[e], and maint[ain]" the Hungry Horse Dam). Consistent with those statutes, the Corps and Reclamation are recognized as the "operators" of the federal hydrosystem. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.* (*NWF 2018*), 886 F.3d 803, 812 (9th Cir. 2018) ("The Corps operates the eight mainstem dams, Reclamation operates other FCRPS dams, and Bonneville markets and transmits power . . . ."); 2-ER-404–07.

BPA's role is to act "as the marketing agent for all electric power generated by Federal generating plants in the Pacific Northwest, constructed by" the Corps and Reclamation, with certain limited exceptions. 16 U.S.C. § 838f. In practice, the agencies must coordinate their activities. As described in the CRSO Record of Decision:

> The Corps and Reclamation develop operating requirements for their projects. These are the limits within which a reservoir or dam must be operated. . . . Within these operating limits, [BPA] schedules and dispatches power. This process requires continuous communication and coordination among the three agencies.

2-ER-435. In this way, BPA's power marketing activities implicate the "operation" of the federal hydrosystem. *See* 2-ER-437 ("[BPA] will use the CRSO EIS for any operational changes associated with power marketing.").

Given the term's use in prior statutes, "operating" in § 4(h)(11)(A) is best read to refer to the duties of the Corps and Reclamation vis-à-vis the federal hydrosystem, as well as BPA's power marketing duties insofar as they affect those other agencies' operational activities. Under that reading, the activities that BPA points to as being the *only* sorts of activities subject to § 4(h)(11)(A)—"flow management, spill operations," etc.—are all part of "operating" the federal hydrosystem: they are activities that Congress has empowered the Corps and Reclamation to perform, in coordination with BPA, through the various statutes governing federal hydroelectric projects in the Columbia Basin.[6]

[6] Indeed, the agencies' analysis of how to conduct these activities for the CRS set of dams was called the "Columbia River System *Operations* EIS." 2-ER-403.

Had Congress stopped at "operating" in § 4(h)(11)(A), BPA's interpretation might have some force. But Congress also included the broad terms "managing" and "regulating"—terms that had not been used in prior statutes governing the hydrosystem—alongside "operating," evincing an intent to have § 4(h)(11)(A) sweep more broadly than federal hydrosystem operations. *See, e.g.*, *Washington Market Co. v. Hoffman*, 101 U.S. 112, 115–16 (1879) ("a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant") (citation omitted). Moreover, Congress explicitly referred to non-federal as well as federal facilities, reflecting the Northwest Power Act's "comprehensive approach" to fish and wildlife protection. *NEDC 1997*, 117 F.3d at 1533.

Given that Congress must have meant to include *something* in addition to federal hydrosystem operations through the use of the broad terms "managing" and "regulating" in § 4(h)(11)(A), the question is whether that "something" includes BPA's funding of mitigation projects under § 4(h)(10)(A). The term "regulating" does not describe BPA's mitigation funding, but the broad term "managing" is plausibly read to include BPA's funding of non-operational mitigation projects—that is, the "management" of the hydrosystem includes efforts to mitigate for the effects of the system as well as BPA's funding of those efforts.[7] *Cf.* 2-ER-426 (noting that "[o]peration, configuration, and maintenance

[7] Federal and state courts have long recognized that "manage," "managing," etc. are broad terms whose meaning depends on context. *See Dep't of Soc. Servs. v. Saunders*, 247 Conn. 686, 698–99 (1999) ("application of the [Black's Law Dictionary] definition to the word "manage" . . . results in a statutory grant of wide-scale authority . . ."); *Commonwealth v. Jones*, 90 Pa. Super. 489, 493 (Pa.

of the CRS requires mitigation for its effects"); 2-ER-427–28 (including in the preferred alternative various non-operational mitigation measures).

Statutory Structure and Context

A close examination of "statutory context" and structure shows why this "textually permissible" reading of the statute is correct. *Rojas*, 989 F.3d at 672–73. The first contextual or structural clue that Congress intended for BPA's § 4(h)(10)(A) mitigation funding duty to be among the "responsibilities" covered by § 4(h)(11)(A) is the use of nearly identical language in the two provisions.

Section 4(h)(10)(A) grants BPA authority to use the BPA fund "to *protect, mitigate, and enhance fish and wildlife* to the extent *affected by the development and operation of any hydroelectric project of the Columbia River and its tributaries* . . . ." Section 4(h)(11)(A)(i), in turn, instructs BPA and other agencies to exercise certain of their responsibilities "to adequately *protect, mitigate, and enhance fish and wildlife*, including related spawning grounds and habitat, *affected by [Columbia Basin] projects or facilities* in a manner that provides equitable treatment for such fish and wildlife . . . ." The nearly identical language in the two provisions strongly suggests that BPA's § 4(h)(10)(A) authority is among the "responsibilities" included in § 4(h)(11)(A)(i)—after all, which of BPA's responsibilities is better suited to "protect, mitigate, and enhance" so as

Super. Ct. 1927) ("The words 'better management of the Allegheny County Prison' are broad enough to include anything pertaining to the maintenance and administration of that institution."); *Music Grp. Macao Commercial Offshore Ltd. v. Foote*, 2015 WL 3882448, *12 (N.D. Cal. June 23, 2015) ("The scope of the word 'management' is broad . . . .").

to provide "equitable treatment" than its explicit § 4(h)(10)(A) responsibility to "protect, mitigate, and enhance" by funding mitigation measures?

