

**ARROYO GRANDE CREEK HABITAT CONSERVATION PLAN**  
**FREQUENTLY ASKED QUESTIONS**  
**September 27, 2011**

**WHAT IS THE ENDANGERED SPECIES ACT?**

The Endangered Species Act (Act) protects endangered and threatened species of wildlife and plants. When Congress passed the Act in 1973, it recognized that our rich natural heritage is of "esthetic, ecological, educational, recreational, and scientific value to our Nation and its people." It further expressed concern that many of our nation's native plants and animals were in danger of becoming extinct. The purpose of the Act is to protect and recover imperiled species and the ecosystems upon which they depend.

**HOW DOES THE ACT APPLY TO THE LOPEZ DAM?**

Federally-listed species (both endangered and threatened) have been documented in Arroyo Grande Creek. The District's manipulation of water releases from Lopez Dam could affect these species and/or their habitat; therefore, pursuant to the Act, the District will need to acquire an incidental take permit. Section 2(c)(2) of the Act states "It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species."

**WHY SHOULD WE SAVE ENDANGERED SPECIES?**

Congress answered this question in the introduction to the Endangered Species Act of 1973 (Act), recognizing that endangered and threatened species of wildlife and plants "are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people."

**WHAT AGENCIES ARE INVOLVED IN THE ENDANGERED SPECIES ACT?**

The Act is administered by the U.S. Fish and Wildlife Service (FWS) and the Commerce Department's National Marine Fisheries Service (NMFS). The FWS has primary responsibility for terrestrial and freshwater organisms, while the responsibilities of NMFS are mainly marine wildlife such as whales and anadromous fish such as salmon and steelhead.

**WHAT IS A HABITAT CONSERVATION PLAN (HCP)?**

Habitat Conservation Plans are planning documents required as part of an application for an incidental take permit. They describe the anticipated effects of the proposed taking; how those impacts will be minimized, or mitigated; and how the HCP is to be funded. HCPs can apply to both listed and nonlisted species, including those that are candidates or have been proposed for listing. Conserving species before they are in danger of extinction or are likely to become so can also provide early benefits and prevent the need for listing.

Habitat Conservation Plans under the Endangered Species Act provide a framework for people to complete projects while conserving at-risk species of plants and animals.

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Congress envisioned Habitat Conservation Plans as integrating development and land-use activities with conservation in a climate of cooperation.

HCPs reduce conflicts between listed species and economic use or development activities, allowing for the development of "creative partnerships" between the public and private sector which make the process work for both landowners and species. Species benefit too, which is another strength of the HCP process. It often expands the focus from conserving a single species to looking at the ecosystem as a whole, and that can often keep species from declining long before they may need to be considered for listing. Thus, the HCP process provides many opportunities for willing owners of natural resources to make positive contributions to the conservation of species and their habitats. This allows landowners to become true partners in the conservation of our precious natural heritage.

**WHAT IS AN INCIDENTAL TAKE PERMIT?**

An incidental take permit is required when non-Federal activities will result in "take" of threatened or endangered wildlife. Take is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct." An HCP must accompany an application for an incidental take permit. The purpose of the habitat conservation planning process associated with the permit is to ensure there is adequate minimizing and mitigating of the effects of the authorized incidental take. The purpose of the incidental take permit is to authorize the incidental take of a listed species, not to authorize the activities that result in take.

**WHAT AGENCIES ARE INVOLVED IN THE HCP?**

- U.S. Fish and Wildlife Service - oversees the protection and conservation of the California red-legged frog and tidewater goby;
- National Marine Fisheries Service - oversees the protection and conservation of steelhead;
- San Luis Obispo County Flood Control and Water Conservation District Zone 3 - will need to complete an HCP that satisfies both agencies' requirements for each species.

**WHY ARE WE DOING AN HCP?**

Federally-listed species (both endangered and threatened) have been documented in Arroyo Grande Creek. Any future activities that could affect these species and/or their habitat will require an incidental take permit.

The HCP is necessary to comply with the Act (Federal law) and is a prerequisite of a State-required amendment to the project's water rights permit. Once the HCP is approved the District will implement a downstream water release program designed to provide on-going water supplies to Zone 3 agencies as well as avoid adverse impacts to listed species.

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Violations of the Endangered Species Act (ESA) can result in criminal penalties of up to one year in prison and \$50,000 in fines. Civil penalties of up to \$25,000 for each violation may also be imposed. Private citizens may bring actions against other individuals or government entities for violations of the ESA.

