



Ecological Restoration Business Association

Growth Through Resilient Environmental Solutions

www.ecologicalrestoration.org

Executive Director

Sara Johnson

President

Adam Riggsbee
RiverBank Conservation

Vice President

Kyle Graham
Ecosystem Investment Partners

Members at Large

Kenny Carothers
Headway Environmental

Greg DeYoung
Westervelt Ecological Services

Greg Kernohan
Ducks Unlimited

TJ Mascia
Davey Mitigation

Preston Smith
Wildwood Environmental Credits

Matt Stahman
Resource Environmental Solutions

Jaime Zsiros
EcoVantage Ecological Services

To: U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration

From: Ecological Restoration Business Association

Date: May 19, 2025

Docket No. FWS-HQ-ES-2025-0034

RE: Proposal to rescind the regulatory definition of “harm” in the Endangered Species Act (ESA) Regulations

The Ecological Restoration Business Association (ERBA) writes to provide comments to the U.S. Fish and Wildlife Service (the Service) and the National Oceanic Atmospheric Administration (NOAA) (collectively, the Agencies) regarding the proposal to rescind the regulatory definition of “harm” in the Endangered Species Act (ESA) (the Recission). ERBA is a national trade association representing businesses that invest billions of private capital into conservation outcomes, typically as mitigation credits or offsets, which provide efficient and measurable solutions for longstanding federal and state regulatory programs. The Recission would undermine at least half a billion of investment in habitat-based species conservation reliant on the over 50-year reading of “harm” under the ESA as including significant impacts to habitat. Further, the Recission would defer or permanently chill millions more in potential job-creating investments that advance species recovery.¹ The resulting disincentive in habitat-based conservation offsets would effectively eliminate a streamlined permitting option currently available to permittees under the ESA.² ERBA recommends that the Agencies withdraw the Recission.

ERBA’s members include mitigation and conservation bankers, In-Lieu Fee (ILF) program sponsors, and sponsors of restoration and ecological outcomes, including restoration of habitat for protected species under the ESA. Collectively, ERBA members have worked with Service offices across the country to oversee permitting on hundreds of conservation bank projects encompassing thousands of acres of high-quality habitat and implementation of actions that support species recovery. Conservation banks are an efficient tool for permittees to absolve their liability under the ESA while contributing to advance

¹ The species conservation market is a part of the broader ecological restoration industry that is estimated to support 225,000 jobs and \$25 billion in annual economic output. BenDor T, Lester TW, Livengood A, Davis A, Yonavjak L (2015) Estimating the Size and Impact of the Ecological Restoration Economy. PLoS ONE 10(6): e0128339. <https://doi.org/10.1371/journal.pone.0128339>.

² Consider that, in the Clean Water Act context, when mitigation bank credits are available, permit times are 50% faster. See “The Mitigation Rule Retrospective.” October 2015. U.S. Army Corps of Engineers Institute for Water Resources. Available at: https://www.epa.gov/sites/default/files/2015-11/documents/mitrule_report_october_2015.pdf

habitat conservation measures that are proven to facilitate species recovery. In the absence of conservation bank credits, ESA permittees must work with Service offices on a project-by-project basis to implement mitigation measures onsite. This project-by-project approach lacks transparency and predictability on mitigation measures and the restriction to onsite burdens the permittee's development plans. ERBA urges the Agencies to reconsider the Recission. We recommend that the Agencies instead focus on policies that increase permittees' flexibility to comply with the ESA and contribute to species recovery. Specifically, we recommend policy actions that support offsite offsets, which typically contribute to species' needs on a more meaningful scale than onsite actions.³

In response to the Recission's specific solicitation, ERBA provides the following comments regarding: i) our industry's reliance interests on the historic interpretation of "harm" authorized by Congress, and ii) the practical impact and potential permitting delays that could result from the Recission.

