



Ecological Restoration Business Association
8270 Greensboro Drive, Suite 700
Tysons, Virginia 22102
P: 703-584-8375 · www.ecologicalrestoration.org

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Mr. Gary Frazer
Assistant Director for Endangered Species
U.S. Fish and Wildlife Service
1849 C Street, N.W.
Washington, DC 20240

RE: Opportunities for Revisions to the 2016 ESA Compensatory Mitigation Policy

Dear Mr. Frazer:

The Ecological Restoration Business Association (ERBA) appreciates the opportunity to provide comments on the 2016 Endangered Species Act (ESA) Compensatory Mitigation Policy (the Policy). ERBA valued the thoughtful dialogue and stakeholder collaboration during 2014-2016 that informed the Policy's development. We believe the Policy represented substantial progress towards accountable mitigation offsets for impacts to imperiled species. As the U.S. Fish and Wildlife Service (FWS) considers potential revision and reissuance of the Policy, ERBA recommends that the FWS retain certain concepts that are inherent in the implementation of the ESA and conservation of imperiled species, and evaluate improvement opportunities to address the issues detailed below. We organize our comments generally according to the chronological sections of the Policy.

- Section 1. Purpose. The Policy includes a statement on collaboration with peer agencies and other partners. ERBA recommends that experienced mitigation practitioners are also explicitly included in this listing of partners and organizations.
- Section 5.1. Siting Sustainable Compensatory Mitigation. This section is well-crafted and practical. ERBA recommends also discussing which documents would normally be most useful to inform siting locations and, if not available, what type of document might then be used; in essence, a step-down approach of applicability. ERBA also recommends further elaborating on how species-specific mitigation strategy documents arise from other conservation documents and plans. ERBA would like to engage with the FWS to explore the idea of funding regional conservation plans through partnerships with NGO's, academic institutions, agencies, and on-the-ground practitioners of species conservation. We have experience from a similar initiative in California (referred to as the RCIS program) that seeks to "identify high-value conservation and habitat enhancement opportunities within a region that will aid in species recovery, adaptation to climate change, and resiliency in the face of development pressure."
- Section 6.1.2. Preference for Compensatory Mitigation in Advance of Impacts. ERBA strongly supports the clear establishment of a hierarchy and priority for advance mitigation in the species context. This Section is very well considered; particular strengths of this language are the: i) clear

articulation of advance mitigation's benefit in reducing risk and uncertainty, ii) acknowledgment that high mitigation ratios are not an effective substitute for advance mitigation, and iii) recognition that the concept of advance mitigation is inherent to conservation banks but can apply across mitigation mechanisms, and thus should be the predominant deciding factor regardless of mechanism. ERBA has recommendations on a preference structure that would more specifically define the stages of risk reduction for mitigation in advance of impacts. While credit releases are based on specific administrative and ecological milestones, credit release criteria are not always transferable to other mitigation mechanisms, such as Permittee Responsible Mitigation. Further definition of "advance" in terms of risk reduction would facilitate decision-making between mitigation mechanisms in different stages of development.

- Section 6.2.2. Use of Public Land to Mitigate Impacts on Private Land. One of the criteria is consideration of private land availability. ERBA cautions that this approach is a subjective slippery slope without further guidance for the decision maker and decision factors to determine if private land is not reasonably available. ERBA recommends that the FWS establish standards for evaluation of this question. Some of our concerns include: Will applicants or mitigation providers be allowed merely to state that private land is too expensive? Will they be required to demonstrate a reasonable effort to acquire private land, and what would that effort look like? Also, there should be an acknowledgment that if private land for habitat is not available in the present moment, then, more likely than not, it never will be. How does putting a cost cap on land-based species mitigation affect conservation strategies and recovery?
- Section 6.3 Service Area. This section references species-specific mitigation guidance. As a best practice, ERBA recommends that such guidance is required for actively mitigated species and periodically updated based on improved knowledge.
- Section 6.5 Timelines. ERBA recommends development of programmatic timelines for review of conservation mitigation mechanisms. We are interested in working with the FWS on development of these timelines and supporting increases in FWS funding to cover dedicated staff time and program training. We recognize that this may also entail needed Congressional action.
- Section 7.1.3. In-Lieu Fee (ILF) Program. This section allows ILFs to fund non-habitat-based compensatory mitigation measures. ERBA strongly recommends that the Policy include a clear preference for advance, land/habitat-based mitigation over non-habitat-based mitigation. While we are not recommending it, to fulfill the equivalency principle, private mitigation providers should be allowed to provide non-habitat-based mitigation if ILFs are allowed to pursue non-habitat-based mitigation.
- Section 7.1.4. Habitat Credit Exchanges (HCEs). ERBA recommends that the FWS conduct an audit of HCE programs to determine their successes and opportunities for improvement. The Policy acknowledged that HCEs were relatively new in 2016, but still included them alongside other more proven mitigation mechanisms. To inform the best use of HCEs moving forward, the FWS should evaluate HCEs' progress and best practices learned to date.