Another clue supporting Petitioners' reading is Congress' inclusion of non-federal as well as federal facilities in both § 4(h)(10)(A) and § 4(h)(11)(A). BPA's § 4(h)(10)(A) mitigation funding authority is not limited to the federal hydrosystem; it includes non-federal projects, as well. *See* 16 U.S.C. § 839b(h)(10)(A) (referring to "*any hydroelectric project* of the Columbia River and its tributaries") (emphasis added); *see also* 48 Fed. Reg. 20,117, 20,118 (May 4, 1983) ("Section 4(h)(10)(A) . . . also provides authority to compensate costs and power losses at non-Federal electric power projects."). This makes sense given the emphasis in the Northwest Power Act on treating the Columbia Basin as a whole. *See* 16 U.S.C. § 839b(h)(1)(A); *id.* § 839b(h)(8)(A).

Like § 4(h)(10)(A), § 4(h)(11)(A) applies to non-federal as well as federal hydroelectric projects. Again, this makes sense in light of Congress' "recogni[tion of] the need for a comprehensive approach to fish and wildlife protection on the Columbia." *NEDC 1997*, 117 F.3d at 1533. Under BPA's reading of the statute, though, § 4(h)(11)(A)(i)'s "equitable treatment" mandate doesn't cover any of BPA's responsibilities with respect to non-federal dams. This makes little sense—why would Congress empower BPA to mitigate for the effects of non-federal dams in § 4(h)(10)(A) only to then exclude the exercise of such authority from the scope of § 4(h)(11)(A)(i), especially given Congress' understanding of the need for a comprehensive approach to mitigation? *Cf. Silverado Hospice, Inc. v. Becerra*, 42 F.4th 1112, 1119 (9th Cir. 2022) ("We

are hesitant to [reach] such a result . . . because we do 'not lightly conclude that Congress enacted a self-defeating statute.'") (quoting *Quarles v. United States*, 139 S.Ct. 1872, 1879 (2019)).

There is nothing in the statutory text that suggests, let alone compels, such an odd result. On the contrary, Congress's use of the broad terms "managing" and "regulating" in addition to "operating" in § 4(h)(11)(A), plus the inclusion of non-federal projects, evinces an intent to sweep in the relevant agencies' duties aside from their operation of the federal hydrosystem. The Corps, for instance, must not only exercise its authority to "operate" its federal dams in a manner that provides equitable treatment, it must also exercise its Clean Water Act authority to "regulate" non-federal dams in a manner that provides equitable treatment. *See PUD No. 1 of Douglas Cnty. v. BPA*, 947 F.2d 386, 394–96 (9th Cir. 1991) (holding that § 4(h)(11)(A) covers the Corps' regulation of non-federal projects under the Clean Water Act).

Statutory Purpose

Reading § 4(h)(11)(A) to apply to BPA's mitigation funding and rate decisions also ensures that the Council's Fish and Wildlife Program plays an important role in decisionmaking, as Congress intended. Again, Congress created the Council as the "hub" of a "pluralistic intergovernmental and public review process" and directed the Council to create its Program through that process. *NRIC 1994*, 35 F.3d at 1378 (quoting Michael C. Blumm, *Fulfilling the Parity Promise: A Perspective on Scientific Proof, Economic Cost, and Indian Treaty Rights in the Approval of the Columbia Basin Fish and Wildlife Program*,

13 Envt'l L. 103, 112 (1982)). Congress expected that "[t]he primary fish and wildlife protection measures [would] be established through the" Council's Program. *NEDC 1997*, 117 F.3d at 1531. In short, the Council's Program is a key component of the Northwest Power Act's approach to fish and wildlife protection.

Given the importance attached to the Council's Program, it is not surprising that Congress directed agencies in § 4(h)(11)(A)(ii) to take the Program into account "to the fullest extent practicable" when exercising their responsibilities. It would have made little sense for Congress to exclude BPA's funding and rate decisions from the reach of § 4(h)(11)(A)(ii)—after all, BPA is the primary implementer of the Program, and Congress knew that BPA funding would be essential to carrying out the Program's non-operational mitigation measures. *See NRIC 1994*, 35 F.3d at 1378; Blumm, *Implementing*, *supra*, at 281–83.

Indeed, as BPA has noted, the Program in its current form is comprised *mostly* of non-operational measures, and "Program content directly relevant to . . . operation, maintenance, and configuration of [the federal hydrosystem] is limited." 2-ER-442–43. Thus, under BPA's interpretation of § 4(h)(11)(A), the requirement to take the Council's Program into account "to the fullest extent practicable" does not apply to the decisions that have by far the most bearing on how and whether the Council's Program is actually implemented—BPA's funding and rate decisions.

This extremely odd result is not suggested, much less compelled, by

the text of the statute. Again, "managing" is a flexible enough term to include BPA's funding of measures to mitigate for the effects of the Columbia Basin's hydroelectric projects. Reading "managing" in that way ensures that the Council's Program influences the decisions that are actually relevant to its implementation. BPA's reading, on the other hand, frustrates the operation of the Northwest Power Act by minimizing the influence of the Council's Program.[8] Petitioners' reading is thus favored. *Connell v. Lima Corporate*, 988 F.3d 1089, 1101 (9th Cir. 2021); *see also Corrigan v. Haaland*, 12 F.4th 901, 912–13 (9th Cir. 2021) (rejecting a statutory interpretation that "contravene[d] th[e] purpose" of the statute).

Section 4(h)(11)(A)(i)'s inclusion of "wildlife" alongside fish is yet another indication that Congress intended for BPA's mitigation funding decisions to be subject to § 4(h)(11)(A). The major impact of hydroelectric dams on wildlife is the loss of habitat due to the dams' construction and the resultant inundation of habitat behind the dams. 2-ER-440–41. The effects of dam *operations* on wildlife have been "generally found [to be] minor, negligible, or not measurable . . . ." 2-ER-441. Accordingly, the strategy for wildlife mitigation in the Council's Program is acquisition of new land to make up for habitat lost due to dam construction and inundation. *See* 2-ER-322–23; Mot. Jud. Not.

