



# Ecological Restoration Business Association

*Growth Through Resilient Environmental Solutions*

[www.ecologicalrestoration.org](http://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  
From: Ecological Restoration Business Association  
Date: July 9, 2025

**RE: ESA Section 10(a) Program Implementation Recommendations;  
FWS-HQ-ES-2025-0049**

The Ecological Restoration Business Association (ERBA) appreciates the opportunity to provide comments to the U.S. Fish and Wildlife Service (Service) regarding improvements to the development and implementation of conservation benefit agreements, plans and permits under Section 10(a) of the Endangered Species Act (ESA). ERBA's enclosed recommendations focus on clarifications and clear establishment of standards, roles and responsibilities, and target timelines to facilitate greater programmatic efficiencies and utilization of Section 10(a) permitting tools.

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 compliance with the Endangered Species Act (ESA). 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 and the development and implementation of Habitat Conservation Plans (HCPs) encompassing thousands of acres of high-quality habitat and actions that support species recovery. We have seen firsthand the need for reforms to make Section 10's processes more accessible for applicants' participation and our industry's services. With changes to the scope of federal jurisdiction underway, these Section 10 reforms are more important than ever to ensure efficient permitting pathways are readily available for applicants to comply with the ESA.

ERBA is pleased to share the enclosed recommendations on specific aspects of Section 10, as well as two general comments for consideration. First, the value of integrating conservation banking opportunities within HCPs: HCPs best contribute to species recovery and help regional conservation efforts by ensuring that occupied and other high-quality habitat is protected, while permitting development in areas of lower quality habitat. Conservation banks are a key contributor to this benefit because bank sponsors conserve and restore the best habitat (typically located offsite from the development) at a larger landscape scale and that fits within regional conservation planning efforts. This approach is more effective than an HCP that relies on "onsite avoidance," which typically results in postage stamp preserves surrounded by

development. Second, when HCPs require surveys, it becomes expensive for an applicant to prove absence because surveying usually entails two years or more of data collection, staff time, and ultimately project delays. In many cases it is more cost effective and efficient to skip surveying and meet project timelines by assuming species presence and acquiring mitigation.

#### **I. Clarify species mitigation requirements for more efficient Section 10 decision-making.**

Congress directed the Service to issue a rule governing species mitigation mechanisms in Section 329 of the National Defense Authorization Act FY21.<sup>1</sup> A regulation clarifying species mitigation will provide applicants with transparent, consistent standards and provide our industry with the policy stability necessary to invest in conservation banks and prospective habitat conservation plans ahead of development impacts—all of which makes compliance easier and more efficient.<sup>2</sup> The Service’s issuance of the rule is critical to ensuring certainty and consistency in the mitigation standards applied across all projects, regardless of the applicant or development sector.

ERBA strongly recommends that the rule include a requirement and process for development of species-specific standards (e.g. as a component of the recovery planning process, see Recommendation VI), which process would be independent of, and external to, Section 10 permits and Section 7 consultations. Externalizing these species-specific standards will help prevent the Service from applying inconsistent requirements to different development sectors or projects. Consistent and predictable standards also provide certainty for companies to invest in mitigation options, making those options available sooner and at a lower cost for project applicants.

As detailed in other ERBA advocacy, a species mitigation rule should build off the concepts and principles in the May 2023 Service Mitigation Policy and ESA Compensatory Mitigation Policy, which represent nonpartisan understandings and national lessons learned on mitigation under the ESA. This includes structuring the rule to prioritize habitat-based mitigation measures. Species’ recovery plans and listing decisions document that habitat loss and fragmentation are the leading cause of species’ loss and failed recovery. Because research does not replace lost habitat, it often falls short of contributing to species’ recovery. We recommend that the rule and other guidance establish only a limited role for research as a part of a larger mitigation package and limit research to only qualify as mitigation for species that are not habitat constrained.

#### **II. Leverage conservation offsets for flexibility in compliance and to meet the “Maximum Extent Practicable” requirement.**

Conservation banks are an efficient, programmatic and established tool for permittees to absolve their liability under the ESA while providing pre-established habitat conservation measures that are proven to facilitate species recovery. In the absence of conservation banks and their associated credits, ESA permittees must work with Service offices on a project-by-project basis to implement mitigation measures

---

<sup>1</sup> 16 U.S.C. 1531 et seq., Pub. L. 116-283. See “Objectives, Performance Standards, and Criteria for Use of Wildlife Conservation Banking Programs,” which directed the Service to issue regulations establishing objectives, standards, and criteria for species conservation banking that shall, to the maximum extent practicable, maximize available mitigation credits.

