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Endangered and Threatened Wildlife and Plants; Endangered Species Act Compensatory Mitigation Policy; Notice

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–ES–2015–0165; FXES11120900000—167—FF09E30000]

RIN 1018–BB72

Endangered and Threatened Wildlife and Plants; Endangered Species Act Compensatory Mitigation Policy

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Announcement of draft policy; request for public comment.

SUMMARY: We, the U.S. Fish and Wildlife Service, announce the draft Endangered Species Act (ESA) Compensatory Mitigation Policy. The draft new policy is needed to implement recent Executive Office and Department of the Interior mitigation policies that necessitate a shift from project-by-project to landscape-scale approaches to planning and implementing compensatory mitigation. The draft new policy is also needed to improve consistency in the use of compensatory mitigation as recommended or required under the ESA. The draft ESA Compensatory Mitigation Policy, if adopted, would cover permittee-responsible mitigation, conservation banking, in-lieu fee programs, and other third-party mitigation mechanisms, and would stress the need to hold all compensatory mitigation mechanisms to equivalent and effective standards. We request comments, information, and recommendations on the draft new policy from all interested parties.

DATES: We will accept comments on the draft policy from all interested parties until October 17, 2016. Please note that if you are using the Federal eRulemaking Portal (see **ADDRESSES**, below), the deadline for submitting an electronic comment is 11:59 p.m. Eastern Time on this date. For the information collection aspects of this draft policy, comments will be accepted until October 3, 2016.

ADDRESSES: *Document Review:* The draft policy is available for review at *http://www.regulations.gov,* under docket number FWS–HQ–ES–2015–0165.

General Comments: You may submit comments on the draft policy by one of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov.* In the Search box, enter the docket number for the draft policy, which is FWS–HQ–ES–2015–0165. You may enter a comment by clicking on the ''Comment Now!'' button. Please ensure that you have found the correct document before submitting your comment.
- *U.S. mail or hand delivery:* Public Comments Processing, Attn: Docket No. FWS–HQ–ES–2015–0165; Division of Policy, Performance, and Management Programs; U.S. Fish and Wildlife Service, MS: BPHC; 5275 Leesburg Pike; Falls Church, VA 22041–3803.
- For the Information Collection Aspects of the draft policy: You may review the Information Collection Request online at *http://www.reginfo.gov.* Follow the instructions to review Department of the Interior collections under review by OMB. Send comments (identified by 1018–BB72) specific to the information collection aspects of this proposed rule to both the: Desk Officer for the Department of the Interior at OMB–OIRA at (202) 295–5806 (fax) or *OIRA_Submission@omb.eop.gov* (email); and Service Information Collection Clearance Officer; Division of Policy, Performance, and Management Programs; U.S. Fish and Wildlife Service, MS: BPHC; 5275 Leesburg Pike; Falls Church, VA 22041–3803 (mail); or *hope_grey@fws.gov* (email).

We will post all comments on the draft policy on *http://www.regulations.gov.* This generally means that we will post any personal information you provide us (see Request for Information, below, for more information).

FOR FURTHER INFORMATION CONTACT: Craig Aubrey, U.S. Fish and Wildlife Service, Division of Environmental Review, 5275 Leesburg Pike, Falls Church, VA 22041–3803; telephone 703–358–2442.

SUPPLEMENTARY INFORMATION:

Background

The mission of the U.S. Fish and Wildlife Service (Service or USFWS) is working with others to conserve, protect, and enhance fish, wildlife, and plants and their habitat for the continuing benefit of the American people. As part of our mission, we continually seek opportunities to engage both the public and private sectors to work with us to conserve species and the ecosystems on which they depend. This collaborative effort includes conservation of endangered and threatened (listed) species and their designated critical habitat protected under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and other species proposed for listing or at-risk of being listed. The purposes of the ESA are to provide a means whereby the ecosystems upon which listed species depend may be conserved and to provide a program for the conservation of such species. The Service and National Oceanic and Atmospheric Administration's National Marine Fisheries Service share responsibilities for administering the ESA. However, this draft policy would only apply to the Service and species under our jurisdiction.

This draft policy is the first comprehensive treatment of compensatory mitigation under authority of the ESA to be issued by the Service. Both the 1995 interagency policy on the establishment and operation of wetland mitigation banks (60 FR 58605, November 28, 1995), and the 2000 interagency policy on the use of in-lieu fee arrangements (65 FR 66914, November 7, 2000) are specific to wetland mitigation, but provide guidance that is generally applicable to conservation banking and in-lieu fee programs for species associated with wetlands or uplands. These interagency policies were superseded by the Environmental Protection Agency–U.S. Army Corps of Engineers 2008 Compensatory Mitigation Rule for Losses of Aquatic Resources (73 FR 19670, April 10, 2008). In 2003, the Service issued guidance on the establishment, use, and operation of conservation banks (68 FR 24753, May 8, 2003). In 2008, we issued recovery crediting guidance (73 FR 44761, July 31, 2008). This draft ESA Compensatory Mitigation Policy would replace these previous policies and guidance documents and expand coverage to all compensatory mitigation mechanisms recommended or supported by the Service when implementing the ESA, including, but not limited to, conservation banks, in-lieu fee programs, habitat credit exchanges, and permittee-responsible mitigation.