[8] BPA's reading would also exempt the Corps and Reclamation from having to comply with § 4(h)(11)(A)(ii) when conducting non-operational mitigation measures. Again, this would be an odd result given that the Council's Program contains such measures for the Corps and Reclamation to carry out. *See* 2-ER-327. Under BPA's view of the statute, it is hard to see why the Council bothered to include such measures in the Program.

Ex. A at 4–6, 13. BPA's role in these wildlife mitigation efforts is to fund land acquisition and habitat enhancement. 2-ER-322–23; 2-ER-419–20; Mot. Jud. Not. Ex. A at 4–6.

Under BPA's reading, § 4(h)(11)(A) would not apply to its decisions concerning funding land acquisition for wildlife mitigation. Thus, according to BPA, Congress (1) instructed BPA to provide "equitable treatment" for "wildlife" but then (2) excluded from the scope of the "equitable treatment" provision the activities that can actually provide such treatment. This result makes little sense. *See Quarles*, 139 S.Ct. at 1879. And it is not compelled, or even suggested, by the text: the broad term "managing" is elastic enough to encompass BPA's funding of mitigation measures, thereby ensuring that BPA actually has the ability to provide "equitable treatment" for wildlife, as Congress intended.

Historical Context

Finally, the historical context in which the Northwest Power Act was passed supports Petitioners' construction of § 4(h)(11)(A). *See Cnty. of Amador v. U.S. Dep't of the Interior*, 872 F.3d 1012, 1022 (9th Cir. 2017) (discussing the use of historical context in construing statutes).

Just four years before the passage of the Act, the BPA Administrator sought advice from the Solicitor of the Department of the Interior[9] as to whether BPA had authority to fund mitigation projects and research studies carried out by tribes and/or state wildlife agencies. Solicitor's Opinion M-36885, Authority of Bonneville Power Administrator to Participate in Funding of Program to

[9] At that time, BPA was part of the Department of the Interior.

Help Restore the Columbia River Anadromous Fishery (Nov. 22, 1976).[10] The Solicitor concluded that BPA had such authority, and that it stemmed, in part, from BPA's power marketing authority. *Id.* The Solicitor recognized that Congress intended BPA "to operate with the freedom similar to that of a utility" and that "an integral aspect of any electric utility's responsibility in this age of public concern for the environment is to find means and undertake or contribute to measures to minimize adverse effects of its operations on other significant aspects of the environment." *Id.* Accordingly, the Solicitor concluded that BPA could fund studies or mitigation projects if "necessary to carry out [its] power marketing responsibilities . . . ." *Id.*

The Northwest Power Act codified and expanded this implied mitigation funding authority, but it did not divorce it from its origins as part of BPA's duties as a quasi-utility. The Solicitor's Opinion reflects a general understanding that mitigation funding is simply part of what any utility does—an authority that comes along with power marketing responsibilities. No one disputes that Congress intended for BPA's power marketing decisions to be covered by § 4(h)(11)(A). It would have been odd for Congress to exclude BPA's mitigation funding decisions given the link between power marketing and mitigation funding—especially since § 4(h)(11)(A) is all about mitigation.

In sum, construing § 4(h)(11)(A) as applying to BPA's mitigation funding and associated rate decisions makes the Northwest Power Act "an harmonious whole." *Brown & Williamson*, 529 U.S. at 133 (cleaned up). This "textually

[10] The Solicitor's Opinion can be found in the addendum.

permissible" interpretation is far more consonant with the purposes of the Act than BPA's contrary interpretation and is therefore a better reading of the statute.[11] *Connell*, 988 F.3d at 1101; *see also Rojas*, 989 F.3d at 674.

B. This Court's Caselaw Supports Petitioners' Reading.

Although this Court has never explicitly addressed whether § 4(h)(11)(A) is implicated by BPA's mitigation funding (and rate) decisions, two prior cases support Petitioners' position on the issue.

In *NEDC 1997*, this Court clarified the relationship between the Council's Fish and Wildlife Program and the "equitable treatment" mandate. As discussed *supra* p. 29, the Council's Program is central to the scheme set out by Congress, and "[t]he primary fish and wildlife protection measures are intended to be established through the" Program. *NEDC 1997*, 117 F.3d at 1531. According to this Court, the Council's Program is the first of "two levels of consideration for fish and wildlife." *Id.* The second level is the equitable treatment provision, which may not be satisfied even by "complete adoption of the" Program. *Id.* at 1532.

BPA's reading of § 4(h)(11)(A) is impossible to square with *NEDC 1997*. "Complete adoption of the Council's program" means adoption

[11] The above analysis shows that no deference is owed to BPA's interpretation of § 4(h)(11)(A) under *Chevron, USA, Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837 (1984), because § 4(h)(11)(A) *clearly* applies to BPA's mitigation funding and related rate decisions. *See Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019) (stating that courts "must carefully consider . . . text, structure, history, and purpose" before finding ambiguity that justifies deference); *Grand Canyon Tr. v. Provencio*, 26 F.4th 815, 824–25 (9th Cir. 2022) (same).

of non-operational as well as operational measures—indeed, the current Program is largely "an off-site mitigation (or 'enhancement') program . . . ." 2-ER-442–43. This Court's statement that equitable treatment requires *at least* full implementation of the Council's Program necessarily implies that BPA's implementation (through funding) of non-operational measures is part of providing "equitable treatment."[12]

In *Confederated Tribes*, this Court again considered BPA's compliance with the "equitable treatment" provision. In doing so, the Court assessed whether BPA was providing "equitable treatment" through its support of non-operational measures as well as its operations-related power marketing activities. Specifically, this Court rested its conclusion that BPA was providing equitable treatment in part on BPA's "expenditures to support fish and wildlife measures, principally those in the . . . Council's Fish and Wildlife Program . . . ." *Confederated Tribes of the Umatilla Indian Reservation v. BPA*, 342 F.3d 924, 922–23 (9th Cir. 2003).

