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September 26, 2022

U.S. Fish and Wildlife Service,
5275 Leesburg Pike,
Falls Church, VA 22041–3803

Submitted via http://regulations.gov

Re: Comments on FWS's Advance Notice of Proposed Rulemaking Concerning Compensatory Mitigation Mechanisms (87 F.R. 45076 (July 27, 2022)) (Docket No. FWS-HQ-ES-2021-0137)

Defenders of Wildlife ("Defenders") is a 501(c)(3) non-profit organization dedicated to the protection of all native animals and plants in their natural communities. With more than 2.2 million members and activists, Defenders of Wildlife is a leading advocate for innovative solutions to safeguard our wildlife heritage for generations to come. Defenders appreciates the opportunity to offer comments in response to the U.S. Fish and Wildlife Service's ("FWS" or "Service") Advance Notice of Proposed Rulemaking ("ANPRM") regarding conservation banking regulations under the Endangered Species Act ("ESA" or "Act"). The ANPRM was issued pursuant to Section 329 of the 2021 National Defense Authorization Act (NDAA), which requires FWS to:

> [I]ssue regulations of general applicability establishing objectives, measurable performance standards, and criteria for use, consistent with the Endangered Species Act . . . for mitigation banking offsetting effects on a species, or habitat of such species, that is endangered, threatened, a candidate for listing, or otherwise at risk under such Act.[1]

The breadth and scope of the questions contained in the ANPRM suggests that FWS may be considering promulgating regulations covering compensatory mitigation under the ESA generally rather than limiting such regulations to conservation banking. We urge FWS to do this – it is critically important that the regulations offer rigorous, consistent, and equivalent standards for other forms of compensatory mitigation such as in-lieu fee mitigation and permittee-responsible mitigation. We also know that the Service is developing general mitigation policies for both its activities generally, as well as an ESA-specific mitigation policy. We hope the Service takes the opportunity to set strong compensatory mitigation requirements that are reflected in these policies under development. Unless specified otherwise, all comments set forth below are intended to apply to all types of compensatory mitigation to be governed by the regulations promulgated pursuant to this ANPRM.

[1] Pub. L. 116–283, div. A, title III, §329, Jan. 1, 2021, 134 Stat. 3527.

As an initial matter, we urge FWS to incorporate the following principles into all compensatory mitigation regulations, policies, or decision-making processes (including but not limited to the regulations considered here, the mitigation policies under development, and all step-down guidance), including:

1) A net gain (or at a minimum, no net loss) goal consistent with §2(b), §2(c), and §7(a) of the Endangered Species Act and the standard set forth in the Service's 2016 mitigation policies;

2) A conservative, precautionary approach to conservation banking across all decision-making processes (including but not limited to setting mitigation ratios) that recognizes both Congress' intent with the ESA to "give the species the benefit of the doubt" and that it is better to risk overmitigation than undermitigation;

Given the extent and scope of the biodiversity and extinction crises, it is not enough for federal agencies to simply aim at stemming losses of species and habitats. FWS has ongoing obligation to restore and recover biodiversity under Executive Order 14,008[2], and ESA §2(b), §2(c), and §7(a)(1). Section 2(b) of the ESA states that the purpose of the ESA is to recover threatened and endangered species and their ecosystems. Section 2(c) states that all federal agencies should use their authorities to recover threatened and endangered species. And §7(a)(1) of the Endangered Species Act requires agencies across the government to consult with the Services and use their authorities to recover species listed as threatened or endangered under the ESA. Consistent with this strong Congressional mandate, we recommend that any compensatory mitigation regulations set an explicit policy goal of achieving net gain, with a no net loss goal as the required minimum threshold, or "the floor," to the extent permitted by law. This net gain goal should be adopted for both individual compensatory mitigation decisions to the maximum extent practicable, as well as for the program in aggregate.

