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' REPLY BRIEF

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INTRODUCTION

For years, the Bonneville Power Administration ("BPA") has pursued a "flat funding" policy, imposing "firm cost constraints" on fish and wildlife mitigation efforts it is required to fund under the Northwest Power Act. *E.g.*, 1-ER-190; 2-ER-291–93. Predictably, this has led to important mitigation projects being underfunded. *See* Opening Br. at 11–13, 17–20; *see also* 2-ER-226–28. When setting spending levels and rates for the BP-22 rate period, BPA had a unique opportunity to provide adequate funding for fish and wildlife without raising power rates. Opening Br. at 15–18. Rather than even consider taking advantage of this opportunity, BPA ignored its obligations to fish and wildlife, including its "equitable treatment" obligation under § 4(h)(11)(A) of the Act, 16 U.S.C. § 839b(h)(11)(A).

None of this is addressed in any meaningful way in BPA's answering brief. Instead, BPA tosses out a host of distracting arguments while repeating its flawed legal analysis from the BP-22 Record of Decision ("BP-22 ROD"). BPA continues to claim that its obligations to fish and wildlife under § 4(h)(11)(A) are "irrelevant" in the ratemaking process—even though that process is where BPA adopts the funding mechanism to "protect, mitigate, and enhance fish and wildlife."

BPA appears to think that the Northwest Power Act means whatever BPA says it means. But this Court, not BPA, has the final say. This Court must make clear to BPA that its reading of § 4(h)(11)(A) is wrong, and that the agency erred in setting BP-22 rates without even considering its § 4(h)(11)(A) duties to fish.

ARGUMENT

I. BPA Continues to Misinterpret § 4(h)(11)(A).

A. BPA Reads "Managing" Too Narrowly, to the Extent It Reads the Word At All.

BPA refuses to engage with the crucial textual question of how to read the term "managing" in § 4(h)(11)(A). BPA claims that "defining the words 'managing' or 'operating' is not necessary to understand the scope of § 4(h)(11)(A)" and that, in fact, "defining each word is not helpful." Answer. Br. at 23–24. To BPA, "managing or operating" is something of a term of art that means whatever BPA says it means, and which cannot be broken up into its parts.

However, as Petitioners have discussed, the Northwest Power Act must be "construed in a consistent manner" with other laws applicable to the federal hydrosystem, 16 U.S.C. § 839, and those laws use the term "operate" (or its gerund or noun forms), but not "manage." Opening Br. at 24–26. Moreover, the Northwest Power Act itself sometimes uses the term "operation" separate from the term "management." *See* 16 U.S.C. § 839b(h)(1)(A) (referring to the "development and operation of hydroelectric facilities on the Columbia River and its tributaries"); *id.* § 839b(h)(2)(A)–(B) (similar). The question, then, is what Congress intended to accomplish by including the broad terms "managing" and "regulating" alongside the known term "operating" in § 4(h)(11)(A)—specifically, did it intend to include BPA's mitigation funding as part of the "management" of the hydrosystem?

BPA's answer is that "managing" the hydrosystem cannot include funding

mitigation measures because those measures might take place offsite (that is, away from hydroelectric facilities) and "Congress intentionally linked the verb 'managing' to 'hydroelectric facilities.'" Answer. Br. at 25. Putting aside the fact that mitigation projects need not take place offsite, this argument overlooks that the Northwest Power Act contemplates using "[e]nhancement measures" to "achiev[e] offsite protection and mitigation." 16 U.S.C. § 839b(h)(8)(A); *see also id.* § 839b(h)(5). And § 4(h)(11)(A) itself explicitly instructs agencies to "protect, mitigate, and enhance . . . related spawning grounds and habitat," which usually entails offsite mitigation. *See, e.g.*, 2-ER-442–43, 451, 461–62 (describing offsite mitigation efforts). Given that, there is nothing odd about the "management" of hydroelectric facilities encompassing the implementation or funding of offsite mitigation measures to aid species harmed by those facilities. Indeed, the Act clearly contemplates that operating and managing a *non-federal* facility may involve implementing offsite mitigation measures. *See* 16 U.S.C. § 839b(h)(11)(A)(ii) (providing that agencies may "impose upon any non-Federal electric power project measures to protect, mitigate, and enhance fish and wildlife *which are not attributable to the development and operation of such project*") (emphasis added); 2-ER-417–19 (describing offsite mitigation).[1]

[1] In their proposed amicus brief, the Spokane Tribe of Indians and the Coeur d'Alene Tribe ("Tribes") advance a slightly different reading of the statute than Petitioners, one which does not require construing the term "managing." The Tribes read "managing, operating, or regulating" in § 4(h)(11)(A) as words that merely identify which agencies are subject to the provision. *See* Tribes' Proposed Amicus Br. (Dkt. 44-2) at 13–19. The Tribes' reading of the statute leads to the same result as Petitioners' reading: BPA should have complied with § 4(h)(11)(A) when setting the BP-22 rates.

Notably, BPA's assertion that "purchasing short-term alternative power from the market to offset diminished generating capacity" is a "managing" or "operating" activity, Answer. Br. at 22, undermines its argument regarding "offsite" activity, because such an activity is definitely "offsite," to the extent it can even be tied to a particular geographic location.

