Ecological Restoration Business Association
8270 Greensboro Drive, Suite 700
Tysons, Virginia 22102
P: 703-584-8375 · www.ecologicalrestoration.org

To: U.S. Fish & Wildlife Service (FWS)
From: Ecological Restoration Business Association
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Cover Note re: ERBA Species Committee Position Papers on Priority Concepts

The Ecological Restoration Business Association ("ERBA") greatly appreciates the work of the FWS at the Headquarter and Regional levels to facilitate conservation offset projects and foster partnerships with the ecological restoration industry. We are highly supportive of the FWS rule-making on species mitigation (the "Rule") to bring consistent and transparent high standards to all conservation offset projects. ERBA is encouraged by the FWS' thoughtful formation of a knowledgeable rule drafting team and aims to serve as an experienced practitioner resource to that team.

With this goal in mind, ERBA's Species Committee identified five priority concepts where the Committee feels ERBA can be most insightful[1]: i) incentivizing private investment for programmatic efficiencies and species conservation (p. 6); ii) requirements for habitat-based offsets (p. 9); iii) the species-specific offset standard (p. 15); iv) advance offset preference (p. 19); and v) equivalency (p. 24). We open with an overview paper on how each policy concepts and the Rule can incentivize investment in conservation. Then for concepts (ii)-(v) the Species Committee developed specific draft language, background on the underlying issue, and key language considerations. The draft language for each concept is grounded in prior policy precedent and regulatory models, including FWS's substantial work on the 2016 Mitigation Policies and supporting 2017 Implementation Guidance (the "prior Policies"). Our hope is that these Position Papers will spark discussion and foster collective thinking about how a rule should best address these critical issues. With this cover note, we provide the following information, applicable to all the Papers, and any others forthcoming.

Background:

The January 1, 2021 National Defense Authorization Act (NDAA) for Fiscal Year 2021 (Public Law No.: 116-283), Section 329 directs the FWS to pursue a species mitigation rulemaking, specifically stating that the FWS "shall issue regulations of general applicability establishing objectives, measurable performance standards, and criteria for use, consistent with the Endangered Species Act (16 U.S.C. 1531 et seq.), for mitigation banking offsetting effects on a species, or habitat of such species, that is endangered, threatened, a candidate for listing, or otherwise at risk under such Act. To the maximum extent practicable, the regulatory standards and criteria shall maximize available credits and opportunities for mitigation, provide flexibility for characteristics of various species, and apply equivalent standards and criteria to all mitigation banks" (the "Congressional Directive").

[1] ERBA's Species Committee deliberated on a list of principles previously submitted to the FWS and voted on the listed five as those where ERBA could introduce new concepts or contribute additional thought that goes a step further than the FWS' excellent prior policy work. For example, as expressed in ERBA's June Discussion Recap, we generally support the FWS' approach to the concepts of Durability and Additionality as handled in prior Policies and recommend that the FWS now codify those standards in the forthcoming Rule. As such, we have not included either concept as one of our priority position papers and we briefly reference the concepts in our papers when needed without great detail to avoid duplicity.

While the 2016 Service-Wide Mitigation Policy and Endangered Species Act Compensatory Mitigation Policy were both rescinded in 2018 (and the 2017 Implementation Guidance never progressed past draft form), these documents are instructive now, and we carefully considered them alongside the 2008 Wetland Mitigation Rule as we developed the enclosed Papers.

Importantly, the Rule should not be limited to just conservation banks, but rather should establish standards for all offset forms to fulfill the NDAA directive to "maximize available credits and opportunities for mitigation" and "provide flexibility." A comprehensive Rule applicable to all offset forms also builds on the Service's mitigation framework laid out in the prior Policies and guidance, which addressed PRM, ILFs, HCPs, and CCAs. This approach is critical to achieving implementation of equivalent standards across offset forms. Similarly, as we detail in our Offset Standard paper, the requirements established in a species-specific Offset Standard must be applied moving forward to all Section 10 permits and considered and incorporated into all Biological Opinions associated with Section 7 consultations for the relevant species. Further, approved compensatory offset program credits, such as those from conservation banks or in-lieu-fee programs, should be preferred over other offsets that have not been established via an instrument in advance of impacts.