Purpose and Importance of the Draft Policy

The primary intent of the draft policy is to provide Service personnel with direction and guidance in the planning and implementation of compensatory mitigation, primarily through encouraging strategic planning at the landscape level and setting standards and providing minimum criteria that mitigation programs and projects must meet to achieve conservation that is effective and sustainable. Compensatory mitigation is defined in this draft policy as compensation for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied, by replacing or providing substitute resources or environments (see 40 CFR 1508.20) through the restoration, establishment,

enhancement, or preservation of resources and their values, services, and functions (part 600, chapter 6 of the Departmental Manual (600 DM 6.4C)). While this policy addresses only the role of compensatory mitigation under the ESA, avoidance and minimization of impacts retain their central role in both the Section 7 and Section 10 processes. Guidance on the application of the mitigation hierarchy is provided in our draft Mitigation Policy (81 FR 12380, March 8, 2016), regulations implementing the ESA, and other policies and guidance documents specific to various sections of the ESA.

Alignment of the Draft Policy With Existing Directives

By memorandum (80 FR 68743), the President directed all Federal agencies that manage natural resources, ''to avoid and then minimize harmful effects to land, water, wildlife, and other ecological resources (natural resources) caused by land- or water-disturbing activities, and to ensure that any remaining harmful effects are effectively addressed, consistent with existing mission and legal authorities.'' This draft policy is consistent with the Presidential memorandum (''Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment'') issued November 3, 2015; the Secretary of the Department of the Interior (Department) Secretarial Order 3330 entitled, ''Improving Mitigation Policies and Practices of the Department of the Interior,'' issued October 31, 2013; and is intended to institute the policies and procedures reflected in the guiding principles on mitigation established by the Department through the report to the Secretary entitled, ''A Strategy for Improving the Mitigation Policies and Practices of The Department of the Interior,'' issued in April 2014 (Clement et al. 2014). These directives anticipate a more comprehensive use of a landscape-scale approach to planning and implementing mitigation. The landscape-scale approach to mitigation is not a new concept. For example, in 2013 the Service issued mitigation guidance for two listed song birds in central Texas based on recovery goals for these species. The song bird mitigation guidance sets minimum standards that must be met by mitigation providers and encourages the use of consolidated compensatory mitigation in the form of permanent protection and management of large, contiguous patches of species habitat. Proactive approaches, such as this example, provide greater regulatory certainty for project proponents and encourage the establishment of conservation banks and other mitigation opportunities by mitigation sponsors for use by project proponents.

This draft policy adopts the mitigation principles in the Presidential memorandum (80 FR 68743); the strategy report to the Secretary (Clement et al. 2014); the Department's Mitigation Policy, ''Implementing Mitigation at the Landscape-scale'' (600 DM 6); and the Service's draft revision of our Mitigation Policy (81 FR 12380, March 8, 2016), including a mitigation goal to improve (*i.e.,* a net gain) or, at a minimum, to maintain (*i.e.,* no net loss) the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority, primarily for important, scarce, or sensitive resources, or as required or appropriate. The mitigation goal is not necessarily based on habitat area, but on numbers of individuals, size and distribution of populations, the quality and carrying capacity of habitat, or the capacity of the landscape to support stable or increasing populations of the affected species after the action (including all proposed conservation measures) is implemented. In other words, it is based on those factors that determine the ability of the species to be conserved.

Benefits of the Draft Policy

This draft policy would set forth standards for compensatory mitigation that would implement the tenets in the directives cited above and reflect the many lessons learned by the Service during our more than 40-year history implementing the ESA, particularly sections 7 and 10 of the ESA. The standards would apply to all compensatory mitigation mechanisms (*i.e.,* permittee-responsible mitigation, conservation banks, in-lieu fee programs, habitat exchanges, and other third party mitigation arrangements), which is instrumental to achieving effective compensatory mitigation on the landscape and encouraging private investment in compensatory mitigation.

Adherence to the mitigation principles and compensatory mitigation standards identified in this draft policy would be expected to achieve greater consistency, predictability, and transparency in implementation of the ESA. Service offices are encouraged to work with Federal agencies and other partners to establish compensatory mitigation programs based on landscape-scale conservation plans, such as more efficient, better coordinated, and expedited regulatory processes, which can provide project applicants with incentives to mitigate their actions. Compensatory mitigation programs and projects designed and implemented in accordance with the standards set forth in this draft policy and that also adhere to prescriptive guidance provided in this draft policy would be expected to achieve the best conservation outcomes for listed, proposed, and at-risk species through effective management of the risks associated with compensatory mitigation.

This draft policy would encourage the use of market-based compensatory mitigation programs such as conservation banking in conjunction with programmatic approaches to ESA section 7 consultations and habitat conservation plans that can be designed to achieve a no net loss or net gain mitigation goal. Consultations and habitat conservation plans that establish a ''program'' to address multiple, similar actions and/or impacts to one or more species operate on a larger landscape scale and expedite regulatory processes. Market-based mitigation programs improve regulatory predictability, provide efficiencies of scale, and incentivize private investment in species conservation (Fox and Nino-Murcia 2005). The benefits provided by these mitigation programs generally encourage Federal agencies and incentivize applicants to develop proposed actions that fully compensate for adverse impacts to affected species anticipated as a result of their actions.

