

# ELR

## NEWS & ANALYSIS

### Landowners Bank on Conservation: The U.S. Fish and Wildlife Service's Guidance on Conservation Banking

by Marybeth Bauer, Jessica Fox, and Michael J. Bean

#### Swept Away: A Cautionary Tale Regarding Endangered Species Mitigation

For many years, fossil enthusiasts have searched for Miocene fossils on a secluded beach south of Chesapeake Beach, Maryland. About a decade ago, without warning or explanation, a formidable chain link fence appeared on the beach, anchored at one end to the nearly vertical cliffs behind the beach, and extending at the other end about 30 feet into the Chesapeake Bay. No sign warned against trespassing, and since the water is shallow there, most fossil hunters simply waded around the fence to get to the more productive areas on the other side. A year later, the fence was even less of an obstacle. Enterprising beachgoers had scraped out a small passage between the cliff face and the landward end of the fence through which a person could squeeze. The bayside end of the fence was sagging, having been battered by storms the previous winter. More storms the next winter pretty much leveled the fence. Soon, not a trace of it remained. Most visitors then never knew why the short-lived fence had been erected. Most visitors today are unaware it ever existed.

The mystery of why the fence suddenly appeared is revealed in—all places—the U.S. Fish and Wildlife Service's (FWS') endangered species *Consultation Handbook*.<sup>1</sup> The handbook gives extensive guidance to the FWS staff regarding implementation of §7 of the Endangered Species Act (ESA).<sup>2</sup> Section 7 is the provision of the Act that requires federal agencies to consult with the FWS to ensure that the actions they authorize or carry out do not jeopardize the continued existence of endangered species. The handbook illustrates its detailed guidance with numerous documents showing how to implement various stages of the consultation process. Among those illustrative documents is a letter dated January 11, 1993, that discusses the mysterious fence.

The letter addressed plans for a boardwalk along the bayfront from the center of town to a point just short of the fossil hunters' beach. The boardwalk, by facilitating access, was sure to increase public use of the beach. That concerned the FWS, since the beach was not only a good place to find the fossilized remains of long extinct sharks and whales, but

also one of the few remaining places to find the not-quite-extinct Puritan tiger beetle, an endangered species. The solution to this dilemma, the FWS believed, was to condition the approval of the boardwalk (which required a permit from the U.S. Army Corps of Engineers) on the erection of a fence that would deter public access to the part of the beach most valuable to the endangered beetles. In short, the fence was a strategy to mitigate the impact to the beetle of the increased public use that the boardwalk was certain to cause.

There is more than small irony in the inclusion of this letter in the handbook. Its purpose there is to illustrate how FWS employees should draft a letter to a sister agency concerning a particular aspect of the §7 consultation process. As a letter, it is indeed a model of clarity, brevity, and impeccable grammar. However, beyond the four corners of the letter lies a more important and dismaying story. The story of the short-lived fence is, in microcosm, an illustration of much that is wrong with endangered species mitigation.

Mitigation measures have often been inadequately conceived, poorly executed (the fence was built in the wrong place, though given the lack of signage and maintenance, its placement hardly mattered), and infrequently monitored. As a result, they have sometimes utterly failed to achieve their intended purposes. Scarce resources have too often been expended on well-intended mitigation efforts that ultimately failed to produce any real conservation benefit. Instead of being made whole through compensatory mitigation measures, rare species ended up worse off.

This is a matter of no small consequence. If the ESA is to succeed, then mitigation must succeed, since mitigation is a pervasive aspect of the law's implementation. Widespread public perceptions to the contrary, the ESA prohibits very little. Instead, it allows a wide range of activities that detrimentally affect listed species, subject only to mitigation requirements intended to minimize or compensate for those detrimental impacts. For example, private land development or logging of private forest land that harms an endangered wildlife species is unlawful without an FWS permit authorizing the "incidental taking" of the listed species.<sup>3</sup> Such a permit, in turn, requires a habitat conservation plan (HCP)<sup>4</sup> that, among other things, must "minimize and mitigate the impacts"<sup>5</sup> of the authorized activity on the listed species. In effect, HCPs, which in the past decade have become the primary means through which private economic

Marybeth Bauer is an intern with the Wildlife Program of Environmental Defense in Washington, D.C., and a doctoral candidate in Environmental Ethics at Bowling Green State University in Bowling Green, Ohio. Jessica Fox is a senior associate at *EPRISolutions* Environment Division, Palo Alto, California. Michael J. Bean chairs the Wildlife Program of Environmental Defense in Washington, D.C.

