

**Federal Assurances under the
Endangered Species Act**

**Draft Platform Statement
1-20-05**

Shared Strategy Summit 2005 Draft Platform Statement

Introduction to Platform Statements

This “platform statement” is one of nine papers drafted to stimulate discussion and make progress on topics related to salmon recovery that cross all the Puget Sound watersheds. These platform statements are not intended to represent positions or decisions of any individual or organization. Rather, they have been developed by the Shared Strategy staff with help from others and are intended to describe the ideas and questions that have been identified to date by a variety of people working on these issues.

The expectation is that together, Shared Strategy participants will be able to forge a regional consensus on how to make progress on the ideas and questions identified in the papers and that these ideas will be incorporated into the draft regional recovery plan submitted to NOAA and U.S. Fish and Wildlife Service this June.

Under the Endangered Species Act, a recovery plan must identify the threats to survival, the actions necessary to address the threats, measures for delisting, cost of the actions and a schedule for implementation. In the Shared Strategy, all governments and interest groups agreed to add to the federal requirements by including commitments to implement the plan to ensure its success. This will be the first recovery plan ever developed through a partnership of affected parties that includes commitments for implementation.

The Puget Sound recovery plan will be a living document that evolves and improves over time through implementation. Parts of it will be well defined by June, and other parts will need more work in the future, due to limited knowledge, resources or current political or public commitments. Where additional detail is needed to address a significant threat to salmon survival, the plan must provide a schedule with measurable decision points for how the gap will be filled.

We encourage your comments at the Summit or by contacting Shared Strategy staff directly. It will be most helpful for you to indicate where the draft statement is generally heading in the right direction and how to take it further to help achieve recovery goals, as well as to identify which questions or issues will need to be addressed at a future time.

Shared Strategy Summit 2005
Draft Platform Statement

**Federal Assurances under the Endangered Species Act
Draft January 20, 2005**

ESA Requirements and Potential for Regulatory Certainty

When species are listed under the Endangered Species Act (ESA), federal agencies are required to ensure any actions they fund, permit or carry out are not likely to jeopardize the species' continued existence or destroy or adversely modify its critical habitat. Federal agencies must consult with the listing agency (NOAA Fisheries or U.S. Fish and Wildlife Service) regarding actions they take that "may affect" the listed species or its critical habitat. Actions that may affect but are "not likely to adversely affect" the species undergo an informal consultation, while those that are likely to adversely affect the species or its critical habitat must undergo more lengthy formal consultation. The ESA also prohibits the "take" of listed species, either through section 9 (for an endangered species) or through section 4(d) (for threatened species).

Private citizens, landowners, businesses and local governments can all be affected by the federal consultation requirement or the ESA prohibition of take. For example, ESA consultations can affect the time it takes to issue a permit, fund a project, or complete an action when a federal agency is involved. Consultation might also affect the conditions on a permit or funding, or the manner in which a project is completed. The take of a listed species can occur as a result of many of the everyday activities carried out in a watershed, resulting in an ESA violation.

In Puget Sound, local participants are developing a recovery plan for ESA-listed salmon and bull trout, along with commitments to implement many of the provisions in the plans. In exchange for those commitments, these parties are asking what relief they can expect from NOAA Fisheries and the U.S. Fish and Wildlife Service from project uncertainty and delays and from the potential liability associated with take of listed fish. The extent to which a party might receive regulatory relief, or assurances against take liability, will depend on the extent to which that party commits to taking certain specific actions.

Some options for regulatory relief or certainty from take liability include:

1. Expedited section 7 consultations for actions in the plan;
2. Programmatic section 7 consultations for categories of actions in the plan that are not likely to adversely affect the listed species and are sufficiently uniform or predictable;
3. Authority to take a listed species incidental to some other lawful activity through a section 7 incidental take statement, a section 10 incidental take permit, or a section 4(d) approval;
4. The ability to use conservation banking in appropriate circumstances;

Shared Strategy Summit 2005 Draft Platform Statement

5. Delisting of the species if the federal agencies conclude the protections of the ESA are no longer necessary because there are sufficient improvements in the status of the listed species and sufficient implementation of the recovery plan.

Interests for Federal Certainty and Regulatory Relief

Addressing the uncertainty and legal liability created by the ESA mandates is important to the future of many activities ranging from farming to forest management, rural and urban development, and road maintenance and other community improvements.