Additionally, San Luis Obispo County has numerous federally listed species and almost any project affecting a water source could affect these species. Future coordination with the Services will be required for several other projects that the District and/or the Public Works Department may propose.

**CAN AN INCIDENTAL TAKE PERMIT BE ISSUED WITHOUT AN APPROVED HCP?**

The Services cannot issue a temporary incidental take permit prior to the completion of an HCP. The Services are mandated to only issue 'take' of listed species once they've analyzed the project impacts and made a jeopardy determination. In summary, the federal government may authorize takings of protected species that do not jeopardize the continued existence of the species if (1) the takings occur as part of an otherwise legal action, and (2) the taking results from an activity subject to an approved HCP. The regulations provide for no other methods.

**WHICH ENDANGERED SPECIES ARE FOUND IN THE PROJECT AREA?**

Steelhead, California red-legged frogs, and tidewater gobies have been found in Arroyo Grande Creek. It is yet to be determined where the project boundary will end; either upstream of the Arroyo Grande Creek Lagoon or extend the boundary to the mouth of the Pacific Ocean. The boundary limit will determine whether or not the HCP will include the tidewater goby which has not been found upstream of the Arroyo Grande Creek Lagoon.

**WHAT IS THE DIFFERENCE BETWEEN SECTION 7 & SECTION 10 OF THE ENDANGERED SPECIES ACT?**

Incidental take can be permitted via two sections of the ESA: Section 7 or Section 10.

Section 7 applies only to projects with a Federal nexus. A Federal nexus is when a Federal agency funds, authorizes or carries out the program or project.

Section 10 applies to non-Federal actions and is available to private landowners, corporations, Tribal governments, State and local governments, and other non-Federal landowners.

The Arroyo Grande Creek HCP addresses the operation and maintenance of the Lopez Dam, including its water releases. The project participants and/or applicants are the San Luis Obispo County Flood Control and Water Conservation District Zone 3 and the State Water Resources Board. There is no Federal involvement with this project (e.g., no Bureau of Reclamation, Federal Energy Regulatory Commission, or Army Corps of

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Engineers). Because the project does not have a Federal nexus, we must seek take authorization via Section 10 of the ESA.

There are benefits associated with Section 10 process versus Section 7. Typically, Section 10 permits are longer lived (up to 100 years) where as Section 7 take authorization is typically for a shorter period of time (up to 10 years.).

The Section 10 process provides No Surprises Assurances. Essentially, private landowners are assured that if "unforeseen circumstances" arise, the Services will not require the commitment of additional land, water or financial compensation or additional restrictions on the use of land, water, or other natural resources beyond the level otherwise agreed to in the HCP without the consent of the permittee. Section 7 does not have these assurances.

**WHY WERE STEELHEAD HABITAT SURVEYS CONDUCTED ABOVE THE DAM AND WHAT DO THEY MEAN TO THE HCP PROCESS?**

NMFS requested that the District provide information about habitat suitability for steelhead above the dam to assist NMFS with their determination (Biological Opinion) regarding the impacts of the dam on steelhead. A Habitat Suitability Index (HSI) is an approach used by NMFS to understand the quality of habitat for steelhead. There are some issues with the method – it was created for the Pacific Northwest. The southwest experiences more arid climate, affecting the behavior of our steelhead. However, this method still provides a general understanding of habitat.

Mark Allen with TRPA submitted a final Habitat Suitability Index (report summarizing his findings) to Public Works via electronic mail (e-mail) on February 25, 2011. The Habitat Suitability Index (HSI) was e-mailed to NMFS on the same day and was posted on the San Luis Obispo County Water Resources website on February 28, 2011 at: <http://www.slocountywater.org/site/Flood%20Control%20and%20Water%20Conservation%20District%20Zones/ZONE%203/index.htm>.

The HSI for upper the Lopez Dam watershed concluded that there is good habitat for steelhead above the dam. Of the three reaches studied, approximately 11 or 12 miles of stream is accessible and suitable for steelhead. There is more suitable habitat beyond these 11 or 12 miles, but they are impeded by natural barriers.

Because there is suitable habitat for steelhead above the dam, the HCP needs to address the effects of the dam on habitat upstream. The effects assessment will need to analyze whether or not the dam impacts the viability of the steelhead population. The HCP will need to look at how the dam affects historical spawning and rearing. Potential mitigation will also be addressed.