BPA also argues that, because the "other purposes" referenced in § 4(h)(11)(A)(i) all have to do with federal hydrosystem operations, § 4(h)(11)(A) cannot be read to cover non-operational actions such as mitigation funding. *See* Answer. Br. at 23. The premise of this argument is wrong—the "other purposes" mentioned in § 4(h)(11)(A)(i) include, but are not limited to, the purposes set out in the statutes under which the U.S. Army Corps of Engineers ("Corps") and the Bureau of Reclamation ("Reclamation") operate individual federal hydroelectric facilities. *See* SER-73. The purposes for which the hydrosystem is operated, managed, and regulated also include, *e.g.*, "assur[ing] the Pacific Northwest of an adequate, efficient, economical, and reliable power supply." 16 U.S.C. § 839(2); *see also* 2-ER-440 ("the purposes of the Northwest Power Act also factor into the agencies' consideration of equitable treatment"). Like fish and wildlife protection, that purpose is achieved through both operational and non-operational means.[2]

[2] Because § 4(h)(11)(A) explicitly refers to "non-Federal" facilities, "other purposes" necessarily includes purposes that have nothing to do with the operation of federal hydroelectric projects.

B. BPA Misunderstands the Relationship Between § 4(h)(10)(A) and § 4(h)(11)(A).

BPA argues that § 4(h)(11)(A) should not be read to apply to funding decisions because "§ 4(h)(10) is replete with language concerning mitigation funding." Answer. Br. at 25–28. The gist of BPA's argument is that § 4(h)(10) is about mitigation funding, § 4(h)(11)(A) is about system operations, and never the twain shall meet.

This understanding of the two provisions' relationship is incorrect, as Petitioners have already explained. *See* Opening Br. at 36–37. BPA continues to fail to grasp the nature of § 4(h)(11)(A): it does not grant any new power to BPA or other federal agencies, but instead directs agencies *how* to exercise their power. *Cf. Am. Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 299 (5th Cir. 1998) (describing § 7(a)(2) of the Endangered Species Act as "a directive to agencies to channel their *existing* authority in a particular direction"). Moreover, unlike § 4(h)(10)(A), it applies to at least four federal agencies.

Given those features, it is not surprising that § 4(h)(11)(A) does not specifically mention BPA's mitigation funding duties. Rather than attempt to list all of the agencies' duties subject to the provision—non-federal dam licensing, power marketing, Clean Water Act permitting, federal dam operations, mitigation funding—Congress used the broad terms "managing, operating, or regulating" to capture those duties. "Regulating," for instance, covers both the Federal Energy Regulatory Commission's ("FERC") licensing of non-federal dams under the Federal Power Act as well as the Corps' regulation of non-federal dams under

the Clean Water Act. *See PUD No. 1 of Douglas Cnty. v. BPA*, 947 F.2d 386, 394–96 (9th Cir. 1991).

BPA is correct to point out that § 4(h)(10)(A) contains more than just a grant of power: it also guides BPA's exercise of its power through the "consistency" requirement. *See Nw. Envt'l Def. Ctr. v. BPA* (*NEDC 2007*), 477 F.3d 668, 674 (9th Cir. 2007). But that requirement applies to *everything* BPA does, not just its mitigation funding. *See* 16 U.S.C. § 839b(h)(10)(A) (imposing the consistency requirement on BPA's use of the BPA fund "and the authorities available to [BPA] under this chapter and other laws"). Thus, when BPA engages in power-marketing activities—which even BPA admits are subject to § 4(h)(11)(A)—those activities are also subject to the "consistency" requirement. This further demonstrates that there is no "funding/operations" dichotomy between § 4(h)(10)(A) and § 4(h)(11)(A).

C. This Court's Precedents Do Not Support BPA's Interpretation

BPA claims that its interpretation of § 4(h)(11)(A) is supported by *Northwest Environmental Defense Center v. BPA* (*NEDC 1997*), 117 F.3d 1520 (9th Cir. 1997) and *Confederated Tribes of the Umatilla Indian Reservation v. BPA*, 342 F.3d 924 (9th Cir. 2003). Answer. Br. at 28–30. But, to the extent those cases have anything to say about § 4(h)(11)(A), they support Petitioners' view. Opening Br. at 34–35. BPA's answering brief confirms this.

BPA first advances a convoluted argument to the effect that *NEDC 1997*'s analysis of the interplay between § 4(h)(11)(A)(i) ("equitable treatment") and § 4(h)(11)(A)(ii) ("fullest extent practicable") implies that BPA's mitigation

funding duties cannot be subject to § 4(h)(11)(A). In *NEDC 1997*, this Court described the "fullest extent practicable" and "equitable treatment" requirements as "independent." 117 F.3d at 1532. BPA infers from this that its mitigation funding duties are not subject to § 4(h)(11)(A)(i). Answer. Br. at 28.