I. Ecological Restoration Industry Monetary Reliance Interests.

The availability of conservation banking credits or offsets is dependent on the willingness of businesses to invest their private capital in properties that, once conserved and/or restored, provide measurable conservation value for species and generate offsets that can be matched to an ESA permittee's impacts. From the time of scouting project locations, securing the real estate interests, navigating the multi-year agency approval process, and receiving the first credit release, it is typically a 5-to-10-year investment proposition before initial capital costs are recouped and several years later to realize a return on investment. Of ERBA members surveyed, the average agency approval timeline is 3.5 years on average, with a range of one to ten years. The resulting value to the Agencies, permittees, and species is immense: i) the Agencies benefit from readily available compliance solutions in the form of offsets that have already been vetted and thus save substantial staff time; ii) permittees benefit from faster permit issuance and a transfer of liability with offsets, and iii) the species benefit from conservation actions on a landscape scale and in advance of impacts that replace critical habitat necessary for their life actions to sustain and grow species populations.

Because conservation banking offsets are habitat-based investments, the Recission's discussion on "harm" excluding significant impacts to protected species' habitats undercuts the conservation banking model and current investments. To date the ecological restoration industry has invested at least \$483M—nearly half a billion dollars—in conservation banks and similar species mitigation projects that conserve over 220,000 acres in support of species' recovery.⁴ These investments were made in response to the needs of permittees and in reliance on the longstanding interpretation of "harm" as including habitat modification. If habitat modifications are no longer regulated under the ESA, then the permittee customer for these investments is eliminated and existing and pending offsets are essentially stranded investments without a market.

³ For example, the Agencies and permittees have benefitted from programmatic consultations with a conservation banking option, under which habitat impacts trigger the option for permittees to assume presence and mitigate via a programmatic consultation, creating significant time savings for their project. This tool should be elevated as a streamlining approach that supports the Administration's Executive and Secretarial Orders' objectives.

⁴ The monetary reliance interest numbers represented in these comments are based on an anonymous survey circulated to ~300 of ERBA's member individuals over May 5-12th 2025. Sixteen member companies responded to the survey and their aggregated responses are reflected in the \$483M and \$300M monetary reliance interest numbers.

But for the Recission, our industry would invest another approximately \$300 million over the next five years into conservation offsets. The additional \$300M investment has the potential to support thousands of jobs and expand the footprint of conservation actions known to fast-track permittees' ESA compliance and actually advance Congress' stated goal of the ESA, species recovery. In the absence of this additional investment and when considering the 3.5-year average timeline for approval of a conservation bank, the Recission could cause a decade or longer delay in development of conservation offsets. This delay will leave permittees with few compliance options in the event there is a change in interpretation to return to the prior 50-year old understanding of "harm."

Ecological restoration businesses' investments in habitat offsets are reasonable and based on an understanding of "harm" authorized by Congress in the ESA. Congress' stated purpose of the ESA is conservation of the ecosystems (i.e. habitat) upon which protected species depend, and the act's implementation sections have several references to habitat considerations and incidental takings that could occur as a result of habitat impacts.⁵ Congress' deliberate inclusion of ten different verbs and "attempt to engage in any such conduct" within the definition of "take" is evidence of the statute's intended broad scope to realize endangered species' recovery. The Recission's discussion of Justice Scalia's interpretation of "harm" as only an affirmative act against a particular animal versus a population of animals would reduce "harm" to having the effect of a mere synonym and thus make "harm" redundant with the other verbs of the "take" definition. This reading violates the surplusage canon and, in ignoring the other statutory sections' habitat references, also violates the whole-text and harmonious-reading canons.

Beyond these plain language readings of "harm" within the ESA, the Congressional Record also affirms the longstanding interpretation of "harm" as including habitat modification: the Senate Report states "'take' is defined . . . in the broadest possible manner to include every conceivable way in which a person can 'take' or attempt to 'take' any fish or wildlife"⁶ and the House Report states the bill "includes, in the broadest possible terms, restrictions on taking," further explaining "Any program for the protection of endangered species must necessarily concern itself with more than a simple 'hands-off' attitude toward the animals and plants themselves... The basic purpose of the Act is clearly stated in the legislation; to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, protected or restored."⁷

With these statements on record and supported by an objective plain reading of the statute, the ecological restoration industry began investing in conservation banks that restored habitat for protected species and provided permittees an efficient compliance solution for their ESA permitting needs. Today that investment totals at least half a billion dollars now at risk if the dramatic re-interpretation of "harm" moves forward under the Recission. We defer to the comments of our peer members and conservation partners for additional details on the longstanding reading of the statute and congressionally authorized interpretation of "harm."