- Section 7.3 Other Compensatory Mitigation Programs or Projects. ERBA strongly recommends that research should only be allowed in rare circumstances and should be part of a mitigation package that also includes a habitat-based component.
- Support: Long Term Financial Assurances. The Policy's definition of and references to endowments was a thoughtful approach to long term financial assurances. ERBA members believe this definition improved upon the confusion sometimes seen in the CWA 404 context. The requirement for long term financial assurances sets mitigation providers' projects apart from other conservation efforts and providers not held to the same requirement, such as under a voluntary restoration effort or public lands mitigation. To date, mitigation providers have collectively put aside millions of dollars in endowments established for conservation outcomes, which would not have otherwise been dedicated towards a conservation purpose.
- Recommendation: Introduce and define the mitigation instrument document. We understand that the articulation of the bank or ILF instrument was deferred to the Implementation Guidance. However, the Policy is incomplete without at least an introduction of the instrument concept, which is foundational to the whole idea of third-party mitigation. For example, in Section 9.1 in a discussion on compliance and tracking, there is a reference to the requirements of mitigation instruments, but there is no preceding definition of those instruments and the role that they play in adequate compensatory mitigation. ERBA recommends including a definition of the enabling instrument and the information required at various stages of agency review. For this latter point, ERBA recommends that the FWS propose a stepwise progression of tentative approvals that matches the progressive development of information that mitigation sponsors pursue as they evaluate conservation projects. The initial iteration of the required instrument, i.e. the prospectus, should be sufficient to conceptualize, inform, and describe how the proposed property would assist in the conservation of the species pursuant to the ESA, including assurances for management and in perpetuity protection. But, it should not be unnecessarily comprehensive or unreasonably burdensome on the potential mitigation sponsor. For example, the initial prospectus may require: a site, a biological survey focusing on the imperiled species, a proposed service area, and title insurance commitment showing a reasonable pathway to clear title. An approval letter for a proposal should outline the remaining information required to obtain final instrument approval.
- Recommendation: Clarify real estate protection requirements to address land use concerns.
 - Address the issue of clear title for separated subsurface estates. The Policy does not address the issue of surface access to properties where the oil, gas, and mineral (OGM) rights have been separated. Access is not part of the OGM estate and may be extinguished by states' marketable record title acts. These acts limit the continuation of unused access rights if not extended by legal notice before expiration and can prevent the OGM estate owner from accessing the surface of the property for exploration or development. The mineral rights are not extinguished but the access to the property

under which they occur is extinguished. This scenario is not uncommon where the OGM rights have been uneconomical for several decades, and should be addressed.

- Recognize that some title issues pose de minimis risk to the proposed mitigation site. Some mitigation reviews are delayed by scrutiny of minor title burdens that are decades old and/or pose little to no risk for the mitigation plan at the proposed site. Approving agencies should acknowledge that after centuries land use there will be some unresolved title issues that constitute minimal risk to the mitigation project. For example, easements for roads and power lines that are unlikely to be built and power line R-O-W easements that are described without a width. Mitigation practitioners need some acceptance of minimal risk by the approving agencies or there will not be any qualifying properties.

Comment on Framework of Species Mitigation Policies/Regulations

While we support the reissuance of the Policy, we also reiterate the message of our April 2021 letter and urge the FWS to immediately begin work to promulgate a species mitigation rule that builds upon the foundational concepts reflected in the Policy. Beyond the Policy, ERBA has also started to identify a number of critical definitions and fundamental concepts for the review, approval, and oversight of conservation banks in the proposed 2017 Interim Guidance (the Guidance). We recommend that the FWS include certain elements from the Guidance in a species mitigation rule and the revised Policy. ERBA also recommends that the FWS clarify the role of the rule versus policy versus implementation guidance in the overall species mitigation framework.

We welcome your questions and open discussion on these recommendations and topics. As always, we appreciate your work to advance the quality and effectiveness of species mitigation. Please do not hesitate to reach out with any questions or comments. We are eager to serve as an industry resource and look forward to working with FWS.