September 26, 2022

Comments regarding:

July 27, 2022 Advance Notice of Proposed Rulemaking on Species Conservation Banking

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

Public Comments Processing
Attn: Docket No. FWS-HQ-ES-2021-0137
U.S. Fish and Wildlife Service
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The Energy and Wildlife Action Coalition ("EWAC")[1] submits these comments in response to the U.S Fish and Wildlife Service's ("Service") July 27, 2022 Advanced Notice of Proposed Rulemaking ("ANPR") that solicits input to assist the agency in developing a proposed rule establishing objectives, measurable performance standards, and criteria for use, consistent with the Endangered Species Act ("ESA"), for species conservation banking ("Forthcoming Rule").[2]

EWAC supports the Service's initiative to provide mitigation optionality, clear regulatory guidance, and consistent application of Service regulations and policy across the agency's offices. Increased availability of conservation banks and in lieu fee programs will ultimately make permitting processes under the ESA more efficient, which will help promote the generation, transmission and distribution of renewable energy and deployment of electric infrastructure broadly, thereby furthering the Biden Administration's climate change and environmental justice goals. Nevertheless, and as detailed further below, EWAC cautions the Service that in developing updated conservation banking guidance and criteria, the agency ensure any criteria are consistent with the statutory framework of the ESA, and that the agency does not create requirements that are overly stringent or unworkable for the regulated community or those establishing conservation banks or in-lieu fee programs or implementing permittee-responsible mitigation.

EWAC also encourages the Service that in developing proposed conservation banking regulations, the agency retain the flexibility and creativity that is currently available to permittees and others that are implementing mitigation projects in connection with Service-approved habitat conservation plans ("HCPs") under ESA section 10 ("Section 10").[3] For many years, permittees with Section 10 incidental take permits ("ITPs") have successfully implemented permittee-responsible mitigation projects that take into account the specific needs of the species affected by a given ITP and the particular impacts to the species in connection with activities covered by ITPs. Permittee-responsible mitigation is valuable and should continue to remain available. Accordingly, EWAC encourages the Service to complement these practices in the Forthcoming Rule.

In the ANPR, the Service solicited comments on several specific topics. EWAC provides its comments on each of these topics below.

[1] EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States, and related trade associations. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner. EWAC is a majority-rules organization and therefore specific decisions made by the EWAC Policy Committee may not always reflect the positions of every member.

[2] 87 Fed. Reg. 45,076 (July 27, 2022).

[3] 16 U.S.C. § 1539.

1. **Level of detail necessary to ensure standards are applied consistently across all forms of compensatory mitigation, including equivalence in covering the costs of mitigation on public and private lands.**

EWAC recognizes there are benefits in requiring consistent application of conservation standards across conservation mediums. However, any Forthcoming Rule should avoid imposing requirements that may impede or overly complicate the bank establishment process. Requirements that necessitate the use of complex calculations and metrics may limit opportunities for conservation. The success of conservation banking to date has depended on the willingness and cooperation of landowners to encumber and restrict their lands to promote species conservation. If the requirements and process for doing so are overly complex, landowners may be discouraged from establishing conservation banks or enrolling their lands in conservation banks or in-lieu fee programs, which in turn would likely reduce available mitigation options for the regulated community. Additionally, if requirements are too onerous, the cost of developing mitigation projects will increase, which would potentially deter individual landowners and local land trusts from developing creative mitigation solutions. This would mean fewer mitigation options and higher costs for the regulated community, which would have a deleterious effect on conservation objectives and administration of Section 10. For these reasons and others that are detailed throughout this letter, EWAC recommends the Service adopt a general framework for conservation banking rather than a set of criteria intended for strict application.