Interested parties want to know that development, and most importantly, implementation of a salmon recovery plan will achieve salmon recovery, help reduce the legal and regulatory uncertainty for activities necessary to support our human population. They also hope that effective plan implementation will lead to a reduction in the cost of ESA compliance and the risk of third party lawsuits.

People working across Puget Sound share the perspective that the money provided from the federal and State governments while important will be inadequate to recover salmon without resources committed from local governments, business, and other private parties. Without incentives for working on recovery, local governments and the private sector will find it difficult to do more than just comply with the law.

Interests in the business community and local governments would like several options considered as incentives from the federal government for implementing the recovery plan.

1. Programmatic consultation on the issuance of the recovery plan so that subsequent actions by local governments and business that require review by the Services can get expedited treatment.
2. A policy statement that the Services will not initiate enforcement actions against parties who are making reasonable good faith efforts to act in ways consistent with the recovery plan. This would not preclude citizen suits but might discourage them.
3. Adopt reasonably "may affect" and "Not likely to adversely affect" thresholds for ESA consultation on actions consistent with the recovery plan. For example, NOAA Fisheries could adopt a policy that small land development projects that are covered by CWA Section 404 nationwide general permits or regional general permits and are consistent with the recovery plan would be presumed not to have more than de minimus effects on ESA-listed salmon and therefore no ESA consultation is needed unless the Corp decides the project "may affect" salmon in more than a de minimus way.
4. Adopt a policy that projects consistent with the recovery plan which "may affect" salmon are presumed to be "not likely to adversely affect" ESA listed salmon unless either the Corps or NOAA Fisheries finds that extraordinary circumstances cause significant adverse effects.

These are just several examples for consideration and significant research and policy analysis will be required to determine if these suggestions are possible and what conditions need to be met for them to become an option used by the federal government.

Shared Strategy Summit 2005 Draft Platform Statement

Ability to Provide Federal Certainty

The ability of the federal agencies to provide certainty and regulatory relief is based on several factors;

1. The comprehensiveness, level of detail and scientific certainty of results proposed in a recovery plan,
2. Comprehensiveness and certainty of commitments for implementation,
3. Demonstrated progress in implementation of actions called for in the plan, and
4. Improved status/trends for populations listed under the ESA.

Like climbing the rungs on a ladder, the more progress that is made toward achieving the four criteria, the higher the level of certainty or regulatory relief that could be offered. At the time of the anticipated adoption of the plan by the federal agencies, the factors mentioned above will only be partially met. It is anticipated that the plan will actively evolve over time and that substantial progress could be made on all four factors over the first years of implementing the plan.

Initial Steps for Federal Certainty

The recommendation for discussion is to create milestones to review and evaluate progress with the possibility of increasing federal certainty or regulatory relief at each milestone. A staged review of progress and the provision of assurances would need the flexibility to provide support for the whole region, individual watersheds and specific sectors of the region. Some individual sectors or watersheds may be further along than others in their understanding and commitment to address the threats to the salmon and they should be rewarded with additional assurances.

As a first step, upon the adoption of the Puget Sound recovery plan by the federal services, an agreement could be signed by the federal agencies and the State of Washington for the conservation and recovery of the salmon. "Conservation agreements" are not specific to the ESA but provide a means to formalize shared understanding of commitments that could support implementation of the plan.

The conservation agreement would acknowledge that the Puget Sound recovery plan with its implementation commitments is the agreed upon approach for achieving recovery. The conservation agreement would identify key measures that would be monitored for success, the process for adapting to new information and the initial milestones over a ten-year period where progress and results would be evaluated. The agreement would also state the intention of the state and federal agencies to jointly pursue funding for local communities. Finally, the agreement could indicate the support of the recovery plan actions as the appropriate solution for the area in the event of third party lawsuits.

The agreement would identify review points at specific time intervals, like at three, five and ten years. At each review point the progress would be evaluated for each watershed, fish population and the whole region. Based on the four factors mentioned in the previous section, the federal agencies would determine if additional assurances or regulatory relief could be provided.

Questions for Discussion at the Summit Work Session

Shared Strategy Summit 2005 Draft Platform Statement

1. What constraints and limitations have been created by the listing of salmon and bull trout on local activities in both the public and private sector?
2. What certainty or regulatory relief would be most important to encourage aggressive implementation of the recovery plan?
3. How important is it to be able to provide assurances for individual watersheds or sectors of the community?
4. How can a conservation agreement between the federal and state government provide significant encouragement and political support? What would need to be in the agreement to support local communities in implementation? How could the agreement be expanded to include local communities?