

## Federal Assurances Draft Platform Statement – Summit Breakout Session Notes

January 26, 2005

### Introduction by Facilitator Stephanie Ryan

The goal of this session is to:

- Build on consensus and agreement on platform statement.
- Highlight areas need further work.
- Highlight, but not try to solve problems of conflicting science or strong opinions.
- Make constructive suggestions to improve platform statement.
- Provide input on the designated questions.

### Presentation of Draft Platform Statement by Jim Kramer

- We hope advance in ideas beyond what's in platform statement – tell Shared Strategy in the next 6 months how to move this issue forward.
- How do we reach agreement? Who's binding who to what? We need to stay within the spirit of the law.
- Why do we care federal assurances?
  - Under ESA, the federal agency must ensure their actions are not likely to jeopardize a listed species; private and other governmental agencies are prohibited from take.
  - Assurances reduce uncertainty and liability.
  - A federal and local commitment to the recovery plan would like to reduce the regulatory process and increase predictability - reduce the cost of compliance, and provide more confirmation that the plan will result in recovery and ultimately de-listing. (Main goal is de-listing)
  - Factors to be considered – level of detail and certainty of results of the plan, commitment, progress in implementation, status and trend for population.
- The Recovery Plan will: identify threats, actions to address threats, cost, implementation strategy, schedule and strategy, commitments, monitoring and adaptive management.
- Technical requirements from the Plan – all populations and watersheds need to be improved, and no longer be in current level of high risk. Goal is 70-80% of historic level of salmon, currently at 50%.
- Strive for scientific and political certainty.
- Desired relief – programmatic consultation (reduce cost and time frame), commitment to not enforce takings if plans are being implemented, view compliance with programs as “not affecting” in regards to ESA such Clean Water Act permit requirements
- Draft statement calls for a conservation agreement (not legally binding, more politically adopted) between state and federal agencies and a staged review of progress over 10 years based on 4 factors:
  - Relief provided based on progress at both watershed,
  - and regional scales,
  - Set measures for evaluating results and types of relief,
  - Support recovery plan actions if third party lawsuits are filed.

### Issue Experts

*Ken Berg – US Fish and Wildlife Service*

- US Fish and Wildlife Service supports watershed recovery projects.
- Agency may be able to provide ESA assurances, regulatory certainty, incentives to participate and rewards, technical help, agency to adopt recovery plan, funding.
- 3 types of projects currently – invasive species control, remove fish passage barriers, riparian building: providing technical assistance, funding, and partnering.

- USFWS has grants available. Provided \$5 mil for to acquire and restore habitats:
  - \$13 mil for habitat conservation acquisition.
  - \$2.5 to develop habitat conservation plans.
  - \$300,000 for fish passage barriers.
- Army Corps of Engineers issues regional general permits under Clean Water Act so individuals don't have to get their own individual permits. This saves time
- Section 10 - long-term permits are available in exchange for a long-term commitment
- Bull trout technical review (like Chinook one), jump-start recovery plans – good information of what needed to implement recovery and how to adopt Shared Strategy.

*Bob Lohn - NMFS*

- NMFS is interested in what assurances local entities and those implementing the plan need.
- There are three mechanisms to restore salmon through ESA: stop killing species, restraint of harmful actions, and restoration of habitat.
- ESA is silent on how to provide incentives on restoration, and what restoration really means.
- Gain support of the plans through people doing restoration. This provides the federal agency with assurances of the local entity making a commitment of implementation.
- Eagles and bears have been treated under ESA with a “protect and wait” strategy; salmon needs more immediate help to see results.
- Ownership: Local control of plans gives local groups control for overall results – When you have a plan, you have the beginnings of a possibility...What would it look like?
- The assurances could operate by giving standards of greater certainty and performance.
- If we provide enough assurances to federal agency, then could we turn the control to state and local organizations?

*Steve Mullet – City of Tukwila*

- It is very important to provide assurances to the watersheds, especially to stakeholders and cities are investing dollars.
- It is simple to do no harm, but the key is salmon recovery – are our actions really going to recover salmon?
- Do the federal agencies require us to look hard at do no harm, or conduct a recovery plan? This distinction can also be made from a financial perspective.
- The city wants federal assurances (doesn't have to be all funding) to implement recovery.
- Speedy permits are a big issue; time is costly. Builders want to start projects in 1-2 years; government is thinking 5 years - need to come to agreeable time expectations. This needs to be wrapped into assurances.
- What is done at grassroots levels needs to be respected at top, grassroots is the pusher for recovery, it's critical to keep them in loop as we move forward. This will also provide us with more assurances in the form of prevention of third party lawsuits.

*Bob Kelly – Nooksack Tribe*

- Wants certainty from tribal standpoint – key point: standard is harvestable number of fish. This is the tribe's goal.
- How to get to that certainty of reaching harvestable numbers of fish? There is a trust and responsibility that this will happen – that is why the tribe is engaged.

*Sam Anderson – Masters Builders Association*

- Certainty and flexibility are both important.