Discussion

''In enacting the ESA, Congress recognized that individual species should not be viewed in isolation, but must be viewed in terms of their relationship to the ecosystem of which they form a constituent element. Although the regulatory mechanisms of the [ESA] focus on species that are formally listed as endangered or threatened, the purposes and policies of the [ESA] are far broader than simply providing for the conservation of individual species or individual members of listed species'' (Conference Report No. 97–835 House of Representatives, September 17, 1982). This comment, made over 30 years ago during reauthorization of the ESA, is a reminder of the challenges still before us. Incorporating a landscape-scale approach to development and conservation planning, including mitigation, that ensures a net gain or, at a minimum, no net loss in the status of affected resources, as directed by the Presidential memorandum (80 FR 68743), would help address the additive impacts that lead to significant

deterioration of resources over time and has the potential to foster recovery of listed species and avoid listing of additional species.

As discussed later in this document, the Service's authority to require compensatory mitigation under the ESA is limited and differs under Sections 7 and 10. However, we can recommend the use of compensatory mitigation to offset the adverse impacts of actions under certain provisions of the ESA and under other authorities, such as the Fish and Wildlife Coordination Act (16 U.S.C. 661–667e) and the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*). This draft policy would encourage Service offices to work with Federal agencies and applicants, and to recommend or require, if appropriate, the inclusion of compensatory mitigation for all unavoidable adverse impacts to listed, proposed, and at-risk species and their habitat anticipated as a result of any proposed action. While this practice currently exists for some species, it is not used broadly throughout the Service. Recommending, where applicable, that Federal agencies use their authorities to fully mitigate the adverse effects of their actions (*i.e.,* ensure no net loss in the status of affected resources) is consistent with the Presidential memorandum (80 FR 68743), the Department's and the Service's proposed mitigation planning goal, and the purposes of the ESA. Effective mitigation that fully offsets the impacts of an action prevents that action from causing a decline in the status of affected species (*i.e.,* achieves no net loss).

Compensatory Mitigation Under Sections 7 and 10 of the ESA

The additive effects of impacts adversely affecting listed and at-risk species as a result of many past and current human-caused actions are significant. The number of listed species has increased from slightly more than 300 in 1982 (when the ESA was reauthorized) to more than 1,500 by the end of 2015. While some listed species have been downlisted or delisted within the last 40 years, the projected increase in human population growth, increasing demand on our natural resources associated with this projected population growth, accelerated climate change, continued introductions of invasive species, and other stressors are putting even more species at risk and compromising the essential functions of ecosystems necessary to improve the status of these species and recover listed species. We cannot expect to change the status trajectories of these species without a commitment to responsible and implementable standards for accomplishing effective, sustainable compensatory mitigation that fully offsets the adverse impacts of actions to species and other resources of concern.

Compensatory mitigation is a conservation measure that can be used within an appropriate context under section 7 of the ESA to address proposed actions that may result in incidental take of listed species that cannot be avoided. Under section 7(a)(1) of the ESA, all Federal agencies are required to use their authorities to carry out conservation programs for listed species. Federal agencies may choose to develop and implement section 7(a)(1) conservation programs for listed species in conjunction with section 7(a)(2) consultation through a coordinated program. The Service supports these efforts, and we encourage Federal agencies to coordinate with us on development of such programs.

Compensatory mitigation can be used under section 10(a)(1)(B) of the ESA through habitat conservation plans developed to address adverse impacts of non-federal actions on listed and other covered species that cannot be avoided. Landscape-scale habitat conservation plans developed for use by multiple applicants to conserve multiple resources are generally the most efficient and effective approaches. The Service supports these efforts and encourages applicants, particularly local and State agencies and organizations, to coordinate with us on the development of such plans.

Landscape-Level Approaches to Compensatory Mitigation

Taking a landscape-level approach to mitigation will assist the Service to modernize our compensatory mitigation procedures and practices and better meet the challenges posed by the growing human population's demands on our natural resources and changing conditions such as those resulting from climate change. Conservation banking is a market-based compensatory mitigation mechanism based on a landscape approach to mitigation that achieves compensation for listed and other resources of concern in advance of project impacts. In-lieu fee programs also establish compensatory mitigation sites but generally not in advance of impacts and often not through a market-based approach. Habitat credit exchanges are market-based compensatory mitigation programs based on a clearinghouse model that may or may not accomplish mitigation in advance of project impacts. All three of these mitigation mechanisms use a landscape-level approach to consolidate and locate compensatory mitigation in areas identified as conservation priorities. These programs have designated service areas within which proposed actions that meet certain criteria may be mitigated with Service approval. The functions and services provided for listed, proposed, and at-risk species by these compensatory mitigation programs are represented by credits. Credits are used to offset impacts (often referred to as debits). Most credit transactions involve a permittee purchasing the amount of credits needed to offset the anticipated adverse effects of an action from the mitigation project sponsor. The Service must approve credit transactions as to their conservation value and appropriate application for use related to any authorization or permit issued under the ESA.