To the degree the Service elects to apply specific criteria across all types of mitigation (e.g., conservation banking, in-lieu fee programs, and permittee-responsible mitigation), the agency should exercise caution, particularly in connection with applying restrictive criteria standards[4] to species conservation banking for the following reasons:

- As implied by the statute and recognized by the Service,[5] the Section 10 permitting process is inherently applicant driven and, as such, requires flexibility as the applicant and Service work together to identify appropriate mitigation for the impacts to specific species permitted under an ITP.[6]
- In some cases, and in particular for ongoing projects (e.g., power infrastructure), strict habitat-based mitigation objectives that lack flexibility may severely constrain and limit the options for an applicant to secure an ITP and operate a project in compliance with the law and ensure conservation of affected species.
- Strict and inflexible criteria applied to all forms of conservation programs, including permittee-responsible mitigation, is likely to result in increased costs for those seeking ITPs for electric infrastructure projects, which ultimately will be passed on to customers.

[4] 87 Fed. Reg. at 45,076.
[5] Memorandum from Principal Deputy Director of the U.S. Fish and Wildlife Service to Regional Directors, *Guidance on trigger for an incidental take permit under section 10(a)(1)(B) of the Endangered Species Act where occupied habitat or potentially occupied habitat is being modified* (April 26, 2018); found at: https://www.fws.gov/sites/default/files/documents/guidance-on-when-to-seek-an-incidental-take-permit.pdf.
[6] 16 U.S.C. § 1539.

Further, increasing costs to some of these customers, particularly those within low-income communities, could raise environmental justice concerns.

- While the Service may prefer a more specific set of criteria in connection with the agency's review of conservation banks or in-lieu fee programs, permittee-responsible mitigation does not need this degree of specificity. The Service's current regulations, guidance, and policies allow ITP applicants to tailor mitigation measures and implementation in a way that is both practicable for the applicant and will result in ensuring the continued existence of the relevant listed species. To the degree the Forthcoming Rule establishes criteria for developing conservation banks and in-lieu fee programs that are intended for strict application, EWAC recommends these same criteria are not applied to permittee-responsible mitigation.

2. Level of detail necessary when addressing durability and additionality standards to ensure consistency across mitigation mechanisms and ensure species conservation.

Additionality

While EWAC recognizes that some level of detail on issues of additionality[7] will increase the likelihood that the Service will treat similarly situated projects in a comparable manner, we note that there is no requirement under the ESA that mitigation for impacts authorized under the ESA demonstrate additionality at all. Mitigation under the ESA is required only in connection with applications for an ITP under Section 10.[8] With respect to the provision of mitigation, Section 10 requires only that permittees minimize and mitigate impacts to listed species "to the maximum extent practicable."[9] Neither the ESA, nor its implementing regulations, define "mitigation" or "conservation" to include a demonstration of additionality. Over the last several decades, remarkable conservation achievements have been made through the Section 10 program without an express additionality requirement. Conservation should be encouraged even where a particular parcel proposed for mitigation is not under significant or imminent threat.

To the degree the Service prefers, as a matter of policy, to recognize that compensatory mitigation projects should provide an ecological lift for the subject species, in no event should the concept of additionality serve as an impediment to Service approval or serve as the basis for Service disapproval of a proposed mitigation opportunity. Moreover, EWAC recommends that any stated preference for a mitigation project to provide ecological lift should not be so restrictive that it disqualifies those willing to preserve parcels the Service does not deem as being sufficiently

[7] In the context of conservation banking for ESA-listed species, the Service considers a conservation measure to be "additional" where "the benefits of [a] measure improve upon the baseline conditions of the impacted resources and their values, services, and functions in a manner that is demonstrably new and would not have occurred without the compensatory mitigation measure." *Final Endangered Species Act Compensatory Mitigation Policy*, 81 Fed. Reg. 95,316, 95,339 (Dec. 27, 2016) (citing 600 DM 6.4G).
[8] 16 U.S.C. § 1539.
[9] *Id*.

"under threat." Finally, EWAC recommends that the Service specifically recognize that preservation of species habitat is important, valuable, and should in no way be discouraged.

Durability

With respect to durability, any durability requirements should be practicable and based on the best available science for the subject species. Less durable options could be credited differently than more durable options, but durability should not be a controlling factor over whether a mitigation project is acceptable.