1. U.S. FWS & NATIONAL MARINE FISHERIES SERVICE (NMFS), *CONSULTATION HANDBOOK*.

2. 16 U.S.C. §1536.

3. *Id.* §1536(b); 50 C.F.R. §402.14(i). See also *Bennett v. Spear*, 520 U.S. 154, 170, 27 ELR 20824 (1997) (describing a "permit authorizing the action agency to 'take' the endangered or threatened species as long as it respects the [FWS'] 'terms and conditions'").

4. See 16 U.S.C. §1539(a)(2)(B)(i-v).

5. *Id.* §1530(a)(2)(B)(ii).

activity is reconciled with the requirements of the ESA, are simply mitigation plans.<sup>6</sup> For federal actions subject to the consultation requirements of §7, there is no explicit mitigation requirement set forth in the statute. Nonetheless, it is common for federal agencies to design a proposed project with mitigatory features, e.g., the fence on the beach, to ensure that the project will not run afoul of the substantive requirements of the law.

Given the importance of mitigation to the success of the ESA, the question must be asked: how can mitigation be better accomplished? One promising new approach is conservation banking.<sup>7</sup>

The basic idea of banking as a mitigation strategy is simple: in anticipation of future mitigation requirements, someone, e.g., an individual landowner or state highway department, invests in conservation activities at a bank site, e.g., acquiring high quality habitat or restoring degraded habitat for a particular species. The FWS accepts such an investment as compensatory mitigation for future activities detrimentally affecting the species or habitat type conserved on the bank site.

Conservation banking has a number of potential advantages over traditional approaches to mitigation. By completing necessary mitigation prior to project impacts, banking assures that the mitigation is done, and done properly. Further, in theory, banking allows mitigation on a larger scale, providing advance mitigation at a single large site for multiple future projects that would otherwise be mitigated at several smaller sites. In addition, banking creates the opportunity for some landowners to turn endangered species on their property, or restorable habitat for such species, into assets. That turns on its head the conventional wisdom of many landowners that endangered species are a liability to be avoided because of the land use restrictions that can accompany them. Finally, since the number of credits that some banks earn is a function of how successfully species or habitats are restored, bankers have a compelling economic incentive to do the best restoration job possible.

Despite these potential benefits, conservation banking for endangered species is still in its infancy. It may be about to undergo a growth spurt, however, as a result of formal banking guidance recently issued by the FWS. Before turning to that guidance, a brief look at one recent bank illustrates the potential of this new conservation tool to benefit endangered species and landowners alike.

### The Hickory Pass Ranch Conservation Bank

The endangered golden-cheeked warbler couldn't ask for a more suitable home than the privately owned 3,000-acre Hickory Pass Ranch in Texas Hill country. And conservationists couldn't ask for a more suitable parcel of land to be managed as habitat for the migratory songbird, a 52-inch long, yellow-cheeked and black-bodied spectacle of our natural heritage that sings *bzzzz layzee dayzee*, ending on a high note. The golden-cheeked warbler nests only in central Texas woodlands with mature Ashe juniper mixed with

oaks, elms, and other hardwoods. This type of woodland is widespread on the Hickory Pass Ranch, which houses a large population of golden-cheeked warblers. But Ashe juniper woodlands have been rapidly disappearing in central Texas due to land clearing for urban development and other human purposes. Accordingly, active management of the ranch to maintain its high quality habitat for the golden-cheeked warbler is important to the recovery of the species.

To proponents of the warbler, the time-honored conservation strategy of land acquisition might have seemed a promising way to ensure the perpetual management of the ranch for the benefit of the species. The Hickory Pass Ranch lies within the proposed acquisition area for the Balcones Canyonlands National Wildlife Refuge, which is managed to conserve nesting habitat for the golden-cheeked warbler. Acquisition of the ranch by the refuge would have guaranteed its management for this purpose.