The conservation banking model is generally perceived as successful at achieving effective conservation outcomes and, when used in conjunction with section 7 consultations and section 10 habitat conservation plans, has achieved notable regulatory efficiencies. Results include ecological performance that usually achieves no net loss, and often a net benefit, in species conservation; increased regulatory predictability for Federal agencies and applicants; and more efficient and better coordinated permitting processes, especially when multiple agencies with overlapping regulatory jurisdictions are involved.

Permittee-responsible mitigation for many small to moderate impacts cannot provide adequate compensation because it is often difficult to achieve effective conservation on a small scale. Small mitigation sites are often not ecologically defensible, and it is often difficult to ensure long-term stewardship of these sites. Most individual actions result in small or moderate impacts to species and habitat, yet the additive effects of these actions (often referred to as ''death by a thousand cuts''), when not compensated for, can have substantial adverse effects on these resources. In general, conservation banking, in-lieu fee programs, and similar mitigation mechanisms that consolidate compensatory mitigation on larger landscapes are designed to serve project proponents with small to moderate impact actions, are ecologically more effective, and provide more economical options to achieve compensation than permittee-responsible mitigation.

Furthermore, larger landscape-scale conservation programs with market-based compensatory mitigation

opportunities create an economic incentive for private landowners, investors, and mitigation project sponsors to participate in these programs. The most robust programs generate competition among mitigation sponsors and may provide cost-effective means for complying with natural resource laws such as the ESA. To be successful, these market-based and other compensatory mitigation programs must operate transparently and be held to high standards that are uniformly applied across all compensatory mitigation mechanisms. Equally important is transparency in the implementation of the ESA and the development of mitigation programs for use by regulated communities.

Mitigation Defined

Because endangered and threatened species are by definition in danger of extinction or likely to become so in the foreseeable future, avoiding, minimizing, and compensating for impacts to their populations are all forms of mitigation that the Service may consider when administering the ESA. The Council on Environmental Quality (CEQ) National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) regulations (40 CFR 1508.20) state that mitigation includes:

- Avoiding the impact altogether by not taking a certain action or parts of an action;
- Minimizing impacts by limiting the degree or magnitude of the action and its implementation;
- Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
- Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and
- Compensating for the impact by replacing or providing substitute resources or environments.

In 600 DM 6, the Department of the Interior states that mitigation, as enumerated by CEQ, is compatible with Departmental policy; however, as a practical matter, the mitigation elements are categorized into three general types that form a sequence: Avoidance, minimization, and compensatory mitigation for remaining unavoidable (also known as residual) impacts. Historically, those administering the ESA have often used a condensed mitigation sequence—avoid, minimize, and compensate or avoid, minimize, and mitigate. This draft policy adopts the Department's definition of compensatory mitigation—compensation for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied, by replacing or providing substitute resources or environments (see 40 CFR 1508.20) through the restoration, establishment, enhancement, or preservation of resources and their values, services, and functions (600 DM 6.4C). And, throughout this draft policy, ''compensatory mitigation'' or ''compensation'' is used in this broad sense to include any measure that would rectify, reduce, or compensate for an impact to an affected resource. We also use the term ''minimize'' in the broad sense throughout this draft policy to include any conservation measure, including compensation, which would lessen the impact of the action on the species or other affected resource. We recognize there is some overlap in the use of these terms but, as a practical matter, this use in practice is consistent with the intent of the ESA. Information regarding avoidance and observance of the mitigation sequence can be found at our draft Mitigation Policy (81 FR 12380, March 8, 2016). This draft ESA Compensatory Mitigation Policy would cover permittee-responsible mitigation, conservation banking, in-lieu fee programs, and all other compensatory mitigation mechanisms.

The draft policy follows:

U.S. Fish and Wildlife Service

(Draft) Endangered Species Act Compensatory Mitigation Policy

1. Purposes

This policy adopts the mitigation principles established in the U.S. Fish and Wildlife Service (Service) draft Mitigation Policy (81 FR 12380, March 8, 2016), establishes compensatory mitigation standards, and provides guidance for the application of compensatory mitigation through implementation of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) (ESA). Compensatory mitigation (compensation) is defined in this draft policy as compensation for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied, by replacing or providing substitute resources or environments (see 40 CFR 1508.20) through the restoration, establishment, enhancement, or preservation of resources and their values, services, and functions (600 DM 6.4C). This policy applies to all Service compensatory mitigation requirements and recommendations involving ESA compliance. It is also intended to assist other Federal agencies carrying out their statutory and regulatory responsibilities under the ESA and to provide applicants with guidance on the appropriate use of compensatory mitigation for proposed actions. The standards and guidance in the policy will also assist mitigation providers in developing compensatory mitigation project proposals.