In short, on the few occasions where this Court has construed § 4(h)(11)(A), it has expressed an understanding of the provision that is consistent with Petitioners' reading and inconsistent with BPA's reading.

[12] Moreover, this Court in *NEDC 1997* noted that BPA had "exercised its [§ 4(h)(11)(A)(ii)] responsibility to take into account the Council's Program" by, among other things, "fund[ing] fish hatcheries," 117 F.3d at 1525–26—a clear indication that the Court considered § 4(h)(11)(A)(ii) to cover BPA's funding decisions.

C. BPA's Explanation of Its Interpretation Is Irrational.

The BP-22 ROD's explanation of BPA's interpretation of § 4(h)(11)(A) is muddied, factually inaccurate, and legally unsound. Most glaringly, the ROD purports to rely on the "express language" and "plain text" of the statute, 1-ER-34, but, by BPA's own admission, the ROD "does not even attempt to define" the key terms "operating" and "managing," 1-ER-43. In other words, BPA has no idea what "managing" means; all it knows is that it (conveniently) does not include BPA's mitigation funding duties.[13]

The BP-22 ROD's reasoning vis-à-vis § 4(h)(11)(A) appears to rest on three pillars: the relationship between § 4(h)(10)(A) and § 4(h)(11)(A); BPA's history of implementing the statute; and this Court's caselaw. None of those pillars actually supports BPA's conclusion.

First, as to the relationship between § 4(h)(10)(A) and § 4(h)(11)(A), the ROD maintains that these provisions are "two distinct mandates," with the former "control[ling] the funding and expenditures for . . . fish and wildlife mitigation projects" and the latter governing hydrosystem operations. 1-ER-43–44. This is wrong. Section 4(h)(10)(A) is *not* just about funding; it instructs BPA to use "the [BPA] fund *and the authorities available to [BPA]*

[13] At one point, the ROD states that Congress's inclusion of "managing" "can be interpreted as an intent to bring BPA's power marketing actions within the scope of Section 4(h)(11)(A)'s duties . . . ." ROD at 28. Perhaps that it so. But if "managing" is elastic enough to include BPA's power marketing duties, then it is elastic enough to include its mitigation funding duties. There is no textual basis for construing the term to include the former and not the latter, and purpose and context weigh heavily against such a construction. *See supra*.

under this chapter and other laws administered by [BPA] to protect, mitigate, and enhance fish and wildlife . . . ." 16 U.S.C. § 839b(h)(10)(A). In other words, § 4(h)(10)(A) is the source of BPA's power to use all of its authorities, including its power marketing authority, to protect fish and wildlife.

What distinguishes § 4(h)(10)(A) and § 4(h)(11)(A) is not that the former is about funding and the latter about operations, but that the two provisions are different in kind: § 4(h)(10)(A) grants power and discretion—"responsibility"—to BPA, while § 4(h)(11)(A) tells BPA *how* to exercise its "responsibilities." Once that is understood, there is nothing anomalous about BPA's § 4(h)(10)(A) mitigation funding responsibilities being included in the scope of § 4(h)(11)(A). Indeed, as discussed above, the textual similarity between the two provisions strongly suggests that § 4(h)(10)(A)'s mitigation funding duty falls within the scope of § 4(h)(11)(A).

Second, as to BPA's history of construing the statute, the ROD ignores the many occasions over the years when BPA has stated or implied that funding and/or rate decisions are included within the scope of § 4(h)(11)(A). The first such occasion was in 1981, just after enactment of the Northwest Power Act, while the Council was preparing its first Fish and Wildlife Program. BPA recommended language for the Program to the effect that its § 4(h)(11)(A) duties apply "to relevant decisions on contracts, billing credits, resource acquisitions, environmental cost/benefit analysis, power supply forecasting, *rates*, power scheduling, intertie arrangements, use of advance, energy withdrawals, and other pertinent planning and operations." Mot. Jud. Not. Ex. D at 9 (emphasis

added). A provision along those lines ended up in the Program and remained in the Program through at least 1987. *See* 1982 Fish and Wildlife Program § 1304; 1987 Fish and Wildlife Program § 1203.[14]

A decade later, BPA again advanced a reading of § 4(h)(11)(A) at odds with its position today. In the mid-1990s, BPA prepared an environmental impact statement under the National Environmental Policy Act ("NEPA") in connection with a new business plan. Mot. Jud. Not. Ex. E. In that EIS, BPA considered six different alternatives for how it could run its business. *Id.* at 6–8. In evaluating the effects of the various alternatives, BPA repeatedly discussed how an inability to generate enough revenue to fund fish and wildlife measures would negatively impact its ability to provide "equitable treatment" for fish and wildlife. *See id.* at 19–24. In its subsequent record of decision, BPA again discussed how its "ability to generate revenues to fund fish and wildlife measures" would necessarily affect its "ability to provide equitable treatment for fish and wildlife." Mot. Jud. Not. Ex. F at 10–11.

Later, in the 2000s, BPA justified decisions to enter into long-term mitigation funding agreements on the ground that doing so would help it meet its equitable treatment obligations. For instance, in 2009, BPA entered into a long-term agreement with the Corps, Reclamation, and the State of Washington to fund efforts to restore the Columbia River Estuary. Mot. Jud. Not. Ex. B. The mitigation projects funded through that agreement included various

[14] The 1982 and 1987 Programs are available on the Council's website at https://www.nwcouncil.org/fish-and-wildlife/previous-programs/past-programs-and-background/

non-operational habitat restoration activities. *Id.* at 6, 11–12. BPA justified its decision to enter into the agreement in part on the idea that doing so would "provide[] a higher level of *financial* and operational certainty for fish, further solidifying BPA's efforts to" satisfy the equitable treatment mandate. *Id.* at 14–15 (emphasis added); *see also* Mot. Jud. Not. Ex. C at 13–14 (similar language in Willamette wildlife mitigation decision).

