

BPA “IN LIEU” INTERPRETIVE KEY & RATINGS SYSTEM

Preface

Under section 4(h)(10)(A) of the Northwest Power Act, BPA is required to protect, mitigate and enhance fish and wildlife to the extent affected by the development and operation of the hydropower projects of the Federal Columbia River Power System (FCRPS) in a manner consistent with the Northwest Power and Conservation Council’s fish and wildlife program and the purposes of the Act. Congress expressly limited BPA’s authority to provide protection, mitigation, and enhancement in the “in lieu” provision of section 4(h)(10)(A), which states:

“Expenditures of the Administrator pursuant to this paragraph shall be in addition to, not in lieu of, other expenditures authorized or required from other entities under other agreements or provisions of law.”

As explained by the House of Representative’s Interior Committee, “other fisheries efforts outside this Act . . . are expected to continue and to be funded separately.”¹

In lieu concerns for BPA are easiest to identify when another entity is already *required* by law or agreement to perform an activity. While the activity may be beneficial for fish or wildlife, it can be difficult to demonstrate how BPA’s funding is meeting the terms of the *in lieu* provision when another entity is already required to perform the work.

In lieu concerns for BPA will also arise in areas of overlapping authority—where BPA may be authorized (but not required) to undertake a certain activity to benefit fish and wildlife and another entity is also authorized (but not required) to undertake the same activity, such as in offsite habitat work, or in research, monitoring, or evaluation (RM&E) of fish and wildlife populations. Many other state, federal, and tribal agencies (fish and wildlife and land managing agencies) have authority to undertake mitigation actions benefiting fish and wildlife. Determining how and when BPA’s funding in these areas of overlapping authority may occur in compliance with the *in lieu* provision can be difficult, and is, in part, why the Council has requested that BPA provide greater clarity to its *in lieu* policy.

BPA’s need to demonstrate a nexus between the mitigation it funds under the Northwest Power Act and the impacts of the FCRPS dams is part of the backdrop against which BPA must interpret the *in lieu* provision. BPA has the authority and discretion to fund offsite mitigation that improves conditions for species that are affected by the FCRPS dams. This is true even if something other than the federal dams created the specific limiting factor, so long as the benefits of the action can be demonstrated to offset identified impacts of the FCRPS on that species (the FCRPS “nexus.”). BPA also has the authority to fund RM&E relating to the impacts of the FCRPS dams on fish and wildlife, and the measures it is taking to address those impacts. An evaluation of the BPA responsibility towards biological objectives is critical for this. The Northwest Power Act does not require that BPA fund offsite activities to

¹ H.R. Rep. No. 976, 96th Cong., 2d Sess., pt. 2, at 45. See also 126 Cong. Rec. H9846 (daily ed. Sept. 29, 1980) (Rep. Lujan: section 4(h)(10)(A) would “insure that the program will not call for measures already being implemented to protect, mitigate, and enhance fish and wildlife”).

address fish and wildlife that are not affected by the FCRPS dams, or fund RM&E activities that do not address the impacts of the FCRPS dams on fish and wildlife. In situations where the FCRPS nexus is weak, the potential *in lieu* issues may be heightened because, in the absence of an FCRPS nexus, another entity is likely to already be authorized, if not required, to address the impacts to fish and wildlife.

Given this context, BPA's interpretation of the *in lieu* provision and its application of the provision is as follows, interspersed with questions for which BPA is seeking input to further inform its *in lieu* policy:

Interpretation:

If another entity is authorized or required under other agreements or provisions of law to undertake an activity, BPA cannot fund the activity under the authority of section 4(h)(10)(A) unless BPA's funding is in addition to, not in lieu of that other entity's funding. **This should be questioned because of the term "authorized". See comment below.**

The *in lieu* provision helps ensure that BPA's funding for fish and wildlife protection, mitigation and enhancement under section 4(h)(10)(A) is additive to on-going and future mitigation conducted by others, and is not simply supplanting other efforts outside of the Northwest Power Act.