BPA misunderstands what *NEDC 1997* meant by "independent," which is that complete adherence to the "fullest extent practicable" requirement does not necessarily satisfy the "equitable treatment" requirement. *See NEDC 1997*, 117 F.3d at 1532 ("[A] federal agency c[an]not satisfy its equitable treatment responsibilities under paragraph (i) simply by adopting the Council's program under paragraph (ii)."). This does not mean that implementing the Program is *irrelevant* to the question of whether an agency is providing equitable treatment. On the contrary, as this Court said in *Confederated Tribes*, implementation of the Program can help achieve equitable treatment, and it is therefore proper for an agency to point to its implementation of the Program to support a showing of equitable treatment. *Confederated Tribes*, 342 F.3d at 934.

Thus, contrary to BPA's suggestion, there is nothing "improper" about its mitigation funding activities being subject to both § 4(h)(10)(A)'s "consistency" requirement and § 4(h)(11)(A)(i)'s "equitable treatment" requirement. Indeed, as discussed above, BPA's "operational" activities are subject to both requirements.

BPA next argues that *NEDC 1997*'s holding that BPA can achieve equitable treatment "on a system-wide basis" implies that § 4(h)(11)(A) applies only to "system operations and management actions." Answer. Br. at 29–30. BPA again fails to explain why "system management" does not include the

funding of mitigation measures to address harm to species affected by the hydrosystem. More fundamentally, BPA misunderstands the "system" to which this Court was referring in *NEDC 1997*. In adopting the "system-wide approach," this Court quoted in full § 4(h)(1)(A) of the Northwest Power Act. 117 F.3d at 1533. That provision instructs the Council to develop a Fish & Wildlife Program that, "to the greatest extent possible, [is] designed to deal with th[e] [Columbia] [R]iver and its tributaries *as a system*." 16 U.S.C. § 839b(h)(1)(A) (emphasis added). Thus, this Court was referring not to the federal hydrosystem, but rather to the Columbia River system: a "system-wide" strategy is one that takes "a comprehensive approach to fish and wildlife protection on the Columbia." *NEDC 1997*, 117 F.3d at 1533; *see also* Opening Br. at 6–7.

D. BPA's Attempts to Gloss Over the Odd Consequences of Its Reading of the Statute Are Unconvincing.

1. Efficacy of the Council's Program.

BPA's reading of § 4(h)(11)(A) leads to the odd result of minimizing the influence of the Council's Program over BPA's actions—something that undermines the Northwest Power Act's overall scheme. *See* Opening Br. at 29–31. BPA has three responses to this point, none of which survives scrutiny.

First, BPA points out that the Northwest Power Act has many purposes, only one of which is fish and wildlife protection. Answer. Br. at 38. That is true, but irrelevant. Section 4(h)(11)(A) is about fish and wildlife, and 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. It is thus natural that § 4(h)(11)(A)(ii)—which ensures full consideration of the Program—should apply to BPA's funding and rate decisions, which largely determine whether the Program will be implemented successfully.

Second, BPA argues that its interpretation doesn't undermine the efficacy of the Council's Program (and thus the statutory scheme) because of the existence of § 4(h)(10)(A)'s "consistency" requirement. Answer. Br. at 38–39. BPA's reliance on the consistency provision is surprising given what it has told this Court about that provision. BPA has argued in the past that the consistency provision "certainly cannot be construed as requiring more than [§ 4(h)(11)(A)(ii)]." BPA Answer. Br. in *NEDC 2007* at 32 n.10 (filed July 18, 2006).[3] BPA even went so far as to argue that the consistency provision imposes *no* substantive constraints. *Id.* at 30–31, 40–43. BPA cannot simultaneously interpret § 4(h)(10)(A)'s "consistency" provision as having no teeth while arguing that a narrow interpretation of the scope of § 4(h)(11)(A) is appropriate because the consistency provision is a meaningful backstop.

Even putting that aside, though, BPA's argument doesn't hold up. As discussed above, BPA's "operational" activities are subject to both § 4(h)(10)(A)'s consistency requirement and § 4(h)(11)(A)(ii). This reflects Congress's judgment that it is necessary to have both substantive ("consistency")

[3] A copy of the relevant portion of this brief is included as an attachment. The Court may take judicial notice of this brief for the purpose of ascertaining what arguments BPA made therein. *See Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006).

and procedural ("fullest extent practicable") "hooks" for the Council's Program to influence BPA's actions.[4] In fact, the "fullest extent practicable" requirement, though procedural, is in some respects a more powerful guarantor of the Program's influence on BPA than the "consistency" provision, which requires BPA to balance the Program with other constraints. *Cf. Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 205–06 (1982) ("When the elaborate and highly specific procedural safeguards embodied in [the Education of the Handicapped Act] are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid.").

Third, BPA suggests that, although the Program is *currently* focused on non-operational mitigation measures, this has not always been the case—the implication apparently being that BPA's reading would have done less harm to the statutory scheme in the past. Answer. Br. at 39. But even if the Program's focus has shifted over the years, successful implementation of non-operational mitigation measures, funded by BPA, was essential to the scheme set out by Congress at the very start. *See* 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) (discussing the importance of offsite mitigation); *see also Nw. Res. Info. Ctr., Inc. v. Nw. Power Planning Council*

[4] Congress often imposes both procedural and substantive requirements that apply to the same agency actions. *See, e.g.*, *Salmon Spawning & Recovery Alliance v. Gutierrez*, 545 F.3d 1220, 1227 (9th Cir. 2008) (discussing the Endangered Species Act's procedural and substantive requirements).

