

August 21, 2023

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Subject: Docket No. FWS-HQ-ES-2021-0104 [[amending portions of ESA Section 7](#)]  
Link to comment: <https://www.regulations.gov/document/FWS-HQ-ES-2021-0104-0001>

To Whom it May Concern,

The [Environmental Policy Innovation Center](#) (EPIC) is a 501(c)(3) organization with a mission to build policies that deliver spectacular improvements in the speed of environmental progress. We have a vested interest in better, faster, more equitable and scaled environmental restoration and conservation. These comments regarding amendments to Section 7 are based on research on Endangered Species Act and other mitigation policies over the last six years.

We applaud the **mitigation hierarchy** or “preferred order” for reasonable and prudent measures (RPMs) added to the text in the proposed rule (§402.14(3)) and support this change proposed by the Services. We also applaud the Services’ recognition that RPMs can be implemented inside **or outside** of the action area, and the specific inclusion of measures that **offset** the impact of incidental take (§402.14(2)). When the Services wrote in the 1998 [Section 7] Consultation Handbook that “RPMs may not consist of measures that offset impacts...” it created confusion and likely poorer-quality RPMs negotiated on a case-by-case basis. EPIC has previously recommended that the Services “should confirm that compensatory mitigation may indeed be used in Section 7 consultations” in our comments on the Compensatory Mitigation Mechanisms ANPR. We strongly support the Services’ addition of offsets as an RPM. The Section 7 Consultation Handbook is past due for updating and we look forward to this Handbook adopting the best available science and lessons learned in the 25 years since its publication.

Finally, we strongly support the following recommendations provided by the Ecological Restoration Business Association to (1) prevent potential confusion from the reference to “conservation easement with endowment,” (2) to clarify that in some instances it may benefit species more to carry out offsets outside the action area, and (3) to state a preference for advance offsets.

*“i. We recommend that the Service strike reference to “conservation easement with endowment” in the current list of examples of offsetting measures. While both a conservation easement and endowment are components of a conservation bank and should be required of all offset measures for equivalency, those two components alone do not provide the same rigor of assurances and benefits for the species as the other three primary offset mechanisms of banks, in-lieu fee programs, and permittee-responsible offset projects held to equivalent standards. These mechanisms also include, among other assurances and benefits, management plans with their endowments, which are sufficiently funded to assure that the management plans are carried out in perpetuity. Reference to “conservation easement with endowment,” as a standalone measure, within the category of offset measures does not align with the mechanisms discussed in the Service’s other mitigation policies and the scope of the forthcoming species mitigation rule. In the absence of enforcement of equivalent standards and a preference hierarchy, project proponents will logically resort to the least-cost option for compliance despite other options offering a species greater benefit. The Service can avoid this potential pitfall by closing a potential loophole and striking reference to “conservation easement with endowment” in the list of permissible offsetting measures.*

*ii. We recommend that the Service revise their preferred order for RPM offset measures to clarify that in many instances, for the benefit of the species, offset measures outside the action area are preferable to those within the action area and incorporate an advance-offset preference into the order. As stated by the Service earlier in the Proposal, “conservation efforts can be focused where they will be most beneficial to the species” when there is the option to specify offsets outside the action area, and “in some circumstances, offsetting measures applied outside the action area would more effectively minimize the impact of the proposed action to the subject species.” ERBA understands the preferred order’s reference to measures within the action area receiving a preference for avoidance and minimization measures, which are, by definition, to be carried out onsite. But, one 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.*

*For these reasons, we recommend that the Service revise the preferred order for RPMs to clarify that, following avoidance and minimization onsite, offset measures may be proposed onsite or offsite; however, the Service’s preference for the location of offset measures should be based on conservation planning and which option offers the highest and best habitat benefits for the impacted species...*

*...[a related] recommendation on the preferred order [is the] incorporation of an advance-offset preference. When determining a preference between available offset measures, the measure that offers the species the most advanced benefit, i.e., the greatest reduction of temporal loss, should be considered preferable to less advanced measures, regardless of their mechanism. We refer to ERBA’s more detailed comments on this topic in the Species Rule ANPRM Comments under Section I on Equivalent Standards and subsection (iv) titled “Advance Mitigation Preference.”*

EPIC appreciates the opportunity to provide comments that we believe will strengthen endangered species policy. Please do not hesitate to reach out to us for further discussion or with any questions or comments. We appreciate the work of DOI and FWS in advancing policies to protect species.

Sincerely,

A handwritten signature in black ink that reads "Becca Madsen". The signature is written in a cursive, flowing style.

Becca Madsen  
Director - Restoration Economy Center  
Environmental Policy Innovation Center