Formatting Note: In the four concept papers we assign sections numbers to the proposed rule language for ease of reference throughout. These number assignments are strictly for purposes of reference in the context of this paper series. We do not propose that the sections presented here are exhaustive of all of those that should be included in the Rule.

Glossary of Recommended Defined Terms:[2]

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.

[2] Note that this Glossary is not intended to represent an exhaustive list of definitions for the Rule, and is just the terms relevant to our Paper series.

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.

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.

Federal Compliance Considerations

As noted throughout our papers, we recognize that administering the Rule will increase the burden on Service staff, who are already time and resource constrained. The Service needs to be fully funded to administer the conservation banking program and ESA Section permits and consultations. ERBA continues to advocate for an increase in funding to the Service, and we support any measures for supplemental funding opportunities. Considering these constraints, we can understand the Service's desire to keep administration of the Rule as streamlined as possible and avoid unintentionally triggering additional processes that will delay implementation.

Federal Advisory Committee Act:

Specifically, we do not intend for the stakeholder process articulated in the Offset Standard Paper 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."[3] 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 Offset 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.

National Environmental Policy Act:

[3] *See also* "Individual group members can provide their own personal opinions, advice, or recommendations without implicating FACA. This is true even if several individual members of a group provide similar or identical opinions, advice, or recommendations." from *Key Principles and Practical Advice for Complying with the Federal Advisory Committee Act (FACA)* USDA-Forest Service, August 2013, available at: https://www.fs.fed.us/emc/nfma/collaborative_processes/documents/PracticalAdviceAboutFACA.pdf

When a project triggers a National Environmental Policy Act (NEPA) environmental review, we support a coordinated approach that incorporates advanced mitigation planning. This coordination can result in the identification of information needed to satisfy relevant environmental statutes, including Section 404, in a timely manner, reduce uncertainty and delays, and is likely to result in more cost-effective mitigation. It can also provide the public with a meaningful opportunity to provide comments to the Sponsor and resource agencies. This benefits both the project Sponsor and the resource agencies by providing for advanced planning of mitigation efforts, allowing for greater flexibility and, in some circumstances, a broader range of options for project offsets, including conservation banking.

Closing Note

ERBA reiterates our strong support for the FWS development of a comprehensive Rule that establishes mitigation requirements for all offset forms. Such a Rule will advance the current variable state of species mitigation offsets by providing offset Sponsors with needed regulatory certainty and predictability to invest in accountable, measurable outcomes for protected species. We applaud FWS's work on prior mitigation Policies, which have included many thoughtful concepts that should now be elevated to Rule provisions. ERBA's enclosed papers with recommended Rule language build on this foundation of prior policy work, while prioritizing concepts particularly important to successful conservation markets on which ERBA members can offer a unique practitioner perspective. We welcome the opportunity to review and discuss with the FWS.

Index of Primary Citations for the Position Paper Series:

Endangered Species Act, 16 U.S.C. 1531 *et seq.*, 1988.

U.S. Army Corps of Engineers and U.S. Environmental Protection Agency. 2008. Compensatory Mitigation for Losses of Aquatic Resources; Final Rule. 33 CFR Parts 325 and 332.

U.S. Fish and Wildlife Service (USFWS). 2019. Conservation Banking-Incentives for Stewardship. Accessed online on October 11, 2021. Conservation Banking Fact Sheet (fws.gov) 2pp.

U.S. Fish and Wildlife Service. 2016. Endangered Species Act Compensatory Mitigation Policy. Federal Register: Vol. 81, No. 248. Published December 27, 2016.

U.S. Fish and Wildlife Service. 2017. Interim Guidance on Implementing the Final Endangered Species Act Compensatory Mitigation Policy. Draft published January 17, 2017. Available at: https://www.fws.gov/sacramento/es/Consultation/Documents/Interim%20Guidance%20for%20Implementing_the_Endangered_Species_Act_Jan_2017.pdf.

U.S. Fish and Wildlife Service. 2016. Mitigation Policy. Federal Register: Vol. 81, No. 224. Published November 21, 2016.

U.S. Fish and Wildlife Service. 2019. Recovery Planning and Implementation. Available at https://www.fws.gov/endangered/esa-library/pdf/RPI.pdf.

U.S. Fish and Wildlife Service. 2001. Taking, Possession, Transportation, Sale, Purchase, Barter, Exportation, and Importation of Wildlife and Plants. 50 CFR Part 17.