We also recommend that any regulations created pursuant to the ANPRM explicitly recognize the need for a conservative, precautionary approach to account for the risk and uncertainty inherent in compensatory mitigation. Offsetting project impacts on ESA-listed species off-site is inherently risky, particularly where mitigation areas are or will be restored from degraded states. A precautionary approach should be taken when deciding whether a compensatory mitigation site will be appropriate in the first place, what the mitigation ratio should be when offsetting project impacts, when determining what ecological criteria should measure whether a specific offset has been successful, etc., in order to give the species the benefit of the doubt that Congress intended with the ESA.

Concerning the specific questions set forth in the ANPRM, please see the following additional comments:

[2] "*See, e.g.,* Part II, Section 201 of the Order: "It is the policy of my Administration to organize and deploy the full capacity of its agencies to . . . conserve[] our lands, waters, and biodiversity. . ."

(1) What level of detail should be in the proposed rule to ensure equivalent standards are consistently applied to all forms of compensatory mitigation, including equivalence in covering the costs of mitigation whether they are on public or private lands?

A critical need for the proposed rule is to ensure equivalent standards across all forms of compensatory mitigation. Where available, conservation banking should be the preferred option for offsets, particularly given the fact that such banks are created prospectively. However, lack of consistent standards risk project proponents and managers selecting the cheapest, rather than the best, option. The §404 compensatory mitigation regulations are instructive here; they created equivalent standards between all mitigation mechanisms which raised the quality of permittee-responsible mitigation and- in-lieu programs. This led to an increase in credit transactions and an increase of new conservation banks and in-lieu fee programs.[3] They also set requirements for all compensation projects to have a mitigation plan that must address twelve fundamental components (objectives, site selection criteria; site protection instruments; baseline information; credit determination methodology; mitigation work plan; maintenance plan; ecological performance standards; monitoring requirements; financial assurances, long-term management, and adaptive management plan). The Service should take a similar approach with compensatory mitigation regulations, at least as a starting point.

However, it is also important to take into account lessons learned from the §404 regulations -- several studies after the 2008 rule found several deficiencies including the lack of critical details within the performance standards to adequately track compliance and project development, including monitoring details and long-term management assurances.[4] Additional implementation guidelines and technical resources are therefore needed to address these issues to ensure that the requirements are being utilized to the best of their ability. This can include more detailed information requirements on ecological performance standards, standard operating procedures and credit-debit determination.[5] To address these deficiencies and data gaps, additional and more in-depth details need to be applied either through the proposed rule. Furthermore, the highest appraisal cost of the land needs to be included into the credit price whether on federal or private lands. Private land bank credits include the cost of the land and long-term protection costs (management and monitoring). This too needs to apply to species mitigation on federal lands in those rare

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[3] Hough, Palmer, and Rachel Harrington. "Ten years of the compensatory mitigation rule: reflections on progress and opportunities." *Envtl. L. Rep. News & Analysis* 49 (2019)

[4] *Id.*; IWR. "The Mitigation Rule Retrospective: A Review of the 2008 Regulations Governing Compensatory Mitigation for Losses of Aquatic Resources." *USACE Report*. (2015); Thomas, J. "Evaluating long-term stewardship of compensatory mitigation sites: preliminary findings from California." *National Wetland Newsletter* 38.2 (2016); Rachel Harrington. A Review of Ecological Performance Standards at Post-2008 Rule Mitigation Banks. Presentation at the National Mitigation and Ecosystem Banking Conference (May 9, 2018).

[5] Letter from ERBA, to D. Lee Forsgren Jr., Deputy Assistant Administrator, Office of Water, U.S. EPA (Oct. 8, 2018); Letter from ERBA, to James C. Dalton, Director of Civil Works, Corps Headquarters (June 18, 2018); Hough, Palmer, and Rachel Harrington. "Ten years of the compensatory mitigation rule: reflections on progress and opportunities." *Envtl. L. Rep. News & Analysis* 49 (2019): 10018.; IWR. "The Mitigation Rule Retrospective: A Review of the 2008 Regulations Governing Compensatory Mitigation for Losses of Aquatic Resources."

situations where federal land mitigation is appropriate (we address that issue in more depth in our comment on question 6). Failure to do so will artificially depress mitigation costs on federal land, as the cost of the land will be improperly subsidized by the public. As we address in further detail the needs of federal and private lands mitigation in question six, federal lands mitigation should be rarely used.

