Ecological Restoration Business Association

Growth Through Resilient Environmental Solutions

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To: U.S. Fish and Wildlife Service, Department of Interior
From: Ecological Restoration Business Association
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Docket No. FWS–HQ–ES–2021–0137

RE: Wildlife and Fisheries; Compensatory Mitigation Mechanisms

The Ecological Restoration Business Association (ERBA) appreciates the opportunity to provide comments to the U.S. Fish and Wildlife Service (the Service) regarding the Advance Notice of Proposed Rule-Making (the Rule) for Compensatory Mitigation Mechanisms (the Notice). ERBA represents companies across the country that establish, monitor and protect wetland, stream, species, water quality, and other environmental offsets under multiple federal and state compliance programs. Our 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. Collectively, ERBA members have worked with Regional Service offices across the country to oversee permitting on hundreds of conservation bank projects encompassing thousands of acres of high-quality habitat and implementation of actions that support species recovery. Additionally, ERBA members have restored hundreds of thousands of acres of wetlands and streams under the more established Clean Water Act (CWA) Section 404 mitigation program.

ERBA strongly supports the Service's development of a comprehensive Rule on compensatory mitigation mechanisms. Mitigation sponsors need regulatory certainty and predictability to invest at scale in accountable, measurable outcomes for protected species. This rulemaking presents a critical opportunity to provide that predictability and logically advance the currently variable state of species mitigation offsets. To date the Service has produced several important current and prior species mitigation policies, notably the 2003 Guidance for the Establishment, Use, and Operation of Conservation Banks, which paved the way for our industry and the Service to collaborate on development of existing successful conservation banking efforts in certain regions of the country. We recognize and applaud the Service's leadership and good work on these policies to date. As detailed in our comments below, ERBA urges the Service to now elevate several thoughtful concepts from prior policies to provisions of the forthcoming Rule.

Federal mitigation policies that establish measurable performance standards, specific timelines for agency review and approval, and equivalent requirements for all mitigation mechanisms are critical to responsible development and incentivizing private investment in environmental markets. For example, the 2008 Compensatory Mitigation Rule (the 2008 Rule) has been a success story for wetland and stream resources, as well as for regulators, practitioners, and permittees who benefit from the durability and predictability of established regulation. This regulatory certainty continues to attract significant investment in the CWA 404-mitigation sector, evidenced by the fact that mitigation credits have grown by 120% in the decade since the 2008 Rule's promulgation.

The forthcoming Rule will provide similar benefits to those we've seen under the 2008 Rule: protected species will benefit from measurable, accountable ecological outcomes held to high standards; mitigation providers will benefit from regulatory certainty and consistency; and, as noted by Service Director Martha Williams, the regulated community will benefit from greater efficiency and predictability in species conservation banking, plus the greater availability of reliable conservation banking credits for shovel-ready infrastructure. However, limiting the forthcoming Rule to establish standards and requirements that are only applicable to conservation banks, rather than all mechanisms of compliant mitigation, will undercut the realization of these benefits.

ERBA recommends that the Service establish standards for all mitigation mechanisms to fulfill the NDAA directive to "maximize available credits and opportunities for mitigation" and "provide flexibility" for various species. A comprehensive Rule applicable to all compensatory mitigation mechanism also builds on the Service's mitigation framework laid out in prior policies and guidance, which addressed Permittee-Responsible Mitigation (PRM), ILFs, Habitat Conservation Plans (HCPs), and Conservation Candidate Agreement with Assurances (CCAAs). As discussed further below, this comprehensive approach is essential to achieving implementation of equivalent standards across mitigation mechanisms.

ERBA's comments are organized by the Service's six questions, and within our longer question responses we include subheadings to highlight key recommendations. We also enclose an Appendix of suggested rule language on key provisions. ERBA provides this language to offer as much specificity and clarity as possible on our recommendations and answer the Service's request for input on the appropriate "level of detail" in the proposed Rule. Our primary recommendations on provisions essential for the Service to include in the Rule are:

- General requirements, applicable to all offset mechanisms, that establish baseline requirements on landscape-scale planning, offset type, siting, service area, site protection, management, monitoring, methodology to calculate offsets (debits and credits), and long-term management funding;
- Requirement for all offset projects to be established via an instrument that outlines the roles and responsibilities of the parties and describes the offset project's conservation objectives, site selection, site protection instrument, baseline information, work plan, credit evaluation, credit management and accounting processes, interim management plan, performance standards, monitoring requirements, long-term management plan, adaptive management plan, financial assurances, and service area;
- Concept and process for development of species-specific Offset Standards for certain species;
- Advance preference hierarchy, to be implemented through an advance mitigation timeline;
- Tests and requirements for durability and additionality that are applicable to all offset projects, whether sited on private and public lands.

Note on Terminology Recommendations

"Mitigation" has multiple meanings across environmental programs. In some instances mitigation is understood as the NEPA five step sequence, often condensed to avoidance, minimization, and compensation; this last step is sometimes referred to as "compensatory mitigation" or simply "mitigation." This broad and variegated use of the term "mitigation" facilitates a blurred understanding and implementation of the mitigation sequence. Practitioners have seen some instances where actions that are best characterized as "minimization" are considered as "mitigation," when really the impact warrants compensation or compensatory mitigation.

While "compensatory mitigation" or "compensation" is a defined term in the 2017 Interim Guidance, the overlap in the use of the term mitigation still results in confusion. To avoid confusion and bring clarity to requirements and implementation, ERBA recommends consistent use of "offset" as a defined term meaning habitat-based compensatory mitigation or compensation. ERBA also recommends more specific rather than interchangeable references to mitigation (versus the mitigation sequence and/or mitigation hierarchy) in the Rule and future species mitigation glossaries and policies.

The Notice seems to use both "form" and "mechanism" as terms to reference the various models to deliver offsets (i.e. conservation banks, ILFs, and PRM). ERBA recommends that the Service use the term "mechanism" or offset mechanism in the Rule to refer to the different delivery mechanisms for acceptable compensatory mitigation. This reference is also consistent with references to mitigation banks, ILFs, and PRMs in the final preamble to the 2008 Rule. In this letter, ERBA uses the term mechanism to refer to the different offset delivery vehicles, mitigation bank to refer to CWA 404 banks, and conservation banks to refer to existing species offset banks and those to be developed under the forthcoming Rule.

I. 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?

Equivalency is an essential principle for investment in an environmental market. Investment is hampered by inconsistent application of regulatory requirements and standards across mitigation mechanisms. Investors seek marketplace fairness where all restoration sponsors and project mechanisms are treated with equal application of law and policy for predictable outcomes. Equivalency helps to create clarity and consistency for mitigation providers and thus incentivizes investment in high quality mitigation by alleviating potential competitive disadvantages based on higher risk mitigation projects[1]. The 2016 Endangered Species Act Compensatory Mitigation Policy (ESA CM Policy) reflected the Service's understanding of the need for equivalent standards across mechanisms.[2] While the 2016 ESA CM Policy was rescinded in 2018, the equivalency provisions of that Policy are still germane and the current Rulemaking presents an opportunity to now require, rather than just recommend, those equivalent standards.

To ensure the proposed Rule requires consistent application of equivalent standards across all mechanisms of compensatory mitigation, ERBA recommends that the Rule establish provisions on i) a species-specific Offset Standard that publishes permissible offset actions for certain protected species, ii) general requirements for all offset mechanisms, iii) instruments to implement equal enforcements of requirements and standards across offset mechanisms, and iv) an advance mitigation preference. We discuss the need for each of these provisions below and include recommended language for each provision in the Appendix.

i) The Species-Specific Offset Standard

Under current practice, the Service approves mitigation measures for applicants, often on an ad-hoc basis, through various decision documents—conservation banking agreements (or instruments, as we prefer), HCPs, CCAAs, and 4(d) rules. In each separate document the required standards for species conservation and impacts are independently defined and often are not equivalent. Such inequality in requirements precludes price discovery of what an effective and durable mitigation offset requires to benefit the resource and distorts mitigation markets' incentives and effectiveness. In general, higher standards require more planning, monitoring and maintenance to meet performance requirements, thus necessitating greater early-stage financial investment.

Almost invariably in compliance markets, developers (including government-funded projects) prefer the fastest and lowest-cost offsets available, which often have the greatest ecological risk. Under a PRM mitigation approach, the applicant or PRM sponsor proposes an offset project that is applied to a permit immediately, before the ecological outcomes are realized, which leaves some risk of failure on the public agency approving the project. Contrast with a bank approach, under which the bank sponsor assumes all

[1] Which are often based on unproven or known to fail mitigation designs, or non-mitigation based systems such as subsidy approaches like those seen under the Farm Bill (see examples with the Lesser-Prairie Chicken, Dunes Sagebrush Lizard, and Golden-Cheeked Warbler).

[2] Section 5 of the 2016 ESA CMP stated: "The compensatory mitigation standards apply to all compensatory mechanisms (i.e., permittee-responsible mitigation, conservation banks, in-lieu-fee programs, etc.) and all mechanisms of compensatory mitigation (i.e., restoration, preservation, establishment, and enhancement) approved by the Service."

the performance risk and must meet ecological success criteria before the bulk of their credits are available for sale and application to permits. This disparity in risk typically results in a higher cost for bank credits versus PRM solutions. Applicants' preference for the lower cost option can lead to lower-standard programs dominating a given market, potentially slowing progress towards species conservation, even ultimately recovery, and discouraging private investment.

Consider the mixed results following the Service's recent administration of species markets and the standards. For the American burying beetle, the Service issued performance requirements as guidance applicable to all offsets. Investment quickly followed to deliver those performance outcomes, which contributed to the species' recovery, and in turn assisted in ultimately downlisting the species. In contrast, for the lesser-prairie chicken, the Service issued costlier and more beneficial performance requirements for conservation banks, but separately approved CCAAs with cheaper and less beneficial requirements that were largely based on a Farm Bill program. Offsets were secured from the least-cost programs, which provided little ecological value to the species, and undermined progress towards the species' recovery, or even menial progress towards the CCAA's sponsors own range wide conservation goals, ultimately contributing to the Service's re-listing proposal for the lesser-prairie chicken.

To avoid these inequalities, ERBA recommends that the proposed Rule establish a requirement and a process for development of a species-specific offset standard applicable to all permissible offset mechanisms for a given specific species or community of species (the Offset Standard). This can be done in the form of guidance that informs the Service's decision process for Section 7 consultations or Section 10 plans and permits. The instances when the species-specific Offset Standard will be necessary are limited, but, when applicable, the standard will be essential to incentivizing investment in offsets for those species. The Offset Standard is intended as a tool to be utilized in a limited number of cases where species are habitat limited, impacts are numerous, and the Service is experiencing, or anticipates experiencing, time and resource constraints providing consultations and authorizations. By establishing species-specific requirements for offset programs and projects, the Offset Standard is intended to produce regulatory efficiencies in two principal ways: 1) streamlining the Service's review and approval of applicant proposed offset strategies; and 2) increasing available offset inventories. ERBA expects the number of species requiring an Offset Standard to be relatively low. In general, the Offset Standard is best utilized for species that have a broad distribution or range and are subject to numerous direct or indirect impacts resulting in habitat loss or degradation.

The Offset Standard should inform the Service's decisions relative to all subsequent plans, permits and consultations for the subject species. As species-specific science advances and conservation objectives evolve, the Offset Standard should be updated from time to time to incorporate the best available science, thereby improving the efficacy of mitigation programs. To give species the best chance at recovery, all mitigation mechanisms should be held to updated standards following their issuance.

ERBA recognizes that a requirement for mitigation to comply with updated standards issued after project approval raises obvious concerns and challenges with respect to the Service's historic use of the "no surprises clause." An additional concern is that rapid changes to standards can discourage investment by creating uncertainty with respect to future conservation costs and credit revenue expectations, potentially affecting a species' opportunity for recovery. The Rule should balance the need to adaptively manage conservation efforts with the conservation market's need for regulatory predictability. Therefore, some grandfathering of offset projects and programs is imperative to maintain private investment. Grandfathering can be limited by using phase-in periods, ratios creating equivalence between newer and older standards, and other modifications of credit use (e.g., keeping preference for

restoration-based credits over preservation) that do not undermine the value of investments made under previous standards. In other words, grandfathering limitations should ensure market stability but also accommodate the evolving needs of a species' recovery and conservation goals. We suggest that standards be updated along with five-year species status reviews.

Our recommended language in the Appendix illustrates the level of detail that we believe is necessary to ensure clarity, direction, and consistency in the process to develop species-specific Offset Standards. The process is also intended to provide for expert input and reasonable notice to conservation sponsors and applicants. The Service may decide that such process details are better fit for guidance rather than a Rule because within a guidance document the process could be more readily modified as needed to address feasibility concerns. At a minimum ERBA recommends that the Rule include a provision on i) the concept of a species-specific Offset Standard, ii) the instances when an Offset Standard must be developed and applied, and iii) the purpose and importance of a species-specific Offset Standard to ensure equivalency across the conservation values generated by different permissible mitigation actions and mechanisms of mitigation to offset impacts to a specific species.

ii) General Requirements for all mitigation mechanisms.

While the conservation of species involves a broad range of ecological as well as socioeconomic actions, the most valuable conservation actions ensure ecosystem processes, functions and structure are maintained so that the species may persist.[3] Because the ESA calls out ecosystems for conservation protection and because habitat is commonly the limiting factor for most protected species, the Rule should incorporate the following three key concepts to incentivize investment in habitat-based offsets: i) prioritize strategic habitat protection and enhancement; ii) establish a Landscape-Scale Conservation framework, and iii) ensure the values achieved from species conservation measures are durable (discussed more in Question 2 below).