On each of these occasions, BPA explicitly or implicitly recognized that its funding and rate decisions implicate § 4(h)(11)(A). For instance, in its funding agreements, BPA understood that long-term commitments to spend money on mitigation measures would help provide "financial certainty" for fish, contributing to equitable treatment. Under its current interpretation, on the other hand, BPA could announce an intent to reduce fish and wildlife mitigation spending to $0 without implicating "equitable treatment" at all. This inconsistency is not even mentioned in the BP-22 ROD; instead, the ROD states, incorrectly, that BPA has adhered to its current interpretation of § 4(h)(11)(A) "for decades." 1-ER-42.

Third, as to this Court's caselaw, the ROD is simply incorrect that BPA's interpretation of § 4(h)(11)(A) is supported by *NEDC 1997* and *Confederated Tribes*. 1-ER-35. On the contrary, as discussed above, those cases do not resolve the question concerning the scope of § 4(h)(11)(A) at issue here; and, to the extent that they shed light on the issue, they support Petitioners' view.

D. BPA's Interpretation of § 4(h)(11)(A) Does Not Deserve *Chevron* Deference.

The shortcomings in the ROD's analysis discussed above reflect the deep flaws in BPA's reading of § 4(h)(11)(A) . They also provide two separate reasons why BPA's interpretation is not due any deference under *Chevron*, 467 U.S. 837. First, even if BPA's interpretation *could* be supported by a reasonable argument, BPA did not do so in the ROD. An agency does not receive *Chevron* deference for a statutory interpretation—even a permissible one—supported by an unreasonable explanation. *Ariz. Alliance for Cmty. Health Ctrs. v. Ariz. Health Care Cost Containment Sys.*, 47 F.4th 992, 1004 (9th Cir. 2022).

Second, because BPA failed to acknowledge the many times in the past when it adopted a different view of § 4(h)(11)(A), its interpretation of that provision in the ROD is owed no deference. "[A]n 'unexplained inconsistency' in agency policy is 'a reason for holding an interpretation to be an arbitrary and capricious change from agency practice.'" *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 222 (2016) (quoting *Nat'l Cable & Telecomm'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005)) (alterations omitted). "An arbitrary and capricious [interpretation] of this sort is itself unlawful and receives no *Chevron* deference." *Id.*

There is a third reason why BPA's interpretation of § 4(h)(11)(A) does not deserve *Chevron* deference: BPA is not the only agency that implements § 4(h)(11)(A), so it lacks the authority to speak with "the force of law" as to that provision's scope and meaning. *See Proffitt v. FDIC*, 200 F.3d 855, 860

(D.C. Cir. 2000) ("When a statute is administered by more than one agency, a particular agency's interpretation is not entitled to *Chevron* deference."). "Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *Brown & Williamson*, 529 U.S. at 159. But where more than one agency is tasked with carrying out a statute or statutory provision, "it cannot be said that Congress implicitly delegated to one agency authority to reconcile ambiguities or to fill gaps, because more than one agency will independently interpret the statute."[15] *Salleh v. Christopher*, 85 F.3d 689, 692 (D.C. Cir. 1996).

II. BPA Was Required to Demonstrate "Equitable Treatment" at the Time It Adopted the BP-22 Rates, and It Failed To Do So.

Under this Court's caselaw, BPA needs to demonstrate equitable treatment "only when [it] makes a final decision that significantly impacts fish and wildlife." *Confederated Tribes*, 342 F.3d at 931. The question, then, is whether BPA's BP-22 rate decision—including the preliminary decisions feeding into it—"significantly impacts fish and wildlife." As explained below, it does.

[15] A panel of this Court rejected this "multiple agencies" rule in *Navajo Nation v. U.S. Dep't of Health & Human Servs.*, 285 F.3d 864 (9th Cir. 2002). But that opinion was vacated and the case reheard en banc, and the en banc court did not address the "multiple agencies" rule. *See Navajo Nation v. U.S. Dep't of Health & Human Servs.*, 325 F.3d 1123 (9th Cir. 2003) (en banc).

A. BPA Was Required to Demonstrate Equitable Treatment at the Time It Made Its BP-22 Rate Decision.

For several reasons, the BP-22 rate decision was a "final decision that significantly impacts fish and wildlife," triggering BPA's obligation to demonstrate equitable treatment.

First, BPA's selection of rates was itself a crucial decision with serious consequences for fish and wildlife: it was when "the cost recovery mechanisms [were] adopted." *Golden Nw. Aluminum*, 501 F.3d at 1053. A failure to set rates high enough to cover the costs of fish and wildlife mitigation measures makes it "less likely that BPA w[ill] ultimately be able to live up to its statutory obligations and other commitments," including its commitment to fund fish mitigation measures. *Id.* at 1052. In other words, the setting of BP-22 rates established the funding mechanism for fish and wildlife mitigation measures during the rate period.

Second, the final BP-22 rate decision necessarily followed BPA's decision during IPR about how much it will spend on fish and wildlife mitigation during the rate period. That funding decision clearly has a "significant impact" on fish and wildlife, as it determines how much total money will be available to fund mitigation measures during the rate period. But however important that IPR funding decision was for fish and wildlife, it did not by itself trigger the duty to show "equitable treatment," because it was not a "final decision." What triggered the duty to show equitable treatment was BPA's BP-22 rate decision, which relied on the spending decisions made during IPR. *E.g.*, 2-ER-239–40 ("This

[Revenue Requirement] Study incorporates the spending levels identified in the 2020 IPR final closeout report . . . .").