(2) What level of detail should be in the proposed rule regarding durability and additionality standards to both achieve equivalent standards across mitigation mechanisms and provide species conservation?

Ensuring durability is a critically important part of ensuring compensatory mitigation integrity. Appropriate in-lieu fee and permittee-responsible mitigation must last at *least* as long as the project impacts themselves; in other words, for anything less than permanent protection the species *and* their habitat must have fully and demonstrably recovered from project impacts before the offset can end. All conservation banking mitigation should be permanent – that is a necessary feature of conservation banking generally. Compensatory mitigation should default to permanent protection in most cases.

Furthermore, where durability is determined by legal mechanisms, those legal mechanisms should expressly allow the durability required for the specific project. For example, if permanent protections are required, and the land at issue is protected through a non-permanent easement, then it should be disallowed as an offset. When there is a question as to what the length of the project impact will be, the default should again be permanent protection. Any regulations should incorporate explicit criteria to establish durability as to designation (*i.e.* legal or contractual protections), durability as to management (*i.e.* the entity managing the land has the authority and responsibility to remove threats and improve the status quo for species), and durability as to funding (*i.e.* provision is made for long-term funding of conservation management).

Regarding durability as to funding, an important requirement of ensuring durability is to secure sufficient financial assurances during the planning process (for ILF and permittee-responsible) or creation (for conservation bank) for offsets to ensure that they meet their durability goals. Where appropriate, financial assurances should be written into any applicable permits, contracts, etc. related to the project. The §404 compensatory mitigation regulations (33 C.F.R. §332.3) offer possible guidelines on how to approach financial assurance requirements in the proposed rule. They state that financial assurances may be in the form of performance bonds, escrow accounts, casualty insurance, appropriate instruments, letters of credit, legislative appropriations for government sponsored projects, or other appropriate instruments. . .” For legislative appropriations, Service staff evaluating legislative appropriations should evaluate the likelihood that necessary appropriations will continue into the future. The proposed rule should lay these principles out clearly and in detail to guide agency staff evaluating compensatory mitigation options. The proposed rule should also expressly require agency staff evaluating durability to take climate change into account.

Similarly, additionality is a need of overriding importance in compensatory mitigation practice. Offsetting environmental modification or degradation elsewhere requires that the "offset" actually result in habitat being restored or protected that would otherwise remain degraded or be subject to likely development or degradation. Otherwise, there is no effective offset. It is therefore important to set detailed rules in any compensatory mitigation regulations to ensure additionality is preserved across all types of mitigation. Additionality is not preserved when lands proposed for use as mitigation banks, ILF, or permittee-responsible mitigation are:

1. Areas protected under laws, ordinances, regulations, or legal instruments, including parks, wildlife preserves, watershed protection areas, conservation programs under U.S. Department of Agriculture programs, cultural or historical sites, and areas protected by other effective area-based conservation measures ("OECM");
2. Areas likely to be protected under laws, ordinances, or regulations in the foreseeable future;
3. Areas protected by zoning restrictions that effectively prevent significant habitat modification;
4. Areas unlikely to be developed in the foreseeable future due to physical unsuitability, remoteness, or other factors;
5. Areas already set aside as offsets to other types of environmental degradation (*e.g.* §404 wetland conservation banks, ILF, or permittee-responsible mitigation);
6. Areas previously preserved under conservation easements where such easements were created without the expectation at the time that the area at issue would be used to create a conservation bank, or otherwise used as an offset for a specific project; and
7. Areas protected under other types of easements or encumbrances that restrict habitat modification (*e.g.* historical preservation easements).

