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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  
Filed to Docket No.: FWS-HQ-2015-0165  
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The Ecological Restoration Business Association (ERBA) is pleased to provide comments to the Department of Interior (Interior), U.S. Fish and Wildlife Service (FWS) docket FWS-HQ-2015-0165 regarding the advisability of retaining or removing references to net conservation gain from the Service's ESA-CM policy.

First established in 1998 as the National Mitigation Banking Association, ERBA promotes federal legislation and smart regulatory policies that encourage advance compensatory mitigation and private investment in ecological restoration that offset any unavoidable adverse effects of development, as a way to support compliance with the Endangered Species Act (ESA). Our member companies have 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 permitting and regulatory compliance for permit applicants by providing creative and efficient mitigation strategies at fair prices. More broadly, our industry is a part of the ecological restoration sector, which creates 225,000 jobs (and growing) and has a total economic impact of \$24.5 billion.

However, like all regulated entities, the ecological restoration industry faces the challenge of regulatory burdens, both those posed by policy substance and policy implementation. ERBA members support their clients' development and infrastructure projects and are motivated to provide clients with the most cost effective methods of species compensatory mitigation. Our efforts, though, are often slowed by inconsistencies and delays, which occur in the absence of clear policies and guidance. ERBA was encouraged by FWS' promulgation of the ESA-CM Policy (the "Policy") and the certainty the Policy provided to permit applicants and our industry. While recognizing the Policy as a step in the right direction for consistency, transparency and equivalency in mitigation requirements, ERBA also acknowledges the opportunity for improvements, particularly to the Policy's mitigation planning goal.

ERBA respectfully submits for Interior and FWS' consideration the following suggested Policy changes, as well as recommendations for concepts to preserve. Ultimately, ERBA makes the following recommendations based on the goal of durability in a species mitigation policy for ERBA's clients, permit applicants.

- **Establish a new mitigation planning goal that is fair and accountable.** The current Policy's mitigation planning goal of "net conservation gain" has raised concerns and created confusion for the regulated public. We understand that the inclusion of "net conservation gain" in the Policy stemmed from the Service's ultimate goal of species recovery and subsequent delisting. However, to be effective and durable, any mitigation planning goal in the Policy must be measurable and grounded in the ESA's statutory text. ERBA recommends Interior remove reference to "net conservation gain" and establish another mitigation planning goal standard with more precise terms.

Based on our practitioner experience, ERBA recommends consideration of a standard of "no net loss of habitat value" or "no net loss of species population," depending on the context, for the following reasons:

- Section 2(B) "Purposes" of the ESA states that the purpose of the Act is "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." In this framework language, the ESA clearly states an objective of the Act is to conserve the ecosystems that are critical to endangered and threatened species. Habitats comprise these critical ecosystems, and thus either "habitat value" or "species population" are the logical indicators to use when evaluating mitigation requirements under the Act.
- The concept of "no net loss" clearly articulates a measurable benchmark and supports more efficient project review by minimizing uncertain negotiations over "how much is enough." The concept has already been used for a quarter of a century in assessing nexus and proportionality to the impact determinations in other realms of mitigation. Such a standard would act as an assurance to the regulated public that the outcome of regulation will be fair and compensatory mitigation measures will be commensurate with impacts.

- Tying “no net loss” to habitat value or species population ensures consistency, transparency and equivalency in what “no net loss” is measuring for all permit applicants subject to ESA jurisdiction across the country. The particular species and given situation may dictate use of one indicator over another. But, fundamentally, whether “habitat value” or another indicator, the amount of conservation produced as mitigation must be measured on the same terms as the respective permit.
- **Develop clear metrics for calculating the mitigation planning goal.** To consistently calculate “habitat value” (not simply acre-for-acre replacement), the Policy must include a requirement for a species-specific methodology for calculating habitat impacts and habitat ecological output over time. The methodology should provide reliable, repeatable and quantitative metrics that measure all resource effects and accounts for uncertainty or risk (i.e. use of multipliers or ratios). An adaptive management protocol should be developed and implemented on a regular basis.
- **Direct local FWS field offices to develop transparent mitigation guidance based on the national policy.** The Policy should encourage every FWS program and field office to develop and distribute guidance that articulates how national mitigation policy will be applied and how compensatory mitigation measures will be calculated for specific, local resources. Such transparent guidelines would ensure that compensatory mitigation measures are applied equivalently between permit applicants and consistently over time. This transparency would also aid permit applicants and mitigation providers in better long term planning for project impacts and offset design, resulting in more efficient business decisions. All mitigation options must follow the same standards for each species/resource, without exception.
- **Require consistent application of the mitigation guidelines to all permit applicants.** FWS should include language in their policy that locally developed mitigation guidance will be applied consistently to all permit applicants. Such consistent application would increase certainty and predictability for regulated businesses.
- **Require application of equivalent requirements to all compensatory mitigation mechanisms.** FWS should include language in their policy that equivalent requirements