However, for reasons that commonly thwart this conservation strategy, land acquisition was not an option. Funds for refuge acquisition were insufficient and the ranch owners had no wish to sell. To its owners, the ranch represents not only a conservation opportunity but also a family legacy, the setting for stories made and told across generations. Hickory Pass Ranch is a family ranch, and the owners intended to keep it in the family for their three daughters and future generations. Given this intention, the goal of ensuring active management of the ranch to maintain warbler habitat needed to be reconciled with the ranch's continued private ownership and operation.

In this respect, the golden-cheeked warbler is not alone. Most of the nation's threatened and endangered species require some form of active management of private land to further their recovery—for example, controlling invasive species, replicating natural disturbance regimes through prescribed fire, or maintaining suitable hydrological characteristics in wetland habitat. Seventy-three percent of the land in the contiguous United States is privately owned, and most of our nation's threatened and endangered species have most of their habitat on nonfederal land (most of which is privately owned). Accordingly, recovering our nation's threatened and endangered species requires enlisting private landowners as partners in conservation.

However, there are powerful disincentives against the willingness of private landowners to manage their land for the benefit of listed species. First, active management typically requires considerable time, expense, and/or technical expertise. For example, controlling invasive species on just 100 acres of wetland habitat could cost as much as three new Ford Rangers—a sum that would make a sizable dent in a mortgage.

Second, by making the land inviting to an endangered species, active management could invite substantial burden for a landowner in the form of regulatory restrictions on land use. Under the ESA, activities that harm an endangered species by modifying its habitat are prohibited without a permit.<sup>8</sup> Consequently, if a landowner restores habitat that becomes occupied by an endangered species, a permit may be necessary for such prevalent and profitable activities as mining, logging, and grazing. The permit process is often lengthy, laborious, and uncertain. Moreover, if the

6. See U.S. FWS & NMFS, HABITAT CONSERVATION PLANNING HANDBOOK 3-19 (1996) (describing typical mitigation actions). See also Michael J. Bean, *Major Endangered Species Act Developments in 2000*, 31 ELR 10283 (Mar. 2001).

7. See Michael J. Bean & Lynn E. Dwyer, *Mitigation Banking as an Endangered Species Conservation Tool*, 30 ELR 10537 (July 2000).

8. See *Babbitt v. Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 25 ELR 21194 (1995).

permit is denied, the landowner may be forced to forgo revenue from the use of the land. These burdens of active management confirm Aldo Leopold's warning, made 70 years ago in his famous essay entitled *Conservation Economics*,<sup>9</sup> to be wary of "the time-honored supposition that conservation is profitable."

The lesson from Leopold's insight is that the challenge of making conservation *possible* on private lands can be won by making conservation *profitable* for the economic and other goals of private landowners. For the owners of the Hickory Pass Ranch, creating a conservation bank on their property for the benefit of the golden-cheeked warbler has done just that. The Hickory Pass Ranch Conservation Bank ensures that the golden-cheeked warbler remains an economic asset to the owners rather than a potential regulatory liability, preserves the ranch as a family legacy, and sustains the owners' ranching way of life.

Under their agreement with the FWS, the ranch owners placed an initial parcel of 500 acres of high quality warbler habitat under a permanent conservation easement with the option to increase the bank to cover their entire 3,000 acres of habitat. Among other conservation assurances, the owners pledged to manage the initial parcel for the permanent conservation of habitat important to the golden-cheeked warbler; limit grazing density to maintain hardwood seedlings that will eventually replace canopy trees; and restrict building sites to designated areas at least 50 feet from heavy canopy warbler habitat. In return, the FWS pledged to award the owners one "conservation credit" for every acre of land placed under conservation easement. The owners can sell these credits to parties who are required by law to compensate for their adverse impacts on the golden-cheeked warbler elsewhere.

The allure of conservation banking is multifold. It supplies private property owners with an economically viable land management alternative, allows the FWS to secure the conservation of contiguous, high quality habitat, and provides those in need of mitigation with additional mitigation options. In the case of the Hickory Pass Ranch Conservation Bank, the golden-cheeked warbler is assured a contiguous parcel of high quality habitat over the long term, and the owners expect sufficient economic gain (with credits currently priced at \$5,000 each) to continue managing the land as a family ranch without selling parcels to developers.