- Recovery will really only be attained through economic well-being of the business community and the taxpayers. The tax base is necessary for funds for implementation.
- What kind of assurances will we get if we spend all this money and time?
- Are we committed to harvestable numbers of salmon? Yes, the business community accepts this commitment and goal.
- The business community is willing to invest in the future as long as we don't experience the "paralysis and paranoia" that we did the first year the fish was listed. (Paranoia paralysis – no idea what to do, permits frozen, no one could make a decision)
- If city is comfortable with controlling federal actions, then business community is comfortable and everything runs smooth. The goal is no lawsuits.
- The business community wants to know what the return will be on their investment in salmon recovery. They want credit for their efforts and commitment, from salmon recovery and other things they've implemented like GMA, CWA, etc.

*Jay Manning – Brown, Reavis and Manning PLLC*

- Was surprised that the environmental community accepted what they did.
- Environmental community is acceptable of bottom-up and not top-down approach.
- Great to plan but plan needs to be implemented to really recover salmon.
- Assurances are not the only tool to insure implementation, and are not the most important tool. What is important is that the vast majority of us agree we want our grandchildren to experience what our grandparents experienced – lots of salmon returning to our rivers.
- Liability is a disincentive, giving assurances is taking away this disincentive to recover salmon. This is necessary unless you have a more powerful incentive than the disincentive.
- Generally supportive of the notion of assurances.
- Is take liability necessary?
- What additional incentives do you need and what kind of assurances? Form of take liability as long as specific, clear, enforceable, the more take liability you should get...the less clear, etc the more assurances you get!!!

Q&A – Metaphor was made: Getting a mortgage on a house is a metaphor for the deal you make with the federal government in promising to implement salmon recovery. What does the government need as "collateral" to prove you are going to "make good on the loan" or implement salmon recovery?

- The farming community sees tribal fishing rights are a great incentive to reach recovery.
- Farming community's contribution is water quantity. They have been reaching an agreement between tribe and the farmers about water for farming and for harvestable level of fish for tribes.
- Water rights – tribe has senior water right, see how to make it complement the farmers needs some parts of the year. When the tribe doesn't need water, it can be made available to farmers.
- There has been a recognition that tribe and farming need each other; now with assurances we are trying to do it in federal context
- The tool for this assurance might be like the Comprehensive Irrigation Plan, but created by NOAA, state agencies, US Fish and Wildlife. This tool is being used across the state. It integrates both Clean Water Act and ESA, and addresses quality and quantity

**Comments from the group:**

- Mayor of Sammamish – inherited infrastructure deficit, need assurances on projects so they can implement and not end up in third party lawsuits and/or paralysis

- City of North Bend – recognize critical role of tribe and regulators so city can conduct its business, meet obligations of Growth Management Act and respect water quantity issue
- Clarity is needed on the range of things that need to be done at the local level
- Just because there has not been a third party lawsuit recently, we are still at risk of it.
- Why spend a lot of money to buy insurance policy when there is a low risk of law suit? (judging by what has happened recently.) What is it that local entities are specifically looking for?
- Growth of 1 million people is predicted in King County while we implement recovery. Its not easy for builders – condominiums are not marketable. How can we be profitable with a limited amount of land to develop?
- People who live in urban growth area will pay for salmon recovery and people out of the urban growth area will pay in land use restrictions.
- Snoqualmie watershed coordinator – implementation rewards are not clear, what do local entities get for making this commitment? She wants a formally written document of the give and take process.
- Jim K – We are presenting the federal agencies with a plan for watershed that says, “if we focus urban growth in areas and give protection to rural areas, that fish will recover.” That is the hypothesis. The question is whether everyone is willing to go along with this hypothesis as long as we measure recovery and progress over time, thus not providing an ultimate assurance now, but providing a willingness to partake in this experiment? Is this willingness enough incentive for business and environmental communities?
- Sam – The problem is, “show me the money.” How will the federal government guarantee the funding?
- What are the mechanisms of changing the deal once the permit is in place?
- If a city does everything under the GMA plan and all the permit plans are all good, isn't that enough? GMA does have fish habitat standards, SMA protects fish but the protections aren't to ESA standards.
- Purpose of ESA needs to be clear so one can compare other plans to see if it meets it. It's unclear what the recovery standard is.
- Look at the possibility of assurances on a watershed by watershed basis to give incentives of interim assurances to the ones that abide by the rules.
- Implementing GMA collides us against other acts, like Clean Water Act – we don't control the whole watershed just pieces.
- What assurances were provided with the Lower Columbia salmon recovery plan? The commitment to the recovery plan depends on level of assurances provided.
- What happens if local entities don't participate in restoration? What is the liability or consequence of falling short of the expectations of recovery (i.e. if we recover 200 fish instead of the predicted 250)?
- There's a mandate that we can't harm endangered species, but there's no mandate or any amount of federal assurance to convince people to do restoration.
- If you do no harm, follow 4d rule and decide to do no restoration, then if species degrades over time, you have no 4d safety net and can be held liable for degradation from lack of restoration, plus you're in a worse off position to recover.
- Is it possible that if salmon is not improving in your city or watershed area, then permitting for growth steps may be held back?
- Make a commitment over the long-term to develop a workable recovery plan w/ federal while just implementing the no harm rule to hold the line stable.
- If developers invest in restoration of critical areas, they should get credit. Developers should also get credit for regulatory scheme, i.e. pumping money outside GMA to restore and if you

aren't following it, expect to be sued. (There is no payback for additional restoration work done, only consequences if GMA isn't followed.)