Is it appropriate to include the term "authorized"? All managers are "authorized" to implement numerous actions within their jurisdiction; however, lack of funding often precludes actions. It is not possible for BPA to fully mitigate the effects of the hydrosystem without funding "off-site" actions, most of which would occur within a manager's jurisdiction. Should these potential actions be subject to in-lieu provisions?

How to apply the provision:

1. Is another entity authorized or required under other agreements or provisions of law to undertake the activity?
2. If no, then no further in lieu review is needed.
3. If yes, then BPA's funding must be in addition to, not in lieu of that entity's funding.

What is another entity?

BPA interprets this to mean any entity other than BPA, including but not limited to federal, state or tribal governmental entities, corporations, individuals, etc.

Questions:

1. *Should BPA interpret "entity" to mean governmental entities only (excluding private individuals, corporations, and other non-governmental entities) since "authorized or required" may have been intended to apply only to entities that are typically "authorized" or "required" to conduct mitigation efforts?*

2. *Should BPA interpret “entity” to mean governmental entities only, even if a non-governmental entity is **required** to mitigate for the impacts of its activities but it is asking for BPA to fund that activity?*
3. *Should BPA exclude activities conducted by federally-recognized tribes from the in lieu provision, and, if so, on what grounds?*

Private entities and corporations are sometimes “required” to implement actions, particularly in regards to environmental clean up, re-forestation, etc. Limiting “entity” to government only could therefore result in a net loss of projects and project funding.

What does “authorized or required under other agreements or provisions of law” mean?

Taking into account relevant provisions of the Northwest Power Act, including sections 4(h)(10)(A), as well as sections 4(h)(8)(C),² 4(h)(8)(A),³ and 4(h)(8)(B)⁴ in particular, BPA interprets “authorized” to mean that another entity has been given legal authority under other agreements or provisions of law to undertake the protection, mitigation, or enhancement activity proposed for BPA funding. The entity need not have appropriations or be currently funding the activity to be “authorized” to do so.

BPA interprets “required” to mean that another entity has been directed under other agreements or provisions of law to undertake the activity. BPA interprets this to be a directive to the entity to conduct the activity. The entity need not be currently funding the activity even though “directed” to do so.

BPA interprets “other agreements” to mean a contract, permit, license, settlement, memorandum of agreement or other written arrangement between entities other than BPA.

BPA interprets “provisions of law” to mean a statute, regulation, or regulatory or judicial order.

Questions:

4. *Should BPA provide funding for activities that another entity is required to perform? If so, should BPA use a different standard for evaluating proposals for resolving in lieu issues when an entity is required to undertake the activity as compared to when an entity is authorized to do so?*

² “To the extent the program provides for coordination of its measures with additional measures (including additional enhancement measures to deal with impacts caused by factors other than the development and operation of electric power facilities and programs), such additional measures are to be implemented in accordance with agreements among appropriate parties providing for the administration and funding of such additional measures.”

³ “Enhancement measures may be used, in appropriate circumstances, as a means of achieving offsite protection and mitigation with respect to compensation for losses arising from the development and operation of the hydroelectric facilities of the Columbia River and its tributaries as a system.”

⁴ “Consumers of electric power shall bear the cost of measures designed to deal with adverse impacts caused by the development and operation of electric power facilities and programs only.”

5. *Should BPA continue to treat wildlife land acquisitions as posing no in lieu issues if providing offsetting credit? (BPA has generally treated wildlife land acquisitions for habitat unit credit against its FCRPS loss assessment obligations as posing no in lieu problem because no other entity is authorized or required to fund wildlife land acquisitions to mitigate the FCRPS in accordance with the loss assessments, and there is specific credit for the offsite acquisitions).*
6. *Should BPA treat projects that BPA proposes to fund under 4(h)(10)(A) in support of Endangered Species Act commitments (either in a proposed action or as recommended or required by the National Marine Fisheries Service or the U.S. Fish and Wildlife Service in a Biological Opinion) as posing no in lieu issue because no other entity is authorized or required to meet BPA's ESA commitments?*

If “required” is indeed defined so that it is easily discernable from “authorized”, then BPA funding of other entities requirements may result in a net loss of projects and project funding.