(*NRIC 1994*), 35 F.3d 1371, 1378 (9th Cir. 1994) (the Northwest Power Act "tapped revenues of the Basin's hydropower system as a source for financing the biological restoration").

2. Effects of BPA's Interpretation on Other Agencies' Duties.

As explained in Petitioners' opening brief,[5] BPA's interpretation of § 4(h)(11)(A) renders the parts of the Council's Program that apply to the Corps' and Reclamation's non-operational mitigation activities a nullity. Opening Br. at 31 n.8. BPA has two responses to this point, neither of them persuasive.

First, BPA suggests that the Council erred by including in the Program non-operational mitigation projects to be carried out by the Corps and Reclamation—the Council "is not infallible," according to BPA, and its inclusion of such projects in the Program "is not dispositive of what Congress intended." Answer. Br. at 41–42. But the Council is doing *exactly* what Congress intended. In § 4(h)(2) of the Northwest Power Act, Congress instructed the Council to solicit for inclusion in the Program both recommendations for "establishing objectives for the . . . operation of [hydroelectric] projects" *and* recommendations for "measures which can be expected to be implemented by [BPA] *and other Federal agencies* to protect, mitigate, and enhance fish and wildlife, including related spawning grounds and habitat, affected by" hydroelectric projects. 16 U.S.C. § 839b(h)(2) (emphasis added). Congress clearly wanted the Council to consider for inclusion in the Program a broad suite of actions—operational and

[5] The Tribes' proposed amicus brief discusses this issue in greater depth. *See* Tribes' Proposed Amicus Br. (Dkt. 44-2) at 18–25.

non-operational—that could be carried out by BPA *and other agencies*, and the Council has done just that.[6]

Second, BPA argues that "addressing th[e] question of the statute's application to (or effect on) other agencies would call for an advisory opinion irrelevant to the issue in this case." Answer. Br. at 42. But courts regularly interpret statutes in a manner that affects non-party agencies—every time a court interprets the Freedom of Information Act, for instance, it potentially affects *all* federal agencies. Such interpretations are not "advisory opinions." And it is not "irrelevant" how a particular reading of § 4(h)(11)(A) might affect other agencies: if BPA's interpretation frustrates the operation of the statute by removing any duty that other agencies have to consider the Council's Program when carrying out non-operational mitigation projects, that is a reason not to follow BPA's interpretation. *See, e.g.*, *United States v. Mohrbacher*, 182 F.3d 1041, 1049 (9th Cir. 1999) ("whether [a] proposed interpretation would frustrate or advance th[e] purpose" of a statute is relevant to statutory interpretation); *see also* Pet'rs' Reply in Support of Tribes' Amicus Motion (Dkt. 59) at 8–10.

[6] The mention of "related spawning grounds and habitat" and the use of "enhance" in § 4(h)(2) are two more strong indications that Congress intended the Council to include in the Program non-operational mitigation measures for the Corps and Reclamation to carry out. *See* 2-ER-443 (equating "enhancement" with "off-site mitigation"); 2-ER-451 (discussing the agencies' habitat restoration efforts).

3. BPA's Funding of Mitigation for Non-Federal Projects.

Under BPA's reading of the statute, its funding of mitigation projects to address harm caused by non-federal dams is not subject to § 4(h)(11)(A)(i). As explained in Petitioners' opening brief, Opening Br. at 28–29, this result makes little sense in light of § 4(h)(11)(A)'s explicit mention of "non-Federal" facilities and § 4(h)'s comprehensive approach to fish and wildlife protection.

BPA responds that it "does not *have* § 4(h)(11)(A)(i) responsibilities with respect to non-Federal dams." Answer. Br. at 42. This misunderstands Petitioners' argument. BPA's duty and authority to mitigate for harm caused by non-federal dams comes from § 4(h)(10)(A), which instructs BPA to use the BPA fund and its other authorities to protect fish "to the extent affected by the development and operation of *any hydroelectric project* of the Columbia River and its tributaries," not just federal projects.[7] 16 U.S.C. § 839b(h)(10)(A) (emphasis added). Under BPA's reading, this duty is not subject to § 4(h)(11)(A)(i), which means that *none* of BPA's duties vis-à-vis non-federal projects are subject to § 4(h)(11)(A)(i). This makes little sense given the comprehensive approach of § 4(h) as a whole and § 4(h)(11)(A) in particular. *See* Opening Br. at 28–29.

[7] BPA fails to note its statement, cited in Petitioners' opening brief, that "section 4(h)(10)(A) . . . provides authority to compensate costs and power losses at non-Federal electric power projects." 48 Fed. Reg. 20,117, 20,118 (May 4, 1983).

E. BPA's Selective Legislative History Does Not Help Its Case.

BPA points to two pieces of legislative history to support its reading of § 4(h)(11)(A). Answer. Br. at 30–31. Given the voluminous legislative history of the Northwest Power Act—it was developed over the course of four years and many committee hearings, 126 Cong. Rec. 29,807 (1980) (remarks of Rep. Dingell)—this appears to be an example of legislative history mining as an exercise akin to "entering a crowded cocktail party and looking over the heads of the guests for one's friends." *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring in the judgment).

