



## Association of California Water Agencies

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May 17, 2012

Daniel M. Ashe, Director  
U.S. Fish and Wildlife Service  
1849 C Street, NW  
Washington, DC 20240

**RE: Comments to Endangered and Threatened Wildlife and Plants; Expanding Incentives for Voluntary Conservation Actions Under the Endangered Species Act, 77 Fed. Reg. 15,352 (Docket No. FWS-R9-ES-2011-0099)**

Dear Mr. Ashe:

The Association of California Water Agencies (“ACWA”), on behalf of a very diverse and experienced group of interested stakeholders who participated in an ACWA-sponsored roundtable event and who have signed on to this letter, submits these comments on the Advance Notice of Proposed Rulemaking (“ANPR”) published by the U.S. Fish and Wildlife Service (“FWS”) on March 15, 2012. The roundtable participants are a diverse group of water agencies and landowner agricultural organizations such as the California Building Industry Association, California Farm Bureau Federation, and The Nature Conservancy, from across the State of California whose operations and resource management activities are affected by Endangered Species Act (“ESA”) implementation. We welcome the FWS initiative to expand incentives for voluntary conservation actions under the ESA and appreciate this opportunity to submit our comments.

### **Introduction**

ACWA and the signatory organizations recognize the increasingly important role that public, private, and non-governmental partners can play in species and ecosystem conservation, particularly when federal agencies’ resources are scarce. In order to realize the full potential of such involvement, however, government must recalibrate its approach to these partnerships and ensure that its recalibrated approach extends to all agency levels and regions, effecting a change in culture that increases the agency’s receptiveness to these partnerships and recognizes conservation partners’ priorities. This cultural shift must begin at the top and be communicated throughout the agency, so that it is fully embraced by agency staff, if these partnerships are to have a solid chance to succeed.

Specifically, federal participants such as FWS and the National Marine Fisheries Service (“NMFS”) must acknowledge and respect the needs of landowners, water rights holders, local utilities, non-governmental organizations, and other interested parties in making decisions to become more actively engaged in voluntary conservation activities. For many of these potential conservation partners, the decision to become involved by responding to incentives and taking voluntary conservation actions is ultimately a business decision. They must have increased assurances and certainty that their investments will be properly recognized and that there will be improved timeliness of decision-making and expanded risk-sharing by the federal agencies. It is critical that federal agencies such as FWS and NMFS infuse flexibility and a judicious exercise of discretion, at all levels of the organization, in order to encourage voluntary participation in conservation actions. This is particularly true when the science is uncertain, and adaptation is necessary in response to evolving knowledge and changing environmental circumstances such as climate change. Of course, it is understood that achieving environmental performance, in terms of habitat protection and possibly enhancement obligations, goes hand-in-hand with incentives for voluntary conservation actions.

Any new program such as the one proposed for pre-listing mitigation necessarily should build upon the existing legal and policy foundation. Despite some successes of Habitat Conservation Plans (“HCPs”), Safe Harbor Agreements (“SHAs”), and Candidate Conservation Agreements with Assurances (“CCAAs”) that have been implemented in California, there is continuing concern about the costs and timeliness of these transactions. FWS must strengthen the existing framework for landowner incentives, even as it explores new opportunities for conservation partnerships. ACWA and the signatory organizations endorse FWS’s stated objectives of improving the effectiveness of the ESA; eliminating unnecessary process requirements and increasing efficiency; improving the clarity of FWS regulations and guidance; engaging the states, stakeholders, and public and private resource managers more effectively; and encouraging greater experimentation. We believe that there is a great deal of opportunity and flexibility in promoting voluntary conservation actions *prior to a species listing* under the federal ESA. The ultimate goal should be to create environmental and administrative conditions so that such a listing is not necessary. As FWS pointed out in the ANPR:

If the need to list a species under the ESA can be avoided, everyone benefits. The species benefit from early action to address threats to their survival. Landowners and other regulated interests avoid the imposition of potentially costly restrictions on their activities. The Service avoids the need to dedicate scarce conservation dollars to additional species. The States maintain their primary management authority over non-listed species, ensuring that local authorities respond to local problems with input from their residents.<sup>1</sup>

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<sup>1</sup> 77 Fed. Reg. at 15,353.

