

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is centered in the narrow neck of the hourglass. The top bulb has a dark blue cap, and the bottom bulb has a light blue cap.

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*The Columbia River Basin's Fish Passage Center*

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**Abstract.** Senate and conference committee reports (S.Rept. 109-84 and H.Rept. 109-275) on the 2006 Energy and Water Development Appropriations Act (P.L. 109-103) instructed BPA to cease funding the FPC and transfer the FPC's functions to other existing entities, and BPA responded by determining that it would transfer the FPC functions to two entities. A number of organizations sued to block transfer of the FPC's functions, and on January 24, 2007, the U.S. Court of Appeals for the Ninth Circuit the court ruled that BPA's decision to transfer the FPC's functions violated the Administrative Procedure Act.

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## CRS Report for Congress

# The Columbia River Basin's Fish Passage Center

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### Summary

The Fish Passage Center (FPC) provides technical assistance and information to fish and wildlife agencies and tribes on the passage of juvenile and adult salmon and steelhead through the mainstem Columbia River. It is an element of the Northwest Power and Conservation Council's fish and wildlife program, which was created by the Northwest Power Act (P.L. 96-501). The Council's fish and wildlife program is funded by the Bonneville Power Administration (BPA) with revenue from the sale of electric power in the Pacific Northwest. Some parties in the region contend that the FPC does not provide unbiased scientific analysis, but instead advocates specific policy positions.

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### Background

Under the Pacific Northwest Electric Power Planning and Conservation Act of 1980 (the Northwest Power Act, 16 U.S.C. §839), Congress required that the Pacific Northwest Electric Power Planning and Conservation Council (now known as the Northwest Power and Conservation Council) develop and adopt a program to protect fish and wildlife,

enhance their habitat, and mitigate habitat damage.<sup>1</sup> The act required that the program be based on broad regional consultation with agencies, tribes, customers, and the public.<sup>2</sup> Congress further mandated that BPA fund the Council program through revenue collected from electric power ratepayers.<sup>3</sup>

One element of the Council's fish and wildlife program is the Fish Passage Center (FPC), which was established to address concerns about impacts to fish from the Federal Columbia River Power System (FCRPS), a system of 31 federal dams primarily on the Snake and Columbia rivers in Washington, Oregon, and Idaho. (See **Figure 1.**) Eight dams, four on the lower Columbia River and four on the lower Snake River, are the primary impediments to upstream and downstream fish migration in the Columbia Basin. The FPC provides technical assistance and information to state and federal fish management agencies, tribes, and the public on the passage of juvenile and adult salmon and steelhead through the mainstem Columbia River hydrosystem.<sup>4</sup> It also plans and implements the annual Smolt Monitoring Program and the Gas Bubble Trauma study,

**Figure 1. Major Columbia River Basin Dams**



Source: [<http://www.nwd.usace.army.mil/ps/colbsnmap.asp>]

<sup>1</sup> 16 U.S.C. §839b(h)(1)(A).

<sup>2</sup> 16 U.S.C. §839b(h)(2)-(5).

<sup>3</sup> 16 U.S.C. §839b(h)(10)(A).

<sup>4</sup> Northwest Power and Conservation Council, *Mainstem Amendments to the Columbia River Basin Fish and Wildlife Program* (Portland, OR: 2003), p. 27.

which supplies daily information for in-season river management decisions aimed at protecting salmon and steelhead. The FPC also provides agencies and tribes with reservoir operation information and analysis, including current and historical data, to support their decisions and requests to the federal agencies operating the FCRPS. Additionally, the FPC coordinates the implementation of the regional comparative survival study.<sup>5</sup>

## Regional Controversy

The FPC has been at the center of some controversy in the Pacific Northwest. Many agencies and tribes concerned primarily with salmon recovery have confidence in the center's technical analyses and consider FPC staff to be a valuable resource when reviewing FCRPS operations and impacts on fish. Others are concerned that the FPC does not provide unbiased analysis, but rather advocates policy positions favoring fish protection.

Representatives of the Fish and Wildlife Service, the Oregon Department of Fish and Wildlife, and the Columbia River Inter-Tribal Fish Commission, among others, have provided statements in support of the FPC. They indicate that their jobs require them to provide the best scientific information on effects of the FCRPS on fisheries resources to their respective agencies and to the region as a whole and that they have relied heavily on the scientists at the FPC for information and analysis. They stress that, in their opinion and consistent with independent review, the work conducted by the FPC scientists is at a high level of scientific rigor and merit, and that no other group in the region has had to endure such levels of scrutiny as the FPC staff.<sup>6</sup>

The National Marine Fisheries Service (NMFS) Science Center and the University of Washington's Columbia Basin Research Center have both expressed concern that the FPC's approach mingles an advocacy role with a scientific one and that this commingling of advocacy and analysis shades the FPC's analytical products. Staff of those two research institutions also feel that the FPC data are difficult to work with and that the data sources and underlying analyses are not always clear.<sup>7</sup> The Council established a Fish Passage Center Oversight Board in 2000<sup>8</sup> to assess why the FPC did not enjoy the same reputation for independent analytical quality as other scientific bodies in the region.<sup>9</sup>

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<sup>5</sup> Available at [[http://www.fpc.org/about\\_fpc.html](http://www.fpc.org/about_fpc.html)].

<sup>6</sup> State, federal, and tribal fishery agencies, *Joint Technical Staff Memo* (Jan. 25, 2006), available at [[http://www.fpc.org/documents/joint\\_technical/06-06.pdf](http://www.fpc.org/documents/joint_technical/06-06.pdf)].