Incentivizing Private Investment for Regulatory and Conservation Efficiencies under the Rule

I. Introduction

For listed and candidate species that are predominantly affected by habitat loss and fragmentation, conservation of key habitat is essential to their recoveries. Regulations that encourage private investment in habitat improvement and protection, well ahead of impacts, would capture both conservation and regulatory efficiencies. If appropriately incentivized, ERBA's member companies will invest private capital in Service-approved conservation projects before impacts occur. In turn, industries operating in sensitive habitats will, in advance of their needs, have access to readily available offsets meeting their regulatory obligations. This structure generates programmatic conservation efficiencies for the species and all parties. Utilized appropriately, released offsets from conservation banks and ILFs are implementation tools, compatible with Section 7 consultations and Regional HCPs, that provide efficient ESA compliance pathways for regulators and project applicants.[4]

While past Service policies and guidance have made laudable attempts at creating this exact scenario, implementation across multiple regions has unfortunately produced mixed results. Notably, the Service's Portland Field Office currently implements a programmatic consultation that covers the establishment and use of conservation banks, which streamlines the approval process for banks and subsequently saves staff time and resources.[5] However, this benefit is only afforded to the species, regulators, and offset sponsors in that region. A national framework is needed to bring these efficiencies and investment in conservation to scale. The Service's forthcoming rulemaking ("Rule") provides an opportunity to establish a network of regulatory standards that will provide the private sector incentives needed, much as the 2008 Clean Water Act regulations have done for wetlands and streams.

In the following series of papers, ERBA has identified a few key provisions that we believe are imperative to establishing a regulatory framework attractive to capital investment. The concepts we present are interdependent, but in each paper, we present them individually with some context of how each interacts with others. This opening paper is intended as a high-elevation summary of the role of these provisions, independently and collectively, emphasizing their importance to capital markets. If well designed and implemented, these suggested provisions should induce private investment and ultimately reduce significant aspects of the Service's workload while improving the efficacy of conservation efforts for imperiled species. And, again, more critical to capital markets than our suggestions *per se* is the need for certainty that a well-designed, comprehensive Rule would provide.

II. General and Habitat Offset Requirements

The series of position papers opens with the General and Habitat Offset Requirements structured to establish the foundation of the Rule, which as we perceive it, is intended to regulate how the Service evaluates and approves the generation and use of offsets, not impacts. Within this framework are the essential elements of an effective Rule as well as the anchor points for other more novel provisions

[4] To further elaborate the value: conservation banks can provide regulatory efficiencies similar to programmatic Section 7 consultations and Regional HCPs. Once established, and as appropriate, the bank can be used in place of these pathways. For example, if a project needs ESA compliance and a bank is already established, the project proponent can use the bank to identify conservation measures. If no other measures are needed, the Service can simply agree via a concurrence letter; no other process is required. These efficiencies are a real incentive to establish policies supporting conservation banks.

[5] *See* "Programmatic Formal Consultation on the U.S. Fish and Wildlife Service's Vernal Pool Conservation Strategy for Jackson County, Oregon," January 25, 2011, available at: https://www.fws.gov/oregonfwo/Documents/VP-BO-final.pdf.

developed in the other position papers—i.e., offset standard, advance offsets and equivalency (all discussed further below). With respect to the essential elements, this section of the proposed Rule language seeks to: 1) establish a preference for habitat-based offsets for species most affected by habitat loss and fragmentation; 2) ensure habitat-based offsets are durable; and 3) ensure offset projects are sited in locations where they can provide species with the most benefit (i.e. the landscape-scale approach).

III. The Offset Standard

The second paper, building off the first and emphasizing durable and strategically sited habitat-based offsets, addresses the Offset Standard, specifically the need for the Service to issue species-specific offset requirements. Our intent is to ensure all offsets are approved according to explicit conservation objectives that ensure equivalency across offset mechanisms. Equivalency is crucial to incentivize advance offset establishment. Without it, private conservation investment—at least at relevant scales—is unlikely to occur.[6] If, however, it is clear all offset projects will have to meet the same exact standards, conservation gains should come early, well ahead of impacts. To accomplish this, our language requires the Service, with input from stakeholder experts, to develop and publish an Offset Standard prior to approval of any Section 10 permits, and, once the Offset Standard is published, to incorporate it directly into all Section 7 consultations thereafter. While necessarily exacting, adoption of an Offset Standard is necessary to rein in decisions driven by the exigencies of the moment that can inadvertently undermine long-term investment decisions.