This should not be considered an exhaustive list; while any compensatory mitigation regulations should explicitly list out the types of areas above that should *not* qualify as offsets, those regulations should also state that this list is not exhaustive and relevant agency personnel will analyze each proposed area to be used for compensatory mitigation to ensure additionality is preserved. Where public lands are not under existing protections or which should be highly disfavored as offset sites in many cases such sites can usually be protected at the discretion of the governing body. As we noted above, we will address federal lands specifically in our comment on question (6).

(3) How should the proposed rule incorporate monitoring, financial assurances, and publicly accessible mitigation data tracking systems to ensure a compensatory mitigation mechanism is meeting its performance standards?

One of the largest threats to compensatory mitigation success is a lack of monitoring, and corresponding enforcement. For example, while the 2008 Rule sets forth monitoring requirements for compensatory mitigation under the Clean Water Act, including the requirement that mitigation bank sites or in-lieu fee sites submit monitoring reports. It also requires a monitoring period "sufficient to demonstrate that the compensatory mitigation project has met performance standards, but not less than five years," and allows agency staff to carry out inspections.[6] Despite this, compliance with compensatory mitigation requirements under the §404 program have often been

[6] 40 C.F.R. §230.96.

lacking, particularly as time goes on, as we detail in our comment on question (1) above. The 5-year minimum monitoring period floor also is likely too short: one study that evaluated compensation sites in 2012 that had been restored 8-20 years previously found that surveyed compensation sites met only 65% of standards during the final years – and that had gone down to 53% by the study year.[7] The authors concluded that the presumption that performance standards would be continued to be met after the 5-year monitoring period ended was not supported.[8] The proposed rule should therefore offer rigorous monitoring requirements, including a longer minimum monitoring period (at least ten years, but in many cases it may be significantly longer depending on the biological and physical characteristics of the site). The policies should also expressly acknowledge the potential for innovative new monitoring tools, such as automated change detection using remote sensing data.[9] Monitoring costs can be significantly reduced with such tools for permittees, project managers, and agencies.

Concerning our thoughts on financial assurances, please see our comment on durability set forth above in response to question (2).

Finally, concerning publicly mitigation data tracking system, all compensatory mitigation should be publicly available online. Currently the U.S. Army Corps of Engineers records some ESA compensatory mitigation and in-lieu fee mitigation; recording all such mitigation as well as permittee-responsible mitigation in RIBITS should be required by the ANPRM. The Service should also ensure the proposed rule mandate that all mitigation information into internal systems like ePermitting and ECOSPHERE where linked to projects kept in those systems, as well.

(4) What are the hurdles to species bank establishment that are within the Service's authority to address through regulation?

Due to its rigorous standards, conservation banking provides the most optimal outcome when offsetting impacts to imperiled species. However, rigorous standards have resulted in conservation banks being underutilized generally in comparison to less stringent mechanisms: in-lieu fee programs and permittee-responsible mitigation. Without broad reaching standards and policies across all mitigation mechanisms, "leaky demand" for mitigation credits will continue to strain the industry. [10] Therefore, the proposed rule must set equivalent standards to be met for all mitigation mechanisms and mitigation should be done prior to impacts. This will, much like the 2008 rule strengthen standards for all mitigation mechanisms allowing for an even playing field, and in turn increase demand for stronger mitigation.

