



## **Position Paper on Reform of the Endangered Species Act**

The Western Urban Water Coalition (WUWC) consists of the largest urban water utilities in the West, serving over 30 million water consumers in 16 metropolitan areas in seven states. These utilities established the WUWC in 1992 in recognition of the critical role that water plays in the growth of the most urbanized regions of the western United States.

Water requirements for municipal, agricultural and environmental purposes have increased competition for the finite water resources of this region. Application of the Endangered Species Act (ESA) in the West has heightened this competition by requiring that water resources be reserved and used for the protection and recovery of listed species.

WUWC utilities, which provide a critical water supply to millions of homes and businesses daily, are constantly challenged to continue to provide that service. ESA issues abound in water collection, transportation and delivery, and water is critical to the survival and recovery of many species throughout the West. The resulting interplay between water supply and species conservation has caused the WUWC to seek creative solutions to ESA issues. In particular, the WUWC has long supported the use of proactive approaches to species conservation problems, with an emphasis on preventing the need to list species under the Act and using regulatory incentives to encourage non-federal parties to contribute to species conservation. For this purpose, the WUWC has developed the following recommendations for ESA reform.

- 1) Critical habitat requirements should be evaluated to determine how to better provide for habitat protection in relationship to the jeopardy and recovery planning requirements of the Act. At a minimum, the critical habitat provisions of the ESA should be amended in the following ways:
  - a) The designation requirement should be moved from the species listing stage to the recovery plan stage so that sufficient information will be available to make more accurate designations possible. In addition, adequate funding must be provided to carry out agency decision-making and recovery plan implementation.
  - b) Congress should provide guidance on how to analyze the economic impacts of critical habitat for purposes of excluding areas where costs outweigh benefits. That guidance should require the use of a cost-effectiveness approach that values economic impacts to specific areas through direct and indirect effects and then weighs those costs against the biological benefits. The WUWC has prepared a detailed position paper describing the methodology that should be used for this purpose.
  - c) Critical habitat should exclude areas subject to habitat conservation plans (HCPs), safe harbor agreements, candidate conservation agreements, or government land use plans that include significant species conservation measures. If all applicants for a particular

incidental take permit/HCP agree, however, it should be permissible to include all or part of those plan areas within critical habitat designation on a voluntary basis.

- d) The Act should define the term "essential to the conservation of the species," which is a prerequisite for critical habitat designation, to ensure that only habitat vital to species conservation is designated, as based upon the objective gathering and analysis of the best available science and the weighing of economic factors.
- 2) In terms of administrative reform, the term "adverse modification" should be defined to link the term to the conservation concept, as required in the court's decision in Gifford Pinchot Task Force v. U.S. The definition should take into account the net effect of direct or indirect alterations of critical habitat that appreciably diminish its value for conservation purposes, but after considering offsetting improvements in habitat and mitigation. In addition, the term "jeopardy" should be defined to prohibit actions that would cause a species to decline below minimum sustainable levels, with the limitation that the current status of a species should not be appreciably diminished. This definition should be:

*Destruction or adverse modification means the net effect of a direct or indirect alteration that appreciably diminishes the value of the physical or biological features of the designated area such that they no longer meet the needs considered to be essential to the conservation of the species at the time of designation, after consideration of offsetting improvements in habitat or protection for replacement habitat associated with the proposed action.*

For purposes of legislative reform, Congress should consider approaches that apply section 7(a)(2) consultation and jeopardy in a manner that, while taking species conservation goals into account, does not set an unduly restrictive standard for the effects of an action or allow speculative, insignificant, or short-term effects to trigger the prohibition.

- 3) The ESA should codify regulatory incentives to non-federal landowners such as no surprises and safe harbor agreements.
- 4) The Act should require more efficient and effective recovery plans that include recovery milestones, mid-course progress evaluations, and projected time-frames. These plans should be developed through public review procedures, and should be available on a habitat-based approach that covers multiple species in defined geographic areas.
- 5) Federal agencies should be required to meet their own obligations under cooperative recovery plans and similar initiatives. Such agreements should be fully enforceable against all parties, and any necessary waivers of the sovereign immunity of the United States should be provided for. If federal agencies fail to perform, other participants in such plans and initiatives should not be required to expand their own obligations to make up for the federal failure to perform.