Adherence to the principles, standards, and guidance identified in this policy is expected to: (1) Provide greater clarity on applying compensatory mitigation to actions subject to ESA compliance requirements; (2) improve consistency and predictability in the implementation of the ESA by standardizing compensatory mitigation practices; and (3) promote the use of compensatory mitigation at a landscape scale to help achieve the purposes of the ESA.

This policy encourages Service personnel to collaborate with other agencies, academic institutions, nongovernmental organizations, Tribes, and other partners to develop and implement compensatory mitigation measures and programs through a landscape-scale approach to achieve the best possible conservation outcomes for activities subject to ESA compliance. It also encourages the use of programmatic approaches to compensatory mitigation that have the advantages of advance planning and economies of scale to: (1) achieve a net gain in species' conservation; (2) reduce the unit cost of compensatory mitigation; and (3) improve regulatory procedural efficiency.

Appendices A and B provide a list of acronyms and a glossary of terms used in this policy, respectively.

2. Authorities and Coordination

This policy is focused on compensatory mitigation that can be achieved under the ESA. The Service's authority to require mitigation is limited, and our authority to require a ''net gain'' in the status of listed or at-risk species has little or no application under the ESA. However, we can recommend the use of mitigation, and in particular compensatory mitigation, to offset the adverse impacts of actions under the ESA. Other statutes also provide the Service with authority for recommending compensatory mitigation for actions affecting fish, wildlife, plants, and their habitats (*e.g.,* Fish and Wildlife Coordination Act (FWCA; 16 U.S.C. 661–667e), National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), and Oil Pollution Act (33 U.S.C. 2701 *et seq.*)). In

addition, statutes such as the Clean Water Act (CWA; 33 U.S.C. 1251 *et seq.*) and Federal Power Act (16 U.S.C. 791a-828c) provide other Federal agencies with authority to recommend or require compensatory mitigation for actions that result in adverse effects to species or their habitats. These other authorities are often used in combination with, or to supplement the authorities under, the ESA to recommend or require compensatory mitigation for a variety of resources including at-risk species and their habitats. For example, the ESA and the Federal Land Policy and Management Act (43 U.S.C. 1701 *et seq.*) together provide a greater impetus to conserve desert tortoise habitat than either statute alone.

Synchronizing environmental review processes, especially through early coordination with project proponents, allows the Service to provide comments and recommendations for all mitigation types (*i.e.,* avoidance, minimization, and compensation) included as part of proposed actions in an effort to reduce impacts to listed, proposed, and at-risk species and critical habitat. For example, the Service may comment on proposed actions under NEPA and State environmental review statutes (*e.g.,* California Environmental Quality Act and Hawaii Environmental Policy Act). Coordination of environmental review processes generally results in conservation outcomes that have a greater likelihood of meeting the Service's mitigation goal.

The supplemental mandate of NEPA (42 U.S.C. 4335) adds to the existing authority and responsibility of the Service to protect the environment when carrying out our mission under the ESA. The Service's goal is to provide a coordinated review and analysis of the impacts of proposed actions on listed, proposed, and at-risk species, and designated and proposed critical habitat that are also subject to the requirements of other statutes such as NEPA, CWA, and FWCA. Consultation, conference, and biological assessment procedures under section 7 and permitting procedures under section 10(a)(1)(B) of the ESA can be integrated with interagency cooperation procedures required by other statutes such as NEPA or FWCA. This is particularly the case for cumulative effects. Cumulative effects are often difficult to analyze, are defined differently under different statutes, and are often not adequately considered when making decisions affecting the type and amount of mitigation recommended or required.

3. Scope

The ESA Compensatory Mitigation Policy covers all forms of compensatory mitigation, including, but not limited to, permittee-responsible mitigation, conservation banking, in-lieu fee programs, and other third-party mitigation projects or arrangements, for all species and habitat protected under the ESA and for which the Service has jurisdiction. Endangered and threatened species, species proposed as endangered or threatened, designated critical habitat, and proposed critical habitat are the primary focus of this policy. Candidates and other at-risk species would also benefit from adherence to the standards set forth in this policy, and all Service programs are encouraged to develop compensatory mitigation programs and tools to conserve at-risk species in cooperation with States and other partners.

This policy does not apply retroactively to approved mitigation programs; however, it does apply to amendments and modifications to existing conservation banks, in-lieu fee programs, and other third-party compensatory mitigation arrangements unless otherwise stated in the mitigation instrument. Examples of amendments or modifications to which this policy would apply include authorization of additional sites under an existing instrument or agreement, expansion of an existing site, or addition of a new type of resource credit such as addition of a new species credit.

Additional guidance that provides more specific operational steps may be developed by the Service to further implement this policy. Existing guidance documents will be reviewed and revised as necessary to ensure consistency with this policy.

This policy supersedes the Service's ''Guidance for the Establishment, Use, and Operation of Conservation Banks,'' published in the **Federal Register** in 2003 (68 FR 24753), and ''Guidance on Recovery Crediting for the Conservation of Threatened and Endangered Species'' (73 FR 44761) published in 2008. It also supersedes ''Federal Guidance on the Establishment, Use, and Operation of Mitigation Banks'' (60 FR 58605, November 28, 1995) and ''Federal Guidance on the Use of In-lieu Fee Arrangements for Compensatory Mitigation under Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act'' (65 FR 66914, November 7, 2000).