And here, BPA's "friends" are not even that friendly. Congressman Dingell's statement regarding how § 4(h)(11)(A) applies to FERC underscores the point that Congress wanted the "equitable treatment" provision to apply to *all* of FERC's relevant duties. *See* 126 Cong. Rec. 31,434–35 (1980) ("I stress that the directive of section 4(h)(11) applies to FERC, not to a particular license, permit, or certificate, and to how FERC carries out its responsibilities under the law."). Similarly, Congress wanted § 4(h)(11)(A) to apply to *all* the relevant duties of BPA, the Corps, and Reclamation. *See id.* at 31,434 ("The directives of this section . . . apply to the exercise of responsibilities by FERC and these other agencies.").

The other piece of legislative history says nothing at all about § 4(h)(11)(A). It is a portion of a committee report explaining amendments to 16 U.S.C. § 838i. H.R. Rep. No. 96-976, pt. II, at 54 (Sep. 16, 1980). The amendment BPA points to does indeed show that Congress contemplated

short-term power purchases as one type of financial activity that BPA can undertake to protect fish and wildlife. But Congress also intended BPA to undertake other financial activities to benefit fish and wildlife, such as funding fish and wildlife mitigation measures. 16 U.S.C. § 839b(h)(10). Accordingly, as explained in *the very next paragraph of the committee report*, Congress also amended § 838i "to permit BPA to use its self-financing ability to carry out the provisions of" the Northwest Power Act. H.R. Rep. No. 96-976, pt. II at 54; *see also* 16 U.S.C. § 838i(b)(12).

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

In their opening brief, Petitioners gave four reasons why BPA's interpretation of § 4(h)(11)(A) does not deserve *Chevron* deference: (1) § 4(h)(11)(A) is not ambiguous in any relevant way, Opening Br. at 34 n.11; (2) BPA's explanation of its interpretation in the BP-22 ROD is arbitrary and capricious, *id.* at 40; (3) BPA's interpretation has been inconsistent, which it did not acknowledge in the BP-22 ROD, *id.*; and, (4) because § 4(h)(11)(A) is administered by multiple agencies, no one agency should receive Chevron deference for its interpretation, *id.* at 40–41.

BPA spends most of its time addressing the first three reasons. Answer. Br. at 43–44. Petitioners have already addressed these arguments in their opening brief and in motions practice. *See* Pet'rs' Mot. Jud. Not. at 6–10; Pet'rs' Reply in Support of Mot. Jud. Not. at 1–6.

BPA spends almost no time, however, on the "multiple agencies" issue, saying only that "[t]his Court has not endorsed [the multiple-agencies] rule" and

pointing out that this Court has in the past deferred to BPA's interpretation of § 4(h)(11)(A). Answer. Br. at 45. Neither of these engages with the substance of the multiple-agencies rule. As to the first point, this Court has neither endorsed nor rejected the multiple-agencies rule; its applicability is an open question in this circuit, as Petitioners explained in their opening brief. *See* Opening Br. at 41 n.15.

As to the second point, although it is true that this Court has in the past deferred to BPA's interpretation of § 4(h)(11)(A), it did so when addressing different questions than the ones presented here, and *Chevron* deference applies on an issue-by-issue or question-by-question basis rather than a provision-by-provision basis. *See Route v. Garland*, 996 F.3d 968, 977–80 (9th Cir. 2021) (deferring to an agency resolution of one question related to a statutory provision even though no deference had been given to a prior interpretation involving the same provision). Moreover, it appears that no party raised the "multiple agencies" argument in any of the prior cases involving § 4(h)(11)(A). "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Webster v. Fall*, 266 U.S. 507, 511 (1925).

BPA's answering brief neatly illustrates one of the rationales underlying the multiple-agencies rule and shows why that rule should be applied here. BPA argues that this Court should not opine on the effect BPA's reading of § 4(h)(11)(A) would have on other agencies because doing so would amount to an "advisory opinion." Answer. Br. at 42. As discussed earlier, this argument

is misguided. But BPA is correct that the resolution of the central statutory interpretation issue in this case could implicate the scope of other agencies' legal duties. That is not a reason to abstain from resolving the question, but it does show one reason why some circuits have adopted the "multiple agencies" rule: deferring to BPA's interpretation of § 4(h)(11)(A) is inappropriate because it allows "the one agency that happen[ed] to reach the courthouse first . . . to fix the meaning of the text for all." *Rapaport v. U.S. Dep't of Treasury, Office of Thrift Supervision*, 59 F.3d 212, 216–17 (D.C. Cir. 1995).

III. Section 7 of the Northwest Power Act Does Not Preclude BPA from Complying with Its § 4(h)(11)(A) Duties During Ratemaking.

BPA points out that § 7 of the Northwest Power Act, 16 U.S.C. § 839e, imposes many "detailed requirements" for the ratemaking process, and that "nowhere in [§ 7] is there a requirement to" comply with § 4(h)(11)(A). Answer. Br. at 47. BPA infers from this that Congress did not intend § 4(h)(11)(A) to apply to BPA's rate decisions. Answer. Br. at 45–49.

This is not how statutes usually work. "[W]hen two statutes"—or, in this case, two provisions of the same statute—"are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). BPA does not even attempt to point to an inconsistency between § 7 and § 4(h)(11)(A), because there is none. Rather, BPA suggests that the "detailed requirements" of § 7 imply that no other requirements—at least not the requirements of § 4(h)(11)(A)—apply to ratemaking.

