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Board of Directors

September 15, 2008

SHERI LEWIN  
PRESIDENT

Public Comment Processing  
Attention: 1018-AT50  
Division of Policy and Directives Management  
U.S. Fish and Wildlife Service  
4401 North Fairfax Drive, Suite 222  
Arlington, VA 22203

GEORGE KELLY  
VICE PRESIDENT

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SECRETARY

Filed electronically at [www.regulations.gov](http://www.regulations.gov)

DON EWOLDT  
IMMEDIATE PAST  
PRESIDENT

Re: Comments on "Interagency Cooperation Under the Endangered Species Act,"  
FWS-R9-ES-2008-0093, 73 Fed. Reg. 47, 868 (August 15, 2008), Proposed Rule

GEORGE HOWARD  
DIRECTOR AT LARGE

Dear Sir/Madam:

CRAIG DENSIORFF  
DIRECTOR AT LARGE

The National Mitigation Banking Association ("NMBA" or Association)  
provides these comments on the above noted Federal Register Notice.

MIKE MCCOLLUM  
DIRECTOR AT LARGE

The NMBA is a membership organization representing companies engaged in wetland mitigation and habitat conservation banking. Our members invest in and develop suitable habitat for protected natural resources, subject to approval and oversight of the federal and state agencies. Once approved, credits from a wetland mitigation bank or conservation bank may be used to compensate for unavoidable natural resource impacts of authorized activities. Wetland mitigation banking and conservation banking is a strong, growing industry in the United States.

STEVE COLLINS  
DIRECTOR AT LARGE

CYNTHIA ROBINSON  
DIRECTOR AT LARGE

CLIFF ORR  
DIRECTOR AT LARGE

Conservation banking has been recognized by the U.S. Department of Interior ("Interior") for many years. In 2005, the Agency published its Guidance for the Establishment, Use, and Operation of Conservation Banks, 68 Fed. Reg. 24,753, 24,753 (May 8, 2003) (Conservation Banking Guidance). Since that time, conservation banks have been used widely in California, and are beginning to be used in other parts of the United States, to compensate for unavoidable impacts to protected species. Conservation banks, like wetland mitigation banks, are subject to advanced federal and state approval. They assist in recovery implementation by providing excellent endangered species habitat, subject to long term legal and financial protection.

Wetland mitigation banking has proven successful for more than fifteen years. Originally managed under the interagency Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (Mitigation Banking Guidance), 60 Fed. Reg. 58605 (Nov. 28, 1995) issued jointly by the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, Interior, the Department of Agriculture and the National Oceanic and Atmospheric Administration,

mitigation banks are now governed by federal regulations for establishment and use of wetland mitigation banks. See, Compensatory Mitigation for Losses of Aquatic Resources (Mitigation Regulations), 73 Fed. Reg. 19594 (April 10, 2008). Recognizing that well regulated and managed consolidated off-site mitigation provides an outstanding service to the environment and the economy, Congress has provided that major federal projects that impact wetlands should give a first preference to obtaining mitigation from mitigation banks. This preference appears in the surface transportation laws (TEA-21)<sup>1</sup>, and the Water Resources Development Act of 2007<sup>2</sup>, as well as federal transportation regulations.<sup>3</sup>

The recently released Mitigation Regulations also provide a preference for mitigation banks, recognizing that

they usually involve consolidating compensatory mitigation projects where ecologically appropriate, consolidating resources, providing financial planning and scientific expertise (which often is not practical for permittee-responsible compensatory mitigation projects), reducing temporal losses of functions, and reducing uncertainty over project success.

33 C.F.R. § 332.3(a)(1) [Corps]; 40 C.F.R. § 230.93(a)(1) [EPA]. See also, 33 C.F.R. § 332(b), 40 C.F.R. § 230.93(b). The preamble to the Mitigation Regulations provides additional explanation of the benefits of mitigation banking.

Interior notes in the Preamble to the Proposed Rule that "there have been no comprehensive revisions to the implementing section 7 regulations since 1986. Since those regulations were issued, much has happened," 73 Fed. Reg. 47,868. We suggest that one of the major things that has happened since 1986 is the emergence of wetland mitigation banking and conservation banking as proven, ecologically beneficial systems for compensating for impacts to species protected under the Endangered Species Act. We suggest that Interior

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<sup>1</sup> FEDERAL AID HIGHWAYS ACT (TEA-21, 1998), 29 U.S.C. § 133(B)(11):

With respect to participation in a natural habitat or wetland mitigation effort related to a project funded under this title that has an impact that occurs within the service area of a mitigation bank, preference shall be given, to the maximum extent practicable, to the use of the mitigation bank if the bank contains sufficient available credits to offset the impact and the bank is approved in accordance with the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (60 Fed. Reg. 58605 (November 28, 1995)) or other applicable Federal law (including regulations).

<sup>2</sup> Water Resources Development Act (WRDA 2007), H.R. 1495, Section 2036(c):

In carrying out a water resources project that involves wetlands mitigation and that has impacts that occur within the service area of a mitigation bank, the Secretary, where appropriate, shall first consider the use of the mitigation bank if the bank contains sufficient available credits to offset the impact and the bank is approved in accordance with the Federal Guidance for the Establishment, Use and Operation of Mitigation Banks (60 Fed. Reg. 58605) or other applicable Federal law (including regulations).

<sup>3</sup> 23 C.F.R. § Part 777.

should take this opportunity, in revising its Section 7 process, to provide a preference or "first look" for conservation banks in connection with the proposed revisions to the Section 7 process. Recognition of the benefits of conservation banking is consistent with the general purposes of the Proposed Rule, to build on contemporary practices and facilitate protection of species consistent with smooth interagency procedures.

We suggest that Interior include recognition for the use of conservation banks as part of the Section 7 process. This could be included in 50 C.F.R. § 402.3, Applicability, through addition of a subpart as follows:

(c) In carrying out activities subject to these regulations that have impacts that occur within the service area of a conservation bank, the Federal agency where appropriate, shall first consider the use of a conservation bank to compensate for those impacts if the bank contains sufficient available credits to offset the impact and the bank is approved in accordance with the Guidance for the Establishment, Use, and Operation of Conservation Banks, 68 Fed. Reg. 24,753, 24,753 (May 8, 2003) or other applicable Federal law (including regulations).

This suggested language is modeled after the text of the 2007 Water Resources Development Act, the most recent Congressional designation of a preference for mitigation banks. Of course, Interior may feel that this provision should be included elsewhere in the regulations. The point is, there should be recognition of the role of and preference for conservation banks as an integral part of the Section 7 process.

In addition to the above suggestion, we urge that Interior assure, as it considers finalization of the Proposed Rule and other policies under the Endangered Species Act concerning Section 7 and federal agency activities, that the goals of species protection, survival and recovery remain paramount. We believe that incorporation of recognition for conservation banks is consistent with that paramount objective.

We appreciate your consideration of these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Sheri", written in a cursive style.

Sheri F. Lewin, President  
National Mitigation Banking Association