



NATIONAL MITIGATION BANKING ASSOCIATION

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March 28, 2011

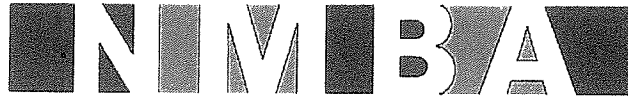
Regulatory Review
Office of the Executive Secretariat and Regulatory Affairs
Department of the Interior
1849 C Street, N.W., Mail Stop 7328
Washington, DC 20240

Dear Sir/Madam:

These comments are submitted on behalf of the National Mitigation Banking Association in response to the Department of Interior request for comments on how to implement President Obama's Executive Order 13563 on "Improving Regulation and Regulatory Review." As the Department and its Bureaus and Services implement this important Executive Order, all components should consider regulatory and policy changes to enhance and expand the use of conservation banks.

The National Mitigation Banking Association (Association) represents businesses engaged in conservation banking as well as wetland and stream mitigation banking. Conservation, wetland and stream mitigation banks provide credits to offset adverse impacts to protected species, wetlands or streams. The banks are approved in advance by regulators, and enhance the environmental function and species habitat. Conservation banks contribute to species protection and recovery, and provide a private sector tool to further the goals of habitat protection programs for listed species. Availability of conservation banks enables other regulatory programs, such as Section 7 consultation, Section 10 permitting and Habitat Conservation Plans, to function more efficiently. In an approved conservation bank, regulators know that the needs of the species will be met. This enables streamlining of permits necessary for land development that adversely affects protected species.

Based on over 10 years of Association member's experience in implementing conservation banks in USFWS Regions 1, 2, 4, 5, and 8 and wetland mitigation banks throughout the United States, the Association has developed a suite of recommendations that will enhance conservation banking and the Interior Department's regulatory programs. Attached to this comment is the Association's document, "Conservation Banking: Principles for Fostering Implementation." We ask that the Department consider these Principles as it conducts its review of regulatory programs.



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Page 2

Among the recommendations, the Association urges that the Department of the Interior evaluate all of its Endangered Species Act regulations to improve the use of conservation banks as a tool for species protection and recovery. Among other programs, consultations under Section 7 of the Endangered Species Act should specify the role for mitigation and minimization, with attention to use of conservation banks; Section 7 procedures should recognize a preference for conservation banks; compensatory mitigation and minimization of impacts to protected species should be clear under both the Section 7 and Section 10 regulations; and the Department should assure that all providers of conservation under all of its programs meet equivalent, high standards. By clarifying the important role of mitigation in all of the Endangered Species programs, with a preference for conservation banking, the goals of species protection and recovery can be advanced.

Thank you for consideration of these comments.

Sincerely,

A handwritten signature in black ink that reads "Margaret N. Strand". The signature is written in a cursive, flowing style.

Margaret N. Strand

Representative, National Mitigation Banking
Association

Enclosure



Conservation Banking: Principles for Fostering Implementation
Prepared by:
The National Mitigation Banking Association
March 2, 2011

The National Mitigation Banking Association (Association) represents businesses engaged in conservation banking as well as wetland and stream mitigation banking. Conservation banks contribute to species protection and recovery, and provide a private sector tool to further the goals of habitat protection programs for listed species. The Association appreciates the efforts to date by the US Fish & Wildlife Service (USFWS) and Department of Interior in sound regulation and support of conservation banks.

Based on over 10 years of Association member's experience in implementing conservation banks in USFWS Regions 1, 2, 4, 5, and 8 and wetland mitigation banks throughout the United States, the Association presents the recommendations below. For each recommendation, we identify a major principle as well as certain specific actions that would address the principle. It is understood that other actions could also address key principles.

The Association looks forward to continuing to work with the USFWS to foster implementation of conservation banking.

Table of Contents

1. Conservation Bank Training
2. Section 7 Consultations
3. Timelines for Bank Review
4. Policies on Use of Conservation Banks
5. Equivalent Standards for all Providers of Conservation
6. Integrating Conservation Banks with Habitat Conservation Plans
7. Open Doors for Conservation and Mitigation Banking to Federal Programs



1. Conservation Bank Training

Principle: The establishment of a conservation bank involves biological, financial and legal aspects that require a set of skills most USFWS staff members have not been trained to address. This lack of expertise in the field offices hinders the development of viable offset markets within which conservation banks operate, and slows down the conservation bank approval process. We compliment the Service for developing the pilot training course and scheduling the next iteration and allowing the Association's participation.

Action: We request that USFWS:

- (a) Continue to develop the NCTC course for Conservation Banking and utilize the expertise and experience of Association members to assist in the development, the course curriculum and instruction of the training; and
- (b) Set a goal for key USFWS field offices to have, within three years, at least one person at a minimum who has been thru the conservation banking training.

2. Section 7 Consultations

Principle: Section 7 should clearly recognize (1) the opportunity to minimize impacts to species in opinions, and advance towards recovery goals, through the use of habitat offsets or mitigation, (2) the value of establishing a consistent benchmark of performance for all forms of offset or mitigation activities as illustrated by the USACE 2008 Compensatory Mitigation Regulations, and (3) the preferential benefits of using available conservation bank credits to satisfy minimization or mitigation requirements.