This policy does apply to other Federal or non-Federal actions permitted or otherwise authorized or approved prior to issuance of this policy under circumstances where the action may require additional compliance review under the ESA if: new information becomes available that reveals effects of the action to listed species or critical habitat not previously considered; the action is modified in a manner that causes effects to listed species and critical habitat not previously considered; authorized levels of incidental take are exceeded; a new species is listed or critical habitat is designated that may be affected by the actions; or the project proponent specifically requests the Service to apply the policy. This policy does not apply to actions that are specifically exempted under the ESA. It also does not apply where the Service has already agreed in writing to mitigation measures for pending actions, except where new activities or changes in current activities associated with those actions would result in new impacts, or where new authorities, or failure to implement agreed upon recommendations warrant new consideration regarding mitigation. Service offices may elect to apply this policy to actions that are under review as of the date of publication of the final policy.

4. Compensatory Mitigation Standards

The mitigation principles, as described in the Service's draft Mitigation Policy (81 FR 12380, March 8, 2016), are goals the Service intends to achieve, in part through recommending or requiring, as appropriate, under the ESA and other applicable authorities, the inclusion of compensatory mitigation in proposed actions with adverse impacts to listed, proposed or at-risk species and designated or proposed critical habitat. The compensatory mitigation standards described in this section of the policy will implement the mitigation principles, as outlined in the draft Mitigation Policy, including using a landscape approach to inform mitigation and aspiring to meet the goal to improve (*i.e.,* a net gain) or, at minimum, to maintain (*i.e.,* no net loss) the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority. Compensatory mitigation programs, projects, and measures that are consistent with the mitigation principles and adhere to the compensatory mitigation standards set forth in this section of the policy are expected to achieve the best conservation outcomes. The compensatory mitigation standards apply to all compensatory mitigation 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. The standards are as follows:

4.1. Siting Sustainable Compensatory Mitigation

Compensatory mitigation will be sited in locations that have been identified in landscape-scale conservation plans or mitigation strategies as areas that will meet conservation objectives and provide the greatest long-term benefit to the listed, proposed, and/or at-risk species and other resources of primary conservation concern. In the absence of such plans, conservation needs of the species will be assessed at scales appropriate to inform the selection of sustainable mitigation areas that are expected to produce the best ecological outcomes for the species using the best available science. The following factors should be considered when selecting sites for compensatory mitigation:

- Core areas of existing and projected suitable species habitat and areas that provide connectivity between core areas;
- Designated and proposed critical habitat;
- Recovery plan, 5-year review, and State conservation recommendations;
- Size and configuration of the site within the landscape;
- Land use trends and compatibility with adjacent land uses;
- Habitat types that provide the required ecological functions and services (these may not be the same habitat types that are impacted);
- Existing encumbrances on the site and split estates (*e.g.,* sites with separate ownership of the surface and subsurface mineral rights);
- Degree of threat to the proposed site (*e.g.,* imminent development or invasive species encroachment); and
- Existing and projected landscape conditions (*e.g.,* climate change projections) that may hinder or improve the resilience of the species and other resources of concern.

Other factors may also warrant consideration when siting compensatory mitigation. Compensatory mitigation plans and programs may not necessarily be limited to the above list.

4.2. In-Kind for Species

Compensatory mitigation must be in-kind for the listed, proposed, or at-risk species affected by the proposed action. The same requirement does not necessarily apply to the habitat type affected, as the best conservation outcome for the species may not be an offset of the same habitat type or ecological attribute of the habitat impacted by the action. Many species use different habitat types at different life stages or for different life-history requirements such as feeding, breeding, and sheltering. For example, some species are migratory. Selecting a habitat type different from that impacted by the action or selecting more than one type of habitat for compensatory mitigation may best meet the conservation needs of the species.

Offsetting impacts to designated or proposed critical habitat through the use of compensatory mitigation should target the maintenance, restoration, or improvement of the recovery support function of the affected critical habitat as described in the relevant biological or conference opinion, conservation or mitigation plan, mitigation instrument, permit, or conference report. Recovery plans, 5-year reviews, proposed and final critical habitat rules, and the best available science on species status, threats, and needs should be relied on to inform the selection of habitat types subject to compensatory mitigation actions for unavoidable adverse impacts to species or critical habitat.

The use of compensatory mitigation to minimize the impacts of incidental take on listed species can be based on a habitat or another surrogate such as a similarly affected species or ecological conditions under circumstances where it is not practicable to express or monitor the amount or extent of take in terms of the number of individuals of the species, in accordance with 50 CFR 402.14(i)(1)(i). A causal link between the surrogate and take of the species must be explained and must be scientifically defensible. For example, occupied habitat of a listed species has been used as a surrogate to express the amount or extent of take of the vernal pool fairy shrimp (*Branchinecta lynchi*) because quantification of take in terms of individuals is not practicable but the surface area of occupied vernal pool habitat is easily measured and monitored.

