



ACWA Policy Principles on **Implementation of State and Federal Endangered Species Acts**

Preamble

The federal and state Endangered Species Acts (ESA) are among the most powerful pieces of legislation ever enacted to manage the natural resources of California and the nation. Depending upon how these acts are implemented, they can both generate significant benefits and create substantial economic harm. There are a number of examples of successful implementation of ESA in California. (See sidebar, "Where Has ESA Worked?") The ACWA Blueprint identifies modernization of ESA to improve its implementation as a high priority for California water management.¹ In particular, the application of these laws in the San Francisco-San Joaquin River Delta has not been as successful. Restrictions on water diversions imposed through the biological opinions have exacerbated the economic impacts of the recent drought, without a corresponding improvement to the ecosystem. (See sidebar, "ESA and Delta Water Supply Reliability.")

ACWA believes the current situation in the Delta provides a significant opportunity to improve the implementation of the ESA. The principles set forth below outline a more effective approach to ESA implementation that incorporates the co-equal goals of water supply reliability and ecosystem enhancement that are the basis of California law. ACWA urges senior management at the ESA implementing resource agencies, with Cabinet-level concurrence, to use these principles to implement a more integrated and diversified approach. Without a fundamental change in implementation strategy, it will be impossible to satisfy the demands required by the ESA while also effectively meeting the needs of California's families, farms, businesses and communities.



¹No Time to Waste: A Blueprint for California's Water. ACWA publication, May 2005. Pages 29-30. The Blueprint encourages "increased habitat-focused species protections through more proactive, collaborative, and incentive-based management agreements with property owners and resource managers."

Where has ESA Worked?

The ESA has, in fact, been successfully implemented in a variety of circumstances in California. On the North Coast, the Humboldt Bay Municipal Water District recently completed a Habitat Conservation Plan (HCP) that provides 50 years of regulatory certainty for its operations while recovery efforts for salmon and steelhead species are implemented in the Mad River. In the Mokelumne River watershed, East Bay Municipal Utility District has similarly completed a 30-year HCP for terrestrial species that provides operational flexibility and management certainty for its 56,000-acre watershed. In Southern California, water agencies and developers, in cooperation with counties, environmental groups, and others, have implemented long-term HCPs for terrestrial species that have facilitated the construction of major water infrastructure, such as Diamond Valley Lake, and allowed major development projects to proceed in Riverside, Orange, and San Diego Counties.

What do these successes have in common? First, all of them were completed as HCPs, which by their nature require a collaborative approach that embraces the concept of “co-equal goals.” Second, these successes embraced a comprehensive approach, focusing on multiple species and using multiple management tools as appropriate. Third, all were supported by a strong commitment to provide the resources necessary to assure both long-term economic and ecosystem success. The challenge is to replicate this successful approach in non-HCP applications of the ESA.

ACWA fully supports the underlying goals of the state and federal ESAs to avoid the extinction of listed species and ultimately ensure species recovery so that a listing is no longer warranted. However, it is critical to recognize that the primary purpose of the ESA, as expressed in the federal statute, is to “provide the means whereby ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such endangered species and threatened species...” 16 U.S.C.A. 1531(b). The remarkable aspect of this statement is that Congress recognized conservation of ecosystems is the first purpose of the ESA, even before conserving endangered and threatened species themselves.

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As the federal and state ESAs are currently administered, the responsible agencies primarily focus their limited resources on single-species approaches and a single action (or set of related actions), as opposed to a comprehensive assessment of all the factors affecting species viability. For example under the federal ESA, the responsible agency limits its consultation to individual federal actions under section 7 of the ESA. The result is narrowly constructed biological opinions, mitigation measures, and, in the case of the federal ESA, often extremely restrictive reasonable and prudent alternatives (RPAs) that may not even be addressing the underlying causes of ecosystem and species declines.

ACWA believes that the agencies have greater discretion to develop comprehensive strategies that also consider economic and social stability. (See sidebar, “Are the Co-Equal Goals Inconsistent with ESA?”) We believe such strategies are more likely to ensure that the agencies achieve statutory obligations in both the near and long term, especially if they encourage voluntary participation in solution development and implementation, which is more likely to result in additional resources voluntarily allocated to species protection and restoration. Such an approach will not impede adequate protections for the listed species in the near term, and in fact could enhance effectiveness.