Another barrier to establishing effective and efficient conservation banking is the absence of standardized metrics for credits. Most conservation banks (70%) use an acre-based approach for

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[7] Van den Bosch, Kyle, and Jeffrey W. Matthews. "An assessment of long-term compliance with performance standards in compensatory mitigation wetlands." *Environmental management* 59.4 (2017): 546-556.
[8] *Id.*
[9] For examples, please see Defenders of Wildlife's work on automatic change detection at https://defenders-cci.org/project/acd/
[10] White, Thomas B., et al. "Uncovering opportunities for effective species conservation banking requires navigating technical and practical complexities." *Conservation Science and Practice* 3.7 (2021): e431.

calculating credits, without factoring habitat quality.[11] While the acre-based metric is easy to use, it can also undermine more valuable ecological metrics (habitat quality, species abundance, nesting impacts, etc.). In addition, standardized quantification tools are lacking resulting in an "ad-hoc" determination of credit ratios leading to difficulties in assessing conservation outcomes for the species especially for a no net loss or net benefit goal.[12] Calculating harm and necessary conservation measures is by nature complex but considering complexity within credit establishment will create positive outcomes for impacted species. The USFWS Mitigation Policy (since withdrawn) recognized that it is important to consider "scarcity, suitability and importance" when establishing mitigation credit ratios.[13] The proposed rule needs to reestablish this criterion as well as update conservation banking guidance to provide additional, step-down guidance for agency review and approval of metrics.

In addition to technical barriers, institutional barriers have hindered opportunities for conservation banks across the U.S. For decades, USFWS have struggled with reductions in staffing, available financial resources, knowledge gaps resulting in bank approval delays and oversight issues.[14] A 2013 FWS staff survey, found that most respondents (57%) stated that additional species or habitats would greatly benefit from establishment of conservation banks, but insufficient staffing was a substantial factor for delay in review time of documents for banks.[15] Opportunities to combat these barriers include utilization of regional conservation strategy plans which target high priority conservation actions and address regional threats with strategic focus on scale and location where conservation benefits can be most effective.[16] In addition, greater use of templates for creating banking agreements as well as offering additional training for USFWs staff and bankers, and greater communication and outreach to banks on addressing new species opportunities.[17] Lastly, by standardizing reporting criteria for all banks as well as updating RIBITS to be more user friendly or utilizing FWS's updated ECOSHERE for mitigation documents, would help streamline the review process and more effectively measure performance while allowing for increased transparency.

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[11] Gamarra, Maria Jose Carreras, and Theodore P. Toombs. "Thirty years of species conservation banking in the US: Comparing policy to practice." *Biological Conservation* 214 (2017): 6-12.
[12] Li, Ya-Wei, and Timothy Male. "Improving Mitigation Under the Endangered Species Act." (2021).
[13] 81 CFR § 83440
[14] DOI, US. "A Preliminary Analysis of the Conservation Banking Program and Results from a Survey of USFWS Staff." *United States Department of the Interior.* (2013); White, Thomas B., et al. "Uncovering opportunities for effective species conservation banking requires navigating technical and practical complexities." *Conservation Science and Practice* 3.7 (2021): e431.
[15] *Id*
[16] Rappaport Clark, Jamie. Comments on Proposed Revisions to the U.S. and Wildlife Service Mitigation Policy, 81 Fed. Reg. 12380. Defenders of Wildlife (March 8,2016).
[17] DOI, US. "A Preliminary Analysis of the Conservation Banking Program and Results from a Survey of USFWS Staff." *United States Department of the Interior.* (2013); DOI, US. "Results from a survey of conservation banking sponsors and managers." *United States Department of the Interior.* (2016).

(5) How should the proposed rule align with 2008 Rule provisions to maintain compatibility between mitigation banks and species banks where appropriate?

We recommend that where appropriate the Service use the 2008 Rule provisions to maintain general compatibility between mitigation banks and species banks to encourage the development of species banks, including mitigation bank providers who have experience with compensatory mitigation activities governed by the 2008 Rule and wish to expand the services they offer. Following the 2008 Rule provisions would also allow the Service to benefit from lessons learned from shortcomings in that Rule. The proposed rule should in any event be more rigorous than the 2008 Rule generally, including but not limited to shortcomings we identify in this letter.