But the "detailed" nature of § 7 does not amount to a "clearly expressed congressional intention" to make the requirements of that section the exclusive requirements applicable to ratemaking, particularly in the case of "outside" requirements that do not conflict with § 7. *Cf. United States v. Vasquez-Benitez*, 919 F.3d 546, 553 (D.C. Cir. 2019) (rejecting a similar line of reasoning). On the contrary, § 7 *explicitly states* that "BPA's rates shall be established in accordance with . . . the provisions of this chapter," *i.e.*, the Northwest Power Act. 16 U.S.C. § 839e(a)(1). Congress thus directed that, in setting rates, BPA must comply not only with § 7, but also with requirements found elsewhere in the Act.

The situation here is similar to the one in *Portland General Electric Co. v. BPA*, 501 F.3d 1009 (9th Cir. 2007). There, BPA insisted that its authority to enter into settlements under § 2(f) of the Bonneville Project Act, 16 U.S.C. § 832(f), was not governed by certain provisions of the Northwest Power Act, even though such settlements involved matters that would otherwise be governed by those provisions. 501 F.3d at 1027–28. This Court disagreed, noting that the Northwest Power Act itself makes BPA's Bonneville Project Act settlement authority "[s]ubject to the provisions of" the Northwest Power Act. *Id.* at 1028 (quoting 16 U.S.C. § 839f(a)). Similarly, § 7 requires BPA to set rates "in accordance with . . . the provisions of" the Northwest Power Act. Thus, just as "Congress could not have made it any clearer that it intended for BPA to exercise its general settlement authority within the confines of the" Northwest Power Act, *id.*, Congress "could not have made it any clearer that it intended for BPA to exercise its" rate-setting responsibilities consistent with portions of the

Act outside § 7.

BPA also ignores the fact that there is more to ratemaking than the § 7(i) hearing. BPA cannot escape its § 4(h)(11)(A) duties by artificially separating its cost-setting process from the § 7(i) hearing and then claiming that § 4(h)(11)(A) does not apply to the § 7(i) hearing. *See* Opening Br. at 9, 44–45, 45 n.17.

IV. The BP-22 Decision "Significantly Affects Fish and Wildlife," Requiring BPA to Demonstrate Equitable Treatment.

BPA next argues that its BP-22 decision did not trigger the duty to show equitable treatment because the decision will not "significantly affect" fish and wildlife. Answer. Br. at 50–58. This is incorrect, as explained below and in Petitioners' opening brief.[8] *See* Opening Br. at 41–46.

A. BPA's Account of Its Cost-Setting Process Is Inaccurate.

BPA first argues that, because its BP-22 rate decision did "not finally determine [its] funding for fish and wildlife" during the rate period, it cannot be said to "significantly affect" fish and wildlife. Answer. Br. at 52. According to BPA, the fish and wildlife spending levels underlying the BP-22 rates are mere "projections," with actual spending levels determined at some other time. Answer. Br. at 52–55.

As an initial matter, BPA's argument that "Congress ultimately has the final say on what BPA can spend" is deeply misleading. It is of course true in a sense that Congress *always* has the "final say" on what any agency can

[8] BPA does not argue that it demonstrated equitable treatment in the BP-22 ROD.

spend—or regulate—because Congress can at any time pass legislation altering an agency's legal duties. But, under existing law, BPA can spend money on fish and wildlife mitigation without further action by Congress. *See* 16 U.S.C. § 838i(b)(12) (allowing BPA to use the BPA fund "to carry out the purposes and provisions of the" Northwest Power Act "without further appropriation and without fiscal year limitation"); *see also* 31 U.S.C. § 9104(b)(1) (Congress's review of BPA's budget does not "prevent [BPA] from carrying out or financing its activities as authorized under another law").

More broadly, "BPA does not receive annual appropriations, as is the case with most federal agencies. Rather, the revenue that BPA obtains from its sales and transmission of electricity is deposited in the [BPA fund]. BPA then uses the fund to finance its operations." *NEDC 2007*, 477 F.3d at 673 (citation omitted). "Unlike many regulatory agencies, Congress endowed [BPA] with broad-based powers to act in accordance with BPA's best business interests, allowing BPA to function more like a business than a governmental regulatory agency." *Portland Gen. Elec. Co.*, 501 F.3d at 1029 n.17 (cleaned up).[9] The fact that Congress *could* step in at any point and, through legislation, tell BPA how to spend money does not mean that BPA lacks control over its spending decisions.[10]

[9] BPA is quick to tell the public that it is not financially reliant on Congress. *See, e.g.*, *Funding and ensuring results*, BPA.gov, www.bpa.gov/environmental-initiatives/efw/funding-and-ensuring-results (last visited Jan. 31, 2023) ("BPA's fish and wildlife program is paid for through the electric rates of utilities that buy power from BPA. It is not funded by U.S. taxpayers.").

[10] The examples provided by BPA to illustrate its supposed lack of control over its own spending demonstrate only the obvious point that Congress has the power to step in at any time and, through legislation, order BPA to act in certain ways.