The Offset Standard enforces some aspects of the Service's take authorizations under Section 7 consultations and Section 10 permitting and ensures long-term approaches to species conservation. We realize that if a given regulatory pathway proves ineffective, the long-term nature of Service take permits and authorizations (e.g. "no surprises" agreements made under Section 10) could significantly inhibit efforts to conserve and recover imperiled species. To prevent this scenario, ERBA has suggested language that requires periodic updates of Offset Standards to incorporate the best available science into conservation efforts, thus targeting offsets in an adaptive way. And to counteract the potential instability that changing offset requirements can represent for conservation investments, we include language supporting limited grandfathering to balance species' needs with conservation investment risk. By this we mean that previous investments should remain viable but not at the expense of an imperiled species' conservation and recovery.

IV. Advance Offsets

ERBA's Rule suggestions are based on the belief that incentivizing private investment in advance conservation is the best way to support species' conservation efforts. The Offset Standard paper would prevent a key threat to private investment by requiring species-specific standards for all offsets. The next paper in the series suggests how an explicit preference for advance offsets can be established. Our proposed approach is different than the 2008 Clean Water Act rule, which uses a preference structure based on offset mechanism: 1) mitigation bank credits, 2) in-lieu fee credits and lastly, 3) permittee-responsible mitigation. We would instead focus on the extent to which performance standards are met at the time Offsets are used. This method assumes that as more ecological and administrative requirements are met, the habitat becomes more reliably suitable and beneficial for the species. The paper further develops the "advance offset timeline" concept previously presented to the Service, which

[6] In our experience, developers often seek the lowest cost for compliance, and offset costs are directly affected by regulatory requirements (performance standards). If all offset mechanisms do not have the same requirements, there is a considerable risk that advance offsets could be stranded in favor of lower-cost, lower-standard offsets.

is used to frame the preference within suggested Rule text. Finally, the paper provides some important context, as potential preamble language, on how the Offset Standard should be used to inform the implementation of the Advance Offset preference. We also show how the Offset Standard should be used to preserve and prescribe the Service's flexibility in making key decisions relative to offset transactions.
Producers of all kinds are usually in economic competition, and when a factor of production is the procurement of offsets, the strong tendency is to look for the least cost alternative. In the interest of species conservation, boundaries have to be placed on low-cost alternatives when they are substantially inferior to preferred alternatives, as we believe concurrently produced offsets are to advance offsets. Concurrently produced offsets are less expensive because they have a lower cost of capital carried over time and because some of the risk of failure is transferred to the public. The advance offset preference mostly eliminates competition from concurrently produced offsets and, thereby, allows private capital to be rationally deployed for conservation banks.

V. Equivalency

The final paper in ERBA's series is offered as a means of codifying the transactional nature of offset projects between sponsors and the Service. Offset 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 offset 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 forms of offset. If instrument standards are consistent across all offset 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.

The equivalency paper suggests rule language that establishes instrument content requirements. It also offers potential preamble content regarding the use of common approaches, outside of instruments, by the Service that have either bolstered or unintentionally undermined equivalency—specifically, ratios and service areas. The proposed preamble language addresses the potential role of the Offset Standard in prescribing how these tools are utilized and limited to provide a stable regulatory environment encouraging upfront, targeted investments in conservation.

VI. Conclusion

If the Rule effectively establishes equivalency (i.e., Offset Standard and instrument requirements) and an explicit preference for advance offsets, conservation efficiencies should follow, as species will receive the habitat support they need ahead of impacts. When private investment in conservation occurs as ERBA expects, applicants seeking coverage under Section 7 and Section 10 will only need to individually address avoidance, minimization, and take limits. Conservation strategies and requirements, having been previously and externally addressed, would not require significant time and resources during consultation and authorization discussions with the Service.

The 2008 Wetland Mitigation Rule has demonstrated that private investment working within the framework of regulation creates efficiencies for both the regulatory agencies and applicants. Thus, the Species Mitigation Rule would likely save time for applicants and the Service, while giving species a better chance at recovery and achievement of conservation goals. With all these elements working together, the incentives are in place to establish a network of durable and high-quality conservation offset sites that will more effectively conserve and recover species.