Conservation banking can restack the "economic cards" in favor of conservation on private land by turning listed species into economic assets (rather than regulatory liabilities). For some parcels, use as mitigation may have a higher value than other alternative land uses. Moreover, this relatively new conservation tool creates a rich variety of other incentives for private landowners to become active conservation partners, including the possibility of earning a public reputation as a conservation ally, preserving a way of life that comes with working the land, enjoying the aesthetic qualities of the bank site and the recreational opportunities that are compatible with its purpose, or using the site for educational purposes. Conservation bankers can also use banks to meet their own expected future mitigation needs. For example, the Chiquita Canyon Conservation Bank in

southern California was destined to be a luxury golf course when the Transportation Corridor Agency (TCA) purchased a conservation easement on the nearly 1,200-acre site protecting coastal sage scrub habitat important for the California gnatcatcher. Although the primary motive for establishing this bank was to generate mitigation credits that can be applied toward future highway projects, the TCA now enjoys additional benefits including improved public relations. They host annual educational tours of the site during which they exhibit their voluntary habitat improvement activities that will not only benefit the gnatcatcher, but also increase the numbers of other rare species in the area. For the TCA, establishing a conservation bank and protecting an ecologically important area was a good business decision.

### Basics of Banking

Endangered species conservation banking is conceptually similar to wetlands mitigation banking under the Clean Water Act (CWA).<sup>10</sup> The first conservation bank was developed in 1995, the same year that federal interagency guidance on wetland mitigation banking was published. The wetland and conservation banking guidance documents treat many of the same issues, but not always in the same way. Differences in program goals (no net loss of wetlands; recovery of endangered species) and characteristics of the resources at issue (relative permanence of wetlands; relative transience of some endangered species habitats) warrant different policy outcomes.

From its beginning in California less than a decade ago, conservation banking has steadily grown in popularity. Concurrently with the establishment of the first U.S. bank in 1995—the Carlsbad Highlands Bank in San Diego County, which provides coastal sage scrub habitat for the California gnatcatcher—California released an *Official Policy on Conservation Banks*.<sup>11</sup> California, like most states, has its own endangered species legislation,<sup>12</sup> which can be more restrictive than the federal law and apply to more species. Though initially established pursuant to that state policy, most California banks have subsequently been allowed to sell credits to fulfill federally imposed mitigation requirements as well. Since 1995, the number of banks in California has grown to around 50. Beyond California, recent conservation bankers include a forest products company in Georgia, a private rancher in Arizona, and the Mobile Area Water and Sewer Commission in Alabama. Banks have been established for species as diverse as the Pima pineapple cactus, golden-cheeked warbler, and vernal pool fairy shrimp. At least one state, Hawaii,<sup>13</sup> has an endangered species law that specifically authorizes "habitat banking."

Conservation banks are properties managed to provide permanent conservation benefits to listed species for the purpose of compensating for adverse impacts to those species elsewhere. The FWS awards bank owners "credits" in proportion to their conservation accomplishments. Owners

9. Aldo Leopold, *Conservation Economics*, in SUSAN L. FLADER & J. BAIRD CALLICOTT, *THE RIVER OF THE MOTHER OF GOD AND OTHER ESSAYS BY ALDO LEOPOLD* 193 (University of Wisconsin Press 1991) (1934).

10. See 60 Fed. Reg. 58605 (Nov. 28, 1995) (wetland mitigation banking policy).

11. California Environmental Protection Agency, *Official Policy on Conservation Banks* (Apr. 7, 1995). See Bean & Dwyer, *supra* note 7, at 10544.

12. See Bean & Dwyer, *supra* note 7, at 10544 (citing several statutes, including CAL. FISH & GAME CODE §§2050-2116 (California ESA)).

13. HAW. REV. STAT. §195D-21.

may use credits to mitigate for their future development projects or sell them to third parties for profit. The price of credits is typically set by the owner and is influenced by the costs to manage the bank and market demand.

By selling credits earned at one bank to many land developers, banks aggregate the mitigation activities of numerous development projects into one site. Consolidation has advantages over more traditional project-by-project forms of mitigation, which often result in a piecemeal approach to conservation that has little conservation benefit and fails to advance regional environmental goals.