- Environmental community is willing to support looking at regulatory and restoration concepts, and developing a pathway to reach recovery/implementation. They are willing to change it as we go along based on needs.
- Rural communities suggest performance funds that if business community doesn't meet up to standards, then don't get funds back and that would become resource for the communities that will bear the burden
- Not current development, but it's the old development causing stormwater problems. We can't hold them liable – challenge is changing the old buildings into new, environmentally better ones.

**Back to the metaphor with the house and the mortgage:**

*What if house paid off – are promises continued obligations?*

*Who are buyer and seller? Seems like we are talking about “buying and selling” two different products.*

*How do we deal with assurances within and between watersheds whose plans are at different levels of development and who have made varying levels of commitment?*

*Can there be programmatic processes for assurance/permitting – urban and fish process like what already exists for forest and fish or agriculture and fish?*

*Is the cost of the “house” different depending on the “buyer”?*

*What does “a project within the plan” mean?*

*ESA assurances are an important issue for local government and others. However, given the fact that there have been no third party lawsuits, etc, why is it a big deal? Why is there need?*

- Stephanie asked, how many people feel assurances are really important? The majority raised their hands. But what does assurances mean?
- The permitting process is source of lawsuit possibilities; entities need assurances that would make the process is clear and certain
- What do you get for your efforts in implementing the salmon recovery plan? How do local entities that have committed to GMA and implemented many programs/rules get this commitment to growth management recognized?
- Local entities want feedback that they are on the right path, but how can they have protection while they are going down that path?
- Business activity is protected with certainty if conducting chosen recovery implementation.
- The more assurances we receive, the more certainty there is that we will carry out implementation.
- Sometimes we give control over something to someone else based on a high level that certain assurances will occur. ESA is about the federal government's control over not having species go extinct. What will make them willing to give over this control?

*Questions:*

*Is it worth looking back at 4-d rule to get guidance on how to do this?*

*What specifically do they expect to get from federal agencies: legal protection or speedy processes?*

*How were assurances handled in Oregon and on the Columbia River?*

*Does it help us to look out a little further (1 or 5 years from now), as the term of the “mortgage”?*

- Business community perspective can't be 30, 40, 50 years, as they need assurances now.

### **Designated Questions from the Position Statement and Powerpoint Template**

*What constraints and limitations have been caused by ESA? What problem are we trying to solve? Is it important to provide assurances for individual watersheds and sectors? What relief would be most encouraging for implementation? What commitments are necessary for watersheds and individual organizations? How can we use a conservation agreement to address the concerns? How would we measure success?*

### **Presentation for Thursday morning session:**

*What is the essence of the platform for the topic?*

- Assurances are important.
- Need clarity on assurances and process since there is an expectation to commitment.
- Agree that level of assurances tie to level of commitment/results.
- Don't live up to commitment, there are consequences.

*What aspects of the platform are headed in the right direction?*

- Platform is a good starting point.
- Yes, assurances important; offer by watershed.
- Timing is critical.

*What improvements were suggested by participants?*

- Recognition of the benefits of having a recovery plan:
  1. Allows individual actions to be reviewed in the broader context of the whole watershed rather than the development site, and
  2. Without recovery plan, federal funding will dry up for recovery.
- We need to be clearer the kinds of assurances, site specific, programmatic at a watershed or regional scale in regard to the standard of not harming the fish and jeopardy.
- Building upon Clean Water Act and Growth Management Act since it corresponds to ESA, get credit along the former acts.
- Identify the consequences of not acting.
- Tell different story go beyond and define aggressive restoration.
- Look at assurances more broadly than just federal government, ie. process on water in the Nooksack.

*What Q's still remain to be answered?*

- How we define credit?
- What if some watersheds are not implementing their recovery?
- How do you balance the commitment and implementation by watershed with the cost and benefit of results in another watershed?

*What happens next, who involved or responsible in the next steps?*

- Build on the learnings of the tri-county process.
- Re-drafting of the platform statement based on the discussion, reviewed by the shared strategy sub-committee and delivered to watersheds by late February.

---

*Below you will find a summary of additional comments submitted by people in **Summit Comments & Evaluation forms**; (these comments were submitted post-breakout, and may reflect the views and opinions of individuals who did not participate in the breakout session dialogue.)*

- There needs to be clarity on what types of assurances are sought, and for whom.
- Systematic, organized approach to recovery plan implementation over an extended period is an integral part of answering assurances question.
- We need continued focus on lowering cost of compliance through programmatic reviews.
- If we follow guidelines and timelines of adopted plans, the feds have to help defend us in litigation.