GENERAL AND HABITAT BASED OFFSET REQUIREMENTS
RECOMMENDATION ON RULE LANGUAGE

I. Background.

While the conservation of species involves a broad range of ecological as well as socioeconomic actions, the most valuable conservation measures ensure ecosystem processes, functions and structure are maintained so that the species may persist. 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"

With this ESA directive in mind, this narrative discusses three important concepts to consider in the development of regulations or rules for species mitigation associated with offsetting effects on an imperiled species:

A. Prioritizing habitat protection and enhancement
B. Incorporating a Landscape-Scale Conservation framework into Offsets
C. Ensuring the values achieved from species conservation measures are durable

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

Incorporating a Landscape-Scale Conservation framework into Offsets
Landscape-Scale Conservation is a holistic approach that emphasizes efforts to conserve large, connected, and diverse landscapes to support resilient ecosystems where species are free to move in response to their needs. This coordinated approach helps conservation planning invest in projects with multiple benefits, accounts for the impacts of climate change, and aims to reconcile the competing objectives of conservation and economic activities across a given landscape. Landscape-scale conservation can be seen as an alternative to site-based conservation. Because Offset Projects sited within a Landscape-Scale Conservation framework will generally offer species the most benefit, the Rule should incorporate the concept into general requirements for habitat-based offsets and development of Offset Standards.

Ensuring the values achieved from species conservation measures are durable

Setting private land aside, as well as using public lands, is an important factor in ensuring that impacts to species are offset over a long period of time. Just conservation dedication, however, is often not sufficient to protect imperiled species. Active long-term stewardship that meets the Rule and Offset Standard requirements is also needed. Otherwise, conservation values can be rapidly lost to invasive species, trespass, and other unauthorized or destructive uses, as well as urban encroachment, habitat conversion, and a myriad of other threats. Unless a long-term management or perpetual stewardship program is put in place to ensure the active protection of natural resources, lands acquired for those resource values are not fully protected. In other words, mere acquisition does not equal protection," and the ecological values associated with species conservation need to persist exist for a long time without significant deterioration in quality or quantity to be durable).

II. Key Elements and Considerations.

Proposed framework for the General Requirements section of the Rule:
Several essential elements of effective habitat-based Offset Projects deserve a dedicated provision within the Rule. Mirroring the successful structuring seen in the 2008 Wetland Mitigation Rule, we recommend the Service establish "General Requirements for Offset Projects" as an opening section of the Rule. At a minimum we recommend that this Rule section describe the requirements of landscape-scale planning, offset type, siting, service area, site protection, management, monitoring, and endowment funding. To preview our recommended language below, we provide the following additional background and descriptions for your consideration:

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, and methods by which conservation progress towards these and other relevant goals will be measured. 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 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 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.

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. Recommended Rule Language.

Section 1. General Requirements for Offset Projects.

(a) *Offset Standard.* Species or community-specific Offset Standards will establish requirements for all Offset Projects (see Sec. 2 of this part).[7]

(b) *Appropriateness of Habitat or Non-Habitat-Based Offset Projects*. The Service will 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).[8]

(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).[9]

Sec. 1.2 General Requirements for Habitat-Based Offset Projects

(a) *General* Considerations.

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

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

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

(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)[10] 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.
(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

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

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.

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

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OFFSET STANDARD
RECOMMENDATIONS ON RULE LANGUAGE

I. Background.

A species' chance of recovery is dependent on the various standards established by the Service to regulate offsets and impacts. Under current practice, the Service approves the use of offsets through various decision documents—conservation banking agreements, HCPs, CCAAs, and 4(d) rules. In each one the required standards for species conservation and impacts are independently defined and often are not equivalent. Such inequality in requirements distorts offset markets. In general, higher standards require more planning, monitoring and maintenance to meet performance requirements, thus necessitating greater financial investment. Almost invariably in compliance markets, developers (including government-funded projects) prefer the lowest-cost offsets available. This preference can lead to lower-standard programs dominating a given market, potentially slowing progress towards species conservation and discouraging private investment.