should be applied to all compensatory mitigation mechanisms, whether a conservation bank, ILF program, PRM project, or Habitat Credit Exchange. Such equivalent application would ensure all mitigation providers are held accountable regardless of the jurisdiction or mitigation delivery form.

- **Improve accountability in administration of ILF programs.** ILF programs serve a necessary market function for permit applicants when advance mitigation projects are not available within a market. However, ILF programs, as currently overseen, often do not timely spend their funding to produce mitigation projects in the ground. ERBA recommends that, if Interior does continue to support ILFs as a necessary market mechanism and there is a readily available mitigation solution in the region, the Policy require ILFs serve as a consolidator of funds for mitigation projects and set accountable directions around when an ILF must spend aggregated funds. From our experience, ERBA suggests the Policy establish a requirement that upon aggregation of \$500,000.00 in funding (or other similar threshold determined by FWS) ILFs must then either spend their received funds within six (6) months on a viable project or issue a Request for Proposal to apply the funding towards another readily available mitigation solution. ERBA acknowledges that the exact spend requirement threshold may need to be adjusted for the specific ILF program and resource need. This requirement would ensure ILF programs are meeting the needs of the species and ILF funds are spent in a timely, accountable manner.
- **Commit to investing in training on developing and applying mitigation guidance to ensure transparent, consistent and equivalent implementation.** FWS should promote existing national or regional trainings on how to develop and apply mitigation guidance established under the Policy. Additionally, for any state program or other entity seeking approval of a mitigation program to satisfy federal recommendations or requirements, the entity should also be required to attend a FWS national training session at the National Conservation Training Center in West Virginia.
- **Restructure the “landscape-level” approach mitigation goal.** ERBA recognizes the term “landscape-level” may have caused confusion. To clarify, we recommend the Policy incorporate incentives for designing compensatory mitigation projects that are an

appropriate size for the target resources and sited to maximize conservation outcomes. These goals can be reflected in the “habitat value” methodologies. We recommend the FWS include incentives for compensatory project size and position in the overall conservation landscape in their species-specific compensatory mitigation frameworks.

- **Important concepts to maintain.** ERBA also applauds the following concepts and current Policy directions for the clarity they provide to the regulated community:
  - Allowing Reasonable and Prudent Alternatives (RPAs) in the consideration of jeopardy and adverse modification determinations to include compensatory mitigation as an advance planning policy that will then expedite future permitting decisions.
  - Compensatory mitigation must be in-kind for the listed, proposed or at-risk species affected by the proposed action, but this does not necessarily apply to habitat type as long as all elements that support the breeding, foraging, and aestivating habitat requirements for a species are present within the compensatory mitigation site or if the site is targeting a specific limiting factor important to FWS (e.g. a factor described in a recovery plan).
  - Maintain the preference for advanced mitigation concepts that factor in:
    - Temporal loss of species and habitat
    - Prioritize compensatory mitigation projects that maximize conservation outcomes, i.e. preference for bank sites and projects that will provide additional species benefits
    - Clear timeframes for achieving conservation objectives
    - Durability, both protection and maintenance, of the project site
  - Section 6.1.2 “Preference for Compensatory Mitigation in Advance of Impacts”
- **When implementing the mitigation planning goal, reduce administrative and procedural local discretion by implementing defined mitigation protocols.** Local discretion in implementing the administrative and procedural aspects of the permitting process and Policy results in a lack of consistency and equivalency. Interior can reduce this cause of permitting inefficiencies by clearly stating the goals of consistency and equivalency in the Policy and establishing clear timelines for bank processing. Interior could enforce these goals through more direction and routine oversight from Headquarters to field offices on the procedural processing of conservation bank applications and impact permits. Further, ERBA recommends incorporating adherence to and

timely implementation of the Policy into the evaluation process of Regional leadership and offices.

Thank you for your consideration of these comments and please do not hesitate to contact ERBA with any questions or on any matters where ERBA could serve as a resource to Interior.