<sup>7</sup> *Fish Passage Center Oversight Board Meeting Notes* (Oct. 2, 2002), available at [[http://www.nwcouncil.org/fw/fpcob/2002\\_10.pdf](http://www.nwcouncil.org/fw/fpcob/2002_10.pdf)].

<sup>8</sup> Northwest Power Planning Council, *Columbia River Basin Fish and Wildlife Program* (2000), p. 28, available at [<http://www.nwcouncil.org/library/2000/2000-19/Default.htm>].

<sup>9</sup> *Fish Passage Center Oversight Board Meeting Notes* (Oct. 2, 2002), available at [[http://www.nwcouncil.org/fw/fpcob/2002\\_10.pdf](http://www.nwcouncil.org/fw/fpcob/2002_10.pdf)].

## Legal Issues

The debate over the FPC's role in the Columbia Basin came to a head in 2005 during congressional debate over the Energy and Water Development Appropriations Act of 2006. First, in its report of the appropriations bill, the U.S. Senate Appropriations Subcommittee on Energy and Water Development instructed that BPA "may make no new obligations from the Bonneville Power Administration Fund in support of the Fish Passage Center" because there were universities in the region that collect the relevant data and could fulfill the functions of the FPC while saving money for taxpayers.<sup>10</sup> Similarly, the conference committee report for the act directed that "[t]he Bonneville Power Administration may make no new obligations in support of the Fish Passage Center."<sup>11</sup> The committee report also stated that the conferees "call upon the Bonneville Power Administration and the Northwest Power and Conservation Council to ensure that an orderly transfer of the Fish Passage Center functions ... occurs within 120 days of enactment of this legislation."<sup>12</sup>

BPA selected two entities to take over the functions of the FPC. On January 26, 2006, BPA announced that the Pacific States Marine Fisheries Commission (PSMFC) and the Battelle Pacific Northwest National Laboratory (PNNL) would assume the duties of the FPC on March 21, 2006.<sup>13</sup> Specifically, BPA indicated that PSMFC would (1) manage the Smolt Monitoring Program; (2) perform functions associated with related data collection and management; and (3) conduct routine analysis and reporting of that data. PNNL was selected to (1) oversee, coordinate and facilitate broader, non-routine scientific analysis of that data, including independent peer review; and (2) manage the analysis itself, which would be performed by biometricians and scientists selected by and under contract to PNNL via request for qualifications. In addition, BPA proposed that the Columbia Basin Fish and Wildlife Authority assume coordination of the policy interests of regional fishery agencies and tribes on flow and spill issues. This would be done under a modification to its current BPA contract, pending approval of its members.<sup>14</sup>

In response to BPA's decision to transfer the FPC's functions to other entities, a number of organizations, including the Northwest Environmental Defense Center, Public Employees for Environmental Responsibility, and the Northwest Sportfishing Industry Association, filed a petition for review challenging the BPA's decision.<sup>15</sup> On March 17, 2006, the U.S. Court of Appeals for the Ninth Circuit granted the parties' request for a stay of the transfer of the FPC's functions pending resolution of the dispute.<sup>16</sup>

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<sup>10</sup> S.Rept. 109-84, at 179 (2005).

<sup>11</sup> H.Rept. 109-275 (conference report), at 174 (2005).

<sup>12</sup> *Id.*

<sup>13</sup> BPA press release. See [<http://www.bpa.gov/corporate/BPAnews/2005/NewsRelease.cfm?ReleaseNo=695>].

<sup>14</sup> *Ibid.*

<sup>15</sup> A separate petition for review of the BPA's decision filed by the Confederated Tribes and Bands of the Yakama Nation was later consolidated with this petition.

<sup>16</sup> *Northwest Environmental Defense Center et al. v. Bonneville Power Administration*, No. 06- (continued...)

On January 24, 2007, the Ninth Circuit ruled that BPA's decision to transfer the functions of the FPC to two other entities violated the §706 of the Administrative Procedure Act (APA), 5 U.S.C. §706.<sup>17</sup> Under the APA, a federal agency's actions are to be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>18</sup> The court first held that BPA could not base its decision to transfer the FPC's functions on the language found in a Senate subcommittee report and a conference committee report because "legislative history, untethered to text in an enacted statute, has no compulsive legal effect."<sup>19</sup> The court further noted that treating legislative reports as binding law undermines the legislative process because it gives the force of law to language that has not been subject to the constitutional requirements of bicameralism and presentment.<sup>20</sup> The court also found that this treatment of legislative history as binding law frustrated the purposes of the Northwest Power Act, which establishes a participatory process in which various interests collaborate to advise BPA on how best to exercise its discretionary authority.<sup>21</sup> Finally, the court rejected BPA's argument that its decision to transfer the functions of the FPC was based on a thorough analysis conducted independent of the directives in the legislative reports.<sup>22</sup> Therefore, the court held that BPA's decision to transfer the functions of the FPC to other entities based on the language in legislative reports was arbitrary and capricious and contrary to law.<sup>23</sup>

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<sup>16</sup> (...continued)  
70430 (9<sup>th</sup> Cir. March 17, 2006) (order granting stay).

<sup>17</sup> *Northwest Environmental Defense Center et al. v. Bonneville Power Administration*, — F.3d —, 2007 U.S. App. LEXIS 1493 (9<sup>th</sup> Cir. 2007).

<sup>18</sup> 5 U.S.C. § 706(2)(A).

<sup>19</sup> 2007 U.S. App. LEXIS at \*35.

<sup>20</sup> *Id.* at \*40.

<sup>21</sup> *Id.* at \*43-44.

<sup>22</sup> *Id.* at \*51-56.

<sup>23</sup> *Id.* at \*58.