II. Practical Permitting Impact of the Recission.

Through their experience permitting conservation bank projects and working with permittees on ESA compliance solutions, ERBA members are well versed in the practical challenges of the ESA permitting

⁵ 16 U.S.C. § 1531(b); §1532(3); §1533; §1536; §1539.

⁶ S. Rep. No. 93-307, p. 7 (1973).

⁷ H.R.Rep. No. 93-412, p. 6, 15 (1973).

provisions under Sections 7 and 10. While one motivation of the Recission is to remove permitting delays under the ESA, the uncertainty created by the Recission could cause the opposite effect. First, the Agencies may still determine that habitat loss rises to the level of “harm” on a species-by-species basis, which could present greater uncertainty to each listing and add another administrative step for navigating ESA compliance. Second, habitat modification is an easier proxy for an applicant to assess whether they may have incidental take of a protected species than certifying the complete absence or potential presence of a protected species that may be taken by the proposed permit action.

In the absence of using habitat as a proxy for take, the Agencies may require permittees to demonstrate that no individual species are currently or will ever be within the permitted action onsite area. Such demonstration could require time consuming and expensive protocol surveys for the presence of protected species’ individuals, particularly for more cryptic species or those requiring multiple seasons to document presence or absence. For example, vernal pool invertebrates and California tiger salamanders require at least two years of surveys, and sometimes longer in period of drought to prove their absence from a project site. Rather than undertaking these surveys and their corresponding project delays, permittees may instead prefer to voluntarily assume presence of the species and mitigate for assumed takings through habitat offsets via conservation banking.⁸ However, if the Recission moves forward it will certainly disincentivize investment in conservation offsets and thus these offsite offsets may no longer be available as a timely (and thus cost efficient) solution for permittees. This leaves onsite avoidance, minimization, and mitigation measures as the only option for ESA compliance, which often restrain permittees’ economic development and use of their project site without making substantial contributions to the protected species’ recovery.⁹

In at least two ways, the Recission will also compound challenges with species’ recovery, contributing to additional species listings that present further permitting hurdles. First, by removing habitat loss as de facto “harm,” and thereby disincentivizing conservation bank development supporting species’ recoveries, currently listed species are not likely to recover with further unregulated habitat losses. And second, if habitat losses are not offset for currently protected species, other species they share habitat with are likely to be impacted as well, potentially requiring their own listing decisions.

We urge the Agencies to rethink the Recission and other policy changes from these practical standpoints, and for the Agencies to take actions that support habitat-based offsite offsets as an efficient ESA compliance option.

ERBA Reliance Interests and Recommendations in Summary

ERBA members have invested at least half a billion dollars into conservation banking projects that generate habitat-based offsets for efficient ESA compliance. These investments were made reliant on the 50-year interpretation of “harm” and “take” under the ESA as including significant modification of protected species’ habitat. ERBA members are prepared to invest another \$300 million over the next

⁸ Again, we refer to the efficiencies of programmatic consultations with a conservation banking option, mentioned in footnote 3.

⁹ Consider just a few examples of challenges with onsite versus offsite mitigation measures: forcing mitigation and its maintenance into highway rights-of-way; compelling installation of offsets in floodways and on levees, reducing the efficiency of facilities; and creating attractive nuisances and maintenance headaches in subdivisions. Contrast with the ability to consolidate impacts’ mitigation measures to instead support larger, optimized mitigation projects offsite that do more to advance the species’ recovery plan.

5 years to expand the availability of ESA compliance options while advancing species' recovery, Congress' stated goal of the act. These monetary investments and their corresponding job and economic benefits are at risk if the Recission's abrupt change in the "harm" definition is finalized. Further, the Recission may have unintended consequences for permitting efficiencies if permittees now must undergo time intensive surveys to verify the presence or absence of species individuals versus using habitat as a proxy for take. For these reasons, we recommend that the Agencies withdraw the Recission.

Thank you for your consideration of ERBA's comments. Please do not hesitate to reach out to ERBA at sjohnson@ecologicalrestoration.org with any questions on the industry, reliance interests represented here, or if we can serve as a resource in any way.

Sara Johnson, Executive Director
Ecological Restoration Business Association

Adam Riggsbee, President
Ecological Restoration Business Association