



Ecological Restoration Business Association

Growth Through Resilient Environmental Solutions

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To: U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration

From: Ecological Restoration Business Association

Date: August 21, 2023

Docket No. FWS-HQ-ES-2021-0104

RE: Proposed Revisions to Section 7 Endangered and Threatened Wildlife and Plants; Revisions of Regulations for Interagency Cooperation

The Ecological Restoration Business Association (ERBA) appreciates the opportunity to provide comments to the U.S. Fish and Wildlife Service (the Service) and the National Oceanic Atmospheric Administration (NOAA) regarding the amendments to regulations implementing Section 7 of the Endangered Species Act (ESA) (the Proposal). ERBA is a national trade association that represents companies and organizations that establish, monitor, and protect wetlands, streams, species, water quality, and other environmental offsets under multiple federal and state compliance programs. Our members include mitigation and conservation bankers, In-Lieu Fee (ILF) program sponsors, and sponsors of restoration and ecological outcomes, including restoration of habitat for protected species. Collectively, ERBA members have worked with Regional Service offices across the country to oversee permitting on hundreds of conservation bank projects encompassing thousands of acres of high-quality habitat and implementation of actions that support species recovery. Additionally, ERBA members have restored hundreds of thousands of acres of wetlands and streams under the well-established Clean Water Act (CWA) § 404 mitigation program.

In this Proposal, the Service has taken a landmark step to remove a longstanding barrier for mitigation from the 1998 Consultation Handbook by clarifying that offsets, including species conservation banks and other offset measures offsite from the action area, qualify as Reasonable and Prudent Measures (RPMs) to mitigate any unavoidable remaining impacts of incidental take. This change will enable the Service, species' offset sponsors, permittees, and protected species to now fully realize the utility and benefits of other recent Service efforts to establish a successful framework for species mitigation. ERBA agrees with the Service's interpretation of the role offsets may play under Section 7 of the ESA, which interpretation affirms existing current practices in some Regions. ERBA previously recommended this

clarification in formal comments and other communications to the Service.¹ We strongly support this action in the current Proposal.

ERBA recognizes that the Consultation Handbook provides critical guidance and is a reference resource that is heavily relied on by Service staff working with project proponents and conservationists across the country. However, the Handbook and its position on mitigation has created confusion and inefficiencies for conserving species and is out of date with the best available science. Specifically, the statement, “it is not appropriate to require mitigation for impacts of incidental take” has created the misconception that offsets cannot be considered an RPM. Despite market headwinds, created in part by the Handbook’s confusing language, the mitigation industry has matured greatly while making significant conservation advancements and has a proven track record of delivering habitat and species benefits through accountable projects with legal, financial, and performance assurances. During this same time, the Service issued newer policies that, unlike the Handbook, acknowledge the progress made and benefits of mitigation for achieving species’ recovery goals, from the 2003 Conservation Banking Guidance to, most recently, the 2023 ESA Compensatory Mitigation Policy (the ESA CM Policy). The proposed clarification in the Section 7 regulations and Handbook now opens the door for the Service to collaborate with offset sponsors and fosters compatibility between the Handbook, the Service’s existing mitigation policies, and the forthcoming species mitigation rule.

While we are primarily writing these comments to express our strong support and appreciation for the revision clarifying that offset measures are RPMs, we have three additional comments and recommendations for the Proposal:

- i. We recommend that the Service clarify their reference to “conservation easement with endowment” in the current list of examples of offsetting measures by specifying that any offset measure should meet the requirements outlined in the ESA CM Policy. Specifically, any offset measure listed by the Service should comply with the standards outlined in Section 5 of the ESA CM Policy and include site protection plus short-term and long-term management planning and funding. While both a conservation easement and endowment are components of a conservation bank and should be required of all offset measures for equivalency, those two components alone do not provide the same rigor of assurances and benefits for the species as the other three primary offset mechanisms of banks, in-lieu fee programs, and permittee-responsible offset projects held to equivalent standards. These mechanisms also include, among other assurances and benefits, management plans with their endowments, which are sufficiently funded to assure that the management plans are carried out in perpetuity. Reference to “conservation easement with endowment,” as a standalone measure, within the category of offset measures does not align with the mechanisms discussed in the Service’s other mitigation policies and the scope of the forthcoming species mitigation rule. In the absence of enforcement of equivalent standards and a preference hierarchy, project proponents will logically resort to the least-cost option for compliance despite other options offering a species greater benefit. The Service can avoid this pitfall by closing a potential loophole and clarifying the reference to “conservation easement with endowment” in the list of permissible offsetting measures.

¹ See ERBA’s comments to DOI regarding the forthcoming mitigation rule, dated September 26, 2022 (“Species Rule ANPRM Comments”), specifically Section IV on hurdles to bank establishment and the subsection “hurdles to address through other policy changes,” [available here](#).

- ii. We recognize that the Service's transition to address conservation by offsetting impacts either onsite or offsite is a significant step forward for protection and recovery of protected species, and has some limitations couched in previous interpretations of the ESA statute. Our experience has shown that offsite conservation is a more meaningful measure for species and is often more readily supported by project proponents as an expeditious permitting path. We suggest a clarification to the Proposal's preferred order for RPM offset measures to i) factor in that, for the benefit of the species, in many instances offset measures outside the action area are preferable to those within the action area, and ii) incorporate an advance-offset preference into the order. As stated by the Service earlier in the Proposal, "conservation efforts can be focused where they will be most beneficial to the species" when there is the option to specify offsets outside the action area, and "in some circumstances, offsetting measures applied outside the action area would more effectively minimize the impact of the proposed action to the subject species." ERBA understands the preferred order's reference to measures within the action area receiving a preference for avoidance and minimization measures, which are, by definition, to be carried out onsite. But, one great benefit of offsets is that they can be located in the area most needed and ecologically beneficial to the species within a defined habitat range.