ERBA recommends that the Rule include an opening general requirements section that establishes up front several essential elements to be required of all mechanisms for effective habitat-based offsets. At a minimum this section should require that all mechanisms adhere to equivalency in: landscape-scale planning, offset type, siting, service area, site protection, management, monitoring, methodology to calculate offsets (debits and credits), and long-term management funding.[4] Each of these elements are covered in ERBA's recommended Rule language in the Appendix and explained below. Critically, the General Requirements must apply to all mitigation mechanisms, including the offset credits considered acceptable under a CCA and/or HCP. Mechanisms like CCAs and HCPs should be directed towards available, advance conservation bank offset credits developed in accordance with the Rule and species-specific Offset Standard as preferred offsets.

Prioritizing habitat protection and enhancement
Generally, species need a given amount of land area with the necessary ecosystem attributes to find enough resources to maintain viable populations. Once the area of available habitat goes below a

[3] Indeed, the Endangered Species Act (ESA) of 1973 Act (16 U.S.C. 1531 et seq.), as amended, clearly articulates the purposes of the ESA: "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species."
[4] This approach would also mirror the 2008 Rule's organization and opening section at 33 CFR § 332.3 - General compensatory mitigation requirements.

certain threshold, populations are no longer viable and species are locally extirpated. Area loss also contributes to fragmentation of the remaining habitat patches and the populations within them. Patches of pristine habitat may become isolated by a "matrix" of inhospitable areas, which limits movement between the habitat areas. This loss and fragmentation may further affect biodiversity inside remaining patches through "edge effects," e.g. there may be abrupt changes in species abundance at the edges.

The importance of conserving habitat for imperiled species has been recognized since the first federal endangered species legislation. The stated purposes of the current ESA are to conserve endangered species "and the ecosystems on which they depend" (16 U.S.C. 1531), a clear mandate linking successful conservation of species to the habitats that they require. Considering the science and legal authority focused on habitats and the ecosystems they comprise, the Rule should focus on habitat-based offsets as the preferred offset in the absence of a scientific imperative otherwise. And, considering the often greater value private lands offer for species conservation outcomes,[5] the Rule should require that the Service conduct a rigorous, publicly available analysis on the eligibility of public lands for habitat-based offsets prior to approving an offset project sited on public lands.

Landscape-Scale Conservation

While not all species require expansive landscapes to maintain healthy and viable populations, all species need adequate habitat at a scale for their respective biological requirements and for their role and function in ecosystems. To this end, when implementing conservation strategies, significant consideration must be given to the spatial needs of the species at their respective landscape scale. Currently, species conservation strategies often do not meet desired conservation goals because they focus and fund small scale actions in a "postage stamp," non-strategic, manner across a species' landscape. The USFWS recognized this as far back as 2003 when it published its original mitigation guidance for conservation banks, as well as in its 2016 Service-Wide Mitigation Policy.

For the species in question, the Offset Standard should clearly define Landscape-Scale Conservation habitat objectives that include but are not limited to the following: population goals across the range and for sub-sectors/distinct populations in the range if applicable, criteria for establishing strongholds to protect existing populations, habitat restoration goals by offset type, methods by which conservation progress towards these and other relevant goals will be measured over time, and adaptive management triggers if the goals are not being achieved. When assessing habitat needs of a species under a landscape-scale conservation framework, the Service should account for resiliency, redundancy, and representation.

Description of Durable Conservation Measures

Measures taken to offset impacts to species must exist for a long time, typically perpetuity or the life of the impact, without significant deterioration in quality or value. To this end, a long-term or perpetual commitment of adequate stewardship is required for species conservation measures to be durable.

Description of Stewardship & Perpetual Stewardship

Stewardship is the wise use, management, and protection of the human, physical, ecological, and financial resources needed to ensure the integrity of conservation lands for future generations. In this light, stewardship is a more encompassing term with broader, long-term implications than habitat management or restoration. Perpetual stewardship, when applied to an Offset Project, also means the legal defense

[5] See discussion under Question II on private vs. public lands for conservation within the context of durability and additionally concerns, and Question VI.

and compliance monitoring of the Offset Project's real property site and/or conservation easement. Management and monitoring can include, but is not limited to, insurance, site construction, biotic surveys, habitat restoration, habitat maintenance, water management, public services, infrastructure maintenance, reporting, office maintenance, field equipment, and operations. Models used to determine stewardship levels should be specified in a species-specific Offset standard in order to avoid gaming between different stewardship models currently available or proprietary models developed by mitigation and developer project proponents.

Description of Service Area
The service area for Offset Projects shall be developed and based primarily upon the ecology of the species including the current and historic range, genetic distinctness, connectivity, habitat requirements, and conservation goals, to assure a well distributed population and long-term viability. Additionally, secondary criteria for establishment of service areas may be desirable to incentivize private investment in habitat restoration and/or preservation, for example, when species distribution is fragmented by human caused barriers like urban development, reservoirs, and highways. A preference for developing service areas is to keep species conservation close to impacts and to maintain populations locally. However, the service area should be established to incentivize restoration and/or preservation of habitats within the species historical range with a goal to reestablish the functional components of the species habitat at a landscape scale. This will require ensuring the protection of high-quality habitats, often away from the impact site. Generally, service area designations should enhance the conservation of species while addressing the statutory and regulatory mechanisms.

iii) Instrument Elements.

Mitigation projects and programs can have exceptionally long-life cycles, extending well beyond the careers of Service and sponsor personnel. Careful attention must be paid to the content and clauses of agreements, or Instruments as they are commonly called, because they form the basis for evaluating project compliance and long-term ecological success. Therefore, instruments are indispensable tools for ensuring equivalencies for all mechanisms of mitigation. If instrument standards are consistent across all mitigation mechanisms, then private conservation investment ahead of impacts is more likely to occur. If instrument requirements are not consistent, investment will likely be chilled by concerns that lower-standard, lower-cost offsets will become the overwhelming preference for compliance. Such a scenario disadvantages advance offset sponsors, but more importantly, it disadvantages species' recoveries and conservation.

Consequently, any equivalency standards need to be anchored in an instrument to compel compliance. This is ERBA's core recommendation: require in the Rule that all offsets, regardless of mechanism, be established through an instrument or project specific authorization that sets forth the specific roles and responsibilities of the parties. The 2017 Implementation Guidance contained detailed recommendations on Instruments for all mechanisms (see Section 5). An approach to equivalency through instrument requirements has proven to be effective under the 2008 Rule. We strongly recommend that the Service repurpose applicable elements of Section 5 of the 2017 Implementation Guidance, along with relevant language from Sections 332.4 and 332.8 of the 2008 Rule, as the basis for provisions on Instrument requirements in the Rule. Our recommended rule language on instrument requirements in the Appendix is primarily based on the 2017 Implementation Guidance and the 2008 Rule. Critically, the Rule must require that all instruments include the following elements: conservation objectives, site selection, site protection instrument, baseline information, offset work plan, credit evaluation (including methodology to calculate debits and credits), credit management and accounting

processes, interim management plan, performance standards, monitoring requirements, long-term management plan, adaptive management plan, financial assurances, and service area.

We also recommend that the Rule establish a review process and accountable approval timeline for Instruments. Years of experience have taught us that while unforeseen delays often happen in the bank establishment process the agencies and sponsors need to have clear expectations at the outset as a basis for a shared schedule. We recommend establishing specific timelines for mitigation bank establishment that track with those of the 2008 Rule (see Question V). Our industry has found that those bank establishment timelines, while not perfect, establish reasonable expectations for all parties and provide standards against which progress can be measured. Additionally, joint wetland/conservation banks are becoming more common and a single standard for timely review is one way to meet the NDAA directive to "maximize available credits." Understanding that mandatory timelines create staffing needs, we are separately advocating for an increase in Service funding and where appropriate the Rule may contemplate the option of the Service receiving supplemental funding to support the program (see also our recommended language on the Offset Standard).

iv) Advance Mitigation Preference.

A cause of non-equivalency is the fact that conservation and mitigation bank credits are released at staggered intervals versus PRM that essentially receives all "credits" upfront since PRM can provide mitigation compliance upon approval even prior to construction. This leads to applicants often favoring PRM as the quick mitigation compliance solution instead of waiting for the approval and release of bank credits, despite the bank already meeting construction and ecological performance standards. To address this inequality and incentivize investment in the most beneficial advance mitigation measures, ERBA recommends that the Rule establish a preference structure for advance mitigation using a timeline to evaluate a mitigation project's advanced status.

Benefits of Advance Offsets

Advance offsets eliminate temporal loss, reduce risk of project failure, increase certainty that ecological performance standards will be met, and allow maximum planning time and compliance flexibility for sponsors. For these reasons, when habitat is the limiting factor for a protected species, the Service should give explicit preference to conservation strategies that are implemented in advance of actions that adversely impact the species or critical habitat in question. As we've seen in the Clean Water Act (CWA) mitigation market, clear preferences for advance mitigation have encouraged significant private investment in conservation projects meeting regulatory objectives ahead of anticipated needs.[6] Similarly, in the context of the ESA, an explicit advance preference will provide many protected and candidate species with the highest conservation value and best chances of recovery by providing financial incentives for species conservation ahead of impacts. We therefore recommend the Service use the forthcoming Rule as an opportunity to codify an advance offset preference.[7]

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[6] See §332.3; see also Doyle, Martin. "This Little Known Industry Restores Our Environment and Bolsters Our Economy." Inside Sources, Sept. 10, 2020. Available at: https://www.insidesources.com/this-little-known-industry-restores-our-environment-and-bolsters-our-economy/. Recent interviews of a sample of leading industry firms reveals that they collectively invested more than $1B over the past 5 years in restoration projects.

[7] ERBA supported the advance preference previously articulated in Section 6.1.2 of the 2016 ESA-CMP. We urge the Service to now take a step further by i) firmly establishing the preference in rule, rather than guidance, language and ii) providing a transparent decision-making process for implementation.

Historically, the Service has worked within a process to consider various conservation strategies under its ESA Section 7 and 10 authorities. While there are many success stories, there are also avoidable missed opportunities for better conservation. In some cases, regulatory decisions (e.g. HCPs, CCAAs, and/or Section 7 Consultations) inadvertently created de facto preferences for impact-offset requirements that were limited to PRM, even though approved conservation banks were available in the same geographic region and offered significant advanced conservation value. PRM typically appears to be a cheaper compliance option[8], but often times at a lower quality mitigation site due to the design price bias of the applicant and their consultant. These outcomes disincentivize use of conservation banks and, consequently, investment in the advance mitigation benefits that conservation banks provide.

- *The Service should use the Offset Standard to guide its advance preference determinations*.

As recommended above, the Rule should codify a requirement for and process by which species-specific Offset requirements are developed and published by the Service. These requirements should then be used by the Service with respect to the establishment and use of offset projects associated with all Section 10 authorizations and Section 7 consultations moving forward. ERBA recommends that the Rule state that the Offset Standard shall be incorporated in all subsequent Section 10 authorizations and Section 7 consultations. Based on the best available science as well as existing recovery plans and other relevant conservation planning tools and documents, the Offset Standard should establish various offset preferences. As examples, the Offset Standard could require offsets be provided in specific proportions of restoration and preservation, prescribe ratios relative to impact and offset locations, etc.

Depending on the needs of the species, certain Offsets Types (e.g., restoration) may be more beneficial to a species than other Offset Types (e.g., preservation), and this hierarchy should be prescribed within the Offset Standard. If the advance preference is not implemented with respect to Offset Standard requirements where restoration offsets are preferred, for instance, preservation is likely to become the predominant Offset Type in most areas—as preservation offsets, relative to restoration, will more quickly advance from establishment to long-term management and are typically lower cost. Therefore, to maximize species' conservation, and thereby comply with the Offset Standard requirements, the advance preference should be implemented separately for each required Offset Type.

- *Define the advance stages of an offset project through use of the advance offset timeline.*

We recommend the Service use the Timeline shown in the Appendix to articulate an advance offset preference and process to evaluate an offset project's "advanced" stage or status. Below we describe chronological stages with examples of the type of administrative or ecological milestones that would define each stage. We introduce the term "Released Offsets," which are bank or in-lieu fee (ILF) offsets made available for transfer or sale by the Service once the sponsor has met pre-determined performance milestones. The definitions for each stage below may be further refined in the species-specific Offset Standard, particularly for the Offset Types permissible for the specific species.

Stage 1 (Approval): Bank/ILF Instrument and/or Parcel (under a programmatic agreement) has been approved. Land control has been confirmed.

Stage 2 (Offset Project Establishment): Some administrative milestones have been met. Conservation easement (or requisite site protection instrument) has been executed, recorded and is in full effect, and

[8] However, if held to equivalent standards then PRM may not be the cheaper compliance option when considering the economies of scale associated with larger bank sites. Higher ratios for PRM due to temporal loss would also affect costs comparisons between the compliance options.

financial assurances have been fully funded for the interim and long-term management period. Released Offsets become available at this stage for banks.

Stage 3 (Interim Management): Some ecological milestones may have been achieved. Year 1 work has been completed (e.g., invasive plants removed, required infrastructure installed, impacting infrastructure removed, earthwork completed) and as-built certification has been approved. All monitoring obligations are being met. If under a restoration offset plan, project receives additional tranche(s) of Released Offsets.

