

NMBA

NATIONAL MITIGATION BANKING ASSOCIATION

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December 3, 2007

Dale Hall, Director
U.S. Fish and Wildlife Service
420 ARLSQ
Washington, D.C. 20240

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By electronic delivery to recovery_crediting@fws.gov

Re: Fish and Wildlife Service, Endangered and Threatened Wildlife and
Plants; Notice of Availability for Draft Recovery Crediting Guidance, 72
Fed. Reg. 62,258 (Nov. 2, 2007).

Dear Mr. Hall:

The National Mitigation Banking Association ("NMBA") provides these comments on the Fish and Wildlife Service ("FWS") Draft Recovery Crediting Guidance ("Draft Guidance") that was published on November 2, 2007.

The NMBA is a not-for-profit membership organization that represents wetland and conservation bankers across the country. NMBA has long advocated for high and equivalent performance standards for all providers of mitigation and conservation credits. Every study that has reviewed offsite compensatory mitigation, from the National Academies of Science to the Environmental Law Institute and many in between, has found that mitigation banks provide superior results to other systems for providing compensatory mitigation. For this reason, NMBA maintains that conservation banking and other natural resource credit trading programs should include the features and protections found in wetland mitigation banking. We call your attention to the documentation, monitoring, performance standards, financial assurances and property control requirements of the Wetland Mitigation Banking Guidance issued in 1995 as the appropriate yardstick against which to measure other credit programs. The FWS Conservation Banking Guidance, issued in 2003, drew heavily on the Wetland Mitigation Banking Guidance.



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Our comments on the Draft Guidance follow.

General Principles

The Draft Guidance would establish an endangered species credit trading system for federal agencies to use on private lands, which is essentially a variation of a conservation bank. The Department of Interior already has a credit trading program set out in the Conservation Banking Guidance. NMBA maintains that there is no need for an additional or separate credit trading program. We believe that the goals of the Draft Guidance can be met through Conservation Banking, and that promulgating a separate Guidance will confuse matters and impede Conservation Banking efforts. Before establishing a separate credit trading program for federal agencies, the FWS needs to explain why the existing Conservation Banking Guidance is not sufficient to meet the perceived need that has prompted the Draft Guidance.

The FWS describes the Draft Guidance as similar to Conservation Banking, but expressly provides for differences between Conservation Banks and the "banked credits" under the Draft Guidance. NMBA strongly maintains that there should be no differences in the conditions and terms between Conservation Banks and the "banked credit" arrangements proposed for federal agencies under this Draft Guidance. The FWS has not shown why federal agencies, currently the only entities that would be eligible to use this Recovery Crediting Guidance, should be subject to different standards than Conservation Banks. Moreover, the FWS has requested comment on applying this Draft Guidance to other public or private entities. Such a step would, in effect, create two types of endangered species banking systems. There is no reason for such duplication.

Finally, NMBA is a strong advocate of private sector natural resource credit and trading systems. We are quite leery of governmentally operated and managed "banks", as governmental entities do not have the same incentives to successful performance as the private sector. Federal agencies with other kinds of missions generally do and should hire the private sector to conduct natural resource management activities; federal agencies can and should purchase credits or services from private sector mitigation and conservation bankers. We have serious concerns that finalizing the Draft Guidance may encourage the development of federally managed conservation banks that would be subject to less oversight and lower standards than private sector conservation banks.



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Additional Comments

The Draft Guidance provides insufficient detail regarding establishment of the "credit bank." Again, the FWS should look to the Conservation Banking Guidance for the kinds of specific information needed to establish a "credit bank." There is no reason for a separate or different set of standards for this "recovery credit" system. The Guidance also should be clear that the establishment will be documented, with specific goals, performance standards, property assurances and financial assurances. There should be a binding agreement establishing the "credit bank" that identifies the specific "bank property", the endangered species recovery benefits, any plans for acquisition and management, as well as defining the real estate controls and financial assurances that the project will be completed, including monitoring. Similarly, the process for documenting and maintaining records concerning debiting of the "credits" must be clear.