Many of the opportunities identified in the ANPR are consistent with the *ACWA Policy Principles on Implementation of State and Federal Endangered Species Acts*, adopted by the ACWA Board in 2010 (Attachment A). Our responses to the specific questions posed by FWS in the ANPR are provided below.

## **Responses to Specific Requests for Comment**

### **(1) How can the Service allow for the recognition of conservation credits for voluntary action taken in advance of listing in a manner that is efficient, readily understood, and faster? How can this be accomplished in an expeditious manner?**

First and foremost, FWS must recognize the tension that exists between investors' need for certainty and the scientific uncertainty which might complicate important decisions under the ESA. By implementing measures that acknowledge and account for this tension, FWS can address potential conservation partners' concerns and increase the chances of success. Potential conservation partners need increased certainty that the terms of a conservation agreement will be honored—that a deal is a deal, so to speak. FWS can account for any uncertainty in the science by using adaptive management strategies within certain predefined boundaries that represent engaged risk-sharing by the agency. For example, the Natural Community Conservation Planning (“NCCP”) program implemented by the California Department of Fish and Game in southern California offers a good model for FWS to consider, whereby a credit/debit system is managed by a third party over time, accounting for changed circumstances as they occur.

FWS can and should increase certainty for potential conservation partners in order to promote engagement in conservation activities. By shifting from a species-specific approach to an ecosystem approach, FWS could offer greater certainty and long-term stability, particularly where the interests of individual species might conflict. As long as the participant is taking actions that benefit and maintain the overall health of the ecosystem, impacts on individual species should generally balance out over time and warrant less attention from FWS on a short-term basis. FWS could also define habitat types or scope of coverage so that participants have well-understood and measurable targets. FWS could create a numbered list of Best Management Practices or adopt a template approach that simplifies the process of project design for individual landowners. In that way, a private landowner or other potential conservation partner can begin from a common starting point, rather than completely reinventing the wheel each time. FWS might also offer staged assurances to reduce the risks of early decisions. Rather than waiting until an entire agreement is reached and actions are implemented, or by providing upfront guarantees of benefits prior to implementation, assurances could be awarded along the way in the context of achieving agreed-to conservation milestones.

FWS must also actively work to reduce transaction costs. The upfront investment required to reach a conservation agreement, often years in advance of any realized benefit, is a serious deterrent that prevents many potential conservation partners from engaging in voluntary conservation activities. By offering phased assurances and

reducing the overall costs of participation, FWS can help to counteract this deterrent factor. Potential avenues for reducing transaction costs associated with pre-listing conservation and mitigation actions include establishing a categorical exclusion from National Environmental Policy Act (“NEPA”) requirements and making greater use of the Service’s authority under section 6 to delegate implementation authority or issue a master permit to the states, thereby eliminating duplicative procedural requirements that result in little additional environmental benefit. An overarching goal of FWS’s reform efforts should be to achieve integration of federal and state programs, particularly in states, like California, which administer parallel programs for the protection of endangered species and their habitat, or which require environmental documentation in addition to NEPA. Wherever possible, FWS should work to reduce procedural requirements, avoid duplication through integration of state programs, and encourage state recognition of federally (or jointly) awarded mitigation credits.

**(2) Should credits recognized for voluntary conservation actions taken prior to listing be available for use solely by the person who created them or should they be transferable to third parties?**

Credits recognized for voluntary conservation actions taken prior to listing should most definitely be transferable to third parties. Allowing transferability will increase participation in voluntary conservation activities, will incentivize investment by non-landowners, and will create a market for conservation credits. FWS will have a critical oversight role in any transfer of credits among parties, primarily to evaluate the ecological value for the affected species or habitats in awarding credits. Market value of the credits should be left to the willing seller and the willing buyer of the credits. A well-administered market will facilitate investments in conservation credits that may, in fact, expand conservation opportunities.