Stage 4 (Long Term Management): All outstanding administrative and ecological milestones have been met. Ongoing monitoring and maintenance demonstrate that ecological performance standards are continuing to be met. Long-term management account is fully funded. Project receives the final tranche of Released Offsets.

- *The Service needs flexibility to make decisions when advance offsets are not available*.

As the advance preference implies, Released Offsets are preferable to any offset projects implemented concurrently with impacts. However, the Service and Applicants must be afforded flexibility when advance conservation is not possible or practicable from a project timing standpoint. To accommodate this, preference decisions should work in a stepwise manner. The Service should implement the preference in the following order: i) first directing Applicants to the most advanced (e.g., in Stage 4 vs Stage 2) offsets for each Offset Type, ii) if no offsets of the preferred type are available, then directing Applicants to the most advanced offsets of other Offset Types (higher ratios may apply); and iii) if no advance offsets of any Offset Type are available, the Service should consider the best available alternative for the species in priority of In-lieu fee programs and secondly PRM or the early release of offsets from low-risk projects with preferable Offset Types. Ideally, these alternatives will be addressed within the applicable Offset Standard.

v) Other Factors to Consider for Equivalency: Service Areas and Ratios

While the above four recommendations will often be sufficient to ensure equivalency across mitigation mechanisms, scenarios are likely to arise that will require additional measures such as Service Area adjustments and offset ratios. Traditionally offset ratios have been a frequently used tool for the Service for multiple different purposes.[9] The adjustment of ratios should be considered as one of the principal tools for addressing risk and/or temporal loss when a preferred offset is unavailable. For example, ratios may be used to adjust for temporal loss when the only available offset option is less advanced (such as a PRM project that allows for temporal lag between impact and offset) than the preferred type (such as a Released Offsets from a conservation bank). In another example, ratios may be applied to a scenario where the only available offsets were generated using a method that has a lower likelihood of success (e.g., restoration of agricultural field) than the Service's preferred Offset Type (e.g., removal of woody species encroachment within otherwise intact, native rangeland). When such determinations are reached, they should be included in any Section 7 Biological Opinion or authorizations under Section 10.

Differing Service Area treatments, or case-by-case exceptions to Service Areas, have created advantages or disadvantages within offset markets. Therefore, careful consideration is needed in circumstances requiring the Service to adjust ratios or make exceptions to Service Areas for offset transactions. To this end, the Service's flexibility with respect to ratios or Service Area exceptions should be defined within the applicable Offset Standard. The Offset Standard provides an analysis and decision-making process

[9] See section 8.4 of the 2017 Interim Guidance, which covers ratios well.

that is transparent, reasonable, and scientifically justified, as well as consistent with applicable laws and regulations.

As the Service Area represents access to the market, this single element within instruments can have dramatic effects on an Offset Project or program's competitive position within a particular market. Put simply, a larger Service Area provides greater opportunity to provide offsets than a smaller Service Area. The Offset Standard requires a Service Area determination to be established for all Offset Projects associated with a given species. However, that Service Area determination can be flexible if in the best interest of the species, but that flexibility must be limited and carefully defined to avoid disincentivizing the use of a preferred Offset Type.

Take the following as an example of how this flexibility can be misapplied if not carefully considered and defined. In this hypothetical case, an offset standard establishes a preference for the restoration of winter foraging habitat, which the Service considers critical. The Service approves a conservation bank that restores degraded winter foraging habitat and agrees to the standard Service Area treatment for the bank (i.e., no exception in this case). However, the Service separately approves a different restoration bank, comprised of less critical summer breeding habitat. The sponsor of this second bank requests an expanded Service Area treatment, as the bank is sited in an area under high development pressure and therefore higher real estate costs. The Service must be careful in these cases, not to approve exceptions that might undermine the Offset Standard's objectives—i.e., the conservation objectives. An expanded Service Area in this case would potentially create a competitive advantage for the less critical habitat, which disadvantages the species' conservation and discourages investment in the habitat needed most.

Instead, the appropriate use of Service Area exceptions would be when it provides further incentives for the conservation of habitat determined the most critical. That is, the first bank in this example is more qualified for an expanded Service Area than the second. A general rule of thumb should be: if the habitat is of the highest value to the species and is rare, it's conservation should be given every incentive possible. Such incentives potentially include broader service treatment, including secondary service areas, accelerated credit releases, and explicit preferences for the use of these offsets when and where available.

vi) Note on Equivalence in Mitigation Costs on Public and Private Lands.

The costs of mitigation can vary greatly between public and private lands. Mitigation typically costs the sponsor less when sited on public lands than private land, especially if the sponsor is a public agency with access to the public land at a lower cost than market price private land. Rather than trying to create equivalency in the costs of mitigation on public and private lands, we recommend that the Service focus on ensuring equivalency in enforcement of standards and ecological outcomes, regardless of whether a mitigation project is sited on public or private lands. Concerns with underlying land costs are outside the scope of issues for the Service to address in this rulemaking. Instead, the Service should focus on ensuring equivalency in additionality and durability standards for public and private land mitigation, discussed more in the next Question. ERBA recommends that the Rule establish requirements for all mitigation projects to have a real estate site protection instrument, short term and long-term financial assurances, and adaptive and long-term management planning memorialized in an Instrument between the Sponsor and the Service (see subsections (ii) and (iii) above). The Instrument's provisions on financial assurances should be required to include a full accounting of costs to implement and maintain the ecological performance of the mitigation site.

We refer the Service to ERBA's Question 6 response below for more recommendations on public lands mitigation. Generally, public lands should only be eligible for mitigation of impacts on private lands when public lands offer the subject species habitat benefits that cannot be found on available private lands. The Service should conduct a formal review of public versus private lands availability prior to approving a proposal for public lands mitigation by a project proponent or government agency.

II. 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?

On a Durability Standard:

Qualifying mitigation options must all be durable, which necessitates requirements for i) perpetual site protection that prohibits incompatible uses for the species (e.g. conservation easement), ii) long term management plans for perpetual site stewardship, and iii) full funding of a long-term management endowment or equivalent mechanism sufficient to assure management, repair and monitoring expenses in perpetuity. Regarding site protection, the mitigation measures on specific land or aquatic parcels must remain in place for at least as long as the associated take of that species or community. In most cases this means perpetuity, but in limited cases it may be shorter, so long as the mechanisms are backed by sufficient legal and financial assurances.

Several site protection instruments have inherent limitations that do not sufficiently meet the durability standard of perpetual site protection. Lease agreements, conservation management agreements, and other variations of public lands agreements by definition do not quality as permanent and thus lands subject to those legal instruments should generally be precluded from eligibility for mitigation. Mitigation on public lands should be permissible in limited instances for species-based reasons: i) when used to offset an impact on public lands in the absence of available private lands for mitigation and the durability and additionality principles are sufficiently met, and ii) when specific identified tracts of public land offer a scientifically-verified unique habitat value to the subject species (e.g. a certain flyway habitat for migratory birds or a species' last remaining population is located on public lands). Even in these circumstances, durability concerns should prevail as a deciding factor; while a tract of public land may offer a species unique habitat, that value is diminished if the land cannot be adequately protected in perpetuity to satisfy the durability principle. As detailed below, proposals for public lands mitigation should first be subject to a formal Service review that assesses the justification for use of public lands over private lands. We refer to our recommendation on a public lands formal review process in Question 6 below for more details on when public lands are eligible to offset permanent impacts.

The three elements of site protection, long-term management planning, and qualified endowment or trust should be required for all mitigation mechanisms and memorialized in a corresponding instrument governing implementation and Service oversight of the mitigation mechanism. We reference our recommended language in the Appendix on Durability under General Requirements 1.2(d) and Instrument (b)(2)(iii) and (xiii) as illustrative of the level of detail necessary to ensure equivalent standards for durability across mitigation mechanisms. To further incentivize adherence to the durability standard, ERBA also recommends that the Service condition liability transfer from applicant to mitigation sponsor on meeting these two durability requirements. Liability should not transfer for temporary offsets that fail to offset for the life of the applicant's impact.

Intrinsic to these durability requirements is that mitigation is habitat-based, meaning that permissible mitigation mechanisms provide a direct, quantifiable conservation benefit for the species on specified areas of the species' land or water habitat type. Durability as a mitigation qualification excludes some actions currently accepted as mitigation and raises the bar on other practices. Unless allowed in a species-specific Offset Standard, measures that are not habitat-based should not be accepted as mitigation. Research of a species should not act as a qualifying mitigation substitute for on the ground habitat preservation or improvement. Research should only be a component of mitigation if

pursued in conjunction with and complementary to habitat-based mitigation activities or in other special, limited circumstances (e.g. white nose syndrome in bats) acknowledged in the species-specific Offset standard.

Beyond the mitigation sponsor, the landowner, conservation easement holder, and long-term stewardship partner are critical entities for implementing a mitigation mechanism's durability requirements.[10] Currently, conservation offset sponsors are subject to varying criteria across Service Regional offices regarding permissible conservation easement holders and land trusts. In one instance the Service requested that a sponsor only partner with a Land Trust Alliance (LTA) accredited land trust, but none of the LTA accredited land trusts operating in the same footprint as the proposed mitigation were willing to take on the role. This has resulted in the sponsor having to go through a long process to identify and propose a separate conservation easement holder and long-term stewardship sponsor. ERBA recommends that the forthcoming Rule establish a preference hierarchy for the Service and mitigation sponsors on how willing easement holders and long-term stewardship sponsor options will be evaluated by the Service. Codifying this analysis will provide mitigation sponsors and applicants consistency and predictability on this important element of implementing durability requirements.

In the Appendix's Durability section, ERBA suggests language on a preference hierarchy for site protection entities. Our recommendation is to give first preference to organizations with a primary conservation mission, second to community foundations or other entities with requisite experience and capacity including tribes, and lastly, subject to the Service's judgement, a qualified individual person or business entity. For each of these options, ERBA recommends that the site protection entity adhere to high standards and practices, have the capacity to perform their obligations, and preferably have direct experience. We generally define capacity to mean the organization and staff experience with relevant transactions, fiscal acumen and responsibility, and easement defense. We reference "high performing standards and practices" to mean an understanding of the durability principle and policies to ensure fulfillment of legal and financial site protection obligations. ERBA suggests the following eleven standards as example high standards to inform implementation of the site protection entity preference hierarchy:[11]

1. Entity must have a mission committed to conservation and public benefit.
2. Entity must have policies and procedures to maintain high ethical standards, including in the conduct of their organizational affairs in accordance with their legal and financial responsibilities.
3. Entity must have policies and procedures to fulfill their respective legal requirements as tax exempt organizations and comply with all other applicable laws.
4. Entity must have policies and procedures to avoid or manage real or perceived conflicts of interest.
5. Entity must accept responsibility and be accountable for how they manage their finances and assets.
6. Entity must have sufficient skilled, experienced personnel to carry out their program and contractual obligations, which may be volunteers, employed staff, and/or consultants or contractors.
7. Entity must have a careful diligence process for selection of their conservation projects.
8. Entity must have policies and procedures to diligently to assure land and conservation easement transaction is legally, ethically and technically sound.

[10] See the discussion on Stewardship under General Requirements section within Q1 above.
[11] These were adapted and condensed from the Land Trust Alliance's *Standards and Practices*, revised 2017.

9. Entity must have a review process and criteria to ensure that every charitable gift of land or conservation easements meet federal and state tax law requirements.
10. Entity must have a program of responsible stewardship for their conservation easements, including tracking of funding, baseline documentation reporting, monitoring, fostering landowner relations, enforcing and defending conservation easements, process approvals and permitted rights, and development of a contingency strategy.
11. If all parties (the Service, offset project sponsor, landowner, land trust, and easement holder) agree the conservation easement holder will be responsible for land stewardship/management, the entity must have a program of responsible stewardship for the land held in fee for conservation purposes. The stewardship program should include a long-term management plan and corresponding financing mechanism that provide for regular maintenance, adaptive management, monitoring, and annual reporting to the applicable agencies on site conditions and financial status.

On an Additionality Standard:

Mitigation must add a quantifiable conservation benefit beyond the identified baseline. Incorporating an analysis on additionality into the forthcoming Rule will reward and incentivize mitigation in locations that offer imperiled species the greatest conservation benefit. In short, an additionality test for mitigation mechanisms may be summarized as an analysis on whether the mechanism provides a measurable benefit that would not have been generated but for the ecological outcomes that result from the mechanism. The Service should require that the species-specific Offset standard establish a baseline for the subject species against which additionality analyses can be made. The species-specific Offset standard should also articulate when preservation will meet the additionality standard to qualify as permissible mitigation.

Additionality concerns are typically met when mitigation results in the placement of the following specific assurances on private lands with conservation value: an easement prohibiting incompatible uses with the imperiled species' use, a management plan with established stewardship obligations, and an endowment. Depending on the conservation needs of the species, both preservation and restoration projects may comply with additionality tests if these assurances are in place. The Service should address the respective roles of restoration and preservation in the species' recovery plan, the Offset standard, or other conservation strategy. ERBA recommends that preservation should never supplant a needed restoration component without use of a ratio or other adjustment metric so as to not undercut investment in more expensive offset endeavors to restore new habitat in priority regions. For an example of this balance between restoration and preservation, consider the programmatic consultation for vernal pools that requires both preservation and restoration in prescribed amounts. This conservation strategy ensures that offset projects deliver the benefits of both preservation and restoration for the protected habitat while also meeting the additionality principle.

