

Breaching the Lower Snake River Dams Without New Congressional Appropriations¹

This paper discusses the pathway to commence immediate breaching of the lower Snake River dams without new Congressional appropriations outside of what is typically allotted. Breaching as referred to herein means removing the earthen embankments of the dams via channel bypass as described in the US Army Corps 2002 Lower Snake River Juvenile Salmon Mitigation Feasibility Report/Environmental Impact Statement (“2002 EIS”), the most comprehensive government study analyzing the breach process. The costs contemplated are for the actual cost of breaching plus necessary mitigation, which totals approximately \$780 million.² In recent years, breaching proposals, such as U.S. Congressman Mike Simpson’s Columbia Basin Initiative, have included money to stakeholders and energy replacement far beyond what is necessary for actual breaching. Appropriations for such measures can be made after breaching has commenced.

The Bonneville Power Administration can use the Northwest Power Act, 16 U.S.C. §839–839h, to fund breaching of the lower Snake River dams. The 1980 Northwest Power Act (NPA) authorized Idaho, Montana, Oregon, and Washington to develop a regional power plan and fish and wildlife program to balance the Northwest’s environment and energy needs. The NPA “marked an important shift in federal policy.” *Northwest Resource Information Center v. Northwest Power Planning*, 35 F.3d 1371, 1377 (9th Cir.1994). “Continually declining fish runs had revealed the failures of previous legislative efforts requiring that ‘equal consideration’ be given to fish and wildlife affected by resource exploitation.” *Id.* The NPA created “a pluralistic intergovernmental and public review process.” *Id.* at 1378. At the hub of this process, Congress established the Pacific Northwest Electric Power and Conservation Planning Council (Council), directing it to create “a program to protect, mitigate, and enhance” the Columbia River Basin’s fish and wildlife “to the extent affected by the development and operation of the Basin’s hydropower system.” 16 U.S.C. § 839b(h)(1)(A), (h)(10)(A).

The Council’s power plan and fish and wildlife program are implemented by the Bonneville Power Administration (BPA), a division of the U.S. Department of Energy. The BPA is a non-profit federal power marketing administration based in the Pacific Northwest. It is part of the U.S. Department of Energy; however, it is self-funding and covers its costs by selling its products and services. BPA markets wholesale electrical power from federal hydroelectric projects in the Northwest, a non-federal nuclear plant, and several small non-federal power plants. The dams are operated by the U.S. Army Corps of Engineers and the Bureau of Reclamation.³

¹ January 2024. This paper was prepared by Elizabeth Dunne, Esq. in consultation with James Waddell, US Army Corps of Engineers (Retired).

² USACE’s 2002 plan to remove the earthen berm used hydraulic breaching to wash away the bottom and widest part of the earthen berm. Subsequent engineering shows that notching and removing the entire earthen portion of the LSRDs via controlled hydraulic breaching can be easily done at a much cheaper cost than the original plan estimate, utilizing structures designed in the initial construction. Breaching in this manner costs less than \$280 million. Mitigation costs for direct impacts of breaching are under \$500 million. Mitigation, except for minor rail modifications, can occur simultaneously or post-breach. *See Lower Snake River Dams Breach Mitigation Plan and Costs*, Dec. 2020, available at <https://damsense.org/wp-content/uploads/2020/12/Mitigation-Plan-2020.pdf>.

³ *See* BPA website at <https://www.bpa.gov/news/AboutUs/Pages/default.aspx>.

Under this statutory scheme, the BPA Administrator has two responsibilities: First, the Northwest Power Act requires the Administrator to exercise his responsibilities under the Act “in a manner that provides equitable treatment” for fish and wildlife. 16 U.S.C. § 839b(h)(11)(A)(i). Second, the Administrator must take into account “to the fullest extent practicable, the program adopted by the Council.” 16 U.S.C. § 839b(h)(11)(A)(ii). Attempting to balance environmental and energy considerations, the Act states that fish and wildlife protection measures cannot jeopardize “an adequate, efficient, economical, and reliable power supply.” 16 U.S.C. § 839b(h)(5).

In terms of funding, the statute requires BPA to use the Bonneville Fund to protect, mitigate, and enhance fish and wildlife adversely affected by production of hydroelectric power on the Columbia River. 16 U.S.C. § 839b(h)(10)(A). The funds must be in addition to, not in lieu of, authorized expenditures from other entities. *Id.* BPA must also assume monetary costs and power losses resulting from fish and wildlife protection. *Id.* at §839b(h)(11)(A)(ii).