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**WHY ARE WE CONDUCTING A PEER REVIEW OF THE HCP PROCESS AND IS THE FIRM CHOSEN TO DO THIS WORK QUALIFIED?**

Because the HCP is not a new project, having been underway for several years, the District proposed hiring a firm to provide a detailed review and analysis of the current draft HCP, the various issues that have been raised by the agencies over the years, the numerous future tasks required, and the goals of the District relative to the HCP. From this analysis the District and the consulting firm would develop a strategy to move the HCP forward. The District's intent was to incorporate a firm that not only understands the requirements of the species involved, but one that is expert in applying the requirements of the law to the situation at hand.

With Zone 3 approval, the District expanded the current HCP project team by adding HT Harvey and Associates, a full-service environmental consultant with demonstrated and successful experience in producing HCPs and Implementing Agreements for anadromous fish. H.T. Harvey and Associates have a long and successful working history with the U.S. Fish and Wildlife Service, National Marine Fisheries Service, and California Department of Fish and Game. Additionally, this firm understands the need to balance the agencies' needs with the District's needs.

H.T. Harvey and Associates was requested to provide a detailed review and analysis which would address the following key issues:

- How far the District is into the process (e.g., 90% done?);
- Any fatal flaws in the District's goals;
- Any key issues remaining to be addressed;
- Any important deficiencies in the work performed to date; and
- H.T. Harvey and Associates' recommendations for moving the process forward.

On January 6, 2010, this approach was reviewed and supported by the Zone 3 Technical Advisory Committee. On January 20, 2011, this approach was approved by the Zone 3 Advisory Committee.

It is anticipated that completion of this effort will lead to a strategy for the completion of the HCP process. Further work, if needed, may or may not involve additional work for H.T. Harvey and Associates. The results of their review will be presented to the Zone 3 TAC once comments from NMFS and USFWS provide some indication on what revisions are appropriate.

**WHY IS THE HCP TAKING SUCH A LONG TIME?**

The length of time to complete the permitting process depends on the complexity of issues involved (e.g., the number of species) and the completeness of the documents submitted by the applicant. The FWS will work to complete all steps, such as the public comment process, as expeditiously as possible. The most variable factor in permit processing requirements is the level of analysis required for the proposed HCP under

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NEPA, in other words, whether an Environmental Impact Statement (EIS), Environmental Assessment (EA), or a categorical exclusion is required. Other factors such as public controversy can also affect permit processing times.

The attached time line outlines the HCP process. It is based on the assumption that the Project will prepare an Environmental Assessment (EA) to meet NEPA requirements rather than an Environmental Impact Statement (EIS). The latter is a larger document that requires considerably more review and can take up to 4 years to complete.

Regarding the long time frame the County has endured during the process of obtaining a Section 10 permit thus far, even if this project had a Federal nexus we would still be in discussions with NMFS regarding a flow release schedule. Formal consultation via Section 7 would not be able to move forward at this point. The flow release schedule must be determined along with all mitigation measures prior to initiating consultation.

Also, even if we had a Section 7 nexus, we would still need to complete the NEPA and CEQA processes which have time frames associated with them (18 mo +).

Providing a firm time line for the current process is difficult. There are several unknowns that could substantially impact the time line shown in the table, such as:

- The potential for a higher level NEPA document
- The potential need for additional studies to provide more information
- The work loads and priorities of FWS and NMFS, which are increasingly being driven by legal decisions and court orders
- The ever-changing regulatory environment, especially with regard to anadromous fish species

The timeline was submitted to both FWS and NMFS for review, but neither agency could commit to the time line because the process depends on their future availability to review and respond. However, both agencies have assured us that they will work to respond in a timely manner, to the degree possible. Although the time line was originally provided by FWS, both agencies provide the same services with regards to the Section 10 process; therefore, the time line is applicable no matter which agency is the lead Federal agency.

Although the HCP development process has taken some 5-plus years to date, the HCP is carefully working through the issues raised by the first draft HCP, in a manner that avoids substantial annual budget impacts. That 2004 draft served to highlight some of the key issues, and moved the process of study and negotiation forward, but did not meet all of the permit issuance criteria. Since 2004, regular coordination with the agencies has guided and bolstered the evaluation of the details of downstream release scenarios, winter time attraction flow options, flow monitoring and release trigger methods, and climate monitoring and prediction methods. Although we can anticipate that the next draft HCP will jump-start the process outlined in the attached time line, we must also anticipate that there will be additional details that will require a more detailed response from the District.