Mitigation and conservation bankers are uniquely positioned and experienced to provide a set of services using private resources – both land and investment – and often deliver the greatest benefit to species using this suite of private-sector based services. The private land base is diminishing each year, shrinking the availability of private lands for conservation purposes, which increases the value of private lands for species' conservation once that private land is dedicated under a conservation easement. Many public lands are acquired for conservation purposes (e.g. State Wildlife Areas, Waterfowl Habitat Protection Areas, National Wildlife Refuges, National Parks) to specifically provide some conservation benefit. It is difficult to confidently demonstrate that mitigation measures on these public lands will meet the additionally principle, or provide the species an ecological benefit above the existing

baseline.[12] However, public lands specifically designated to generate revenue like State Trust Lands, Bureau of Land Management, and U.S. Forest Service System may be exceptions.

As discussed more under Question 6 and as would be refined in a species-specific Offset Standard, ERBA generally recommends that impacts to species on private lands should only be offset by mitigation on private lands. The only public lands that should be eligible for mitigation of private land impacts are those public lands that i) are clearly available for incompatible development uses (e.g. state trust lands, BLM) and ii) determined, through a Service formal review, to have conservation values unavailable on private lands.

The 2016 Policy and 2016 Service-Wide Policy both made a good effort to address some of these additionality concerns. ERBA supports Section 6.2.2 of the 2016 Policy, stating: "the Service supports compensatory mitigation on public lands… only if additionality is clearly demonstrated and is legally attainable... Offsetting impacts to private lands by locating compensatory mitigation on public lands already designated for conservation purposes generally risks a long-term net loss in landscape capacity to sustain species (i.e., future reduction in the range of the species) by relying increasingly on public lands to serve conservation purposes."

ERBA has also supported the outlined criteria for permissible public lands mitigation for private land impacts, items (a)-(e) detailed in Section 5.7.2 of the Service-Wide Policy. However, item (e) of the criteria presented a concept that warrants development of an analysis standard, otherwise the concept is ripe for varying application: "when private lands suitable for compensatory mitigation are unavailable or are available but do not provide an equivalent or greater contribution towards offsetting the impacts to meet the mitigation planning goal for the evaluation species." ERBA recommends that the Rule articulate specific criteria for analysis of private land availability and that Service be required to publicize their analysis conducted in accordance with the Rule criteria prior to approval of any specific mitigation mechanisms on public lands.

If public documentation (such as the species' listing decision or species-specific Offset standard) identifies habitat loss as a major threat, the Service should incentivize mitigation located on high conservation value lands that are threatened with development, i.e. at risk of adverse modification or degradation, over mitigation proposed on land with a low development threat. A development threat analysis is an especially relevant analysis for projects that are largely preservation in their approach. This concept could be implemented through a policy preference for mitigation on private versus public lands, or a policy preference for mitigation in an imperiled species' last stronghold of habitat within a rapidly developing region versus a mitigation option in a more rural region not subject to development pressures.

These additionality analyses illustrate the value of a species-specific Offset Standard; if a mitigation project demonstrably meets the published objectives of the specific-specific Offset Standard and is implemented with the required assurances, then these further analyses may not be necessary.

[12] Doyle, M. et al. (Feb. 2020) *Compensatory Mitigation on Federal Lands.* Duke Nicholas Institute for Environmental Policy Solutions. https://nicholasinstitute.duke.edu/publications/compensatory-mitigation-federal-lands (see the "Key Findings" section on p.3).

III. How should the rule incorporate monitoring, financial assurances, and public mitigation data tracking to ensure mitigation sites are meeting their performance standards?

As discussed in Question 1, ERBA strongly recommends the Rule open with a "General Requirements" section that outlines prerequisite requirements equally applicable to all offset mechanisms. This section should include provisions on project site monitoring, short term financial assurances, and long term financial mechanisms like an endowment. We recommend that the Rule also require that all offset mechanisms execute an instrument with the Service to memorialize the specific site monitoring and financial assurance terms, and the related performance obligations between the project sponsor and the Service, e.g. monitoring reporting. We refer to our Appendix language on Instrument, Section (b)(2)(xii) and General Considerations, Section (e)(2) and Section (f). These requirements will ensure each offset mechanism is held to transparent, measurable performance standards in an accountable manner that facilitates oversight by the Service and the public.

While the instrument is the necessary and first step to accountability and enforcement of monitoring and financial assurance obligations, public mitigation data tracking facilitates ongoing oversight by casting a public light on mitigation sites' performance and enabling regular performance analyses. Public data availability and ease of accessibility are particularly important considering the Service's limited staff time to devote to vigilant performance analysis and follow up with sponsors. Just as in the 2008 Rule at 33 CFR 332.6, the forthcoming Rule should require the project sponsor to submit regular monitoring reports to the Service and require the Service to make all of those monitoring reports publicly available in a timely manner (e.g. 30 days). Considering that RIBITS is already the leading repository of public mitigation data for 404 mitigation banks, existing conservation banks, and water quality banks, ERBA recommends that the Service also use RIBITS as the primary platform for public data tracking of offset mechanisms' performance. The Service should build on lessons learned from the tracking of 404 banks; for example, allowing sponsors to input updates and credit releases, subject to internal quality control processes by the Service. The Service should also work with peer agencies using RIBITS, namely the Corps, to increase the accessibility and transparency of RIBITS data, such as through improvements to the RIBITS interface, file visibility, and display of site performance and credits per project.

Critically, all offset mechanisms must be subject to the same tracking and reporting requirements, including PRM sites. At all types of offset project sites, performance challenges may inevitably be encountered and necessitate timely action through oversight and collaboration between the Service and offset sponsor. When PRM or other permissible offset mechanisms are not tracked according to the same standards and methods as banks or ILF programs, then species suffer from failing offset measures, the Service is exposed to liability for those failures, and sponsors and applicants are incentivized to invest in the untracked offset mechanism that has lower adaptive management and corrective action costs.

IV. What are the hurdles to bank establishment that are within the FWS' authority to address through regulation?

We recognize the Service has multiple authorities that address mitigation depending on the classification and status of the species and permitting frameworks. Under the ESA, federal agencies and applicants must avoid or minimize impacts to listed species and minimize and mitigate the impacts as "practicable." In some cases the Service has authority to assure "reasonable and prudent" measures are implemented to minimize the impacts of taking a protected species. These minimization measures may include: avoidance, reducing a portion of the taking impact, or offsetting the taking commensurate with the impact.

Third party sponsored offsets can uniquely provide a practical, timely, consistent, and transparent process which enable applicants and the Service to achieve the Service's mission to conserve the species without affecting the timing, scope, and duration of applicant projects. To affirm the Service's authority and the applicant's responsibility to provide mitigation that is commensurate with the impact, ERBA recommends that the Rule clearly state that the use of habitat-based offsets, including timing of when offsets are required, qualify as minimization measures. The Rule, whether in the Preamble or Purpose section, should also discuss the benefits of third party sponsored advanced offsets for providing certainty and expediting the Service's approval process for applicants. ERBA members have worked with applicants to provide offsets that ultimately expedite the Service's permitting process. ERBA recommends that the Rule encourage applicants to proactively pursue conservation minimization measures, including offsets, as a direct way to address impacts early in the planning process and avoid an adverse outcome.

Besides affirming that habitat-based offsets serve as minimization measures and enumerating the benefits of offsets to facilitate a timely and efficient permit process, the Rule also presents a key opportunity for the Service to address several hurdles that deter offset sponsors from proactively investing in large scale off-site conservation banks and undermine incentivize for innovative approaches to conservation. Below we first outline hurdles that may be addressed through regulation, and then second highlight hurdles the Service should also address through policy changes:

Hurdles to Address Through Regulation:

i. Standardization for Consistency and Predictability of Offset Requirements and Review Process.

Bank sponsors take on high amounts of risk and early capital outlay to explore and ultimately establish a conservation bank. ERBA members generally find that the market for conservation banks is currently riskier than the market for mitigation banks due to the lack of nationally standardized regulations and review processes. Shifting standards and requirements for permissible offset projects, and unpredictable timing in the review process, make it difficult for sponsors to invest in new conservation banks. Several members have experienced review processes that go outside the scope of the review stage's purpose and Service's authority, e.g. the common "bring me a rock" anecdote. ERBA recommends that the Rule standardize the requirements for permissible offsets and the review process for conservation banks to offer sponsors consistency and predictability and enable their investment at scale in offset projects. This standardization through regulation will also provide Service staff with greater direction on their review scope and improve their efficiencies and staff time on conservation bank reviews. Our primary recommendations for the Rule to achieve this standardization are the i) need for a species-specific Offset Standard, ii) a General Requirements section applicable to all offset mechanisms, and iii)

requirement that all offset mechanisms memorialize their project obligations in an Instrument that is subject to the Service's review via a standardized process with accountable timelines. We refer to Question I and the Appendix for greater detail on each of these recommendations.

ii. Clarify the requirements and qualifications of easement endowment holders.

ERBA members currently experience varying requirements across Service Regional offices on qualifying entities and structures for long term management and endowment holders. In one instance, the Service required a bank sponsor to partner with an accredited land trust, however out of over 20 such land trusts operating in the bank's region, none of the land trusts were interested and willing to move forward with a formal partnership. Ultimately the bank sponsor had to locate an independent easement holder and separately is partnering with a sponsor for long-term stewardship obligations. The lack of clarity and consistent decision making on qualifying arrangements for long term management results delays bank approval and deters investment. ERBA recommends that the Rule establish a preference hierarchy for stewardship holders to allow for flexibility and predictability by both the bank sponsor and Service when assessing available options for a banks' long-term management. We refer to our recommendation on this preference hierarchy and suggested language under Question II's durability discussion and the Appendix.

iii. Foster consistency across Service field offices in the establishment of baseline criteria for habitat-based offsets as they relate to achieving the ESA's requirements to minimize effects to listed species.

ERBA members have seen inconsistent approaches and standards inform effects analyses applied to listed species. Some field offices do not consider habitat offsets to be legitimate measures to offset the impacts of taking a listed species. This inconsistency makes it difficult to predict the species conservation measures that will be supported by the Service and applicants to offset impacts, even within the range of one species as it crosses field office jurisdictions. ERBA recommends that the Service, in the Rule and potential follow up guidance, clarify the permissible criteria that Service staff should use when analyzing effects and making determinations in biological opinions and permit decisions. Based on our experience with prior examples and a concern for the cumulative effects of impacts to protected species, we recommend that the Service discuss the importance of habitat-based offsets as minimization measures to hedge against incremental impacts scenario for species that results in an eroding baseline for the species.

iv. Other Provisions and Tests needed in Regulation to Incentive Bank Establishment:

- Permissible structures for short term financial assurances (*see* Question 3 and in ERBA's *General Requirements* section of Rule language in the Appendix).
- Clear test and process for evaluating additionality that clarifies when preservation is warranted (*see* Question 2).
- Requirement for all Offset Projects to have an Instrument and the required provisions of an Instrument (*see* Question 1).
- Acknowledgment of the investment risks incurred but greater species benefits produced by advance conservation offset projects in the Rule's Preamble or Purpose section, and justification for the advance timeline that establishes a preference for Released Offsets (*see* Question 1).

Hurdles to Address Through Other Policy Changes:

i. Update the ESA Section 7 Consultation Handbook to Modernize References to Mitigation/Offsets.

The Section 7 handbook (Handbook) is a primary resource provided early on during training of Service Field office staff. This leading treatise has guided Service staff decisions on consultations for over two decades. During that same time, the mitigation industry has greatly matured and specialized to deliver accountable outcomes benefiting protected species via offset projects, as well as the Service's policies and practices on offsets such as issuance of the 2003 Policy and industry collaborations with offset sponsors. Unfortunately, the Handbook does not reflect these positive developments and benefits of offsets for species as well as more efficient Service reviews under the ESA. Multiple references are made in the Handbook that the Service may not require mitigation, despite offsets often being used successfully as minimization measures. These outdated references to mitigation confuse Service staff on the role of offsets and complicate bank establishment. ERBA strongly recommends that in conjunction with the rulemaking, the Service update the Handbook to revise current references to mitigation and reiterate that offset projects qualify as minimization measures.

ii. Increase Training and Education of Service Staff and Partners, and Use of Tools for Standardization in Reviews.

As mentioned above, Service staff across Regions and Field Offices have varying levels of knowledge on the elements of successful offset projects and requirements. ERBA recommends that the Service focus on improving consistency in the institutional knowledge of staff through required trainings, such as the conservation banking course annually held at the National Conservation Training Center. In addition to training of Service staff, ERBA encourages, and is ready and willing to assist, with the education of important potential offset project partners like land trusts so they better understand the offset model and opportunity and are willing to partner with offset sponsors.

To consistently and predictably implement reviews, ERBA recommends that the Service direct development of templates and SOPs guidance on bank instruments, conservation easements, short term financial assurances (bonds, letter-of-credit, escrow accounts), and integration of offset projects with other state and federal laws.

iii. Expand opportunities to provide the Service with additional resources to meet offset review timelines and prioritize updates of recovery actions, plans, and adaptive management.