The Service's recent administration of species markets and the standards that regulate them have produced mixed results. For the American burying beetle, the Service issued performance requirements as guidance applicable to all offsets. Investment followed quickly to deliver those performance outcomes, which contributed to the species' recovery, and in turn assisted in ultimately delisting 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. Offsets were secured from the least-cost programs, which provided little ecological value to the species, and undermined progress towards the species recovery, ultimately contributing to the Service's re-listing proposal for the chicken.[11]

II. Key Rule Elements and Considerations.

To ensure equivalency across a given market,[12] the forthcoming ESA regulations ("Rule") should establish a requirement and process for developing offset standards applicable to ***all*** offset programs for a given species or community of species. 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 Rule can provide that the Service, upon receiving a proposed use or creation of offsets through any of these decision processes, will set standard performance requirements. These standards should inform the Service's decisions relative to all subsequent plans, permits and consultations. As species-specific science advances and conservation objectives evolve, standards should be updated from time to time to incorporate the best available science, thereby improving the efficacy of offset programs. To give species the best chance at recovery, all offset programs should be held to updated standards following their issuance.

A requirement for offset programs to comply with updated standards issued after program 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'

[11] The lesser-prairie chicken was listed in 2014 as Threatened; however, that decision was vacated by a federal court in Texas in 2015 on the grounds that the Service failed to consider the potential conservation benefits of the Range-wide Plan—a mitigation program associated with a broad 4(d) rule covering multiple industries and a CCAA covering the oil and gas industry. Most recently, May 2021, the Service proposed the species for re-listing as Threatened across most of the range and Endangered in the remainder of the range.

[12] See ERBA's Equivalency Paper for recommendations on Rule requirements and use of an instrument to implement and ensure equivalent standards across offsets.

opportunity for recovery. The Rule should balance the need to adaptively manage conservation efforts with the conservation market's need for regulatory predictability. Therefore, limited grandfathering of offset projects and programs is imperative, and permanent grandfathering must be avoided. In other words, grandfathering limitations should be long enough to ensure market stability but short enough to accommodate the evolving needs of a species' recovery and conservation goals. We suggest that standards be updated along with species status reviews.

III. Recommended Rule Language.

Section 2. Offset Standards Requirements and Development Process.

(a) *Definitions. See Cover Note Glossary.*

(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. 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[13]; 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.

[13] ERBA assumes that in other sections of the Rule the Service will establish, for all offset types, baseline requirements for site protection and financial assurances to meet the Durability principle. 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.

(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.

(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—The Service shall establish and periodically engage a Stakeholder Group for the Offset Standard Development Process consistent with the Recovery Planning Process.[14]

(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

[14] USFWS (2019). Full citation included in cover note Index.

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.

(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 FWS on funding measures to support their increased program obligations to administer the Species Mitigation Rule, whether through contracting for services or funding agreements to support dedicated staff.

ADVANCE OFFSET PREFERENCE
RECOMMENDATIONS ON RULE LANGUAGE

I. **Background**.

Advance offsets eliminate temporal loss, reduce risk of project failure, increase certainty that ecological performance standards will be met, and allow maximum planning time 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.[15] 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.[16]

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 Permittee Responsible Mitigation (PRM), even though approved conservation banks were available in the same geographic region and offered significant advanced conservation value. These outcomes disincentivize use of conservation banks and, consequently, investment in the advance mitigation benefits that conservation banks provide.

For example, a bank established in Texas conserved more than 5,000 acres for the golden-cheeked warbler and black-capped vireo, with a 13-county service area. However, in the years that followed, a few pipeline projects crossing through the bank service area required permit-specific PRM (under Section 7 consultations), even though released offsets were available from the bank. In addition, at least one municipality was issued a Section 10 ITP for golden-cheeked warbler that required offsets within their city or county boundaries, rather than using the bank's available offsets. While arguably some of these decisions may increase the amount of conservation on the landscape, when considering offsets in a region where banks exist or will likely exist in the future, such considerations must be balanced against the known values of advance mitigation provided by conservation banks.

In this position paper, we further develop the advance offset timeline concept ("Timeline") previously presented to the Service.[17] Our intent is to more clearly define criteria for regulators and offset sponsors to determine a project's advance status (i.e., the extent to which a project has met performance

[15] 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.

[16] 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.