The larger issue here may be the term “BPA proposes to fund”. Projects should be funded based on the Council’s Program, which is based on deference to F&W manager input. A blanket “in lieu issue” or “no in lieu issue” may or may not be appropriate for any category of projects, unless they are fully and appropriately vetted through the Fish and Wildlife Program process..

When is BPA’s funding in addition to, not in lieu of, another entity’s funding?

“In lieu” means “in place of” or “instead of.” BPA interprets this to mean that when another entity is authorized or required under other agreements or provisions of law to undertake an activity, BPA’s funds can also be used, but only if they add to funding by the entity.

A rule of reasonableness has to apply here, so BPA will seek to adhere to the following general principles:

- The central objective is to make sure Bonneville Fund expenditures to benefit fish and wildlife are in addition to and not replacing or supplanting the expenditures others are authorized or required to make.
- In evaluating proposals, BPA may consider a variety of relevant factors, such as the following:

- the relationship of the project to FCRPS impacts
- whether the activity has historically been funded by another entity

This may or may not be relevant on a case-by-case basis.

- Whether a similar activity has been or is funded by an entity in other areas of the country outside of the Columbia River Basin

The relevance here should be explained.

- the nature and extent of the other entity’s authority or obligation to take the action
- the amount and kind of the cost-share

Cost share might be relevant if considered on multi-levels, from project-specific all the way to Basin or jurisdiction-wide. Considering only project-specific cost share is likely not appropriate in most cases.

- the likelihood of the project being implemented without BPA participation
- Or, the likelihood of additional, complimentary projects being implemented without BPA participation on the project in question.

Questions:

Larger-scale considerations that influence the answers to specific questions below are raised in the comments above.

7. *Should BPA consider additional factors?*

- Where BPA and another entity have overlapping *authority* to do work proposed as BPA mitigation, “cost-sharing”—where BPA funding is a portion of the overall proposed budget for a proposal—can provide the proof needed to demonstrate that the *in lieu* prohibition does not apply.
- BPA has not required a set amount of cost-sharing, but the amount of cost-sharing provided must allow BPA to reasonably conclude that its funds are adding to and not effectively supplanting the funding authorized or required of another entity. For example, while cost-sharing of \$1 could technically mean BPA is not supplanting another entity’s funding, this is plainly an unreasonable result; what level is “reasonable” has been evaluated on a case-by-case basis.

8. *Where BPA and another entity have overlapping authority, should BPA require a set amount of cost-share to indicate avoidance of in lieu problems (where cost-sharing is being used as the remedy)?*

This seems inappropriate.

9. *If so, what level or percentage of cost-sharing should be required?*

10. *Can cost-sharing include in-kind support (materials, or equipment, or personnel time) or must it be cash only?*

11. *What, if any, types of in-kind cost share should be allowed?*

12. *How certain should the cost-sharing be? If an entity identified prospective cost-sharing, but then that cost-sharing fell through, what should the consequences be?*

- Cost-sharing is not likely to be appropriate when another entity is plainly *required* to conduct the activity. For example, when another entity has contracted or has been ordered to perform the activity, BPA should not fund what is already covered. BPA’s funding should create additional, measurable value to the project over and above what the entity is responsible for.

13. *How should the additional measurable value be identified?*

- A cost-share agreement between BPA and the entity may address appropriate cost-sharing on a programmatic basis (e.g., the MOU between BPA and the Forest Service).