Third, because "equitable treatment" requires BPA to treat fish and wildlife equitably "on the whole," the BP-22 decision—rather than subsequent decisions about funding for individual projects—was the appropriate point for BPA to demonstrate equitable treatment. Under *Confederated Tribes*, the equitable treatment mandate "does not require every BPA decision to treat fish and wildlife equitably," which allows BPA to make individual decisions that place fish below other concerns. 342 F.3d at 931. The flip side of that flexibility, however, is that BPA must demonstrate equitable treatment when it makes large-scale decisions affecting funding for its entire mitigation program, such as the the BP-22 rate decision. *Cf. California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1011 (9th Cir. 2009) (finding a dispute ripe for review where "the plaintiffs [we]re taking advantage of what may be their only opportunity to challenge the [decision] on a nationwide, programmatic basis").

Fourth, the BP-22 rate case presented BPA with a unique opportunity to act in a way to benefit fish and wildlife, and its refusal to do so will have a "significant impact" on fish and wildlife. The unexpectedly large secondary surplus revenue forecast presented BPA with "unique and important opportunities." Yet BPA refused to see increasing funding for fish and wildlife mitigation as one of those opportunities, and stubbornly adhered to the funding levels developed during IPR.

BPA could have increased funding for all mitigation measures to keep

up with inflation; it could have provided additional funding to allow project sponsors to conduct maintenance that has been deferred thanks to years of flat funding; it could have increased funding for the LSRCP, as the Nez Perce Tribe asked; it could have finally heeded the Council's call "to begin a comprehensive effort . . . to intensify, expand, and then sustain the mitigation effort" above Chief Joseph and Grand Coulee dams. BPA chose to do none of those things. That decision will significantly affect (indeed, is already affecting, *see* Cutter Decl. ¶¶ 27–35) fish and wildlife in the Columbia Basin, triggering BPA's duty to demonstrate "equitable treatment."

The BP-22 ROD offers several reasons why BPA's rate decision did not trigger its duty to show "equitable treatment." None of these is convincing.

The ROD first asserts that the BP-22 decision did not trigger the "equitable treatment" duty because "[t]he final decision that BPA is making . . . is limited to the level of its power and transmission rates." 1-ER-52. But that is just the decision that BPA made *during the § 7(i) hearing itself*. That decision relied on earlier intermediate decisions, including—crucially—the decision about overall fish and wildlife spending levels for the rate period made during IPR. BPA cannot escape its duty to show equitable treatment by artificially segmenting its decisionmaking process and consigning vital spending decisions that significantly impact fish and wildlife to earlier, non-final stages of that process.[16] The point is that the process as a whole—IPR *plus* the subsequent

[16] As mentioned *supra* p. 9, there is nothing in the Northwest Power Act that requires BPA to set or project spending levels outside the § 7(i) hearing.

§ 7(i) hearing—set fish and wildlife spending levels for the rate period and then adopted cost recovery mechanisms, and those choices have a significant impact on fish and wildlife. *See Industrial Customers of Nw. Utils. v. BPA*, 408 F.3d 638, 645–47 (9th Cir. 2005) (holding that a pre-§ 7(i) non-final decision that "was a component of the rate" would later be reviewable "as part of the petition for review of the ultimate . . . rate decision"); *see also NEDC 2007*, 477 F.3d at 678–79 (reviewing a non-final BPA decision alongside a final one because the earlier, non-final decision "was part of the process BPA used to set its course, leading to . . . its final action").[17] Thus, at the end of that process, BPA was required to demonstrate equitable treatment.

Next, the BP-22 ROD insists that the fish and wildlife funding decisions made during IPR were not really decisions—not even "agency actions"—and thus did not trigger the duty to show "equitable treatment," even if considered as part of a single process resulting in the final rate decision.[18] 1-ER-71–79. According to BPA, the IPR spending decisions were really just "estimates that

[17] Both *Industrial Customers* and *NEDC 2007* reflect a general principle of administrative law codified at 5 U.S.C. § 704: "A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."

[18] The ROD also states that BPA's funding decisions are mere "planned spending levels used to inform BPA's budget proposal" to Congress. 1-ER-76. But BPA, unlike most federal agencies, does not rely on appropriations from Congress. *NEDC 2007*, 477 F.3d at 672. BPA does submit a budget to Congress, but it is not reliant on any approval from Congress in order to use the BPA fund for fish and wildlife purposes. *See* 16 U.S.C. § 838i(b). In short, BPA's decisions regarding funding levels are not at all like a typical agency's budget proposal to Congress, because BPA controls its own pursestrings.

are subject to change." 1-ER-74.

To be frank, this is disingenuous. At least since the adoption of its Strategic Plan, BPA has taken a "top-down" approach to setting spending levels and made strong commitments to keeping fish and wildlife funding flat. 1-ER-179, 182, 190; 2-ER-291–93. BPA cannot repeatedly speak of its "commitment" to the Strategic Plan, tout its success in "bending the cost curve," 2-ER-308–10, and then, when it is convenient, claim that these promises of keeping costs flat are illusory or contingent. The truth is that the fish and wildlife funding numbers announced during IPR were not "projections"; they were spending caps—or "firm cost constraints," as BPA put it in the Strategic Plan. 2-ER-293. BPA's actual practice in recent years confirms this. *See* 2-ER-229 (table comparing BPA fish mitigation spending to IPR "projections"); *see also* Cutter Decl. Ex. 3 at 4 (comparing actual spending during fiscal year 2022 to IPR levels).

Moreover, even if the IPR spending levels are viewed as mere "projections," the BP-22 decision still has a "significant impact" on fish and wildife. Again, a rate decision is when "the cost recovery mechanisms [are] adopted," and BPA's ability to fund mitigation measures is necessarily limited by the rates it sets. *Golden Nw. Aluminum*, 501 F.3d at 1053.

Because the BP-22 final decision—which encompasses the funding decisions made during IPR—has a "significant impact" on fish and wildlife, it triggered BPA's duty to demonstrate "equitable treatment."