<sup>2</sup> For further information on the benefits of a species mitigation rule and ERBA’s specific recommendations for the rule, please see our formal comments on the topic from September 2022 at the [link here](#).

onsite. This project-by-project approach lacks transparency and predictability for species mitigation measures while the restriction to onsite locations burdens the permittee's development plans.

Achieving ESA compliance by going offsite for mitigation offsets (i.e. conservation bank credits) gives landowners flexibility and invests in large scale habitat restoration that actually advances species recovery prior to impacts occurring. These offsets allow landowners to fully capture their property's value while supporting broader and more effective species conservation efforts off-site. For example, a great benefit of offsets is that they can be located in the area most needed and ecologically beneficial to the species within a defined habitat range. Species' habitat preferences can fluctuate based on environmental conditions and increasing fragmentation, which in many instances may mean it is more important to prioritize offsite offsets than exhausting all avoidance and minimization measures. Implementing offset measures outside the project action area, i.e. the landowner applicant's property, are often more beneficial from an ecological standpoint to onsite "postage stamp" measures. This is because offsite banks are sited and planned at a landscape scale, can provide habitat connectivity benefits, and are done in advance of impacts. The value of onsite offsets, i.e. those at the site of development impact, is often limited because of the ongoing effects of the development.

Lastly, in many circumstances, the use of conservation bank credits in conjunction with avoidance and minimization measures can help the Service easily determine when a project meets the "maximum extent practicable" requirement. Often, it can be difficult for an applicant to demonstrate and for the Service to determine whether a project meets the "maximum extent practicable" standard. Bank credits can be used to fully offset impacts and demonstrate achievement of specific requirements. When project applicants utilize conservation bank credits to offset their project's habitat loss, it provides certainty and reduces subjective analysis around assessing whether measures qualify as the "maximum extent practicable." We recommend that the Service memorialize this understanding that offsets meet the "maximum extent practicable" standard by recognizing the adequacy of offsets in a regulation establishing objective criteria for satisfaction of the standard.

### **III. Clarification on HCP Roles & Responsibilities.**

All efforts should be made for more efficient and accessible establishment, administration, and participation in HCPs. ERBA recommends starting with clarification on the distinct roles and responsibilities of the different parties within a HCP to ensure there is not duplication or confusion, and instead clear delegation of authorities between the Service and the discretion of the HCP Administrator. Currently, in some instances, the Service continues to act as a de facto Administrator and makes decisions that are at the project level despite the programmatic and industry wide efficiency goals intended for HCPs. To avoid this situation, greater responsibility and discretion should be clearly granted to the applicant HCP Administrator in updated /revised regulations. When applicable, the role of the HCP Administrator should be clarified so they have the authority to issue Certificates of Inclusion (COIs) for third parties wanting coverage by the HCP. The Service, particularly given its reduced workforce, should not retain administrative tasks that do not materially advance the conservation objectives of the HCP.

### **IV. Establishment of Target Timelines for HCP Processes and Clarification of "Low Effects" HCP Thresholds.**

Relatedly, we recommend establishing target timelines for initial approval of an HCP and subsequent processes. The Service should consider different timelines for various HCP approaches to ensure the timeline guidance is commensurate with the subject HCP's level of complexity. To support development

and application of these different timelines, we recommend establishing clear thresholds for qualification as a “low effect” versus more complex HCPs and further clarity around processes for single versus programmatic HCPs with multiple permittees.

Currently it can take parties years to work out solutions with the Service and often the process unnecessarily stalls due to a lack of required response times (e.g. 45-days) for the agencies and their counsel, all of which leads to protracted delays. Internally at the Service, only staff essential to decision making should be involved in reviews and efforts should be made to reduce internal regulatory reviews that stretch on without resolution. Internal agency coordination should also support the Service responding to the applicant with a single “one” agency voice. HCPs are not an effective tool as intended under the ESA if it takes a decade or longer to complete basic processes. Clarification on mitigation requirements and standards for protected species, via the pending rulemaking referenced in Section I above, will facilitate faster HCP decisions because the standards will be externalized and thus not open for renegotiation and reconsideration with each HCP.