Too few resources are dedicated to analyzing and developing comprehensive and well-coordinated strategies that conserve the ecosystems upon which threatened and endangered species depend. To the contrary, the current approach taken by the agencies fails to: (1) incorporate an evaluation of all the potentially significant stressors to the species and its habitat; (2) prioritize actions to address those factors in a comprehensive manner; and (3) enact an implementation plan that coordinates conservation efforts with other state, federal and local agencies, and private and non-governmental organizations. For example, with respect to application of the ESA to the water export projects, the current approach of trying to protect aquatic species

² The recent decision by the federal agencies to consolidate the Delta smelt and salmon biological opinions is a step in the right direction. See letter from Secretary of the Interior Ken Salazar and Secretary of Commerce Gary Locke to Nancy Sutley, Chair of the Council on Environmental Quality, May 3, 2010.



“The current approach of trying to protect aquatic species through a single action only – restricting water diversions from the south Delta – is not working for either ecosystem sustainability or water supply reliability.”

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Whether dealing with ecosystem management in

the Delta or elsewhere, ACWA calls upon state and federal agencies to adopt a comprehensive, ecosystem-based approach. This will require the agencies to work in a more coordinated manner to address multiple species of concern while utilizing more diverse management tools. We believe this approach will better achieve the goals of the ESA in a more efficient, effective and economic manner.

ACWA Policy Principles for ESA Implementation

Principle 1: Comprehensive, Integrated Solutions

Federal and state agencies’ implementation of the ESAs, whether listing species, designating critical habitat or developing biological opinions, should focus on comprehensive, integrated solutions that address all the factors that are or have the potential to adversely affect the viability of endangered or threatened species. Furthermore, the agencies need to promote proactive programs that embrace a comprehensive, ecosystem-based integrative methodology, as opposed to the single-species approach that characterizes current ESA implementation.

Principle 2: Co-Equal Goals

It is critical that the agencies recognize that strategies incorporating the co-equal goals of sustainable ecosystems and a reliable water supply throughout the state have the greatest likelihood for success because they provide stability and certainty, allowing a larger commitment of resources to innovative problem solving.

Principle 3: Real-Time Solutions

It is essential that the agencies enhance their capacity to utilize real-time data and scientific analysis to address both immediate and long-term solutions. Such approaches can reduce conflicts that result from competing demands for the same resources, providing greater flexibility for resource distribution that can enhance both ecosystem sustainability and water supply reliability.

Principle 4: Science

The agencies must develop and use science that adheres to the highest academic and professional standards to justify their biological conclusions and subsequent management recommendations. While we recognize “best available science” may be limited when decisions are made, the agencies must commit to processes that promote ongoing data gathering and scientific analysis combined with the ability to readily modify management practices when such scientific analysis justifies modification.

ESA and Delta Water Supply Reliability

During 2010, California experienced statewide precipitation of 115% of normal with a snow pack of nearly 150% of normal, yet final allocations of water supplies to water contractors that rely on water conveyed across the Delta are at “drought-like” levels of only 50%. This fact is telling and a clear indication that “the system is broken.” DWR estimates that operational restrictions due to the ESA since 2007 have reduced contract deliveries to federal and state contractors by about 30% beyond the level natural hydrological conditions would have provided, with larger impacts in wetter years. To make matters worse, the water management tools developed in the 1990s to bolster dry-year supplies – south-of-Delta storage and voluntary water markets – are not working due to the same ESA restrictions that severely reduced the ability to move water through the Delta.

Even in a relatively wet year, it is extremely difficult to put water into storage (surface and groundwater) for protection against future drought years. Moreover, the capacity to move water from voluntary sellers upstream of the Delta to buyers downstream of the Delta has been reduced by approximately 40%. Water conveyed through the Delta supplies drinking water to more than 22 million Californians, irrigation to produce over 45% of the fruits and vegetables consumed in the U.S., and supports over \$500 billion of the California economy. The current water supply situation is not economically sustainable for the large part of California’s economy that receives a significant portion of its water supply from water conveyed through the Delta.



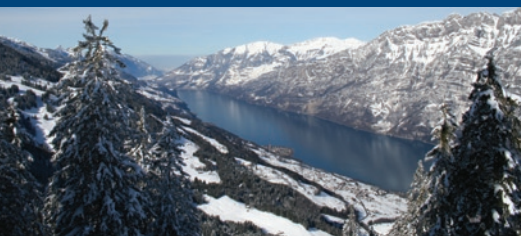
Are the Co-Equal Goals Inconsistent with ESA?