4.3. Reliable and Consistent Metrics

Metrics developed to measure ecological functions and/or services at compensatory mitigation sites and impact sites must be science-based, quantifiable, consistent, repeatable, and related to the conservation goals for the species. These metrics may be species- or habitat-based. Metrics used to calculate credits should be the same as those used to calculate debits for the same species or habitat type. If they are not the same, the relationship (conversion) between credits and debits must be transparent and scientifically defensible. Metrics must account for duration of the impact, temporal loss to the species, management of risk associated with compensatory mitigation, and other such measures. This does not mean that metrics developed to measure losses and gains on the landscape must be precise, as this is rarely possible in biological systems, but uncertainty should be noted where it exists and metrics must be based on the best scientific data available to gauge the adequacy of the compensatory mitigation. Modifying existing metrics on which approved conservation banks or other compensatory mitigation programs are based and still in use warrants careful consideration and must be based on best available science.

Scientifically defensible metrics also are needed to measure biological and ecological performance criteria used to monitor the outcome of compensatory mitigation. It may be necessary to adjust metrics over time through monitoring and adaptive management processes in order to respond to changing conditions and ensure they remain effective at assessing the conservation objectives of the compensatory mitigation program. However, modifying metrics used to monitor performance should not be a substitute for lack of compliance or failure to implement adaptive management.

4.4. Judicious Use of Additionality

Compensatory mitigation must provide benefits beyond those that would otherwise have occurred through routine or required practices or actions, or obligations required through legal authorities or contractual agreements. A compensatory mitigation measure is ''additional'' when the benefits of the measure improve upon the baseline conditions of the impacted resources and their values, services, and functions in a manner that is demonstrably new and would not have occurred without the compensatory mitigation measure (600 DM 6.4G). The additional benefits may result from restoration or enhancement of habitat; preservation of existing habitat that lacks adequate protection; management actions that protect, maintain, or create habitat (*e.g.,* regularly scheduled prescribed burns or purchase of rights in a split estate); or other activities (*e.g.,* an action that reduces threats from disease or predation, or captive breeding and reintroduction of individuals or populations). Baseline conditions for the habitat relevant to the species must be assessed prior to implementing the compensatory mitigation project for

comparison to conditions after completion of the compensatory mitigation project in order to quantify and verify the additional benefits derived from the mitigation project.

Demonstrating additionality on lands already designated for conservation purposes can be challenging, particularly when the lands under consideration are public lands. In general, credit can only be issued for compensatory mitigation on public lands if additionality can be clearly demonstrated and is legally attainable. See section 6.2. Eligible Lands for guidance on using public lands for compensatory mitigation.

4.5. Timing and Duration

Compensatory mitigation projects must achieve conservation objectives within a reasonable timeframe and for at least the duration of the impacts. Ideally, compensatory mitigation should be implemented in advance of the action that adversely impacts the species or critical habitat. When this is not possible or practicable, temporal losses to the affected species must be compensated through some means (*e.g.,* increased mitigation ratio that reflects the degree of temporal loss). Temporal loss may include indirect effects of the action on the species that occur beyond the time period of any direct effects of the action (*e.g.,* removal of habitat during a season when individuals of a migratory species are absent). Temporal loss to the species as a result of both direct and indirect adverse effects must be addressed when determining appropriate compensatory mitigation. Losses of habitat that require many years to restore may best be offset by a combination of restored habitat, preservation of existing high-quality habitat, and improved management of existing habitat. The amount of temporal loss, the form of compensatory mitigation (*i.e.,* establishment, enhancement, restoration, preservation, or some combination of these forms), and the time anticipated to establish the compensatory mitigation on the landscape should be used to determine the amount of compensatory mitigation needed to meet the mitigation goal for the species, critical habitat, and/or other resources of concern.

4.6. Ensure Durability

Compensatory mitigation must be secured by adequate legal, real estate, and financial protections that ensure the success of the mitigation. Most compensatory mitigation projects are permanent, and the viability of the assurances to achieve long-term stewardship of a mitigation site must be carefully planned and implemented to ensure durability. A compensatory mitigation measure is ''durable'' when the effectiveness of the measure is sustained for the duration of the associated impacts (including direct and indirect impacts) of the authorized action (600 DM 6.4H). The parties responsible for establishment, implementation, performance, long-term management of the mitigation site, management of financial resources, and oversight of various aspects of the mitigation project must be clearly identified in the permit or other regulatory documentation that authorizes the use of compensatory mitigation and, in the case of third-party mitigation providers, the authorizations for the establishment and use of third-party mitigation (*e.g.,* a conservation bank instrument). The Service shall require sufficient site protection (*e.g.,* conservation easement), and careful consideration should be given to allowable and prohibited activities on compensatory mitigation sites. Activities that are incompatible with the purposes of compensatory mitigation sites must be precluded. The site protection instrument must also include provisions for transfer of ownership or management responsibility for the mitigation site to successors and, in the case of default, by the landowner and other responsible parties, a description of the remediation process. The Service will also require financial assurances in amounts and forms necessary to ensure a high level of confidence that the compensatory mitigation project will have adequate and accessible funding for long-term management, monitoring, reporting, and administrative and other performance requirements for the duration of the mitigation project.