However, we reiterate that credit "stacking" should in no cases be allowed, even if a given offset would qualify for either §404 compensatory mitigation or ESA species mitigation, and this prohibition should be included explicitly in the proposed rule. Indeed, prohibiting stacking would align with the §404 compensatory mitigation regulations themselves; those regulations state that "under no circumstances may the same credits be used to provide mitigation for more than one permitted activity."[18] Conjoining multiple species credits can, where appropriate, overlap for a single project but this cannot be the case for multiple projects as this raises concerns with additionality. The FWS 2003 conservation banking guidance memo also prohibits the use of credit stacking for multiple projects.[19]

(6) How should the Service address potential bank projects on Federal and Tribal lands or on other lands with unique ownership considerations and/or some degree of existing protection?

Federal lands generally should be significantly disfavored as compensatory mitigation sites out of additionality concerns, and this should be stated in the regulations. This of course clearly applies to lands that are a part of the National Park System or National Wildlife Refuge System, where no compensatory mitigation should be allowed. However, lands under the multiple-use mandate should also be disfavored for compensatory mitigation because the land management agencies have wide discretion to manage such lands for conservation purposes, and an implicit mandate to do so under E.O. 14,008[20], and the affirmative recovery requirements of ESA §2(b), §2(c), and §7(a)(1).

Federal land management agencies should as a matter of principle therefore maximize the protection of federal lands for conservation rather than exploitation by industry, independent of the needs of specific projects. To the limited extent to which public lands may be considered for compensatory mitigation of any type, the principle of additionality should be strongly adhered to. In terms of the proposed rule under consideration, direction for determining additionality on public lands should be framed in the context of affirmative ESA §7(a)(1) conservation programs: since the federal land management agencies already have an affirmative obligation to contribute to the recovery of listed species, the Service should work with those agencies to determine what

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[18] 40 C.F.R. §230.93.

[19] U.S. Fish and Wildlife Service. "Guidance for the Establishment, Use and Operation of Conservation Banks". USFWS, Washington, D.C. (2003).

[20] "*See, e.g.,* Part II, Section 201 of the Order: "It is the policy of my Administration to organize and deploy the full capacity of its agencies to . . . conserve[] our lands, waters, and biodiversity. . ."

"additional" mitigation could occur on public lands. The fact that federal land management agencies may not be optimally meeting their §7(a)(1) obligations currently should not lower the bar for determining additionality. Rather, the Service should work with those agencies to develop baseline conservation programs, and then define what it would recognize as additional to those programs. In all cases should mitigation on federal land be used to offset impacts only on other federal lands – the proposed rule should have an absolute prohibition on offsetting private land impacts on federal lands.

The Service already recognized this important principle in its 2016 mitigation policy (since withdrawn) when it stated:

> The Service will generally but not always, recommend compensatory mitigation on lands with the same ownership classification as the lands where impacts occurred… The Service usually does not support offsetting impacts to private lands by locating compensatory mitigation on public lands designated for conservation purposes because its practice risks a long-term net in landscape capacity to sustain species by relying increasingly on public lands to serve conservation purposes.[21]

As to mitigation on Tribal lands – both those managed by the Tribes and trust lands managed by the Bureau of Indian Affairs – it is imperative to respect Tribal sovereignty and give the Tribes equitable access to the mitigation tools offered other governmental entities. Tribes should be included as governments in the mitigation rules, and emphasize that different types of land tenures (owned, fee, restricted, etc.) can be utilized for mitigation programs which will reduce exclusions and confusion. Early "government to government" communication is also key to support larger landscape conservation benefits as well as treaty rights recognition.[22] We also stress the continued use of additionality and durability for mitigation on Tribal lands.

Thank you for the opportunity to comment on the ANPRM; if you have any additional questions, please feel free to contact us at lrosa@defenders.org, or (202)772-3260.

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[21] 81 FR 83440.

[22] Li, Ya-Wei, and Timothy Male. "Improving Mitigation Under the Endangered Species Act." (2021).