Like many federal resource agencies, the Service suffers from a lack of resources, staff, and funding to timely implement obligations under the ESA. In the context of other underfunded mitigation programs, ERBA members have seen some improvement with project management and prioritization measures and supplemental funding opportunities (e.g., Section 214 funding for Corps Regulatory operations). ERBA will continue to pursue funding solutions on the legislative front. Still, improvements could be made with reprioritization of existing resources and streamlining the recovery plan development and update process. A 2018 study found that among eligible listed species, nearly one-fourth lacked final recovery plans, half of the plans took over five years to finalize after listing, half of recovery plans are more than 20 years old, and there is significant variation in planning between agencies and among

regions and taxonomic groups.[13] Following issuance of the Rule, recovery plans will take on increasing importance as offset sponsors and the Service rely on the plans to inform offset project investments and the species-specific Offset Standard. ERBA recommends that the Service pursue project management and update performance criteria to elevate recovery plans as a priority for staff time and resources.

[13] Malcom, Jacob & Li, Ya-Wei. (2018). Missing, delayed, and old: The status of ESA recovery plans: MALCOM and LI. Conservation Letters. 11. e12601. 10.1111/conl.12601.

V. How should the rule align with the 2008 Mitigation Rule to ensure compatibility between mitigation and species banks?

ERBA recommends that the Service align their Rule with the 2008 Rule in both substance and process. This alignment will encourage sponsors to develop joint banks and maximize their location of offset projects for the greatest ecological outcomes for both aquatic and protected species resources. The 2008 Rule's general requirements section found at 33 CFR 332.3 has proven effective at establishing the baseline of substantive requirements for all compensatory mitigation mechanisms, and should be mirrored now in the Service's Rule with additions and refinements to account for habitat versus non-habitat based offsets and the Offset Standard. ERBA's recommended General Requirements language found in the Appendix is intended to offer a helpful starting point and consideration for the Service.

On the process front, the Rule should align with the same timelines for IRT review of instruments that is found in the 2008 Rule. These are the timelines that informed ERBA's specific language recommendations in the Appendix on instrument review timelines and justifications for extensions. We recommend mirroring these timelines as closely as possible to provide regulators and sponsors familiarity and predictability with the review process.

Just like the 2008 Rule, the Rule should also give preference to the most advance offset mechanisms to acknowledge the risk undertaken by advance investments and their greater benefit to the species. We refer to our recommendations on an advance offset timeline to match and improve upon the 2008 Rule's preference structure.

The more compatible the Rule and 2008 Rule are in substance and process, the easier it will be for experienced offset sponsors and regulators to build on existing frameworks, expertise, and best practices for successful implementation of the Service Rule. The Service can also foster compatibility between conservation and mitigation banks and incentivize investment in joint banks by working with industry experts and agency peers on joint bank instrument templates and standard operating procedures that facilitate efficient, consistent, and predictable reviews. Besides alignment with the 2008 Rule issued by the Corps and EPA, the Service should also pursue coordination with the National Marine Fisheries Service (NMFS) on offset regulations and policies because applicants are often seeking offset solutions for project impacts subject to the authorities and oversight of both the Service and the NMFS.

VI. How should the Service address potential bank projects on Federal or Tribal lands or other lands with unique ownership considerations and/or some degree of existing protection?

Mitigation bankers are uniquely positioned and experienced to provide ecological services using private resources – both land and investment – and often deliver the greatest benefit to species using this suite of private-sector based services. The private land base is diminishing each year, shrinking the availability of private lands for conservation purposes, and in turn increasing the value of private land for species' habitat needs once that land is dedicated under a conservation easement.

Many public lands are acquired for conservation purposes (e.g. State Wildlife Areas, Waterfowl Habitat Protection Areas, National Wildlife Refuges, National Parks) to specifically provide some conservation benefit. Because these lands already have a conservation purpose, it is difficult to confidently demonstrate that mitigation measures on these types of public lands will meet the additionally principle, i.e. provide the species an ecological benefit above the existing baseline.[14] However, public lands specifically designated to generate revenue like State Trust Lands, Bureau of Land Management, and U.S. Forest Service System may be exceptions and meet the additionality principle. ERBA recommends that the Rule reflect the general concept that impacts to species on private lands should only be offset by mitigation on private lands, and impacts on public lands may only be offset on public lands if those lands are at risk of development, i.e. destruction or adverse modification.

To implement these additionality analyses, ERBA recommends that the Rule require the Service to conduct a rigorous and publicly disclosed analysis on the availability and suitability of private versus public land habitat-based offsets prior to approval of any public lands offset projects. The Service's analysis should only allow public lands to be used for offsets if available private lands do not possess the specific attributes or conservation values that the subject species needs. Structuring the analysis criteria and process in this manner will ensure that the Service is addressing the issues of public lands additionality and full cost accounting up front. We include suggested language on this recommended analysis in General Requirements Section 1.1 of the Appendix.

The 2016 Policy and 2016 Service-Wide Policy both made a good effort to address some of ERBA's public lands concerns. Specifically, ERBA generally supports the outlined criteria for permissible public lands mitigation for private land impacts, items (a)-(e) detailed in Section 5.7.2 of the Service-Wide Policy. However, item (e) of the criteria presented a concept that warrants development of an analysis standard, otherwise the concept is ripe for varying application: "when private lands suitable for compensatory mitigation are unavailable or are available but do not provide an equivalent or greater contribution towards offsetting the impacts to meet the mitigation planning goal for the evaluation species." ERBA recommends that the Rule enumerate the criteria or analysis standard that the Service will use to make determinations on the availability of suitable private land. In the absence of such a required test, the "availability" determination is ripe for subjective and inconsistent application.

ERBA also supports now elevating Section 6.2.2 of the 2016 Policy into the Rule, which section stated: "the Service supports compensatory mitigation on public lands… only if additionality is clearly demonstrated and is legally attainable... Offsetting impacts to private lands by locating compensatory mitigation on public lands already designated for conservation purposes generally risks a long-term net loss in landscape capacity to sustain species (i.e., future reduction in the range of the species) by relying increasingly on public lands to serve conservation purposes."

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[14] Doyle, M. et al. (Feb. 2020) *Compensatory Mitigation on Federal Lands.* Duke Nicholas Institute for Environmental Policy Solutions. https://nicholasinstitute.duke.edu/publications/compensatory-mitigation-federal-lands (see the "Key Findings" section on p.3).

Returning to additionality concerns and utility of the Offset Standard, if public documentation (such as the FWS listing decision or Mitigation Standard) identifies habitat loss as a major threat, the Service should incentivize mitigation located on high conservation value lands that are threatened with risk of destruction or adverse modification over mitigation proposed on land with a low development threat. A development threat analysis is an especially relevant analysis for projects that are largely preservation in their approach. This concept might be implemented through a policy preference for mitigation on private versus public lands, or a policy preference for mitigation in an imperiled species' last stronghold of habitat within a rapidly developing region versus a mitigation option in a more rural region not subject to development pressures.

To summarize: mitigation on public lands should be permissible in limited instances for species-based reasons: i) when used to offset an impact on public lands and the durability and additionality principles are sufficiently met, and ii) when specific identified tracts of public land offer a scientifically-verified unique habitat value to the subject species (e.g. a certain flyway habitat for migratory birds or a species' last remaining population is located on public lands) that the Service determines cannot be provided on available private lands. Even in these circumstances, durability concerns should prevail as a deciding factor; while a tract of public land may offer a species unique habitat, that value is diminished if the land cannot be adequately protected in perpetuity to satisfy the durability principle. Again, offsets on public lands should be held to equivalent standards as private land offsets and subject to a publicly disclosed Service analysis prior to approval.

On the question of tribal lands, ERBA defers to our peer organizations and entities with direct experience and perspective on tribal lands challenges for offsets. Specifically, we highlight the comments of the Environmental Policy Innovation Center (EPIC) recommending that the Rule create a clearer role than past policies for tribes participating in compensatory mitigation:

- With regards to durability and site protection mechanisms, the 2016 ESA mitigation policy noted that "Ensuring durability, particularly site protection, is usually a sensitive issue for a tribal nation because a conservation easement entrusts the land to another entity" (Section 6.2.5). The Rule should respect tribes' status as sovereign governments and allow for alternative site protection options other than conservation easements that provide equivalent durability benefits.
- The Rule should not conflate public lands with tribal lands with regards to additionality. Taxpayers are not paying for conservation and management on tribal lands, a distinctly different situation than public lands. Tribal lands are governed under their own sovereignty with the capability of independently demonstrating additionality within the tribal territory.
- The Rule should include tribal lands when describing: lands eligible for compensatory mitigation, eligible conservation bank or ILF sponsors, and eligible site protection entities.

ERBA Responses In Summary

Thank you for your consideration of ERBA's comments. We value the Service's leadership and work over the years on conservation offset policies that have been foundational to existing conservation bank success stories. We now urge the Service to propose a comprehensive Rule that will apply to all offset mechanisms to advance concepts in prior policies, incentivize increased investment in conservation offsets, provide greater certainty for applicants, and improve outcomes for protected species. In summary, ERBA makes the following recommendations in response to the Notice's questions:

I. To enforce consistent application of equivalent standards across mitigation mechanisms on public and private lands, the Rule should include:

i. A requirement and process for development of a species-specific Offset Standard, which would publish permissible offset actions and project types for certain protected species;
ii. A General Requirements section modeled on the 2008 Rule and applicable to all offset mechanisms;
iii. Requirement for all offset projects to be established through a Service approved instrument, and a corresponding instrument review process with timelines;
iv. An advance mitigation preference, implemented through an advance mitigation timeline with defined stages; and
v. Policies on service areas and ratios to incentivize investment in habitat-based offset projects that are of the highest conservation value to the subject species.

II. To ensure durability, the Rule should require that offset projects, whether on public or private land, have the following legal, planning, and financial elements in place: i) perpetual site protection that prohibits incompatible uses for the species, ii) long term management plans for perpetual site stewardship, and iii) full funding of a long-term management endowment or equivalent mechanism sufficient to assure management, repair, and monitoring expenses in perpetuity. To ensure additionality, the Rule should require that all offset projects contribute conservation benefits beyond a species' identified baseline and meet the three durability requirements enumerated above.

III. The General Requirements section of the Rule should include monitoring and financial assurance requirements, to be detailed in an offset project's instrument for transparency, accountability, and subsequent oversight. The Service should use RIBITS as the primary database for public reporting and tracking on project performance, and must subject all offset mechanisms, including PRM, to the same public reporting and tracking requirements.

IV. To address notable hurdles to bank establishment, the Service should:
i. In the Rule's preamble and purpose section affirm that habitat-based offsets serve as minimization measures and enumerate the benefits of offsets to facilitate a timely and efficient permitting process;
ii. Standardize the requirements and review process for banks via the General Requirements, species-specific Offset Standard, and instrument sections of the Rule;
iii. Clarify the requirements and qualifications of easement endowment holders; and
iv. Update the Section 7 Handbook to modernize references to offsets in coordination with the rule-making.

V. At a minimum, to build on the familiarity and successes of the CWA 404 mitigation program and facilitate joint banking, the Rule should closely align with the 2008 Rule on the general requirements for all offset projects, an advance mitigation preference, and the stipulated stages and timelines for review and approval of instruments.

VI. Generally the Rule should permit mitigation on public lands in limited instances for species-based reasons: i) when used to offset an impact on public lands and the durability and additionality principles are sufficiently met, and ii) when specific identified tracts of public land offer a scientifically-verified unique habitat value to the subject species that the Service determines cannot be provided on available private lands.

ERBA welcomes the opportunity for further discussion on the recommendations presented here. Please do not hesitate to reach out to sjohnson@ecologicalrestoration.org with any questions or comments.

Sara Johnson, Executive Director
Ecological Restoration Business Association

Appendix I: Rule Language Recommendations

Question 1, "Offset Standard"

(a) *Definitions. See Glossary at the end of the Appendix.*

(b) *Purpose and General Requirements*—The purpose of this part is to establish a requirement and process for developing Offset Standards. Offset Standards shall dictate all requirements for the establishment, use and operation of offsets and offset sites for listed and candidate species or communities of species. In developing Offset Standards, the Service should consider all relevant, existing conservation planning tools and documents (e.g., recovery plans, habitat assessment tools, etc.) as well as targeted input solicited by the Service from Stakeholders. Offset Standards shall be developed and issued by the Service, as of the effective date of these regulations, before any Section 10 incidental take permits and/or any CCAAs are approved by the Service. Once issued, Offset Standards should be incorporated directly, without modification, into all Section 10 authorizations, Section 7 consultations, and all offset agreements. Accordingly, the Section 10 and 7 handbooks shall be updated to require incorporation of the species-specific Offset Standard where and when appropriate. Any CCAAs and other Section 10 incidental take permits approved before the effective date of these regulations may not be subject to the requirements set forth within this part.

(c) *Required Content*—Offset Standards must define key requirements for all offset projects on species-by-species or community-by-community basis. Published Offset Standards shall define requirements in objective and measurable terms for all standards deemed necessary by the Service. At a minimum, these standards shall include the following: Service Area prescriptions; credit release schedules based on Offset Types; impact and offset determination methods; site selection and prioritization requirements; essential habitat management strategies; financial assurance requirements (including calculation and documentation specifics) as needed for the species in addition to those required in Sect. X.X[15]; site protection requirements as needed for the species in addition to those required in Sect. 1.2(d); long-term management and funding requirements as needed for the species in addition to those required in Sect. 1.2(d); monitoring and reporting requirements; and objective, measurable ecological performance standards directly associated with habitat and biological metrics. In addition, Offset Standards should establish clear preferences for specific Offset Types, including prescribed proportions if the Service determines multiple Offset Types are needed for species conservation.

(d) *Application*—An Applicant or the Service may initiate the Offset Standard Development Process by submitting for publication an Offset Standard Prospectus containing, at a minimum, the following information:

(1) Offset Determination Methodology—a brief description of how Offsets will be determined at offset sites for a particular species or community.