14. *As an alternative to either project-specific cost-sharing or programmatic cost sharing, should BPA consider an approach in which BPA and the entity or entities enter into an memorandum of understanding describing the specific parallel or complementary expenditures that demonstrate there is no in lieu problem? (BPA assumes parallel means a similar kind of activity but conducted in the same or nearby area—such as repairing screens on the same irrigation system, or removing culverts in the same drainage, or fencing along the same riparian area. BPA assumes complementary means a different kind of activity interconnected to the activity funded by BPA, such as BPA funding research for two hatchery diseases, and a fish and wildlife manager funding research for two other diseases, or BPA funding the installation of a new irrigation screen, and the screen owner funding O&M for that screen).*
15. *If parallel or complementary expenditures avoid an in lieu problem, how much detail in terms of commitments in the MOU as to the other funding does there, need to be (bearing in mind that section 4(h)(8)(C) of the Northwest Power Act appears to require an agreement of some kind)? For example, BPA does not think it would be reasonable to assume there is no in lieu problem with any NOAA-sponsored project simply because NOAA administers the Pacific Coastal Salmon Recovery Fund program and some of that work parallels work funded by BPA, but BPA does think that an MOU coordinating work with PCSRF programs could address in lieu issues for some individual projects.*

In lieu ratings for proposals

BPA rated each proposal as follows:

- 1 No *in lieu* concerns identified.
- 2 Potential *in lieu* funding issues: another entity is authorized or required to undertake the activity proposed for BPA funding, but BPA funding appears to be in addition to, not *in lieu* of the other entity's funding, typically due to cost-sharing.

These "2" ratings were further delineated into ratings of "2.1," "2.2" and "2.3" describing BPA's perspective on the reasonableness of the cost-sharing, taking into account the relative proportion of cost-sharing, the nature and extent of the other entity's authorization or requirement to conduct the work, and the other principles outlined above. The ratings are as follows: 2.1—Appears reasonable; 2.2—May be reasonable; 2.3—Appears unreasonable. Is rating system that includes 2.1, 2.2, and 2.3 of use to participants, or should BPA retain simply the "2" concept, meaning requires further evaluation?

- 3 *In lieu* funding problems: another entity is authorized or required to undertake the activity, and BPA's funding is *in lieu* of that entity's funding, e.g., the other entity is authorized or required to undertake the activity and there is no cost-share offered, or

the other entity is clearly required to undertake the activity, and the cost-share offered is not sufficient (does not appear to add value rather than just supplanting).

Under BPA's ratings then, a "1" rating is an "okay to fund" rating at the discretion of BPA. A "2" rating is a "may be okay to fund" at the discretion of BPA (with approximate leanings on use of that discretion indicated). A "3" rating is a "not okay to fund, in lieu concerns."

Questions:

16. *When is the best time for BPA to conduct its in lieu review of proposals?*

As early as possible in the process.

17. *Should there be an informal review process of ratings? How and when should that occur?*

Another possibility is an independent 3rd party review.

18. *Would it be better for proponents to rate themselves using this key in the solicitation process, subject to review by BPA?*

Remedies for in lieu concerns

Question:

19. *In addition to remedies explored above (e.g., project specific cost-sharing, programmatic agreements for programmatic cost-sharing, or written agreements addressing parallel or complementary efforts), are there other ways in which an in lieu issue can be resolved, or avoided in the first instance?*

The larger-scale questions concerning the proposed policy should be addressed before submitting answers to specific questions. Some preliminary issues raised by MAG are below.

Comments expressed by the MAG:

- This policy assumes that the mitigation responsibilities are defined under some other policy and that there has been a determination made as to who is responsible for a specific mitigation program.

- The *in lieu* determination could be complicated by different interpretations by BPA and others as to what their mitigation responsibilities are; however, if BPA and the regional Managers agree on what BPA's mitigation responsibilities are, it would be easier to determine whether or not a project raises *in lieu* issues.

- Implementation of this policy would be better informed by a clear delineation of BPA's mitigation responsibilities relative to other entities.

- The policy should state up front that the operating assumption is that there would be an independent or separate process by which the relative responsibilities of the involved parties had been determined followed by implementation of the policy.