3. **How the proposed rule should incorporate monitoring, financial assurances, and publicly available mitigation data tracking systems to ensure a compensatory mitigation mechanism is meeting its performance standards.**

As noted elsewhere in this comment letter, the requirements for establishing a species conservation bank under the ESA should not be so onerous that it discourages landowners, third-party mitigation providers, land trusts, or others from developing and maintaining conservation banks. EWAC recommends that in developing the Forthcoming Rule, the Service recognize that requiring landowners to provide publicly available information on the location and condition of their lands may pose a significant deterrent to some landowners establishing or maintaining conservation banks.

Any Forthcoming Rule should also recognize that performance standards will vary depending on the particular species' habitat needs and the type of mitigation being offered. For example, significant monitoring should not be required for conservation banks involving habitat preservation, while conservation banks involving habitat restoration may warrant heightened monitoring. Similarly, the endowment for conservation banks should be proportional to the level of effort required to reasonably meet performance criteria. While adaptive management will necessarily be a part of any bank management plan, the financial assurances should not be keyed to worst-case scenarios.

The Service should consider using the Forthcoming Rule to clarify that implementation of mitigation projects—including monitoring, adaptive management, and provision of financial assurances—should not only be practicable for a mitigation provider, but reasonable under the specific circumstances presented. In no instance should performance standards be dependent on a species remaining present within the subject property. A mitigation provider cannot guarantee how species will behave and mitigation providers should not be penalized where the mitigation provider has otherwise provided a biological setting that will appropriately support the subject species. The potential issues here are particularly evident where habitat-related impacts are not the primary reason for a species' decline (such as white-nose syndrome in bats[10]). Permittees and mitigation providers should only be responsible for preserving, enhancing, and/or creating habitat, with the

[10] National Park Service, *What Is White-nose Syndrome?* https://www.nps.gov/articles/what-is-white-nose-syndrome.htm (last updated Dec. 8, 2017).

appropriate habitat criteria, function and value, and should not be responsible for actual species use of a site, which is far beyond the control of any mitigation provider.

4. **What are the hurdles to species bank establishment that are within the Service's authority to address through regulation.**

The Service should ensure that any Forthcoming Rule will promote the establishment of conservation banks and other mitigation options in a way that is consistent with the ESA section 9 take prohibition[11] and the maximum extent practicable standard of section 10.[12] Moreover, in developing standards for conservation banking, the Service should be careful not to impose requirements that will ultimately serve to discourage bank establishment.

In particular, the Service should be careful not to create metrics for mitigation crediting that are disproportional to the impacts of any take being mitigated. The consequence of disproportionate or overly burdensome requirements will be that mitigation options and mitigation providers will become more limited, and the cost of mitigation will increase, which is the opposite result of what any Forthcoming Rule should seek to achieve. If the Service would like to incentivize the regulated community to provide a level of mitigation beyond the Section 10 issuance criteria (though there is no obligation to do so), then the agency cannot make mitigation so complex or costly that the regulated community struggles to find practicable mitigation opportunities. The metrics associated with establishing and purchasing conservation credits for the lesser prairie chicken serve as an example of complexity and cost working against voluntary conservation for that species.[13]

5. **How the Forthcoming Rule should align with joint regulations of the U.S. Army Corps of Engineers and Environmental Protection Agency so that wetland mitigation banks remain compatible with species conservation banks.**

The ANPR arose from a provision of the National Defense Authorization Act for Fiscal Year 2021, which directed the Service to develop regulations related to wildlife conservation banking to "ensure opportunities for Department of Defense participation in wildlife conservation programs…" As written, the ANPR indicates the Forthcoming Rule would seek to apply equivalent standards and criteria to all forms of compensatory mitigation for species impacts, including conservation banks, in-lieu fee programs, and permittee-responsible mitigation, and would be compatible with standards required for wetland mitigation banking pursuant to the U.S. Army Corps of Engineers ("Corps") and Environmental Protection Agency's ("EPA") joint 2008 regulation titled "Compensatory Mitigation for Losses of Aquatic Resources" ("2008 Rule"), which applies equivalent standards to in-lieu fee programs, permittee-responsible mitigation, and

[11] 16 U.S.C. § 1538(a)(1)(B).
[12] 16 U.S.C. § 1539(a)(2)((B)(ii).
[13] WEST, *Renewable (Wind and Solar) Energy, Power Line, and Communication Tower Habitat Conservation Plan for the Lesser Prairie-chicken* (Revised July 20, 2021).

mitigation banks.[14] However, there are several important distinctions between the wetlands program and the ESA.