(2) Site Selection/Habitat Assessment—a brief description of how offset sites will be prioritized and assessed for suitability. Site selection and habitat assessments should be based on existing recovery plans and other relevant conservation planning tools and documents.

[15] As discussed in our response to Question 2, ERBA recommends that in other sections of the Rule the Service establish, for all mitigation mechanisms, baseline requirements for site protection and financial assurances to ensure durability. The financial assurances and site protection requirements included in an Offset Standard would be in addition to those Rule requirements and unique to the specific species needs.

(3) Site Protection—description of how offset sites will be protected from relevant threats to the species to ensure long-term site integrity.
(4) Financial Assurances—propose minimum standards for qualifying and establishing financial assurances guaranteeing offset site establishment and interim management.
(5) Long Term Management Funding—propose minimum standards for quantifying and establishing funding to cover long-term management needs.
(6) Monitoring and Reporting—preliminary monitoring and reporting plans complete with proposed intervals and a list of required elements such as credit ledgers, site conditions, administrative and ecological performance standards and financial accounting of relevant financial assurances.
(7) Service Area—a proposed Service Area determination methodology for generation/use of Offsets.
(8) Management Plan Strategies—preliminary interim and long-term management plans detailing strategies and/or general activities deemed necessary for maintaining suitable habitat.

(e) Stakeholder Group[16]—The Service shall establish and periodically engage a Stakeholder Group for the Offset Standard Development Process consistent with the Recovery Planning Process.[17]
(1) Establishment and Composition—Within 60 days following the close of the Notice of Offset Standard Initiation public comment period (detailed in paragraph (e) of this part), the Service shall establish, using its discretion, a Stakeholder Group comprised of regional expertise representing the diverse interests of the regulated public specific to a particular listed species or candidate species. Stakeholder Groups shall, to the maximum extent possible, be comprised of representatives from affected industries (including offset providers), land conservancies, landowners, academics, biologists with relevant expertise and any other Applicants not covered by the above Stakeholder categories. Replacements of individuals on the Stakeholder Group can be made as determined necessary by the Service.
(2) Stakeholder Group Purpose—The Stakeholder Group is purely advisory and will function only to the extent requested by the Service. While complying with timelines detailed in paragraph (e) of this part, the Service shall engage with the Stakeholder Group to gather representatives' information and input on the most practicable standards necessary to ensure incidental take is sufficiently offset for a candidate or listed species.

(f) Public Notice and Offset Standard Development Process Timelines—The Service, as the administrator of the Offset Standard Development Process, shall comply with the public notice and timeline requirements enumerated in this paragraph.
(1) Notice of Offset Standard Initiation—Within 30 days of receiving a complete Offset Standard Prospectus from an Applicant, or if initiated by the Service, once the Service has prepared an Offset Standards Prospectus, the Service shall publish a Notice of Offset Standard Initiation in the Federal Register. This notice shall include the Offset Standard Prospectus and invite public comment regarding the prospectus. The public comment period should not exceed 30 days.

[16] ERBA does not intend for the stakeholder process recommended here to trigger Federal Advisory Committee Act (FACA) requirements. At 41 CFR § 102–3.40 FACA regulations explicitly exempt: "Groups assembled to provide individual advice. Any group that meets with a federal official(s), including a public meeting, where advice is sought from the attendees on an individual basis and not from the group as a whole." The intent of the Service organizing the stakeholder group is to solicit the expert opinions and perspectives of knowledgeable individuals to inform the Service's development of a species-specific standard. The stakeholder process is purely informational and, at the Service's discretion and invite, open to qualified participants with demonstrated, relevant credentials on the specific species at issue.
[17] USFWS (2019). Full citation included in cover note Index.

(2) Draft Offset Standard—After considering public comments and input from the Stakeholders Group, the Service shall publish a proposed draft Offset Standard in the Federal Register, soliciting public comments. The draft Offset Standards should be published on or before the six-month anniversary of the close of public comment period in subsection (1) of this paragraph. The public draft Offset Standard comment period should not exceed 30 days.
(3) Final Offset Standard— After considering public comments and input from the Stakeholders Group, the Service shall issue a final Offset Standard. The final Offset Standard should be issued within 90 days of the close of public comment in subsection (2) of this paragraph.

(g) Periodic Updates—Offset Standards shall be periodically updated to accommodate improved scientific and market understanding specific to a listed or candidate species. The Offset Standard shall include a provision detailing how frequently the Offset Standard will be updated. In general, Offset Standards should be updated along with species status reviews. Updates shall follow all process and timeline requirements detailed in paragraphs (d) and (e) of this section. Existing Offset Standards shall remain in effect until a subsequent version has been issued.

(h) Grandfathering—All approved Offset Projects and offset programs shall be entitled to limited grandfathering under the terms of the Offset Standard in effect at the time of project approval by the Service. However, in scenarios where Credits have not been fully utilized when a subsequent Offset Standard is issued, the use of such Credits may be subject to further restrictions by the Service. Such restrictions shall be incorporated into the updated Offset Standard and may involve an explicit preference for Credits generated under the terms of an updated Offset Standard or may involve trading ratios whereby grandfathered Credits are traded at higher ratios than Credits developed under the updated Offset Standard.

*(i) Supplemental Funding**— The Service may use Task Orders to support the Service's administration of its duties and responsibilities under this section.

*Note: ERBA welcomes discussion with the Service on funding measures to support their increased program obligations to administer the proposed Rule, whether through contracting for services or funding agreements to support dedicated staff.

Question 1, General Requirements.

Sec. 1.1, Offset Standard & Offset Project Analyses.

(a) *Offset Standard.* Species or community-specific Offset Standards will establish requirements for all Offset Projects (see Sec. 2 of this part).[18]

(b) *Appropriateness of Habitat or Non-Habitat-Based Offset Projects*. The Service shall assess the current condition of an imperiled species' habitat and population as well as probable explanations for trends in abundance and distribution. Based on these or other assessments, as deemed appropriate by the Service, the following criteria shall dictate whether habitat-based or non-habitat-based offsets are appropriate:

(1) Species predominantly affected by habitat loss and/or fragmentation will generally require habitat-based offsets (see Sec. 1.2 of this part).[19]

(2) If species are not predominately affected by habitat loss or fragmentation, or when there are strongly supported and scientifically based reasons why habitat-based offsets are not possible, or success and sustainability are improbable, the Service may determine that the utilization of non-habitat-based offsets is appropriate (Sec. 1.3 of this part).[20]

(c) *Appropriateness of Habitat-Based Offset Projects on Public or Private Lands*. Prior to approval of a habitat-based offset project on public lands, the Service will analyze the appropriateness of public lands for habitat-based offsets of an imperiled species, with consideration of private land availability, the presence of specific attributes or conservation values needed for the subject species on private versus public lands, and generally whether the needs of the species would be better served on public lands. This determination should be informed by listing documents and recovery plans, if available, and must be made publicly available and readily accessible. If an equivalent analysis is already performed by the Service as a part of the listing decision, five-year review, Section 7 consultation or National Environmental Policy Act obligations, and the analysis under those processes was consistent with the requirements articulated here and made publicly available, then the Service does not need to repeat the analysis for compliance with this provision.

Sec. 1.2 General Requirements for Habitat-Based Offset Projects

(a) *General* Considerations.

(1) All habitat-based Offset Projects shall comply with the requirements in this section, whether on public or private land and for public, private, non-profit or for-profit entity Sponsors.

(2) All habitat-based Offset Projects shall require an Instrument (see Sec. 4 of this part)[21] signed by the Sponsor and an authorized representative of the Service.

(3) All habitat-based Offset Projects must add a measurable conservation benefit for the imperiled species in compliance with the relevant Offset Standard (see Sec. 2 of this part).

(b) *Landscape Scale Conservation Framework.* Landscape-Scale Conservation is an important tool to reconcile conservation actions and economic activities across a given landscape. The Service should use this framework when developing Offset Standards and approving Offset Projects and programs to the extent appropriate and practicable. Where existing landscape-scale species conservation and/or recovery plans, or offset strategies are available, the Service should determine how and if their use is appropriate to the relevant Offset Standards, in part through use of baseline assessments of species habitat and populations.

[18] See ERBA Offset Standard paper included with this series of position papers.

[19] The remainder of the presented rule language addresses habitat-based offsets only.

[20] Non-habitat-based offset requirements are not addressed by ERBA.

[21] See ERBA Equivalency paper include with this series of position papers.

(1) *Habitat condition assessments.* Landscape-scale habitat condition assessments should be used to identify factors that may be influencing the degradation of a species' habitat and how those factors drive its population dynamics.

(2) *Measurable conservation strategies.* Conservation targets should be established that identify specific acreage goals and population numbers. Focused geographic locations that ensure a high likelihood of conservation success should be prioritized for siting Offset Projects.

(c) *Location and Type of Offset Projects.* Generally, habitat-based Offset Projects should directly improve existing habitat, expand habitat, increase connectivity of fragmented habitat, and contribute to conservation of target species. Offset Standards shall establish location and Offset Type priorities and preferences as well as Service Area requirements for a particular species (see Sec. 2 of this part).

(1) *Location.* Offset Projects should be sited using a landscape-scale framework (see paragraph (b) in this section). In areas with existing landscape-scale conservation plans or offset strategies, Offset Projects should be sited in areas identified as necessary to meet conservation objectives and that provide the high long-term benefits to the target species. Generally, the Service should encourage siting of Offset Projects in areas where there is an immediate threat to key populations, existence of high-priority occupied habitats, or valuable high-priority unoccupied habitats that benefit the target species. In these scenarios, Offset Projects can prevent further habitat degradation and species decline, and provide viable species conservation frameworks.

(2) *Offset Type.* Offsets may be generated by restoration, enhancement and, in certain circumstances, preservation. Generally, restoration should be the first preferred option to expand habitat for recovering species. Where appropriate, Offsets should be generally categorized by habitat services and functions (e.g., brooding, foraging, mating, etc.) and preferences should be established according to the needs of a particular species.

(3) *Service Area.* Service Areas are geographical locations where Offset Projects may occur for a particular species, as established in such species' Offset Standard. Service Areas shall be well defined and based on the best available science regarding the historic ranges, current ranges, life cycles, habitat preference, and movement patterns of the specific species. Service Areas may be based on habitat types, landscape units, species recovery units (including connectivity corridors), distinct population segments, listing units or other landscape features. The Service may establish multiple Service Area treatments within Offset Standards to incentivize Offset Projects that meet high priority conservation and/or recovery goals.

(d) *Durability.* Long-term conservation-based stewardship is necessary to protect and maintain habitat values for protected species.

(1) Site protection.

(i) The habitats and any necessary buffers that comprise an Offset Project must be protected with a valid real estate instrument to ensure protection from activities that would undermine habitat values. Permanent protection, by way of conservation easement or other suitable real estate instrument, is strongly preferred over temporary or short-term agreements.

(ii) The real estate instrument protecting the Offset Project must, to the extent appropriate and practicable, prohibit incompatible uses that might otherwise jeopardize the objectives of the Offset Project.

(iii) The real estate instrument must contain a provision requiring 60-day advance notification to the Service before any action is taken to void or modify the instrument, including transfer of title to, or establishment of any other legal claims over, the Offset Project's site.

(2) *Management Plans.* Offset Projects should include interim and long-term management plans to ensure the target habitat value is appropriately conserved and maintained.

(i) Interim management plans should include descriptions of management actions to meet an Offset Project's ecological performance standards and establish monitoring programs. Interim management plans should include cost estimates for these needs and identify the funding mechanism that will be used to meet these needs.

(ii) Long-term management plans should include provisions for perpetual resource stewardship that describes long-term management actions that: maintain habitat quantity and quality in a condition that meets ecological performance standards; implement and conduct an ecological monitoring program; and maintain, monitor, and preserve conservation easements or other applicable real estate instruments.

(3) *Long-Term Management Funding.* The actions required in long-term management plans should include annual cost estimates for implementing and/or conducting the actions, including adjustment factors associated with adaptive management, contingencies and inflation. Such estimates shall be used to calculate the principal necessary to establish a an endowment or trust reasonably anticipated to generate revenue on an annualized basis suitable to ensure long-term annual stewardship.

(e) Performance Standards, Monitoring, Reporting and Adaptive Management.

(1) *Performance Standards.*

(i) Interim and long-term management plans must contain ecologically based performance standards that are directly relevant to the target species' habitat or biological community and relate to the Offset Project's stated objectives. Performance standards will be used to objectively determine whether the Offset Project is providing expected habitat functions and areas.

(ii) Performance standards must be based on attributes that are objective and verifiable. Ecological standards must be based on the best available science that can be measured and assessed in a practical manner.

(2) *Monitoring and Reporting.*

(i) Monitoring is required to determine if an Offset Project is meeting its required performance standards and to determine if additional measures are necessary to ensure the Offset Project is accomplishing its objectives.

(ii) The periodic submission of monitoring report to the Service is required to assess the development and condition of an Offset Project. The content and level of detail for such monitoring reports must be commensurate with the scale and scope of the Offset Project as well as Offset Type. Monitoring requirements shall be explicitly detailed in interim and long-term management plans, including parameters to be monitored, the frequency of monitoring events, the duration of monitoring periods, and the frequency of reporting to the Service.

(3) Adaptive Management.

(i) Adaptive management strategies should be included in approved interim and long-term management plans to account for unforeseen circumstances that may affect the integrity of an Offset Project.

