



**Walter Wright, Jr.**  
wwright@mwlaw.com  
(501) 688.8839

# Species Conservation Banking/Compensatory Mitigation Mechanisms: U.S. Fish and Wildlife Service Advance Notice of Proposed Rulemaking

07/28/2022

The United States Fish and Wildlife Service (“Service”) published in the July 27th Federal Register an Advance Notice of Proposed Rulemaking (“ANPR”) in which it seeks comments for developing a proposed rule that would establish:

. . . objectives, measurable performance standards, and criteria for use, consistent with the Endangered Species Act, for species conservation banking.

See 87 Fed. Reg. 45076.

Conservation banking generally involves permanently protected lands that contain natural resources values. Such lands are conserved and permanently managed for species that are threatened, endangered, or otherwise at risk.

Section 329 of the 2021 National Defense Authorization Act (“NDAA”) contained a provision requiring the Service to issue regulations of general applicability establishing objectives, measurable performance standards, and criteria for species conservation banking programs. The regulations are required to be consistent with the Endangered Species Act (“ESA”).

The Service states that the NDAA requires that:

. . . to the maximum extent practicable, the regulatory standards and criteria shall maximize available credits and opportunities for mitigation, provide flexibility for characteristics of various species, and apply equivalent standards and criteria to all mitigation banks.

The Service further notes in the preamble accompanying the ANPR that ensuring consistency, transparency and predictability for project proponents and mitigation providers is important as the conservation banking programs expand. This includes the development and application of equivalent standards and criteria for conservation banks and all habitat-based compensatory mitigation mechanisms. The projected proposed rule is stated to focus on conservation banking programs for ESA-listed, proposed, and candidate species, including maximizing available credits.

The ANPR requests comments from interested parties addressing:

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?
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?
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?
4. What are the hurdles to species bank establishment that are within the Service's authority to address through regulation?
5. How should the proposed rule align with 2008 Rule provisions to maintain compatibility between mitigation banks and species banks where appropriate?
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?

A copy of the Federal Register Notice can be downloaded [here](#).