Like financial banks, conservation banks have a currency. The currency of a conservation bank is the unit of measure according to which: (1) the number of credits awarded to the bank quantifies the natural resource values conserved at the bank site; and (2) the number of credits developers must purchase from the bank quantifies the adverse impacts of their activities. Banks commonly use a currency of acres of habitat. For example, the owners of Hickory Pass Ranch receive one credit for every acre of the ranch placed under conservation easement, and require developers to purchase one credit for every acre of golden-cheeked warbler habitat adversely impacted.

Of course, not all acres of protected habitat represent the same conservation value to listed species. For example, sites vary in habitat quality, contribution to regional conservation goals, and distance from other protected areas. The Hickory Pass Ranch has high conservation value to the golden-cheeked warbler because it contains high quality habitat that links discontinuous refuge lands. Likewise, adverse impacts vary with regard to their degree of permanence, the number of individuals taken or disturbed, and the quality of habitat affected. An appropriate crediting and debiting system must reflect such differences. The standard way of accounting for these differences is to apply "compensation ratios" when determining the number of credits awarded to a bank and the number of credits required for purchase to mitigate for adverse impacts. For example, when a development activity degrades especially high quality habitat, a compensation ratio of three credits to mitigate for every acre of impacted habitat might be appropriate. On the other hand, if a bank is established in a particularly important ecological area, a ratio of one credit to one-tenth of an acre has been applied, as in the case of the Wright Preservation Bank for the Sebastopol meadowfoam, Burke's goldfields, and California tiger salamander.

From the foregoing discussion, it should be clear that conservation banking is a more complicated endeavor than trading schemes for pollutants such as sulfur dioxide or carbon dioxide (CO<sub>2</sub>). One ton of CO<sub>2</sub> emitted to the atmosphere is much more fungible than an acre of habitat for a particular endangered species. The location of an acre in relation to other protected sites, developed areas, roads, and other surrounding land uses can profoundly affect the ecological value of that acre to the species that uses it. Determining the value of specific acres may often need to occur on a project-by-project basis. Thus, conservation banking will almost certainly entail a degree of intervention on the part of the FWS or others that is much greater than what characterizes pollution-trading schemes. The need for intervention suggests that the role of banking in endangered species conservation efforts will always be rather limited, though for some species it may be substantial.

Analogous to the customer base of financial banks, conservation banks have "service areas." The "service area" of a bank is the geographic area (such as a watershed or county) within which the bank's credits can be used to compensate for adverse impacts to the species covered by the bank. In other words, as the FWS' guidance explains: "[I]f proposed projects fall within a specific conservation bank's service area, then the proponents of those projects may offset their impacts, with the FWS' approval, by purchasing the appropriate number of conservation credits from that bank."<sup>14</sup>

Despite the growing popularity of conservation banking, banks outside California have been established on an ad hoc basis without the benefit of official guidance—until now. In May 2003, the FWS released guidance for the establishment, use, and operation of conservation banks to satisfy mitigation requirements under the ESA.<sup>15</sup>

### The FWS' Conservation Banking Guidance

The FWS' guidance seeks to promote conservation banking by providing consistency in the establishment and use of banks, as well as transparency to landowners and developers regarding the rules of the banking process.<sup>16</sup> It applies to banks established on private, tribal, state, or local lands, and neither covers nor precludes conservation banks on federal lands.<sup>17</sup> It was released effective immediately, without invitation for public comment. While the growing number of endangered species banks prompted the need for getting written guidance in place quickly, the decision to do so without public input was questionable.

Below, we discuss several of the key provisions of the guidance that are intended to ensure that banks provide long-term conservation benefits for the species they cover and opportunities for economic payoff for their owners.