B. BPA Failed to Demonstrate Equitable Treatment.

BPA took the position that it did not need to demonstrate equitable treatment at the time of the BP-22 decision, so it did not attempt to do so. *See* 1-ER-45, 55. Petitioners do not believe that BPA could demonstrate "equitable treatment" on this record, because continuing to flatline mitigation funding while lowering power rates and committing to revenue financing does not provide "financial certainty" for fish on par with other agency objectives. But that issue is not before this Court; this Court is "limited to evaluating [BPA's] contemporaneous explanation in light of the existing administrative record." *Dep't of Commerce v. New York*, 139 S.Ct. 2551, 2573 (2019). Because BPA failed to provide such an explanation, its BP-22 rate decision was arbitrary and capricious and not in accordance with law. *See* 5 U.S.C. § 706(2)(A)

III. BPA Failed to Take the Council's Fish and Wildlife Program Into Account "To the Fullest Extent Practicable" When Choosing Funding Levels and Setting Rates.

BPA's rate decision violated the Northwest Power Act for a second reason: BPA failed to take the Council's Fish and Wildlife Program into account "to the fullest extent practicable" before deciding on fish and wildlife mitigation funding levels and setting rates.

A. BPA Did Not Take the Council's Program Into Account "To the Fullest Extent Practicable" During IPR or the § 7(i) Hearing.

There is nothing in the record to suggest that BPA took the Council's Program into account *at all* during IPR, much less took it into account "to the

fullest extent practicable." On the contrary, BPA suggested in the BP-22 ROD that it last considered the Council's Program during the CRSO EIS process. 1-ER-61–62. BPA did not decide on funding levels for its fish and wildlife mitigation efforts during the EIS process. 2-ER-432–33. Thus, BPA *never* considered the Council's Program "to the fullest extent practicable" before deciding on overall fish and wildlife spending levels for the rate period during IPR.

But even if BPA had taken the Council's Program into account "to the fullest extent practicable" during IPR, the § 7(i) hearing itself—and the discovery of the large secondary surplus revenue forecast—offered a new opportunity at which the Program should have been taken into account. Moreover, because the most recent version of the Council's Program (the 2020 Addendum) was not even released when BPA issued its IPR Closeout Report, the § 7(i) hearing offered the first opportunity for BPA to take the updated Program into account during the ratemaking process. *Compare* 1-ER-194, *with* 2-ER-312. BPA did not do so, insisting that it had no further obligation to consider the Council's Program. 1-ER-61–69.

B. There Was At Least One "Relevant Stage" During the BP-22 Process During Which BPA Should Have Fully Considered the Council's Program.

Section 4(h)(11)(A)(ii) requires agencies to fully consider the Council's Program "at each relevant stage of decisionmaking processes." 16 U.S.C. § 839b(h)(11)(A)(ii). The Northwest Power Act does not define what a "relevant

stage" is, but the term "relevant" is usually used to cast a wide net. *See EEOC v. Shell Oil Co.*, 466 U.S. 54, 68–69 (1984) (discussing the meaning of "relevant" in the context of EEOC investigations); *Sandoval v. Cnty. of San Diego*, 985 F.3d 657, 666 (9th Cir. 2021) (discussing the "low bar of relevance" under Rule 401 of the Federal Rules of Evidence). And this Court has held that § 4(h)(11)(A)(ii)'s reference to "each" relevant stage "recogniz[es] there is more than one." *Nat'l Wildlife Fed'n v. FERC*, 801 F.2d 1505, 1514 (9th Cir. 1986).

Given its use of the terms "each" and "relevant," it seems apparent that Congress intended for BPA to take the Program fully into account whenever making decisions with ramifications for Program implementation. The BP-22 rate proceeding involved several such decisions: the choice of overall fish and wildlife mitigation funding levels for the rate period during IPR; the decision of how to respond to the unexpectedly high surplus revenue forecast; and, of course, the final setting of rates. These were all points at which full consideration of the Council's program could have guided BPA's decisionmaking—hence, they were "relevant stages" or, if viewed in aggregate, one "relevant stage."

It is not hard to see how considering the Council's Program "to the fullest extent practicable" could have affected the BP-22 decision. For one thing, fully taking into account the Program's call for BPA to "begin a comprehensive effort over the next five years to intensify, expand, and then sustain the mitigation effort for" the blocked areas above Grand Coulee and Chief Joseph dams could have led BPA to forgo flatlined funding in favor of a funding increase—and perhaps a rate increase—to allow for that expansion of work. Or maybe consideration of

the Council's program would have led BPA to respond to the surplus revenue forecast by pursuing a third "opportunity"—increasing funding for fish and wildlife mitigation programs.

The fact that BPA could, in theory, decide to increase fish and wildlife spending later—through funding decisions on individual mitigation projects, for instance—is irrelevant. Section 4(h)(11)(A)(ii) requires BPA to fully consider the Council's Program "at each relevant stage of decisionmaking processes." The BP-22 process was certainly a "relevant stage" (or even multiple such stages), even if later stages (*i.e.*, renewal or modification of contracts for particular projects) will also be "relevant."[19] *See NWF v. FERC*, 801 F.2d at 1514. The funding levels chosen during IPR will function as spending caps for the rate period, limiting BPA's ability to make significant funding adjustments at the project level. *See, e.g.*, 2-ER-375 (discussion of BPA's "limited flexibility" due to its "fixed budget"). And, even putting that aside, the BP-22 decision was when "the cost recovery mechanisms [were] adopted," determining BPA's ability to fund Program measures. *Golden Nw. Aluminum*, 501 F.3d at 1053.