**(3) If voluntary conservation actions undertaken prior to listing generate conservation credits that can be used to offset impacts of post-listing activities, should they be based solely on the beneficial actions of the person undertaking them, or should they be based on the net impacts of both beneficial and detrimental actions?**

Some recognition of net impacts is appropriate, but the conservation partner should be held responsible only for detrimental actions taken by it, not for actions taken by others or natural occurrences. Voluntary participants should also not be held responsible for past activities that were legally undertaken that resulted in the take of species (e.g., maintenance, grazing, water diversions). The ultimate goal should be to incentivize parties to do the right thing in order to increase the benefit for identified species, their habitat, and the overall ecosystem. Penalizing parties for detrimental effects outside of their control would not further this goal. FWS needs to establish a clearly understood method for calculating net impacts, and the party undertaking voluntary conservation actions needs assurances that the quantity of conservation credits agreed to will continue to cover the actions for which assurances are provided by FWS. Potential conservation partners need assurances that once a credit value is agreed to for

voluntary conservation actions, it will not be subsequently modified or removed by the agency unless there is an unanticipated detrimental action by the conservation partner.

**(4) What role should the States play in recognizing and overseeing the development of credits from voluntary conservation actions taken for species not yet listed?**

States should participate to the extent their policies are consistent and supportive of voluntary credits, but their recognition of federally awarded credits is essential. As discussed in response to Question (1), FWS should strive for integrated parallel federal/state programs, working to reduce duplicative procedural requirements and avoid discrepancies in listing. In particular, FWS must recognize the unique California perspective, where there is a state ESA in addition to the federal ESA, and a state NEPA-equivalent, the California Environmental Quality Act. FWS should explore the potential applicability of federal conservation credits to state conservation programs, and possibly vice versa (i.e., cross-jurisdiction integration that may require some documentation between resource agencies, such as a memorandum of agreement, or legislation). There will be little incentive to participate in a voluntary federal credit program unless equivalent credit and policies are provided by state fish and wildlife regulators. In addition, FWS should look for opportunities to integrate its efforts to address species for which it is responsible under the federal ESA with the efforts of NMFS, which has responsibility under the federal ESA for anadromous fisheries.

**(5) How can or should the Service specify in advance of listing the manner in which it will quantify the value of voluntarily undertaken conservation actions?**

It is essential that FWS specify in advance of listing how it will quantify the value of voluntarily undertaken conservation actions and that certainty is provided for potential conservation partners that these values will remain stable. This could be done in a similar manner to section 4(d) rules—except that it would occur in advance of listing. As discussed in response to Question (1), FWS should consider a shift from an individual species-by-species recovery standard to a multi-species sustainable ecosystem approach. This is needed for managing broader landscapes (e.g., watersheds) where there are numerous species of concern, especially in situations where there are conflicting needs among species. Under this approach, FWS should develop a metric for the health of an ecosystem, and award credits for which the market will set a price. Consideration should be given to providing additional credit for habitat protection or ecosystem enhancement that benefits multiple species over single species to incentivize earlier voluntary protection of higher value habitat.

**(6) How the Service's conservation banking policy could be revised to allow for the use of conservation credits accrued from voluntary actions taken prior to listing?**

The Service's conservation banking policy should be revised to offer greater specificity and clarity generally, and to provide specifically for eligibility of "pre-listed" habitat. FWS should consider a shift from an individual species-by-species recovery

standard to a multi-species sustainable ecosystem approach, as discussed in response to Questions (1) and (5), and specifically recognize and address that shift in its conservation banking policy. The Service's conservation banking policy should also be revised to recognize appropriate consideration of net impacts, as discussed in response to Question (3). FWS should, on an ongoing basis, explore opportunities to expand conservation banking. By doing so, we believe the economic value of conservation credits can grow and, consequently, increase desired ecosystem improvements for both listed and non-listed species.

**(7) What changes, if any, are needed to the following regulations, policies and guidance to clarify mechanisms by which the Service can give “credit” for beneficial actions for unlisted species?**

ACWA and the signatory organizations are best able to provide detailed recommendations for change once FWS promulgates a proposed rule.