The Draft Guidance assumes that federal agencies should be able to transfer or sell their credits to other federal agencies (see 72 Fed. Reg. at 62,261), noting that this needs to be identified early in the process. The FWS should not allow federal agencies to sell or transfer credits, and compete with other sources of endangered species credits such as Conservation Bank credits, for many important reasons.

First, government agencies are overwhelmed with their other primary missions, which are not conservation banking, resulting in ineffective decisions and management of a process (conservation banking) that is being handled quite well by the private sector with public sector oversight. Second, these government "banks" will directly compete with private sector banks, effectively constraining capital investment in private banks and discouraging participation of private landowners who would otherwise consider conservation banking rather than development. Moreover, the government has access to publicly supported funds (taxes), publicly owned land, and publicly financed staff to pursue such competition. There is simply no reason why FWS should establish a system under which taxpayer funds directly compete with private industry.

Third, this initiative puts the Service or other federal agencies in a conflict of interest when it comes to approving appropriate mitigation for impacts. If a publicly financed government "bank" is in an area that is also served by a private sector bank, the inclination of the government decision makers will be to favor the government run bank. At a minimum, entities needing credits will believe they can obtain some added benefit from paying their fees to a government "bank" rather than a private conservation bank. This scenario is currently playing out in Riverside County, California, where an unofficial quasi in lieu fee program was developed subsequent to the approval of a private vernal pool bank. The program is collecting fees for impact to vernal pools when



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the mitigation could instead go to the established bank. There is no available criteria defining why the in lieu fee program is used instead of the bank. Significantly, unlike the existing bank, it is not obvious that any land has been purchased as a result the collection of fees by the in lieu fee program. Further, these decisions are made behind closed doors. The bank operator is not aware that a mitigation potential even exists until after the funds are deposited into the Service's account. This scenario – of conflicts of interest and unexplained decision-making on conservation credits – is likely to repeat itself nationwide if this Guidance is promulgated.

The Draft Guidance raises questions of "double dipping," as it relies in part on the fact that Section 7(a)(1) authorizes federal agencies to utilize their authorities to carry out programs for the conservation of species. It is far from clear whether a federal agency relying upon such authority would be generating "excess" credits that should be available for offsetting impacts or for transfer or sale to a third party. The Draft Guidance is not clear on whether or how the FWS would take into account the reason and statutory authority from which the creation of the credits derives in deciding how many credits are available for future use. This is only one of the problematic issues that can arise when federal agencies, which have myriad other missions, become involved in mitigation and conservation banking.

The Draft Guidance consistently assumes the FWS can rely on Recovery Plans in the establishment of credit values and the implementation of Recovery Credit banks, and yet a majority of listed species for which a credit bank could be used either do not have a viable Recovery Plan in place, or the Recovery Plans are not being updated to allow for changes in the knowledge base for the species being targeted. The Draft Guidance also appears to allow for "temporary" conservation measures to be counted as credits in a credit bank, but states incorrectly that conservation banks may not be used to offset temporary impacts. Permanent Conservation Credits from Conservation Banks are routinely purchased to offset temporary impacts. NMBA believes this approach gives the FWS far greater assurances in the long-term recovery of the listed species being targeted for conservation. The Draft Guidance also identifies "public outreach" as a possible action that could be used to generate Recovery Credits. Again, NMBA believes that long-term conservation of habitat in Conservation Banks is the appropriate tool for offsetting impacts to listed species.



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The Draft Guidance states that it was developed, in part, because of the experience with Fort Hood, Texas. NMBA would describe the Fort Hood situation as a simple off-site credit bank, that should have been held to the same standards as any other conservation bank. Until the FWS can explain the need for a separate credit system for federal agencies, different than the standards applied for conservation banks, NMBA recommends that the Draft Guidance be withdrawn.

Thank you for the opportunity to present these comments.

Sincerely,

A handwritten signature in black ink, appearing to read 'Don Ewoldt', is written in a cursive style.

Don Ewoldt, President
National Mitigation Banking Association

Cc: NMBA Board