#### *Banks Must Meet the Conservation Needs of One or More Covered Species*

Under the guidance, the goal of conserving listed species sets the standard against which the FWS decides whether to approve conservation banks.<sup>18</sup> Approval of a bank amounts to a judgment that the bank's contribution to the conservation of the covered species will be sufficient to offset authorized adverse impacts to that species in the bank's service area.<sup>19</sup> The FWS is to evaluate proposed banks in relation to a scientifically sound conservation strategy (such as a recovery plan, when available) for the species covered by the bank,<sup>20</sup> and assess whether the bank furthers that strategy. The bank site and its management program are "paramount" considerations for such an assessment.<sup>21</sup> In particular, since most listed species are threatened by habitat loss and fragmentation, the guidance recommends siting banks in large,

14. U.S. FWS, GUIDANCE FOR THE ESTABLISHMENT, USE, AND OPERATION OF CONSERVATION BANKS 8 (2003), available at <http://endangered.fws.gov/policies/conservation-banking.pdf> (last visited May 28, 2004).

15. *Id.*

16. *Id.* at 1.

17. *Id.* at 6.

18. *Id.* at 4.

19. *Id.* at 3, 4.

20. *Id.* at 3, 5.

21. *Id.* at 5.

unfragmented regions of habitat adjacent to areas already managed to benefit the covered species, or in areas that serve as corridors.<sup>22</sup> Nonrestorable areas should be excluded from bank boundaries.<sup>23</sup> Moreover, since most listed species and their habitat cannot be conserved without active management, such as invasive species control, the guidance requires that all banks implement an active management program.<sup>24</sup> The primary goal of bank management programs is to maintain habitat for continued use by the covered species.<sup>25</sup>

### *The Service Area of a Bank Should Meet the Conservation Needs of the Species*

In addition to setting the standard for bank approval, the goal of species conservation provides the basis for designating the service areas of banks.<sup>26</sup> The guidance advises that banks be located within areas designated by recovery plans as “recovery units” or other recovery focal areas.<sup>27</sup> A bank’s service area is to correspond to the recovery area in which the bank is located.<sup>28</sup> If there is no recovery plan for the species, the bank location and service area should be based on similar considerations.<sup>29</sup> Since banking practice to date does not always confine credit sales to the designated service area or limit service areas to the recovery unit in which the bank is located, this provision may limit flexibility. For example, the service area of the Hickory Pass Ranch Conservation Bank appears to include part—but not all—of the recovery unit within which the ranch lies, plus part or all of several other recovery units. The rationale for designating the service area in this manner is not clear. If there is a compelling rationale for having done so, that fact might suggest that further review is warranted.

### *Credits Are Awarded for Conservation Outcomes Rather Than Management Actions*

The goal of meeting the conservation needs of the covered species also serves as the criterion for the FWS’ issuance of credits to banks. Under the FWS’ guidance:

[S]pecies or habitat conservation value *outcomes* (e.g., numbers of nesting pairs and family groups, or enhanced or created habitat), not the implementation [of] actions that are causal to those outcomes and values[,] are the standards by which the [FWS] will evaluate banks and authorize issuance and sale of mitigation credits.<sup>30</sup>

In other words, issuance of credits is conditional upon the success of the bank’s management program in meeting the conservation needs of the covered species, rather than the banker’s implementation of that program.

To illustrate, the East Plum Creek Conservation Bank—a 25-acre parcel in the right-of-way for Interstate 25 in Colorado, owned and managed by the Colorado Department

of Transportation for the Preble’s meadow jumping mouse—receives credits based upon a schedule of specific outcomes: committing the property to conservation purposes in perpetuity, meeting alluvial groundwater goals, restoring vegetation, and reaching criteria for population density and distribution. Such a schedule for outcome-based release of credits is intended to provide an economic incentive for bank owners to conduct the management actions necessary to promote the long-term conservation of the covered species.

While outcome-based evaluation safeguards the conservation value of banks, it was not standard practice prior to the federal guidance. Rather, it has been common practice for bank owners to receive credits upon conveyance of a conservation easement over the bank site, independently of the success of subsequent management actions. Whereas this practice assumes that bank owners will generate and successfully implement a management plan that supports the long-term needs of the species, the guidance requires conservation outcomes as a condition of credit release.