The current application of guideline and policy renders the Fish and Wildlife Service with limited ability to address site specific and cumulative losses of listed species habitat associated with Federal actions/projects requiring Section 7 consultations. The same section 7 limitations frequently allow projects to proceed with incomplete avoidance or minimization of take that result in residual impacts that foreclose recovery opportunities. Over time these two outcomes eventually can lead to jeopardy opinions by continually degrading the status of listed species without any requirement to offset the residual unavoidable impacts.



Action: We request that USFWS:

- (a) Develop guidance or policy through Section 7 (a)(1) and (a)(2) to address the cumulative loss of habitat by considering the requirement to offset or conserve (conservation measures) for listed species in non-jeopardy opinion based on the baseline and accumulative effects analysis in each biological opinion.

3. Timelines for Bank Review

Principle: Currently, the permitting of conservation banks may take years, taxing the resources of the agencies as well as the private sector bank sponsors. One obstacle to more efficient review is the lack of template documents in regions outside of California, which necessitates the repeated involvement of the Department of Interior Solicitor's Office in the review and approval of bank documents. Also, given agency workloads, establishment of performance-based, formal timelines for banking instrument review is critical to keeping the process moving.

Action: We request that USFWS:

- (a) Implement policy that establishes a goal to review and render a decision on the conservation bank agreements within 4 (four) months of receiving a completed conservation bank agreement;
- (b) Draft and approve a set of conservation banking document templates to simplify the regional office review process, to minimize the need for the Department of Interior Solicitor's Office review of individual bank applications, and improve the guidance to field offices and
- (c) Provide a checklist for the prospective bankers of what is required in conservation bank documents.

4. Policies on Use of Conservation Banks

Principle: There is currently no clear policy on utilization of conservation bank credits by the USFWS. One of the primary benefits of conservation banks is the protection of large habitat preserves, typically encompassing or adjacent to core species populations or important migration corridors. The upfront capital cost of acquiring these large habitats is very high, as is the investment of time and resources by the USFWS staff and the bank sponsor to permit the bank. However, various USFWS field personnel may formally or informally discourage or prohibit project developers from using established conservation banks to offset large project impacts.



While USFWS must make biologically-based judgment calls in the field, it should not ignore the biologically-based determinations made in approval of the conservation bank.

Action: We request that USFWS:

- (a) Establish policy that states a preference for using approved conservation bank credits in Section 7 consultations to address conservation obligations. This preference should be in place regardless of the project size and the amount of impacts. This preference for approved banks should align with federal policies for wetland and stream mitigation banks, including the 2008 Compensatory Mitigation Regulation, and the policy set out in the Surface Transportation Law and the Water Resources Development Act (WRDA), each of which states a preference for projects to use mitigation banks when available.

5. Equivalent Standards for all Providers of Conservation

Principle: Conservation banks are a valuable tool, and one with validated high standards, that USFWS staff use to work towards Recovery Plan goals in the face of economic development pressures. There are other forms of project minimization to protect listed species, or efforts to meet recovery goals that are not held to the same high standards as conservation banks. This disparity of treatment impedes species recovery, and imposes a competitive disadvantage on existing conservation banks. Conservation, recovery credits or other forms of project minimization should have the same level of biological protections, and financial and legal assurances, as required of conservation banks.

Action: We request that USFWS;

- (a) Provide consistent standards among all forms of species and habitat conservation obligations required of projects.

6. Integrating Conservation Banks with Habitat Conservation Plans

Principle: Conservation banks can be extremely beneficial component of HCP's. However, often times in areas where HCP's are being developed, conservation banks are not part of the implementation strategy. In addition the USFWS should promote the use of conservation banks during the HCP planning phase to address situations where a conservation requirement offset structure would be appropriate plus as a method to address interim 'take' during the HCP planning process until an approved HCP is in place.



Action: We request that USFWS:

- (a) Integrate, and encourage the use of, conservation banks as a component of habitat conservation plans; and
- (b) Notify the USFWS field offices to consider the use of conservation banks to address incidental take situations during the interim period between HCP plan initiation and implementation.

7. Open Doors to Federal Programs for ESA and CWA Banks

Principle: Conservation banking is relatively new in many parts of the country, and has been used primarily in association with Endangered Species Act programs. The USFWS and other federal agencies are involved in many other programs aimed at the goals of habitat restoration and species protection. Purchase of credits from banks should be authorized to meet such programs. For example, the goals of coastal restoration can be met through private investment in conservation and mitigation banks, as long as the law, regulations and programs are clear. Absent clarity, field offices may doubt whether certain funding sources can be expended to purchase bank credits.

Action: We request that USFWS:

- (a) Establish clear policy that conservation and restoration programs in addition to endangered species programs can utilize funds for purchase of bank credits and
- (b) Support recognition of private sector conservation and mitigation banking in any new legislation addressing habitat restoration.

The Association greatly appreciates your consideration of our suggestions to improve the usefulness of conservation banks. If you have any questions, please contact David Urban, President of the Association, at 410-356-5159 or david@ecosystempartners.com.