[17] See ERBA's Species Committee Principles Discussion June Recap, sent to the FWS in July 2021.

standards) from both an administrative and ecological perspective. Using the Timeline as a model, we then suggest specific Rule language for the Service's consideration. Finally, we recognize the Service's need to have flexibility when determining the most effective species conservation strategy with respect to the appropriate use of offsets and mitigation mechanisms in certain circumstances. We include some flexibility in the Rule language, and close with some suggested preamble language illustrating when and how the Service should establish and use this flexibility.

II. Key Rule Elements and Considerations.

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

We recommend the Service use the Timeline (Figure I below) to articulate an advance offset preference and process to evaluate an offset project's "advanced" stage or status. Below we have described chronological stages with examples of the type of administrative or ecological milestones that would define each stage. We introduce the term "Released Offsets" below, 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 standards.

Stage 1 (Approval): Bank/ILF Instrument and/or Parcel (under a programmatic agreement) has been approved. Land control has been confirmed. At this stage, Released Offset become available for ILFs; however, no offsets are released for banks.

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 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.

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

As recommended in the ERBA Offset Standard paper, the rule must codify a requirement for and process by which species-specific offset requirements are developed and published by the Service.[18] 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. 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.

[18] See Offset Standard paper "Key Considerations" section.

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), which 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 Stage 2 to Stage 4 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.

3. *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. 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 permittee-responsible mitigation 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.

III. Rule Language Recommendations.

Sec. 3 Advance Offset Preference Requirements and Determination Process

(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.

IV. Rule Preamble Recommendations.

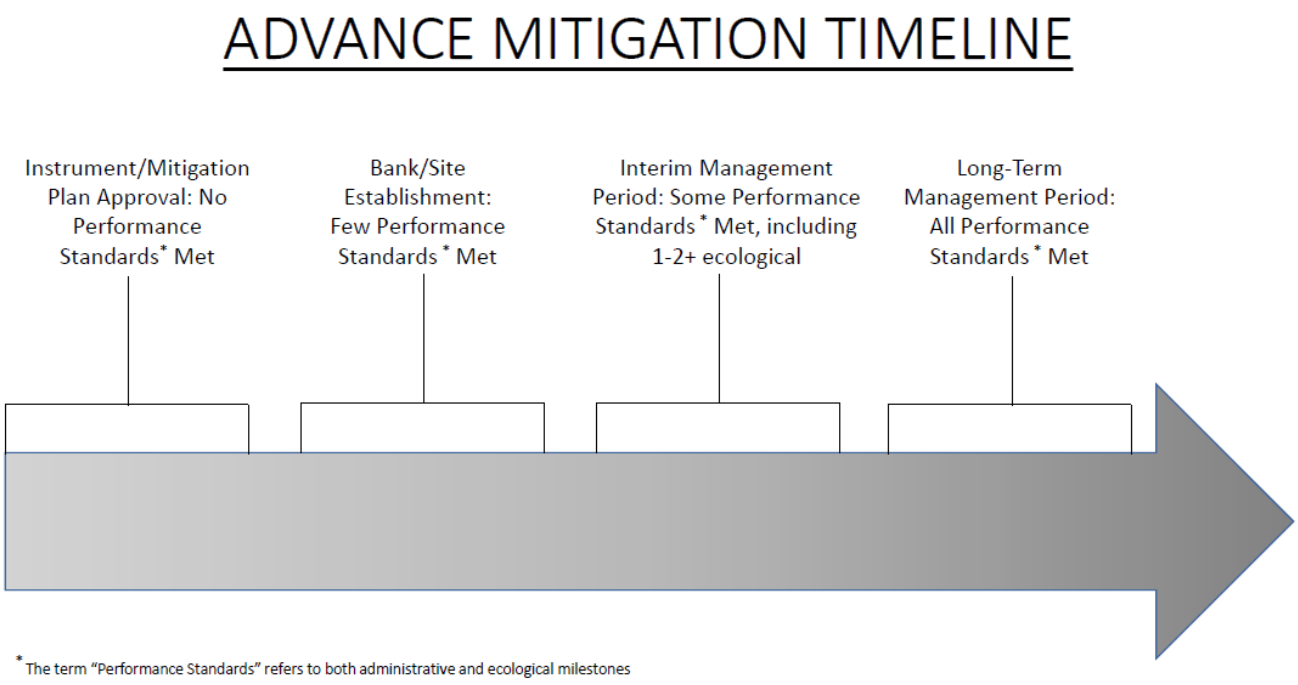
The advance preference process is predominantly an evaluation of Released Offsets. In some cases, Released Offset inventories for the Released Offset Type may be insufficient to meet offset needs relative to Offset Standard requirements. After exhausting all Released Offsets for a particular Offset Type, 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.