### *The Conservation Commitment Made by a Landowner When Establishing a Bank Is Permanent*

Under the FWS guidance, conservation banks may employ a variety of conservation strategies, including “preservation, management, and restoration of degraded habitat, connecting of separated habitats, buffering of already protected areas, creation of habitat, and other appropriate actions.”<sup>31</sup> Regardless of the strategy, bank owners must commit to manage the natural resource values of their banks *in perpetuity*.<sup>32</sup> To effect such a commitment, an owner must convey a permanent conservation easement over the bank property and provide adequate funding for the perpetual operation of the bank.<sup>33</sup> The guidance recommends that bank owners establish a nonwasting endowment fund by depositing a fixed amount for every credit sold.<sup>34</sup> For example, the Hickory Pass Ranch Conservation Bank must deposit \$250 for each credit sold. To ensure that proceeds from credit sales are sufficient, owners should set the price per credit to include not only their profit margin but also the costs associated with managing the bank.<sup>35</sup>

### *A “Conservation Banking Agreement” Must Be Prepared for Every Bank and Include a Management Plan That Provides Assurance of Long-Term Funding, as Well as Provisions for Remedial Action*

A written banking agreement between the conservation bank owner and the FWS is to be prepared for every bank.<sup>36</sup> The guidance lists the required content for conservation banking agreements,<sup>37</sup> providing a national standard for documenting the establishment and operation of conservation banks. Among the requirements is a management

22. *Id.* at 6-7.

23. *Id.* at 7.

24. *Id.* at 7, 12, 15.

25. *Id.* at 7.

26. *Id.* at 8-9.

27. *Id.* at 8.

28. *Id.*

29. *Id.*

30. *Id.* at 12 (emphasis added).

31. *Id.* at 7.

32. *Id.* at 2.

33. *Id.* at 10, 14.

34. *Id.* at 14.

35. *Id.* at 15.

36. *Id.* at 15-18.

37. *Id.* at 15.

plan.<sup>38</sup> The management plan is to identify the actions necessary to achieve the conservation goals of the bank, and provide assurance of long-term funding to manage the bank in perpetuity via an endowment fund.<sup>39</sup> A designated bank manager is responsible for implementing the management plan.<sup>40</sup> Conservation banking agreements must include provisions for remedial action in the event that the bank owner or manager fails to meet obligations specified in the banking agreement.<sup>41</sup>

Consistent with past banking practice, the guidance does not require that a management plan be approved by the FWS before credits become available for sale. For example, the East Plum Creek Conservation Bank was not required to submit a management plan until six months after the effective date of the banking agreement, after 25% of the total credits has already become available. Moreover, for some banks in California, the FWS has reportedly allowed the sale and use of credits in anticipation of signing a banking agreement.

These practices are problematic from a conservation standpoint, though only the latter practice appears to be precluded by the guidance.<sup>42</sup> Mitigation credits represent conservation values that the FWS is confident will be secured at a bank site. Accordingly, credits should not be salable as such until the FWS is assured that the management actions necessary to secure the conservation values represented by the credits will be implemented. To ensure that credits sold are backed by confidence that their conservation value will be maintained at the bank site, the guidance ought to require

approval of a management plan before credits become available for sale.

### Conclusion

While the guidance addresses many key questions, there are others on which it is silent. For example, the guidance applies only to banks established on private, tribal, state, or local lands; it neither addresses nor precludes conservation banks on federal lands.<sup>43</sup> Likewise, it is silent on the question of whether conservation banks can be established outside of the United States to offset impacts to species occurring in the United States. For cross-border species such as the black-capped vireo and California coastal gnatcatcher, habitat beyond U.S. borders may be essential to recovery. Since international banks could offer both a mitigation alternative to U.S. developers and a conservation benefit to species occurring in the United States, the question of their permissibility as a mitigation strategy under the ESA is likely to arise.

By providing greater procedural and substantive clarity to conservation banking, the guidance may increase the use of this new tool. Because some recently approved banks do not appear to conform to the guidance, however, it may raise the bar to such efforts. Properly done, conservation banking offers the potential to improve endangered species conservation, and furnish important incentives for at least some landowners to participate in conservation efforts. It is not a panacea, nor is likely to be perfect, but it does not have to be. If it can accomplish enduring mitigation more successfully than the approach that produced a short-lived fence on a secluded Chesapeake Bay beach, it will be a useful addition to the endangered species conservation toolbox.

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38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 18.

42. *See id.* at 15.

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43. *Id.* at 6.