For these reasons, we recommend that the Service revise the structure of the preferred order for RPMs so that the preference for the offset location is based on conservation planning and which option offers the highest and best habitat benefits for the impacted species. Indeed, species' habitat preferences can fluctuate based on environmental conditions and increasing fragmentation, which in some instances may mean it is more important to prioritize offsite offsets than exhausting all avoidance and minimization measures as currently hierarchically outlined in the preferred order. Offset measures outside the action area are often preferable from an ecological standpoint to onsite "postage stamp" measures because offsite banks are sited and planned at a landscape scale, may provide habitat connectivity benefits, and are done in advance of impacts. Furthermore, the value of onsite offsets is often limited because of the ongoing effects of the covered action.

We also suggest that when determining a preference between available offset measures, the measure that offers the species the most advanced benefit, i.e., the greatest reduction of temporal loss, may be considered preferable to less advanced measures. We refer to ERBA's more detailed comments on this topic in the Species Rule ANPRM Comments under Section I on Equivalent Standards and subsection (iv) titled "Advance Mitigation Preference."

- iii. We appreciate the Service's use of the term "offsets" and "offset measures" versus mitigation throughout the notice. As further articulated in ERBA's Species Rule ANPRM Comments, the term offset is more readily understood than mitigation and clearly messages the ultimate purpose of bank credits and other mitigation measures – to offset negative impacts to protected resources with a positive uplift for the resource within the impacted ecosystem. The term offset versus mitigation also helps to distinguish compensatory measures from the full mitigation hierarchy that encompasses avoidance and minimization measures as well. Lastly, the term offset is regularly used for other biodiversity and carbon markets and is recognizable by the international environmental community, which is less familiar with terms of art specific to U.S. legal regulatory frameworks. Overall, we support the Service's shift in terms to "offset" in this Proposal and other policies on species mitigation.

ERBA Comments in Summary

Thank you for your consideration of ERBA's comments. Again, we applaud the leadership of the Service to modernize Section 7 regulations and the Handbook to clarify that offset measures and conservation banks credits are permissible RPMs. This change reflects the years of collective progress between the Service and offset sponsors to develop a track record of accountable and performing habitat conservation banks. We ask the Service to reconsider their classification of "conservation easement with endowment" as equivalent to the benefits provided by longstanding offset measures like conservation banks and to clarify the currently presented preference hierarchy to incorporate preferences based on the advance principle and best habitat option for the species. These comments were developed through close consultation with ERBA's Species Committee and are based on prior recommendations made by ERBA to the Service. As always, please do not hesitate to reach out to ERBA at sjohnson@ecologicalrestoration.org if we can serve as a resource or provide further information.

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Greg DeYoung, President
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Adam Riggsbee, Chair, Species Committee
Leo Lentsch, Co-Chair, Species Committee

Addendum to ERBA's 8.21.23 Comments re: Additional Recommendations to OIRA

The following additions relate to points two and three, respectively, raised during ERBA's January 29th meeting with OIRA.

- i. As discussed under point (ii) of our comments, in many instances off-site offset measures may be preferable to on-site offset measures for an impacted species because they offer species landscape scale conservation benefits that address the "death by a thousand cuts" concerns. Publicly available conservation planning documents can indicate when off-site offset measures present greater value. In these instances, the preferred order for reasonable and prudent measures (RPMs) should allow for evaluation of available off-site offset measures prior to on-site offset measures. Of course, evaluation of any offset measures should occur following avoidance and minimization measures and we are not suggesting that off-site offset measures would precede those in the preferred order for RPMs.

To implement this recommendation, we suggest that the agencies consider a text revision to 50 CFR 402.14(i)(3) such as: "to the extent it is anticipated that the action will cause incidental take that cannot feasibly be avoided or reduced in the action area, *and publicly available conservation planning species recovery documents indicate that offset measures outside of the action area would provide greater benefit to the impacted species to reduce the impact of the incidental take, then...*" [suggested text italicized].

- ii. In reflecting on the Proposal and the Service's other recent actions under Section 10, ERBA has an additional recommendation on the importance of equivalency. The Service should use this Proposal as an opportunity to solidify the use of equivalent standards across administration of different compliance requirements. For example, habitat conservation plans (HCPs) and Incidental Take Permits (ITPs) often include offset measures that have been carefully considered and evaluated. Project proponents typically consider the benefits of Section 7 versus Section 10 take authorization/permitting approaches when determining their best compliance strategy. Establishing equivalent standards between Section 7 and 10 will ensure the greatest conservation benefits will be afforded species, plus provide a level of consistency for project proponents.

The Service could incorporate this recommendation into the Proposal in a few different ways: i) in the preamble text to the rule describing changes to 402.14(i)(2) and (3) and elaborating that RPMs implemented outside the action area to offset the impact of incidental take should be held to the same standards as offsets for the same species under Section 10, or ii) by adding a sentence on the standards that may inform "offsets outside the action area" to the regulatory text of (i)(2) or (i)(3). At this point in the rule-making process, we recognize that the most defensible approach may be to add a discussion on equivalency with Section 10 offset standards to the Preamble.