Section 10 establishes the "maximum extent practicable" standard.

First, under the specific framework established by the 2008 Rule and related policy, mitigation under the wetlands permitting program must ensure "no net loss" of impacted resources.[15] By contrast, section 10 of the ESA—the lone provision of the ESA permitting program under which provision of mitigation is required—provides that a project proponent seeking permitting must minimize and mitigate impacts to listed species to the "*maximum extent practicable*,"[16] a standard that contemplates something less than fully offsetting impacts to listed species, as the Service has itself noted.[17]

Mitigation sequencing is not required under the ESA.

Second, mitigation under the wetlands program may be considered only after an applicant has completed the "mitigation sequence" of first avoiding impacts to the maximum extent practicable, then minimizing to the maximum extent practicable any impacts remaining after avoidance measures have been employed, and, finally, mitigating or compensating for any impacts to aquatic resources remaining after both avoidance and minimization measures have been implemented.[18] Contrary to the framework of Clean Water Act ("CWA") section 404 ("Section 404"), courts have made clear that mitigation sequencing is not required under the ESA.[19]

Preferential hierarchy for certain kinds of mitigation does not translate neatly to species needs.

Third, the wetlands program mitigation framework establishes a preferential hierarchy for certain types of mitigation over others, with restoration of former or degraded aquatic resources being the highest regarded, and preservation of existing aquatic resources (e.g., removing a threat to or preventing the decline of such resources) holding the least value to the agencies. This preferential hierarchy was first established by the "Memorandum of Agreement regarding Mitigation under

[14] 73 Fed. Reg. 19,593 (Apr. 10, 2008).
[15] *Id*.
[16] 16 U.S.C. § 1539(a)(2)((B)(ii) (emphasis added); *see also* 50 C.F.R. 17.32(b)(2)(i)(B).
[17] *See* U.S. Fish and Wildlife Service and National Marine Fisheries Service's Habitat Conservation Planning and Incidental Take Permitting Handbook ("HCP Handbook") at 9-28 ("The statutory standard of minimizing and mitigating the impacts of the take 'to the maximum extent practicable'…will also be met where the applicant demonstrates that while the HCP will not completely offset the impacts of the taking, the minimization and mitigation measures provided in the plan represent the most the applicant can practicably accomplish").
[18] Memorandum of Agreement regarding Mitigation under CWA Section 404(b)(1) Guidelines (1990); found at: https://www.epa.gov/cwa-404/memorandum-agreement-regarding-mitigation-under-cwa-section-404b1-guidelines-text; *see also* 2008 Rule.
[19] *See Union Neighbors United, Inc. v. Jewell*, 831 F.3d 564, 583 (D. D.C. 2016) (holding that the phrase "minimize and mitigate the impacts" should be read jointly in determining whether it has been done to the maximum extent practicable).

CWA Section 404(b)(1) Guidelines" between the Corps and EPA,[20] was later codified by the 2008 Rule, and makes sense given the goal of no net loss of aquatic resources under the Section 404 permitting program. The ESA, however, addresses threats to species listed as endangered or threatened under that specific statute. For some species, simple preservation of existing habitat may provide the greatest chance that the species will continue to exist in the wild and, eventually, recover, while other species may receive greater benefit from other actions such as restoration of degraded habitat, reintroduction in the wild, or research to determine how best to address non-habitat related threats.

While not directly related to the mitigation hierarchy established by Corps' guidance and the 2008 Rule and discussed above, EWAC recommends that in the context of ESA permitting, the Service not institutionalize a preference for conservation bank credits over other forms of mitigation, including permittee-responsible mitigation. The amount of mitigation provided in connection with an ITP should not be higher where an applicant elects to implement permittee-responsible mitigation instead of through a species conservation bank or in-lieu fee program.