#### **V. Clarification on the National Historic Preservation Act Federal Undertaking.**

ERBA strongly recommends that the Department Solicitor issue an opinion that under the National Historic Preservation Act (NHPA) the federal undertaking for an HCP is the issuance of the HCP itself and not issuance of subsequent COIs. The current approach of treating a COI as a federal undertaking contributes to delays and deters parties from even utilizing HCPs. This issue is ripe for clarification and action through a Solicitor opinion and clarification in the regulations. Relatedly, the Service should consider opportunities to programmatically meet NHPA obligations when processing Section 10 permits, such as through programmatic agreements.

#### **VI. Recovery Plans to inform Section 10 and Funding for Service Staff.**

Proactive recovery plans help facilitate faster and transparent decisions on acceptable conservation actions for Section 10 permitting. ERBA recommends revising the regulatory requirements for issuance of a listed species recovery plan to require that the recovery plan is issued concurrent with the initial listing decision and not years later. The lag between the listing decision and the recovery plan results in years of guesswork and unpredictability for permittees and our industry on what conservation actions are needed and permissible to support species recovery, contributing to permit delays. As mentioned in Recommendation I and ERBA’s prior September 2022 comments on the species mitigation rule, for certain species the development of recovery plans should include development of species-specific mitigation standards that ensure consistent requirements for offsetting impacts to the species, regardless of the project or applicant.

We recognize that development of recovery plans can be a time intensive endeavor and recommend that the Service pursue outside support for plan development as allowed under Section 4(f)(2) of the ESA. We also recommend that the Service expand the use of reimbursable agreements to allow a permittee to fund consultants that perform certain Service functions (with oversight), to delegate duties outside of the Service, and to generally ensure the Service’s limited workforce does not cause a bottleneck. While greater efficiencies can be realized through clarification of roles and responsibilities (see Recommendation (III) above), there is still a fundamental need for a certain number of trained and knowledgeable Service staff across the country to respond to and process permitting requests.

#### **VII. Incentivize creation of General Conservation Plans.**

General Conservation Plans (GCPs) are a prime option for several species and common industry impacts that allow permittees to assume take and thus avoid time and cost intensive surveys. If a permittee demonstrates that they have “offset,” i.e. provided compensatory mitigation for impacts, then it should be clarified that the requirement to minimize and mitigate “to the maximum extent practicable” has been met and satisfied. To incentivize additional use of GCPs, we recommend establishing in regulation further criteria on the applicability, process, and standards for GCPs.

For one example, consider the efficiency benefits of GCPs demonstrated by this case study: The Service created a GCP that delineated the American Burying Beetle (ABB) habitat areas and referred to external ABB Guidance (created in parallel) that defined mitigation standards. Under this model, industry could assume maximum take based on the ABB habitat maps, thus not having to wait on seasonal presence/absence survey restrictions or field assessments. This was a very efficient process by a strategic group of Service staff, which resulted in an industry-wide GCP where all the industry applicants participated (or at least most) and all industry parties purchased offsets that met the same standards. This dynamic created a robust competitive market with multiple conservation bankers.

#### **VIII. Increase Section 6 Funding to Support Expanded Use of HCPs.**

We recommend leveraging the Cooperative Endangered Species Conservation Fund (Fund) established by Congress in Section 6 of the ESA to more broadly support states’ funding for HCP actions. Section 6 does not explicitly prohibit Fund monies from being applied towards supporting strategies that further an HCP’s mitigation requirements. Acquisition of bank credits would support the objectives of the two main sources of Section 6 funding, grants for HCP development and grants to assist with land acquisition, especially the latter (HCP Land Acquisition Grants). Through policy signals in guidance and regulation, the Service should clarify that these Fund monies are available for purchase of conservation bank credits that fit within an HCP’s objective. Acquisition of bank credits represents acquisition of land plus habitat protections and other measures that satisfy HCP mitigation obligations and thus bank credits offer an opportunity for particularly effective and strategic application of Fund monies.

Thank you for your consideration of our recommendations to improve the efficiency and effectiveness of the ESA Section 10(a) program and better leverage the benefits of the conservation banking industry. Please do not hesitate to reach out to ERBA at [sjohnson@ecologicalrestoration.org](mailto:sjohnson@ecologicalrestoration.org) if we can serve as a resource or provide further information.

Sara Johnson, Executive Director  
*Ecological Restoration Business Association*

Adam Riggsbee, President  
*Ecological Restoration Business Association*