



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

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To: Department of Interior, U.S. Fish and Wildlife Service
From: Ecological Restoration Business Association
Re: Mitigation Policies of the U.S. Fish and Wildlife Service

The Ecological Restoration Business Association (ERBA) writes to express support for species conservation policies of the Department of Interior (DOI) U.S. Fish and Wildlife Service (FWS) that would provide clarity and certainty for the regulated community and species mitigation providers.

First established in 1998 as the National Mitigation Banking Association, ERBA promotes federal legislation and smart policies that support private investment in ecological restoration to offset the unavoidable adverse effects of development, as an option for compliance with the Endangered Species Act (ESA). ERBA represents over eighty member companies with projects that support infrastructure in over 120 congressional districts. We work with permit applicants, including many large-scale developers, transportation agencies and energy companies on a daily basis to provide private sector compensatory mitigation solutions and facilitate permit issuance. Our members help expedite regulatory compliance for permit applicants by providing efficient mitigation strategies at fair prices.

Like all regulated entities, the ecological restoration industry understands the challenge of regulatory burdens, both those posed by policy substance and policy implementation. From this perspective and our experience working closely with permit applicants, we appreciate and recognize the effort for regulatory reform and opportunities for improvement in existing federal species policies. However, the recent announcement by the DOI to overhaul their Service-Wide Mitigation Policy and ESA Compensatory Mitigation Policy (collectively, the Policies), without an indication that DOI and FWS will develop replacement policies, causes concern for mitigation providers and permit applicants for multiple reasons.

- **Businesses, Infrastructure Developers, and Utilities need certainty.** ERBA was encouraged by issuance of the FWS Policies and the certainty they provided to permit applicants and our industry on how to comply with the ESA and deliver compensatory mitigation. However, ERBA also acknowledged the need for some revisions to the Policies, particularly the Policies' mitigation planning goal of "net gain," and appreciated

the FWS's utilization of a transparent public process to comment on that goal. ERBA is now concerned that DOI's most recent decision to rescind the Policies leaves permit applicants, mitigation providers, and FWS regional offices without central direction on how conservation actions can advance recovery of species and how developers and regulators can predictably and with ease comply with the Act. ERBA members and their clients have experienced this level of uncertainty before and found that it often results in a protracted, frustrating permitting process where each permit issuance is an isolated negotiation with local regulators to reach a solution.

- **Businesses want to minimize liability risk.** Project permittees need assurance that they have met the legal requirements of the ESA for compliance with Section 10 or Section 7 and that any action they take to comply will not leave them open to liability or timely and costly litigation. With DOI's announcement rescinding the Policies and the subsequent lack of clarity on species mitigation, permittees are potentially left in a vulnerable position and with uncertain legal liability. To minimize the risk of litigation, some project permittees may pursue conservation and mitigation measures above and beyond FWS's current direction. ERBA member companies work closely with permittees to incorporate mitigation into project plans and then include the ecological benefits of that mitigation in the FWS's biological opinion. In this manner, our industry helps permittees move their projects forward and avoid significant legal challenges under the ESA. ERBA encourages DOI to further consider the Congressional intent and authority in Sections 7 and 10 of the ESA and how mitigation options help permittees meet the legal requirements and thresholds outlined in the statute.
- **Private Investment depends on stable regulations.** A continual swing in policy undermines and dis-incentivizes investment in private sector and innovative species mitigation market solutions. If investment pulls away from these solutions due to the lack of regulatory certainty, there will be fewer options and service providers available to assist developers moving forward with projects that impact protected species. ERBA can provide anecdotes from member companies on how they worked with their clients as a partner to deliver meaningful compensation that expedited resolution of the client's permitting challenges, reduced costs, and curtailed legal liability.

- **Weakening the FWS’s Policies will kill jobs.** The ecological restoration sector directly employs 126,000 people and generates \$9.5 billion in direct economic output. This supports an additional 95,000 jobs and \$15 billion in indirect economic activity. Many of these jobs are in rural and economically distressed areas. To compare, the ecological restoration industry employs more people than all domestic iron and steel mills, coal mines, or logging operations. Conservation banking is an emerging sector of ecological restoration that has grown in response to market demands. Without support from FWS HQ on conservation banking, mitigation providers will slow their expansion into the species market and their corresponding company and job growth in that market.
- **A solution for all parties.** ERBA encourages DOI to consider revisiting the Policies or promulgating a new policy that would offer clear direction and the assurance of certainty to the regulated public, within the legal bounds of the constitutional and ESA congressional authority granted to DOI. In the interim, ERBA encourages DOI to provide publicly-available guidance to FWS field offices on compensatory mitigation for compliance with the ESA. ERBA understands the concern of DOI and permittees that compensatory mitigation must have an essential nexus and be roughly proportional to the proposed impacts. ERBA affirms support for these foundational tests of “nexus” and “rough proportionality” found in *Nollan* and *Dolan* and acknowledges the instruction they provide on permissible permit conditions. However, the Policies could be readily brought in line with these constitutional principles through a new rule-making process that adds greater specificity and ensures any mitigation obligation is minimal, fair, and commensurate to the impact. Such a policy would clarify applicants’ compliance requirements and reduce their exposure to legal challenges.

We respectfully ask DOI to consider our concerns outlined here and build off of the Policies for the benefit of mitigation providers and permit applicants. We welcome the opportunity to further discuss the identified issues and potential solutions. We believe that with open communication amongst all industry stakeholders, including permittees and mitigation providers, we can reach the most durable policy outcome that supports the Administration’s infrastructure goals and protects environmental resources. ERBA looks forward to serving as a resource and working with DOI throughout this regulatory reform process.