Because the ESA requires mitigation to be practicable as it relates to the impacts of the take for which a project proponent has sought authorization, mitigation should also be practicable for conservation banking entities to provide. The long-standing practice of the Service has been to allow flexibility for an applicant to tailor appropriate mitigation to the project at hand based upon project requirements, location and setting, covered species needs, and conservation priorities that may vary among sites or within the range of a species. This flexibility is inherent in the "maximum extent practicable" standard established by Section 10. The permitting and mitigation processes established by the Section 404 program by statute, regulation, and guidance is different from the permitting and mitigation standards established by the ESA; therefore, treating mitigation under the two statues differently is both warranted and appropriate.

Moreover, there is a tangible benefit to many species in the simple act of habitat preservation and protection. For many species, habitat cannot simply be created and it may take decades to develop characteristics making it suitable for a given species. If the Service were to adopt the Corps' hierarchical preference placing preservation as the lowest priority, the Service would penalize projects important for the conservation and recovery of threatened and endangered species. EWAC recommends therefore that the Service make clear in any ultimate rule that wetlands conservation banking principles do not always translate neatly to the needs of sensitive species or ESA mitigation requirements.

Differences between ESA and permitting under Section 404 should not be dismissed.

The Forthcoming Rule should be consistent with the Service's authority under the ESA, and the Service should recognize the differences between the CWA's wetlands programs and

[20] Memorandum of Agreement regarding Mitigation under CWA Section 404(b)(1) Guidelines (1990); found at: https://www.epa.gov/cwa-404/memorandum-agreement-regarding-mitigation-under-cwa-section-404b1-guidelines-text.

implementation of the ESA as well as the differences between assessing watersheds versus biological resources.[21] Service decisions on ITPs, conservation banking agreements, and other mitigation instruments should apply the best information available at the time of the relevant Service authorization, and should recognize that quantifying take of and impacts to listed species, and determining the conservation value of a particular mitigation proposal, may not lend themselves to application of precise metrics. EWAC recommends the Service consider these comments not only in connection with the action contemplated by the ANPR, but also in connection with the agency's two mitigation policies currently under review at the Office of Information and Regulatory Affairs.

Finally, to the degree the Service expresses in any final rulemaking a preference for prioritizing development and use of conservation banks and in-lieu fee programs for species conservation, the Service should devote sufficient resources to ensure conservation banks and in-lieu fee programs are processed in a timely manner.

6. How the Service should address potential bank projects on lands with unique ownership and protection considerations, such as federal or tribal lands.

EWAC supports the Service's recognition that federal and tribal lands are eligible to generate conservation credits, and encourages the Service to clarify in any Forthcoming Rule that other lands with unique ownership considerations, including public and tribal lands, could also qualify for credit generation. Such lands include, but should not be limited to, areas under state and local control, areas located within renewable energy and transmission line rights-of-way, and areas around solar and other facilities where the owner or operator establishes pollinator friendly habitat. For example, where routine maintenance activities associated with utility line rights-of-way, site development, and other projects result in a benefit to a given listed species, the Service should allow conservation credit generation in these circumstances, and should also recognize that generation of conservation credits in these circumstances may, in some cases, require utility and conservation easements to overlap.

Finally, it bears repeating that the Service should retain flexibility in how it considers generation of conservation credits on all lands irrespective of ownership structure and should avoid holding small, single-transaction mitigation projects associated with permittee-responsible mitigation to the more complex criteria that may ultimately apply to large-scale conservation banks and/or in-lieu fee programs.

7. Other Considerations.

In addition to providing input on specific questions asked by the Service in the ANPR, EWAC offers the following suggestions for the Forthcoming Rule.

[21] EWAC notes that the 2008 Rule did not necessarily result in consistency across Corps districts and across mitigation projects. While the purpose of the 2008 Rule was to provide consistency across Corps districts, Corps districts have continued to apply their own guidance, resulting in increasingly complex and costly mitigation projects since the 2008 Rule was promulgated.

The Service should think creatively with respect to addressing climate change and other complex threats to listed species.