**(8) How could the Service use pilot projects to demonstrate that the ESA can provide landowners with credits and regulatory assurances for actions intended to benefit candidate species? Are there existing situations where such pilot projects could facilitate conservation for candidate species?**

FWS should use pilot projects to demonstrate its program for providing landowners with credits and regulatory assurances for actions intended to benefit unlisted species and their habitat. Pilot projects would serve as a “test bed” for new approaches. For example, pilot projects should test the shared risk, staged assurances, and adaptive management concepts discussed in the Introduction and the response to Question (1). In order to find suitable situations where pilot projects could be established, FWS should promote its program and actively seek out conservation partners in appropriate settings. FWS should consider sponsoring a grant program for cost sharing for these pilot projects. Potential conservation partners include those with existing SHAs or CCAAs who are looking to expand their existing safe harbors or earn additional credits that could be later transferred. Potential pilot projects could include projects that are currently developing or revising habitat management plans that address multiple species, listed and unlisted, to mitigate—through habitat restoration, improvements, and even possible land acquisition—potential adverse impacts of their management activities associated with the project.

It is critical that pilot projects provide insight not only for conservation partners (e.g., landowners, water rights holders) but also for FWS staff. As we discussed in the Introduction, the likelihood of success of such efforts proposed by this ANPR is dependent on significant cultural changes at all levels of FWS. It is incumbent that staff not only embrace these pre-listing voluntary conservation efforts but also encourage and promote such efforts. They will only do so if they feel empowered and there is an expectation from upper management that such efforts will be pursued.

**(9) How can a landowner use such voluntary “prelisting mitigation” activities to satisfy requirements arising from any future section 7 consultation (such as “conservation measures,” “reasonable and prudent measure,” or “reasonable and prudent alternatives”)?**

FWS’s regulations must provide agencies with the clear opportunity to recognize the benefits from landowners’ participation in these programs, through amendment as necessary. FWS could also establish a preference for the use of defined credits, consistent with U.S. Army Corps of Engineers’ established preference for mitigation banking under section 404 of the Clean Water Act.

We draw your attention to two areas that we believe are important to the advancement of voluntary conservation actions, the use of sound science in section 7 consultations and how critical habitat designations are applied to lands covered by HCPs.

The ESA requires use of “best available science.” More flexibility is needed in the section 7 consultation process to ensure that happens more consistently. ACWA and the signatory organizations encourage the Department of the Interior to provide for participation by project applicants and designated non-federal representatives in consultations, with the goal of providing input for use in development of biological opinions. Such participation could include an applicant request for independent peer review or joint development of additional studies to provide needed information for development of recommendations in a biological opinion. These provisions would contribute greatly to ensure that best available science is used in these important decision-making documents.

As described in ACWA’s ESA Policy Principles, some of the greatest success stories for the ESA have been programs covered by HCPs. Despite the large investment required to develop and implement these collaborative programs, they hold considerable attraction to non-federal participants because of the regulatory assurances provided. Until recently, critical habitat designations were not applied to HCPs when the subject species were addressed under those plans. More recent designation proposals, however, have reevaluated whether additional benefit from a critical habitat designation would be outweighed by the coverage provided by the HCP. It is critical for the ongoing success and utilization of HCPs that the HCP proponent continue to receive assurances that areas and resources covered by a HCP will not be subjected to future critical habitat designations where those species are covered by the HCP.

In conclusion, ACWA and the interested stakeholders listed below appreciate this opportunity to submit comments on FWS’s proposal to expand incentives for voluntary, pre-listing conservation actions under the ESA. We look forward to working with FWS as it improves its implementation of the ESA and more effectively engages landowners and others as partners in conservation. Please contact us if we can submit additional information or otherwise assist in implementing this very worthwhile proposal.

Sincerely,



Randy Record, President  
Association of California Water Agencies

On Behalf of:

Bay Planning Coalition  
California Building Industry Association  
California Farm Bureau Federation  
Contra Costa Water District  
East Bay Municipal Utility District  
Eastern Municipal Water District  
Friant Water Authority  
Glenn-Colusa Irrigation District  
Green Diamond Resource Co.  
Irvine Ranch Water District  
Metropolitan Water District of Southern California  
Northern California Water Association  
Reclamation District 2068  
San Bernardino Valley Municipal Water District  
San Luis & Delta Mendota Water Authority  
Sonoma County Water Agency  
The Nature Conservancy  
Vallecitos Water District  
Western Municipal Water District  
Yuba County Water Agency

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