(ii) If monitoring indicates an Offset Project is not progressing towards or maintaining its performance standards, the Service must be notified as soon as possible. The Service will evaluate potential measures to address the Offset Project's deficiencies. The Service will consider whether the Offset Project is providing benefits to the species comparable to the original objectives.

(iii) The Service, in consultation with the Sponsor and/or long-term manager, will determine the appropriate measures required, if any. These management decisions will be based

on specific uncertainties as well as potential performance milestones identified and described in the adaptive strategy as a component of the management plans.

(f) *Financial Assurances*.

(1) The Service shall require sufficient financial assurances to ensure a high level of confidence that the Offset Project will be successfully completed, in accordance with applicable performance standards.

(2) The amount of the required financial assurances must be determined by the Service, in consultation with the Sponsor, and must be based on the size and complexity of the Offset Project, the degree of completion of the Offset Project at the time of approval, the likelihood of success, the past experience of the Sponsor, and other related factors the Service deems appropriate. Financial assurances may be in the form of performance bonds, escrow accounts, casualty insurance, letters of credit, or currently appropriated funds for government sponsored projects held in a dedicated account, which assurance terms are subject to the approval of the Service. The rationale for determining the amount of the required financial assurances must be documented in the Service's permit action or the Instrument, as applicable. For all Offset Projects when determining the assurance amount the Service shall consider the cost of corrective actions to ensure achievement of performance standards.

(3) When financial assurances are required, the Service's permit action must include a special condition requiring the financial assurances to be in place prior to commencing the permitted activity. Offset Projects may commence in advance of the permitted activity without financial assurances until offsets are required for the permitted activity.

(4) Financial assurances shall be phased out once the Offset Project has demonstrated success in accordance with its performance standards. The Service's permit or the Instrument must clearly specify the conditions under which the financial assurances are to be released to the permittee, Sponsor, and/or other financial assurance provider, including, as appropriate, linkage to achievement of performance standards, adaptive management, or compliance with special conditions.

(5) A financial assurance must be in a form that ensures that the Service will receive notification at least 120 days in advance of any termination or revocation. For third-party assurance providers, this may take the form of a contractual requirement for the assurance provider to notify the district engineer at least 120 days before the assurance is revoked or terminated.

(6) Financial assurances shall be payable at the direction of the Service to their designee or to a standby trust. When a standby trust is used (e.g., with performance bonds or letters of credit) all amounts paid by the financial assurance provider shall be deposited directly into the standby trust account for distribution by the trustee in accordance with the Service's guidance and/or Interim Management Plan.

Sec. 1.3 General Requirements for Non-Habitat-Based Offset Projects

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Question 1, Instrument Content and Review Requirements.

(a) *Definitions. See Glossary.*

(b) *Instrument Provision Requirements:*

(1) *Purpose and General Requirements.* The purpose of this section is to establish required content of Instruments, which are required for all Offset Projects and programs (per Sec. 1.2 (a)(2) of this part). The Service shall ensure each Instrument contains the provisions described below as well as any additional requirements prescribed in the relevant species or community-specific Offset Standard (see Sec. 2(c) of this part). Instruments can be site-specific or programmatic (multiple sites) in nature.

(2) *Instrument:* Establishment and Operation of Offset Projects and Programs. All habitat-based Offset Projects shall require an approved Instrument signed by the Sponsor and authorized Service representative (per Sect. 1.2(a)(2) of this part). In addition to the requirements in (b)(1) of this section, the Service will evaluate each Instrument proposal for inclusion of the following fundamental elements for any Offset Project:[22]

(i) *Objectives.* A description of the resource types and amounts to be provided (usually acres, or some other physical measure), the method of compensation (preservation, establishment, restoration, enhancement, etc.), and the manner in which Landscape-Scale Conservation has been considered.

(ii) *Site Selection*. A description of the factors considered during the site selection process. This shall include an explanation of how the site contributes to conservation of the species regionally and locally, including any recovery plan goals, regional conservation strategies, species-specific offset standards, etc. A description of the ecological suitability of the site to achieve the objectives, including physical, chemical, and biological characteristics (i.e., inventory), of the site and how the site will support the planned offsets.

(iii) *Site protection instrument*. A description of the legal arrangements that will be used to ensure the long-term protection of the Offset Project site. All site protection instruments are subject to Service approval. The site protection instrument must, to the extent appropriate and practicable, prohibit incompatible uses (e.g., clear cutting or mineral extraction) that might otherwise compromise the objectives of the Offset Project. A perpetual conservation easement, where not prohibited by law, granted to a qualified third party (grantee) is the required site protection instrument when the Offset is to be permanent. The Service must be designated as the as a third-party beneficiary with rights of enforcement (this may not apply to federal land protection mechanisms) within the site protection instrument. The interim and long-term management plans for the offset site must be referenced therein. Service approval of a site protection instrument for permittee-responsible offset must be obtained in advance of, or concurrent with, the activity causing the authorized or permitted impacts.

(iv) *Baseline information*. A description of biological resources, geographic location and features, topography, hydrology, vegetation, past and present land uses, adjacent land uses, and a biological inventory, including species and habitats occurring on the site.

(v) *Offset work plan*. A description of site work is required if habitat is to be enhanced, restored, or established. The work plan shall include specifications for constructing,

[22] As were identified in Chapter 6 of the Departmental Manual (600 DM 6.7A) and the Service's Mitigation Policy. The specific 13 elements outlined in the Manual have proven essential to successful species mitigation and should be included in their entirety in the Rule.

enhancing, restoring habitat (as appropriate), geographic boundaries, construction methods, sequencing and timing, and other considerations. The minimum requirements for an offset work plan include: *a)* baseline conditions*,* including the information required in (iv) above; *b)* surrounding land uses and zoning, including anticipated future development in the area *c)* historic aerial photographs and/or historic topographic maps (if available), especially if restoration to a historic condition is proposed; *d)* discussion of the overall habitat development goals and objectives; *e)* description of activities and methodologies for establishing, restoring, and/or enhancing habitat types; *f)* detailed anticipated increases in functions and services of existing resources and their corresponding effect within the watershed or other relevant geographic area (e.g., habitat diversity and connectivity, floodplain management, or other landscape-scale functions); *g)* Habitat establishment performance standards, in accordance with (viii) below; *h)* maps detailing the anticipated location and acreages of habitat developed for species; *i)* monitoring methodologies, in accordance with (viii) and (ix) below, to evaluate habitat development and document success in meeting performance criteria; *j)* a discussion of possible remedial actions; and *k)* additional information as determined by the Service office.

(vi) *Credit evaluation*. A description of the number of credits to be provided and a brief explanation of the rationale for this determination. The credit evaluation shall include an explanation of the assessment undertaken to formulate the habitat value and total number of each type of credit, in accordance with the permissible credit release schedules established in the relevant Offset Standard. Credit evaluations shall be provided for all Offset Projects.

(vii) *Interim Management Plan***.** A description and schedule of habitat management requirements to ensure the continued viability of the resource once the work plan is completed and/or the habitat is managed while credits are sold and the long-term management fund is being established. The interim management plan, at a minimum, shall include: *a)* all management actions to be undertaken on the site during this habitat establishment/ management period; *b)* all habitat establishment performance criteria; *c)* monitoring and reporting schedule relative to performance criteria; and *d)* a detailed cost analysis to implement the plan.

(viii) *Performance standards.* A description of evaluative criteria for habitat establishment, restoration, etc., to determine whether the measure has achieved its intended outcome. The performance standards shall be metrics based on observable or measurable administrative and ecological (physical, chemical, or biological) attributes that are used to determine if a compensatory Offset Project meets the agreed upon conservation objectives identified in an offset Instrument.

(ix) *Monitoring requirements*. A description of parameters to be monitored to determine if the Offset Project is on track to meet performance standards and if adaptive management is needed. A schedule for monitoring and reporting on monitoring results must be included.

(x) *Long-term management plan*. A description of how the compensatory Offset Project will be managed after performance standards have been met, to ensure long-term sustainability of the resource, including long-term financing mechanisms and the entity responsible for long-term management. The long-term management plan must be incorporated by reference into the conservation easement or other site protection mechanism and should include at a minimum: *a)* the purpose(s) of offset site establishment and purpose(s) of long-term management plan; *b)* Baseline description of

the setting, location, history and types of land use activities, geology, soils, climate, hydrology, habitats present (after the offset site meets performance criteria), and species descriptions; *c)* overall management, maintenance, and monitoring goals, specific tasks and timing of implementation, and a discussion of any constraints which may affect goals; *d)* biological monitoring scheme including a schedule, appropriate to the species and site; biological monitoring over the long term is not required annually, but must be completed periodically to inform any adaptive management actions that may become necessary over time; *e)* reporting schedule for ecological performance and administrative compliance; *f)* cost-analysis of all long-term management activities, cross-referenced with the tasks described in paragraph c. above and including a discussion of the assumptions made to arrive at the costs for each task. These itemized costs are used to calculate the amount required for the long-term management fund; *g)* discussion of adaptive management principles and actions in accordance with (xi) below; *h)* rights of access to the offset area and prohibited uses of the offset area, as provided in the real estate protection instrument; *i)* procedures for amendments and notices; and *j)* reporting schedule for annual reports to the Service.

(xi) *Adaptive management plan*. A description of management strategies to address unforeseen changes in site conditions or other components of the Offset Project, including the party or parties responsible for implementing adaptive management measures. Separate adaptive management plans are required for the Interim Management Stage and Long-Term Management Stage. The adaptive management plan(s) will guide decisions for revising Offset Project plans and implementing measures to address both foreseeable and unforeseen circumstances that adversely affect Offset Project success.

(xii) *Financial assurances.* A description of financial assurances sufficient to ensure, with a high degree of confidence, that the Offset Project will achieve and maintain its intended outcome, in accordance with its Interim Management Stage performance standards. The amount of the financial assurances shall be based on the size and complexity of the Offset Project, the likelihood of success, the past performance of the project applicant or offset sponsor, and any other factors the Service deems appropriate to consider for any specific project. Financial assurances for the Interim Management Stage may be in the form of performance bonds, escrow accounts, casualty insurance, letters of credit, or other appropriate financial instruments, depending on the purpose, duration, and entity providing the Offset Project.

(xiii) *Long-term Management Financing.* Long-term Management Stages must be funded pursuant to 1.2(d)(3), using a perpetual non-wasting account, the principal amount of which determined by experience-based investment returns of the endowment holding entity to produce the annualized revenue required.

(xiv) *Other information.* Any addition information the Service determines necessary.

(xv) *For conservation banks and in-lieu-fee programs*. The following are also required: *a) Service Area(s)*, with maps and text descriptions of the geographic area that within which the Offset Project's credits will apply, and *b) Credit management and accounting processes*, in which accurate and timely credit releases, debits, and accounting are ensured.

(c) *Instrument Review Process Requirements*.[23,24]

(1) *Sponsor Responsibilities.* The Sponsor is responsible for preparing all documentation associated with the establishment of the Offset Project and/or program, including the prospectus, instrument and other appropriate documents, such as interim and long-term maintenance plans and conservation easements.

(2) *Timelines.*[25] The following timelines are only applicable to ESA conservation banks. Joint banks permitted under shared authority with the U.S. Army Corps of Engineers or other federal or state agencies shall adhere to applicable established regulatory timelines, such as those articulated at 33 CFR §332. Per requirements of Sec. 1(a) and 2(b) of this part, the Service shall not approve Offset Projects or programs until the relevant Offset Standard has been finalized and published. The timelines for Service review of ESA conservation banks are detailed in (1) through (7) of this paragraph. These timelines may be extended.

(i) *Draft Proposal.* If a draft proposal is submitted, the Service shall provide comments back to the sponsor within 30 days.

(ii) *Proposal*. Once a proposal is submitted, the Service shall have 30 days to determine if the proposal is complete.

(iii) *Initial Evaluation*. 60 days after a completeness determination to provide an initial evaluation letter to the sponsor.

(iv) *Draft Instrument*. 30 days after sponsor submits the draft instrument to determine completeness.

(v) *Service Review*. 60 days after sponsor delivers copies of the complete draft instrument to complete Service review.

(vi) *Final Instrument*. 30 days after sponsor submits complete final instrument, the Service shall issue final approval.

(3) *Extension of timelines.* The deadlines outlined paragraph (c) (2) of this section may be extended by the Service at its sole discretion in cases where:

(i) Compliance with other applicable laws, such as Clean Water Act review, or section 106 of the National Historic Preservation Act, is required;

(ii) It is necessary to conduct government-to-government consultation with tribes;

(iii) Timely submittal of information necessary for the review of the proposed Offset Project is not accomplished by the sponsor; or

(iv) Information that is essential to the Service's decision cannot be reasonably obtained within the specified time frame.

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[23] While we do not articulate the steps for instrument approval here, we emphasize that the Rule should include specific provisions on the establishment process and stages of instrument approval. Section 5 of the 2017 Interim Guidance is a suitable basis for the Rule, with the changes necessary to make the Guidance provisions mandatory rather than advisory.

[24] We recognize that compliance with these timelines places additional obligations on limited regulators. Because of this staffing challenges, we strongly recommend that the FWS include provisions allowing for supplemental funding to support administration of the program. ERBA will also continue to advocate for necessary funding increases to Congressional appropriators.

[25] Note: The timelines detailed here are abbreviated from the 2008 Wetland Mitigation Rule (33 CFR 332). We recommend that the species rule adapt from section §332.8(d) to create specific rule language on timelines.