During the Columbia River Operating System Environmental Impact Statement process, the Corps, in response to public comments, acknowledged that BPA can provide direct funding to cover costs associated specifically with hydropower components of fish and wildlife protection. No new Congressional appropriations are required for this. The average cost allocation to BPA for hydropower on the LSRDs is 91%, while the average cost allocation to the Corps for navigation on the LSRDs is 9%.⁴ Since BPA is responsible for 91% of the cost of these four dams, BPA is responsible for at least 91% of the breach cost. *Id.*

In fact, there is a way for BPA to pay all costs of breach as the most cost effective “fish mitigation” measure for salmon and steelhead recovery under the NPA. 16 U.S.C. § 839b(h)(10)(A). Done in this way, BPA could book a 22% credit against the US Treasury debt on these dams. This is because BPA receives a credit under Section 4(h)(10)(C) of the Northwest Power Act as reimbursement for the non-power share of fish and wildlife costs that the BPA administrator allocates among various hydroelectric projects of the Federal Columbia River Power System. Rather than charge each federal agency for its share, BPA pays those costs in full annually, including a portion of the power purchases.⁵ Non-power purposes such as irrigation, navigation, and flood control comprise a weighted, systemwide average of 22.3 percent of the authorized purposes of the federal dams. The annual credit to BPA is based on this percentage and is applied against BPA’s Treasury payment at the end of the year.⁶ Applying the 4(h)(10)(C) credit reduces

⁴ See “*Policy Considerations for Breaching the Snake River Dams*” at 10, available at: <https://damsense.org/wp-content/uploads/2016/09/Policy-Considerations-for-Breaching-the-Snake-River-Dams-Revised-8-30-16.pdf>

⁵ Other costs are not factored into that 4(h)(10)(C) credit, such as forgone revenue, interest on Treasury borrowing, amortization and depreciation of capital projects, reimbursable expenditures, and the Northwest Power Council budget.

⁶ *2019 Columbia River Basin Fish and Wildlife Program Costs Report*, Northwest Power and Conservation Council, at p. 7-8 (available at <https://www.nwcouncil.org/sites/default/files/2020-2.pdf>). Under 16 U.S.C. § 839b(h)(10)(C): “The amounts expended by the Administrator for each activity pursuant to this subsection shall be allocated as appropriate by the Administrator, in consultation with the Corps of Engineers and the Water and Power Resources Service, among

BPA's total fish and wildlife-related costs. BPA would be getting a higher credit because it would be absorbing all the breach costs as fish and wild-life related costs and not be paying back the Corps for its share of the breach costs.

The Corps has contended that the BPA does not have the authority to allocate NPA funds to breaching the dams because breaching the dams would violate NPA's requirement that there be an adequate power supply. This argument is based on NPA's requirement of equitable treatment for fish and wildlife in a manner that does not jeopardize adequate power supply. However, it is incorrect that breaching the dams would jeopardize adequate power supply. The Pacific Northwest regional power grid produces an annual surplus.⁷ Studies being integrated into the Council's 2021 Power Plan show a dramatic increase in solar, making reductions in power from coal plants and underperforming dams like those on the lower Snake River not only possible, but preferred.⁸

The LSRDs account for less than 3 percent of the energy on the grid and has been replaced nearly three times over by greener solar and wind energy.⁹ As such, the Corps' policy argument holds no merit and authority to use funding to protect fish and wildlife exists under NPA.

The Corps has also stated that dam breaching is not currently part of the Council's program. But that is irrelevant to the fact that funding is available under the NPA and does not require additional Congressional appropriations. The Council can and should include dam breaching as part of its NPA obligation to protect fish and wildlife. To the extent the Council will not do so is a matter for the courts to review, not an issue of funding. *See Nw. Env'tl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1532 (9th Cir. 1997) (noting that "the court's role is not to dictate in advance how BPA is to exercise its obligations under the Northwest Power Act. Our role is to review BPA's actions, once made, to determine whether it has provided equitable treatment.").

the various hydroelectric projects of the Federal Columbia River Power System. Amounts so allocated shall be allocated to the various project purposes in accordance with existing accounting procedures for the Federal Columbia River Power System."

⁷ *See Lower Snake River Dams: Economic Tradeoffs of Removal*, ECONorthwest, July 2019 at p. 4 ("The Lower Snake River Dams supply a small share of the energy needs for the Pacific Northwest region, and account for less power than BPA currently exports to other regions, primarily California."); BPA's Power Services, 2020 Resource Program Summary (noting decrease in load demand due to energy efficiency and competitive solar pricing), available at <https://www.bpa.gov/p/Power-Contracts/Resource-Program/Documents/BPA%202020%20Resource%20Program%20Refresh%20Summary.pdf> (visited Feb. 12, 2021); *See Policy Considerations for Breaching the Snake River Dams Revised*, Aug. 30, 2016, Sharon Grace p. 12.

⁸ *See Northwest Power and Conservation Council Memo from John Ollis, Manager of Planning and Analysis, to Power Committee Members*, at p. 28-30, available at https://www.nwcouncil.org/sites/default/files/2021_03_p1.pdf (visited March 31, 2021).

⁹ *See Policy Considerations for Breaching the Snake River Dams Revised*, Aug. 30, 2016, Sharon Grace p. 12.