ADVANCE MITIGATION TIMELINE
Instrument/Mitigation Plan Approval: No Performance Standards* Met
Bank/Site Establishment: Few Performance Standards * Met
Interim Management Period: Some Performance Standards * Met, including 1-2+ ecological
Long-Term Management Period: All Performance Standards * Met
* The term "Performance Standards" refers to both administrative and ecological milestones

IV. Background.

To fulfill the Congressional Directive of issuing regulations of "general applicability" that "maximize available credits and opportunities for mitigation" and "provide flexibility" for various species, the FWS must establish equivalent high standards for all offset mechanisms. Equivalency helps to create clarity and consistency for offset providers and thus incentivizes investment in high quality offsets by alleviating potential competitive disadvantages based on higher risk Offset Projects. The 2016 ESA CM Policy reflected the FWS' understanding of the need for equivalent standards across mechanisms.[19] While the 2016 ESA CM Policy was rescinded, the equivalency provisions of that Policy are still germane and the current Rulemaking under the Congressional Directive presents an important opportunity to now require, rather than just recommend, those equivalent standards.

Critically, to achieve equivalency, the forthcoming Rule must include equivalent standards for all offset mechanisms and equal enforcement of those standards. If the Rule does not apply to all offset mechanisms, but only to conservation banks, then other options may be held to lower standards and thus will not be equivalent to the ecological outcomes and functions delivered by banks. To implement the concept of equivalency, the FWS should rely on the use of Instruments to document and guarantee that each offset project provides certain assurances and performs to agreed-upon standards. As detailed below, the Instrument is the mechanism to ensure accountable implementation of equivalency; in the absence of an Instrument requirement, regulators and offset providers will struggle to transparently and consistently evaluate how Offset Projects are performing and whether they are meeting required standards.

V. Key Language Elements and Considerations.

Any equivalency standards need to be anchored in an agreement - or Instrument - to compel compliance. This is our core recommendation: require in the Rule that all offset projects, regardless of delivery mechanism, be established through an Instrument 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). This approach to equivalency through Instrument requirements has proven to be effective under the 2008 Wetland Mitigation 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 in this paper is primarily based on the 2017 Implementation Guidance and the 2008 Rule.

We also recommend a review and approval timeline for offset project Instruments. Years of experience have taught us that, while unforeseen delays will 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.

[19] 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 forms of compensatory mitigation (i.e., restoration, preservation, establishment, and enhancement) approved by the Service."

We recommend establishing specific timelines for Offset Project establishment that track with those of the 2008 Wetland Mitigation Rule. 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 timeliness of review is one way to meet the NDAA directive to "maximize available credits." Understanding that mandatory timelines create staffing needs, we suggest that the Rule establish an option for the Service to accept supplemental funding to support the program (see the Offset Standards Position paper).

VI. Rule Language Recommendations.

Section 4. Offset Instrument Content and Review Requirements.

(a) *Definitions. See Cover Note 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:[20]

(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

[20] 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.

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, 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. 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.

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

(xiv) *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*.[21,22]

(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.*[23] 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.* Once 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:

[21] 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.

[22] 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.

[23] 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.

(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.

VII. Rule Preamble Recommendations.

While these regulations have been designed to ensure equivalency among offset mechanisms—i.e., the Offset Standard, Instrument and Durability provisions—scenarios are likely to arise that will require additional measures. Traditionally offset ratios have been a frequently used tool for the Service. And in many respects, differing Service Area treatments, or case-by-case exceptions to Service Areas, have created advantages or disadvantages within offset markets. Therefore, careful consideration is required 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 that is transparent, reasonable, and scientifically justified, as well as consistent with applicable laws and regulations.

Offset ratios may be used for different purposes.[24] 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 than the preferred type. 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.[25]

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

[24] See section 8.4 of the 2017 Interim Guidance, which covers ratios well.
[25] See the Advance Offset Preference and Offset Standard papers for further context on role/importance of offset ratios and for how/when the Service should stipulate ratios for specific species.

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, accelerated credit releases, and explicit preferences for the use of these offsets when and where available.