Question 1, Advance Mitigation Preference

(a)Definitions. See Cover Note Glossary.

(b) Purpose and General Requirements. The purpose of this part is to establish a requirement for the use of the most advanced Offsets available and a process for determining which Offsets are the most advanced. The Service shall make advance offset determinations per requirements of the relevant Offset Standard—including, but not limited to, Offset Type prescriptions, Service Area determinations and strategic site locations or functions. Generally, when an Applicant proposes to use Offsets or the Service deems Offsets necessary for regulatory compliance, then the Service shall prefer the most advanced Offsets, as implemented through the analysis process detailed in paragraph (c) of this section.

(c) Approval of Offset Use. For each Offset Type required by the Offset Standard, the Service shall evaluate Released Offsets to determine which Offsets are the most advanced and therefore appropriate for use. The use of Offsets shall be generally prioritized in the order detailed in (1) through (3) of this paragraph. In scenarios where Released Offsets vary from the descriptions in this paragraph, the Service shall make determinations based on the extent to which projects with Released Offsets have met their respective ecological and administrative performance standards.

(1) Released Offsets from projects in Long-Term Management that have fully funded management endowments, have met all ecological performance standards and are continuing to meet administrative requirements.

(2) Released Offsets from projects in Interim Management that have fully funded management endowments, have met some or all ecological performance standards, and are continuing to meet administrative requirements.

(3) Released Offsets from Established Offset Projects that have met some administrative performance standards but not ecological performance standards.

(4) Most advanced Released Offsets of other Offset Types, adhering to the priorities of (1) through (3) of this paragraph. The Service may determine additional ratios are required, as described in the applicable Offset Standard.

(5) The best available alternative for the species, as described in the applicable Offset Standard. The Service may determine additional ratios are required.

Note on Rule Preamble Recommendations.

The advance preference process is predominantly an evaluation of Released Offsets. In some cases, Released Offset inventories for the Released Offset Type may be insufficient to meet offset needs relative to Offset Standard requirements. After exhausting all Released Offsets for a particular Offset Type, the Service has several options to pursue individually or collectively to determine the best available alternative for the species including: a) substitute different Released Offset Types with an applied ratio, b) allow permittee-responsible Offset Projects to address specific Offset Type(s) requirements, or under certain scenarios, c) release high-priority offsets ahead of schedule.

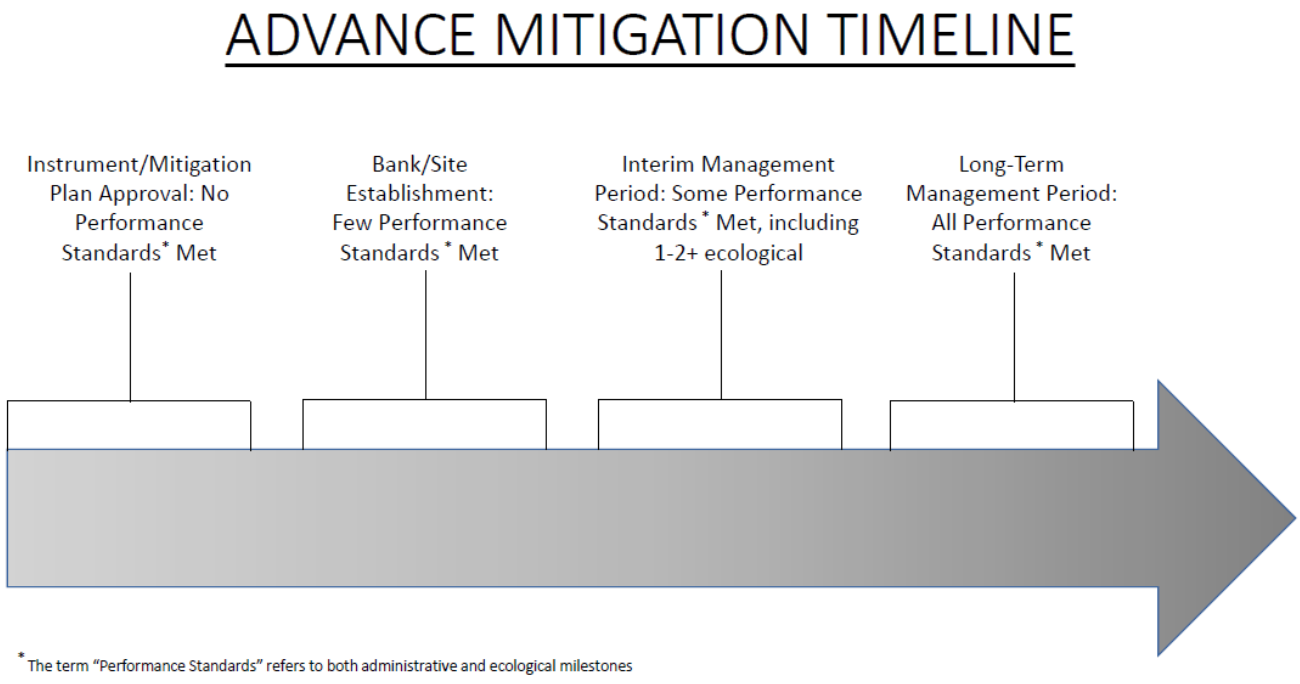
Given its integral role with respect to a species' recovery, the Service should leverage the Offset Standard as one of the most important tools for conservation. This can be done in several ways that might prevent tight offset inventories—by creating incentives—and provide flexibility when tight inventories cannot be avoided. By way of example, if the Service prioritizes the restoration of brooding habitat for an avian species, the Offset Standard could provide accelerated Release of Offsets for projects targeting this specific Offset Type (relative to other types). In addition, the Offset Standard

might reserve, under certain conditions, discretion for the Service to release brooding habitat offsets earlier than otherwise provided in a project's legal instrument.

To further illustrate the last example, an offset project may have fully implemented its interim-management plan—including invasive species removal as well as necessary earthwork and supplemental plantings; however, the Sponsor is waiting for seasonal monitoring to demonstrate that brooding habitat has been re-established before qualifying for the Instrument's next Release of Offsets. In such a case, assuming the Service's experience with similar projects (and perhaps the Sponsor) has been favorable, a reasonable determination may be reached that there is a high likelihood of the project meeting its ecological performance standards. This, in combination with additional financial assurances above and beyond Instrument requirements, may be enough for the Service to release brooding habitat offsets ahead of schedule.

When based on Offset Standards priorities, such determinations may be justifiable if a specific Offset Type is identified as important for a species' conservation, and the Service believes that further investment in that particular resource is necessary to meet conservation objectives. Thus, the Offset Standard should be viewed as an essential tool for the Service to establish and preserve the flexibility necessary to ensure ease of compliance for Applicants while encouraging investment in advance conservation of high-priority resources that are imperative for species conservation.

Figure I.



Question 2, Durability

(a) *Durability Requirements.* Long-term conservation-based stewardship is necessary to protect and maintain habitat values for protected species.

1. *Site protection.*

i. The habitats and any necessary buffers that comprise an Offset Project must be protected with a valid real estate instrument to ensure protection from activities that would undermine habitat values. Permanent protection, by way of conservation easement or other suitable real estate instrument, is strongly preferred over temporary or short-term agreements.

ii. The real estate instrument protecting the Offset Project must, to the extent appropriate and practicable, prohibit incompatible uses that might otherwise jeopardize the objectives of the Offset Project.

iii. The real estate instrument must contain a provision requiring 60-day advance notification to the Service before any action is taken to void or modify the instrument, including transfer of title to, or establishment of any other legal claims over, the Offset Project's site.

2. *Management Plans.* Offset Projects should include interim and long-term management plans to ensure the target habitat value is appropriately conserved and maintained.

i. Interim management plans should include descriptions of management actions to meet an Offset Project's ecological performance standards and establish monitoring programs. Interim management plans should include cost estimates for these needs and identify the funding mechanism that will be used to meet these needs.

ii. Long-term management plans should include provisions for perpetual resource stewardship that describes long-term management actions that: maintain habitat quantity and quality in a condition that meets ecological performance standards; implement and conduct an ecological monitoring program; and maintain, monitor, and preserve conservation easements or other applicable real estate instruments.

3. *Long-Term Management Funding.* The actions required in long-term management plans should include annual cost estimates for implementing and/or conducting the actions, including adjustment factors associated with adaptive management, contingencies and inflation. Such estimates shall be used to calculate the principal necessary to establish a an endowment or trust reasonably anticipated to generate revenue on an annualized basis suitable to ensure long-term annual stewardship.

(b) *Preference Hierarchy for Site Protection Entities*. When reviewing a Sponsor's Draft Proposal terms on site protection, the Service should follow this order of preference for permissible site protection entities:

1. First, an organization formed primarily for the purpose of conservation adhering to adopted high performing standards and practices, and willing to acknowledge the supremacy of the Service in establishing specific standards and practices,[26] so long as the organization has direct experience and capacity to administer site protection obligations at conservation Offset projects.
2. Second, community foundation or entity, including tribes, with the requisite experience and capacity, and willing to adhere to the Service's standards and practices.
3. In the event of no other alternative, and subject to the Service's judgement, a qualified individual person or business entity may hold and administer the obligations of the conservation easement.

[26] E.g. an accredited land trust.

Glossary of Recommended Defined Terms:[27]

Applicant— entities or individuals participating in a Service-approved conservation strategy providing offsets to secure incidental take coverage under a Section 10 authorization or Section 7 consultation.

Approval— means a Bank or ILF Instrument or Agreement signed by the Service and the Sponsor where land control is confirmed, but no offsets have been released because no administrative or ecological standards have yet been met.

Enhancement— means activities conducted in existing habitat of the species that improve one or more ecological functions or services for that species, or otherwise provide added benefit to the species and do not negatively affect other resources of concern.

Established Offset Project or Offset Project Establishment— means the phase of an Offset Project wherein Approval has occurred, the site has been protected, financial assurances have been funded, and initial offsets have been released.

Instrument, agreement – the document that reflects the regulatory decision by the Service that the conservation bank or other offset program or project satisfies applicable ecological and administrative standards and can, therefore, be used to provide offsets under the ESA in appropriate circumstances. The instrument must be signed by the offset Sponsor and the Service to reflect their acceptance of the terms. The instrument is not a contract between Service and any other entity. Any dispute arising under the instrument will not give rise to any claim for monetary damages by any party or third party.

Interim Management Stage—means the phase of an offset project wherein monitoring protocols are implemented for all Offset Types. For enhancement and restoration projects, management actions are implemented as prescribed in project Instruments to re-establish habitat functions.

Landscape-Scale Conservation—means the restoration, rehabilitation, enhancement and preservation of large, interconnected, un-fragmented landscapes capable of supporting species' life stages.

Long-Term Management Stage—means the phase of management following successful completion of the Interim Management Stage—i.e., the attainment of all ecological performance standards. Projects in this stage are monitored routinely and managed to maintain habitat functions in perpetuity.

Mitigation Ratio—the relationship between the amount of the compensatory offset for, and the impacts to, the species, habitat for the species, or other resource of concern.

Notice of Offset Standard Initiation—a public notice that includes an Offset Standard Proposal for public review and comment.

Offsets or Credits— means a unit of measure representing the accrual or attainment of administrative and ecological performance goals and functions at an offset site. These units are intended to offset incidental take or other unavoidable losses to a listed or candidate species and/or its habitat.

[27] Note that this Glossary is not exhaustive and is just the terms relevant to ERBA's Rule recommendations.

Offset Project—means site specific, land-based conservation projects delivered through either an offset bank, in-lieu fee program, permittee-responsible, or other permissible conservation program or mechanism.

Offset Standard—means a set of performance standards and other requirements published by the Service that governs the generation and use of offsets for a particular species or community of species. Requirements include siting specifics, habitat conditions, maintenance actions, monitoring and reporting content and frequency, Service Area determinations, Offset determinations as well as other elements deemed necessary by the Service to ensure all Offsets provide listed and candidate species with a reasonably high probability of recovery and/or conservation value.

Offset Standard Development Process—is the process by which the Service engages with the public and key stakeholders to publish Offset Standards governing Offset generation and use.

Offset Standard Proposal—a proposal submitted to or generated by the Service relative to the establishment of a species Offset Standard.

Offset Type or Type of Offset— means the restoration, establishment, enhancement, or preservation of resources and their values, services, and functions including the life stage habitat requirements for which the offset is generated—e.g., brooding, foraging, mating, etc.

Preservation—means the protection and management of existing resources for the species that would not otherwise be protected through removal of a threat to, or preventing the decline of, the resources to compensate for the loss of the same species or resource elsewhere.

Release of Offsets or Released Offsets—means bank or in-lieu fee (ILF) offsets made available for transfer or sale by the Service once the sponsor has met pre-determined performance standards. A schedule of incremental offset releases will be developed by the Service as part of the Offset Standard, which will be based on the attainment of various administrative and ecological milestones for approved Offset Projects and programs.

Restoration—means repairing or rehabilitating habitat for the benefit of the species on an offset site with the goal of returning it to its natural/historic habitat type with the same or similar functions where they have ceased to exist, or exist in a substantially degraded state.

Service Area—the geographic area outside of an Offset Project within which the Offset Project Sponsor may sell Released Offsets to mitigate impacts to or take of the species or other resources of concern.

Sponsor—means any public or private entity responsible for establishing, and in most circumstances, operating an Offset Project.

Timelines – maximum number of calendar days for key elements of Offset Project review and establishment.