As for BPA's insistence that the fish and wildlife spending levels developed during Integrated Program Review ("IPR") are mere "projections," Answer. Br. at 52–57, that characterization is not accurate. Since the adoption of its Strategic Plan in 2018, BPA has taken a "top-down" approach to its costs, "set[ting] firm cost constraints" during IPR, 2-ER-293, and then sticking to those constraints, 2-ER-229–30, 308–09. *See also* Opening Br. at 10–13, 14–15, 46. The answering brief's description of how spending levels are set—from the bottom up, through a series of project-level decisions, Answer. Br. at 55–56—is the old approach that BPA rejected in the Strategic Plan. *See* 2-ER-293.

To be sure, BPA has sometimes *said* that its IPR cost levels are not spending caps, but rather mere projections subject to change. *E.g.*, 1-ER-194. But other statements made by BPA frame IPR cost levels in mandatory, "spending cap" terms. *See, e.g.*, 1-ER-190 (BPA "*will* manage costs—direct funding, direct expense and capital costs—at or below the rate of inflation, *inclusive of any new obligations*.") (emphasis added). BPA's conduct confirms that IPR cost levels function as spending caps. *See* 2-ER-229–30 (tables comparing IPR "projections" to actual spending); 2-ER-309 ("the budget for the Fish and Wildlife Program has not increased since BP-20, which requires absorbing inflationary increases"). It is ultimately BPA's conduct that is important. *Cf. Pub. Citizen, Inc. v. U.S. Nuclear Regul. Comm'n*, 940 F.2d 679, 682–83 (D.C. Cir. 1991) (discussing how an agency's actual practice is "crucial" to determining whether a particular pronouncement is a rule or a policy

See Answer. Br. at 52 n.16.

statement).

BPA's citations to *Golden Northwest Aluminum, Inc. v. BPA*, 501 F.3d 1037 (9th Cir. 2007), do not help it, because its approach to fish and wildlife costs was very different at the time that case was decided. As this Court said in *Golden Northwest Aluminum*, before BPA sets its rates, it must "know[] its costs *or*, at the very least, . . . estimate[] them 'in accordance with sound business principles.'" 501 F.3d at 1052–53 (quoting 16 U.S.C. § 839e(a)(1)) (emphasis added). In the early 2000s, BPA was forced to estimate its costs because of substantial uncertainty about what its fish and wildlife mitigation program would look like going forward. *Id.* at 1051–53. Now, in contrast, BPA "knows its costs." Indeed, the problem is that BPA knows its costs all too well: rather than spending whatever money is necessary to adequately protect fish and wildlife, BPA has set artificial spending constraints that have left vital mitigation projects underfunded.[11] *See* Opening Br. at 19–20 (describing the effects of BPA's flat funding).

B. BPA Drastically Understates the Importance of Rate-Setting to Fish and Wildlife.

Even accepting BPA's characterization of its IPR spending levels as "projections," it does not follow that its BP-22 decision will not "significantly affect" fish and wildlife. The Northwest Power Act "tapped revenues of the

[11] BPA claims that its "cost-control efforts cannot, and do not, trump [its] legal obligation[s]," Answer. Br. at 56 n.18, but that is precisely what Petitioners contend is happening. *See* Opening Br. at 47 (arguing that BPA would not be able to show "equitable treatment" due to its flat funding practices).

[Columbia] Basin's hydropower system as a source for financing . . . biological restoration." *NRIC 1994*, 35 F.3d at 1378. BPA's rate decisions determine what those "revenues" will be during the rate period—a rate decision is when "the cost recovery mechanisms" that fund fish and wildlife mitigation during the rate period are adopted. *Golden Nw. Aluminum*, 501 F.3d at 1053. If rates are set too low, it reduces BPA's ability "to live up to its statutory obligations and other commitments," including its fish and wildlife funding duties. *Id.* at 1051-52. Thus, the BP-22 decision will "significantly affect" fish and wildlife. *See* Opening Br. at 42, 44–46.

BPA does not really have an answer to this, except to point out that its BP-22 rates contain various mechanisms than can later be invoked to increase available fish and wildlife funds. Answer. Br. at 57. This is irrelevant: the fact that BPA could engage in some future agency action to increase the money available for fish and wildlife mitigation doesn't render its BP-22 decision any less consequential. *Cf. Gen. Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002) ("If the possibility (indeed, the probability) of future revision in fact could make agency action non-final as a matter of law, then it would be hard to imagine when any agency rule . . . would ever be final . . . ."). Moreover, given BPA's commitment to absorb inflationary impacts and costs arising from "new [fish and wildlife] obligations," 1-ER-190, it is unlikely that any of the cited mechanisms will be invoked.

BPA argues that its environmental-effects determination under NEPA[12]

[12] National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.*

shows that its BP-22 decision will not "significantly affect" fish and wildlife. Answer. Br. at 57–58. But, as BPA admits, no one challenged that determination. 1-ER-90. Petitioners' decision not to raise NEPA issues during the BP-22 process cannot be used as evidence that the BP-22 decision will not "significantly affect" fish and wildlife within the meaning of an entirely different statute. For all the reasons discussed above and in Petitioners' opening brief, *see* Opening Br. at 42–46, BPA's decision will have such an effect.