The short answer is “no.” There is nothing in the ESA that prevents implementation approaches that seek to promote the goal of water supply reliability. California law now requires that we manage water resources in a manner to accomplish the co-equal goals of “providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.” In recent federal court decisions regarding the Delta smelt and salmon biological opinions, Judge Oliver Wanger ruled that the ESA implementing agencies have a “responsibility to consider alternative remedies . . . that would not only protect the species, but would also minimize the adverse impacts on humans and the human environment.”¹ Even such prominent conservationists as former Secretary of the Interior Bruce Babbitt² and Michael J. Bean of the Environmental Defense Fund³ have in the past articulated strong support for ESA implementation approaches that embody the spirit of the co-equal goals. The fact is when regulators seek solutions that provide both environmental and economic benefits – as in the HCP examples described elsewhere – ESA implementation is universally better.

¹ Findings of Fact and Conclusions of Law RE: Plaintiffs’ Request for Preliminary Injunction *Consolidated Salmon Cases*, No. 1:09-cv-1053 (E.D. Cal. May 18, 2010); *Consolidated Smelt Cases*, No. 1:09-cv-00407 (E.D. Cal. May 27, 2010).

² Stevens, *Interior Secretary Is Pushing A New Way to Save Species*, New York Times, February 17, 1993.

³ *The Endangered Species Recovery Act of 1997: Hearings on S. 1180 Before the Senate Committee on Environment and Public Works*, 105th Cong., 1st Sess. 97-99 (1997) (statement of Michael J. Bean, on the behalf of the Center for Marine Conservation, Environmental Defense Fund, and World Wildlife Fund)



Principle 5: Adaptive Management

Adaptive management strategies recognize that often there is a need to implement actions with incomplete or imperfect information. While uncertainty should not be cause for inaction, it is vitally important to establish achievable quantified goals and track progress, increasing investments where they appear to have higher returns and reducing investments where they do not pay off. In addition, when there is credible debate about the methodologies used and conclusions reached by the agencies in developing RPAs and other actions, an adaptive management approach should be incorporated into the implementation process associated with the actions to ensure that new science and technology is integrated into on-the-ground practices.

Principle 6: Managing Within Highly Altered Ecosystems

Science-based implementation strategies must reflect the fact that we are pursuing species recovery within highly altered ecosystems. This is generally the case in California’s rivers and watersheds, particularly in the Delta. The Delta has been dramatically altered over the past two centuries as water ways were dredged and realigned, wetlands were converted to farmland, minerals were mined and timber harvested, and water and other infrastructure was constructed. While the co-equal goals seek substantial and sustainable improvements for the ecosystem, in most cases, it is simply not possible or desirable to restore ecosystems to their historical natural state.

Principle 7: Accounting for Climate Change

The ESA never anticipated environmental regime changes of the magnitude we are likely to experience as a consequence of climate change. Climate change is already reshaping California’s hydrology, and these changes are expected to intensify in coming decades. Without developing and adopting more flexible approaches to the administration of the ESA, these dynamic changes to ecosystems will make the existing statutory mandates of the act highly impractical or impossible to implement.

ACWA urges the responsible federal and state agencies to assess their implementation of the ESA in the context of climate change. ESA implementing agencies should ensure that water resource managers have the necessary flexibility and discretion to respond to regulatory mandates in a manner that is achievable and practical, given the magnitude of changes attributable to climate change.

While the changes associated with climate change present great uncertainty, they also serve as a reminder that the planet’s ecosystems are not static, but are constantly changing over time. Measures taken to protect endangered species should be implemented in a manner that reflects and accounts for these ecosystem dynamics.

Principle 8: Flexible Implementation

The agencies should recognize that the ESA provides them with significant discretion to develop and implement strategic options to improve a species’ viability. This flexibility and discretion should be utilized as a first principle rather than as a last resort in the face of legal or other challenges. Given often-limited available data and/or uncertain scientific analysis, as well as the range of temporal, geographic and demographic variability of species and the ecosystem(s) on which they depend, the agencies should promote local and regional strategies that can address such variability most efficiently and effectively.