Traditional conservation efforts under the ESA have largely focused on protecting suitable habitat in order to counter threats to species relating to commercial, residential, and industrial development. However, complex processes such as climate change and white nose syndrome are exacerbating or even serving as the primary driver of decline in some species. Given the complexity of these types of issues, EWAC recommends the Service explicitly recognize in the Forthcoming Rule that "traditional" forms of conservation may not always provide the highest benefit to a given species.

For example, because of the effects climate change appears to have on the habitat of some species and the potential for climate change to cause a shift in some species' ranges, the Service should allow the creation of mitigation opportunities throughout a species' range. Current practice of the Service is to show a preference for mitigation projects that are established in proximity to where authorized take of listed species has occurred even where conservation elsewhere in the species' range may provide a greater benefit. The Service should use the Forthcoming Rulemaking to recognize the value in providing mitigation for species in areas that may provide climate refugia or serve other important functions, even where such areas are not in proximity to the location where the agency has permitted take. This is particularly important for wide-ranging species and those with large migration pathways.

Additionally, while EWAC understands the purpose of the Forthcoming Rule will be to establish standards for species conservation banks, in-lieu fee programs, and permittee-responsible mitigation, we urge the Service to consider recognizing that for species whose decline is not primarily related to habitat impacts, research may be included among the options available to permittees and mitigation providers. Allowing research—including research and development of emerging technologies—to be among the mitigation strategies approved by the Service will increase the likelihood that successful strategies will be developed to offset or reverse the impacts of complex causes of species decline such as climate change and white-nose syndrome.

The Service should continue to support optimizing conservation across resources.

Despite differences between the CWA and ESA, the Service should continue supporting optimization of resources where a particular parcel will serve the needs of resources protected by those statutes. Specifically, where a given parcel meets the requirements for wetland mitigation bank credits or is being protected and managed as wetlands mitigation at the time of the Forthcoming Rule, and also meets the standards for species conservation credits, the Service should allow a conservation banking, in-lieu fee, or permittee-responsible mitigation provider to "stack" those credits, such that a conservation parcel may produce credits for multiple resources.

The Service should continue to allow credit stacking for multiple species and should be judicious with any crediting discounts.

Similar to EWAC's recommendation regarding wetland and species mitigation credit stacking, we encourage the Service to recognize in the Forthcoming Rule that the agency continues to support conservation banks, in-lieu fee programs, and permittee-responsible mitigation that supports more than one listed species on spatially overlapping areas, and to clarify that where multiple species can be supported by the same parcel, the agency should not discount the value of the credits for additional species unless there is a demonstrable and biologically-supported reason to do so.

Recent developments in conservation crediting for ESA-listed bat species illustrate the need for clarifying language surrounding the issue of crediting discounts. In some cases, where a parcel has more than one listed bat species, the Service will not give "full" credit for both species and, instead, requires a mitigation provider to provide additional acreage for each species to account for theoretical competition between those species—a theory not supported by available scientific information. EWAC recommends that where a parcel provides conservation value for more than one listed species, the agency should not discount the value of a given conservation credit and require additional preservation unless clear biological evidence supports doing so.

The Forthcoming Rule should be applied prospectively rather than retroactively.

EWAC recommends that the Service clarify in the Forthcoming Rule that the rule would have only prospective application and that the agency will not require species conservation and mitigation projects that are already under development at the time the Service publishes the Forthcoming Rule to comply with new standards. Ensuring continuity in this manner is especially important for conservation and mitigation projects that are in later stages of development.

8. Conclusion

EWAC supports the Service's efforts to establish standards for conservation banking consistent with the ESA, and urges the Service to avoid overly burdensome requirements and metrics that could reduce innovative conservation actions benefitting species and hamper regulatory certainty for project proponents. EWAC generally encourages the Service to structure any Forthcoming Rule in a way that will promote the development of conservation banks, in lieu fee programs, and permittee-responsible mitigation opportunities. EWAC appreciates the opportunity to comment on this initiative and welcomes the opportunity to discuss these comments in greater detail with the Service.

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