Notably absent from BPA's brief is any acknowledgment that it faced a "unique" situation in the BP-22 rate case. BPA discovered right before the § 7(i) hearing that a large secondary surplus revenue forecast would allow it to cut rates by as much as 4.5 percent. *See* Opening Br. at 15–16. BPA recognized that it was not required to set rates as low as possible, but instead could take into account its various statutory obligations. 2-ER-203. Thus, more so than most other rate cases, the BP-22 case provided BPA an opportunity to exercise its discretion for the benefit of fish and wildlife. Instead of seizing that opportunity, BPA split the benefits from secondary surplus power sales during the rate period between itself and its customers, providing no additional funding for fish and wildlife mitigation. Opening Br. at 16–18. That decision will significantly affect, and is already significantly affecting, fish and wildlife. *Id.* at 19–20, 43–44.

V. BPA Cannot Explain Its Failure to Comply With the "Fullest Extent Practicable" Requirement.

As explained in Petitioners' opening brief, there was clearly at least one "relevant stage" leading up the BP-22 rate decision during which BPA

should have taken the Council's Program into account "to the fullest extent practicable." Opening Br. at 47–51. BPA's meager arguments to the contrary are unconvincing.[13] Answer. Br. at 58–59.

BPA first argues that it was not required to comply with § 4(h)(11)(A)(ii) because § 4(h)(11)(A) categorically does not apply to mitigation funding or rate decisions. Answer. Br. at 58. That is incorrect, as discussed at length above and in Petitioners' opening brief.

Next, BPA argues that there was no "relevant stage" during the BP-22 process because neither "the BPA rate case [nor IPR] . . . 'set' or 'cho[]se' or finalize[d] any funding decisions." Answer. Br. at 59. This is not true—as discussed above and in Petitioners' opening brief, under BPA's current "top-down" approach to fish and wildlife costs, the spending levels established during IPR and fed into the § 7(i) hearing function as spending caps.

But, even accepting BPA's characterization of its spending decisions, it doesn't follow that there was no "relevant stage" within the meaning of § 4(h)(11)(A)(ii) during the BP-22 process. As this Court has noted, "[t]he statute requires consideration of the Council's Program 'at each relevant stage,' recognizing there is more than one." *Nat'l Wildlife Fed'n v. FERC*, 801 F.2d 1505, 1514 (9th Cir. 1986). For purposes of § 4(h)(11)(A)(ii), it doesn't matter whether BPA "finalized" any funding decisions during IPR or the subsequent § 7(i) hearing; all that matters is that at least one of those processes

[13] BPA does not argue that it took the Council's Program into account during the BP-22 process.

was "relevant." As explained in Petitioners' opening brief, that was indeed the case. *See* Opening Br. at 48–51.

Finally, BPA makes a convoluted argument concerning § 7(h) of the Northwest Power Act, which links one part of the Council's Power Plan to ratemaking. Answer. Br. at 59. This argument suffers from a similar defect as BPA's argument concerning the supposed exclusivity of the requirements of § 7. *See supra* p. 17. The fact that Congress explicitly linked one portion of the Power Plan to ratemaking does not imply that other parts of the Power Plan and Fish & Wildlife Program are inapplicable to ratemaking. On the contrary, § 7 tells BPA to set rates "in accordance with . . . the provisions of" the Northwest Power Act, 16 U.S.C. § 839e(a)(1), which includes § 4(h)(10)(A)'s "consistency" requirement as well as § 4(h)(11)(A)(ii)'s "fullest extent practicable" requirement, both of which reference the Program.

VI. Injunctive Relief Is Appropriate.

BPA's arguments that injunctive relief ordering an increase in fish and wildlife mitigation funding would be "improper" underestimate this Court's equitable power. Answer. Br. at 59–61. BPA ignored its duties under § 4(h)(11)(A) when setting spending levels and rates for the BP-22 period, leading to underfunded mitigation projects during the rate period and harm to fish and wildlife. It is entirely within this Court's power to order, as a remedy for BPA's violations, a short-term increase in funding to compensate for the underfunding caused by BPA's violations. *See NEDC 2007*, 477 F.3d at 680–81 ("this court . . . has broad powers to order mandatory affirmative relief, if such

relief is necessary to accomplish complete justice") (cleaned up). In doing so, this Court would not be allowing Petitioners to "attack[] decisions that are not before th[e] Court." Answer. Br. at 60.

Finally, BPA's complaint about Petitioners relying on "extra-record, post-decisional documents," Answer. Br. at 61, to support their request for injunctive relief makes no sense. This Court is not limited to the administrative record when deciding on the propriety of injunctive relief. *See Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560–61 (9th Cir. 2000); *see also* Pet'rs' Resp. to Mot. to Strike (Dkt. 67) at 3, 7.

CONCLUSION

For the foregoing reasons, and the reasons discussed in Petitioners' opening brief, the Court should hold the BP-22 decision unlawful, remand to BPA, and award Petitioners injunctive relief.

Date: February 3, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am the attorney for Petitioners.

This brief contains 6,985 words, excluding the items exempted by Federal Rule of Appellate Procedure 32(f). There are no images in this brief. 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: February 3, 2023 *<u>/s/ Andrew R. Missel</u>*