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It is clear that every group involved in the HCP process is anxious to move to the implementation phase, anticipating that implementation will better benefit both the resources affected as well as the community served by the Lopez project. At the same time, it is important to understand that all HCPs and their accompanying permits and agreements will be subject to a high degree of scrutiny from a variety of stakeholders. This level of interest and care is based upon the basic premise of the Endangered Species Act which is the fact that the survival of the species is at stake. In the long run, it is of the utmost importance to ensure that the various perspectives on each issue are fully addressed before moving ahead with the program.

**CAN WE CHANGE THE SCHEDULE TIME LINE FORMAT SO THAT IT IS MORE READABLE/USER-FRIENDLY?**

The time line format that we have been using was provided to us by the U.S. Fish and Wildlife Service. It is important to stick with this format for discussion purposes.

**WHAT IS THE OFFICIAL START DATE OF THE SCHEDULE?**

The time line will begin when the District submits a revised draft HCP to the agencies for their review, and the agencies agree that the document meets their criteria for a draft HCP.

**DO WE KEEP RECORDS AT MEETINGS WITH THE RESOURCE AGENCIES AND ARE THEY APPROVED BY ALL PARTIES INVOLVED?**

We record all pertinent information during meetings with resource agencies in staff meeting notes. Similar to staff of local agencies, staff of resource agencies are not authorized to approve or make commitments on their agency's behalf, therefore, comments, advice and/or direction given at staff level meetings does not bind the agency in any way.

**HOW MUCH OF THE DAM EIR CAN BE USED FOR THE HCP?**

A full Environmental Impact Report (EIR) was prepared in the late 1990's to assess the potential environmental effects of the Lopez Dam Seismic Retrofit Project. Some of the information contained in the EIR is useful to the Habitat Conservation Plan (HCP) effort; however, the EIR was prepared for a specific project that occurred during a relatively short time frame (2001-2003) in a limited geographic area.

The EIR was required by the California Environmental Quality Act (CEQA). CEQA is a state law that requires state and local public agencies in California to identify the significant environmental impacts of their actions and to avoid or mitigate those impacts, if feasible. EIRs are prepared in accordance with the detailed requirements of CEQA and with the State CEQA Guidelines contained in the California Code of Regulations. The EIR focused primarily on the short term impacts of the retrofit project, that is, those that would occur during the construction process. Long-term impacts were those that resulted from widening the dam, essentially the loss of some areas alongside the dam and in the borrow areas that provided wildlife habitat. As required by the statute and

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guidelines, the EIR also included information about other environmental issues in addition to the temporary impacts on rare and sensitive species.

The seismic retrofitting of Lopez Dam also required a permit from the U.S. Army Corps of Engineers. Because the Corps is a Federal agency, they were required to consult with two federal resource agencies pursuant to Section 7<sup>1</sup> of the Federal Endangered Species Act (ESA) to address impacts to federally listed species (i.e., steelhead and California red-legged frog). The National Marine Fisheries Service prepared a Biological Opinion that addressed the impacts of the retrofit on steelhead and their habitat and the U.S. Fish and Wildlife Service prepared a Biological Opinion for impacts on California red-legged frogs.

Neither federal resource agency addressed the effects of long term operations and maintenance of the dam in their Biological Opinions for a number of reasons. First, the Federal “action” that was the focus of the consultation was the permitting of the retrofit project, not long term operations. Second, all of the regulatory agencies involved understood the urgency of the project; all were focused on meeting their statutory requirements in the shortest possible time. Including the issues being currently addressed in the HCP would have certainly delayed the retrofit project. Third, the District has already embarked on the HCP process and all of the agencies involved that the HCP was the proper venue for addressing long term issues.

Although both CEQA and the ESA address environmental concerns, they have different purposes and address impacts from different perspectives. CEQA is described as an “umbrella” statute that analyzes a project’s potential impact on various environmental issues including aesthetics, agriculture, geology/soils, hazardous materials/hazards, cultural resources, water, public service/utilities, land use, etc. Consequently, impacts to biological resources are just one of several issues reviewed under CEQA. A project’s best efforts at mitigation are required but must be balanced with social and economic considerations.

The ESA looks solely at impacts to federally listed species and their habitat, is much more prescriptive in the approach to how the analysis is done and how impact levels are determined, and requires projects to promote the recovery and long-term sustainability of listed species. Allowances for significant impacts due to social, economic, or other considerations are essentially non-existent; the value of listed species and their habitats are viewed from a national and very long-term perspective.

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<sup>1</sup> See “What is the difference between Section 7 & Section 10 of the Endangered Species Act” discussion