As BPA itself once said, "[t]he ultimate tests of BPA's ability to implement Fish and Wildlife Program measures will occur in the course of BPA's rates proceedings" and other budgetary processes. Mot. Jud. Not. Ex. D at 3. A rate proceeding is not just a "relevant" stage, it is a *crucial* stage—it is when

[19] Procedural requirements under NEPA and the ESA are often applicable both when agencies make programmatic decisions and when they later implement those decisions. *See, e.g.*, *Cottonwood Envt'l Law Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1082 (9th Cir. 2015).

spending levels are chosen and the funding mechanism for the Program is set up. Accordingly, BPA was required to take the Council's Program into account "to the fullest extent practicable" during the BP-22 rate proceeding. BPA did not do so; thus, its BP-22 decision was arbitrary, capricious, and not in accordance with law, 5 U.S.C. § 706(2)(A), as well as "without observance of procedure required by law," *id.* § 706(2)(D).

IV. This Court Should Hold the BP-22 Decision Unlawful and Remand to BPA, and It Should Award Injunctive Relief.

When BPA sets rates in a manner that violates the APA and Northwest Power Act, this Court must hold the decision unlawful and remand to the agency to set rates in accordance with law. *See id.* § 706(2); *Golden Nw. Aluminum*, 501 F.3d at 1053 (remanding to BPA "to set rates in accordance with this opinion"). Because BPA failed to demonstrate "equitable treatment" and failed to take the Council's Program into account "to the fullest extent practicable" in the BP-22 ratemaking, this Court must remand to BPA to cure its legal violations.

In addition to remanding, Petitioners request that this Court order interim injunctive relief directing BPA to increase funding for mitigation measures negatively affected by underfunding during the BP-22 period to date. This Court has already held that it has the power to award a remedy of this kind: in *NEDC 2007*, the Court held that it had "broad powers to order 'mandatory affirmative relief,'" including "the power to require BPA to fund the [Fish Passage Center], at least for a period of time in which BPA can reconsider its action . . . ." *NEDC 2007*, 477 F.3d at 680–81 (quoting *Adams v. Witmer*, 271 F.2d 29, 38 (9th Cir.

1958)).

As the Council recently noted, thanks to funding issues, many mitigation projects "have reached a tipping point where the on-the-ground mitigation work must be cut back." Cutter Decl. Ex. 6 at 10. Ordering BPA to provide additional funding sufficient for these measures to be implemented as intended would be an appropriate remedy for BPA's legal violations. *See E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1297 (9th Cir. 1992) (an injunction should be "tailored to eliminate only the specific harm alleged").

How much additional funding BPA should be required to provide, and which projects should receive funding, are issues that cannot be resolved based on the current record. Accordingly, Petitioners ask that, if the Court finds BPA violated the Northwest Power Act, the Court allow supplemental briefing on the issue of the scope of appropriate injunctive relief. Petitioners recognize that this is an unusual request,[20] but the Northwest Power Act's grant of original jurisdiction to this Court "raises procedural problems that must be resolved on a case-by-case basis." *Public Power Council v. Johnson*, 674 F.2d 791, 794 (9th Cir. 1982).

What is clear from the current record is that *some* kind of injunctive relief is appropriate. The propriety of injunctive relief depends on the usual injunction factors: (1) the threat of "irreparable harm"; (2) the balance of equities; and (3) the public interest in granting or withholding relief. *NWF 2018*, 886 F.3d at 817.

[20] It is not unusual for district courts adjudicating APA cases to decide issues of liability before the parties brief issues of remedy. *See, e.g.*, *Conservation Congress v. U.S. Forest Serv.*, 235 F.Supp.3d 1189, 1221 (E.D. Cal. 2017).

Petitioners satisfy all three of these factors.

First, the declarations submitted by Petitioners demonstrate that they are likely to suffer irreparable harm flowing from BPA's BP-22 rate and funding decisions. BPA's decisions have already had a devastating effect on important programs such as the Fish Passage Center and fish screen installation. *See* Cutter Decl. Ex. 9 (Fish Passage Center); Cutter Decl. Ex. 5 at 6–7 (fish screens); Cutter Decl. Ex. 8 at 2 (WDFW projects); *see also NEDC 2007*, 477 F.3d at 678, 691 (awarding injunctive relief under similar circumstances).

Second, the equities favor Petitioners. Although this is not an ESA case, many of the salmon and steelhead species affected by BPA's underfunding are listed under the ESA, a statute that reflects Congress' judgment "that the balance has been struck in favor of affording endangered species the highest of priorities . . . ." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). And given BPA's financial success in the last year, ordering the agency to provide additional funding for fish mitigation would not impose much of a burden on it.

Finally, the "public interest" favors injunctive relief. It is true that any increase in funding ordered by this Court is ultimately paid by ratepayers, but that is the design of the Northwest Power Act: Congress intended that "the cost of implementing fish and wildlife measures be borne by the region's ratepayers, through increases in [BPA's] wholesale power rates." Blumm, *Implementing*, *supra*, at 283. And any minor financial harm to the region's ratepayers pales in comparison to the incalculable value of saving endangered fish. *See Hill*, 437 U.S. at 187–88 (discussing how "Congress viewed the value of endangered

species as 'incalculable'").

In short, the only way to fully remedy BPA's violations of the Northwest Power Act during the BP-22 rate case is to order BPA to make up for its underfunding of fish and wildlife mitigation measures. The propriety of such relief is evident from the record, but the details require additional factual development.

CONCLUSION

For the foregoing reasons, this Court should hold that BPA violated the Northwest Power Act in making its BP-22 rate decision and should remedy that violation by remanding BPA's decision and ordering injunctive relief.

Date: October 21, 2022

Respectfully submitted,

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STATEMENT OF RELATED CASES

The undersigned attorney is unaware of any related cases currently pending in this Court.

Date: October 21, 2022 */s/ Andrew R. Missel*

CERTIFICATE OF COMPLIANCE

I am the attorney for Petitioners.

This brief contains 13,981 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(f). The brief's type size and typeface comply with Federal Rule of Appellate Procedure 32(a)(5) and (6).

I certify that this brief complies with the word limit of Ninth Circuit Rule 32-1.

Date: October 21, 2022 *<u>/s/ Andrew R. Missel</u>*