4.7. Effective Conservation Outcomes and Accountability Through Monitoring, Adaptive Management, and Compliance

Compensatory mitigation programs and projects will be assessed to determine if they are achieving their conservation objectives through use of science-based, outcome-based ecological performance criteria that are reasonable, objective, measureable, defensible, and verifiable. Ecological performance criteria must be tied to conservation goals and specific objectives identified in compensatory mitigation programs and projects. Continued management, monitoring, and reporting are required for long-term compensatory mitigation projects (most long-term projects are permanent) after initial ecological performance criteria are met (*e.g.,* successful habitat restoration) to ensure expected conservation outcomes are achieved. Monitoring and evaluation protocols used to assess achievement of conservation objectives for long-term compensatory mitigation projects must be developed and implemented within an adaptive framework where adaptive management may be used to modify a program as needed if the program does not meet the objectives.

The Service has authority to conduct direct oversight of all compensatory mitigation programs and projects for which we have exempted or permitted incidental take under the ESA. A standard condition of HCP incidental take permits provides for such oversight. Incidental take exemptions provided by statute to Federal agencies and applicants through the ESA section 7 process require that mandatory terms and conditions included with the take statement must be implemented by the federal agency or its applicant to activate the exemption in 7(o)(2) of the Act. Compensatory mitigation instruments and conservation easements must include language that clearly states the Service has this oversight authority. The Service may rely on third-party evaluators to provide project-specific information on ecological and administrative compliance through monitoring and other reports. The cost for these services must be built into and covered by the mitigation project. Should a mitigation project fail to meet its performance criteria and therefore fail to provide the expected conservation for the species, the responsible party must provide equivalent compensation through other means. A process for achieving remediation or alternative mitigation for compensatory mitigation failures beyond the control of the responsible party (*e.g.,* unforeseen circumstances) must be clearly described in the mitigation instrument, biological and/or conference opinion, or permit.

4.8. Encourage Collaboration

Successful landscape-scale compensatory mitigation depends on the engagement of affected communities and stakeholders. Governments, communities, organizations, and individuals support what they help to develop. The Service will provide opportunities for and encourage appropriate stakeholder participation in development of landscape-scale compensatory mitigation strategies that affect listed, proposed, and at-risk species and proposed and designated critical habitat through appropriate public processes such as those used for programmatic habitat conservation plans. Programmatic approaches to

compensatory mitigation programs for at-risk species are also encouraged, particularly when led by State agencies, and the Service will make every effort to participate in the planning, establishment, and operation of such programs as described in our draft Policy Regarding Voluntary Prelisting Conservation Actions (79 FR 42525). The Service's regional and field offices will determine or assist in determining, as appropriate, the level and methods of public participation using transparent processes.

4.9. Maintain Transparency and Predictability

Consistent implementation of ESA programs that permit or authorize incidental take of listed species will provide regulatory predictability for everyone. The Service will share appropriate information on the availability of compensatory mitigation programs and projects with the public through online media or other appropriate means. Mitigation instruments, long-term management plans, mitigation monitoring reports, and other supporting documents for approved mitigation projects should be readily available to the public, with the exception of any personally identifiable information or other information that would be exempt in accordance with the Freedom of Information Act (5 U.S.C. 552, as amended). This information will be available on the Regulatory In-lieu fee and Bank Information Tracking System (RIBITS) for conservation banks. RIBITS can be accessed at *https://ribits.usace.army.mil.* Similar information for in-lieu fee programs, habitat credit exchanges, and other third-party sponsored mitigation projects must be made available on RIBITS when possible. When it is not possible to use RIBITS, another publicly accessible online system must be used.

5. Application of Compensatory Mitigation Under the ESA

Sections of the ESA under which the Service has authority to recommend or require compensatory mitigation for species or their habitat are identified below. In this section, we provide guidance on applications of these ESA authorities within the context of compensatory mitigation. The compensatory mitigation standards set forth in section 4. Compensatory Mitigation Standards of this policy apply to compensatory mitigation programs and projects established under the ESA, as appropriate.

5.1. Section 7—Interagency Cooperation

Section 2(c)(1) of the ESA directs all Federal departments and agencies to conserve endangered and threatened species. ''Conserve'' is defined in section 3 of the ESA as all actions necessary to bring the species to the point that measures provided pursuant to the ESA are no longer necessary (*i.e.,* recovery or the process through which recovery of listed species is accomplished). This requirement to contribute to the conservation of listed species is reaffirmed in section 7(a)(1) of the ESA. Congress recognized the important role Federal agencies have in conserving listed species.

When the ESA was enacted in 1973, section 7 was a single paragraph directing ''all Federal departments and agencies . . . [to] utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of [the ESA] *and* [emphasis added] by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined . . . to be critical.'' In 1979, section 7 was amended to make subsections 7(a)(1) and 7(a)(2). Federal agencies have separate responsibilities concerning species and their habitats under these two subsections. Section 7(a)(1) is a recovery measure that requires Federal agencies to carry out programs for the conservation of listed species (with discretion to individual conservation actions or programs). Section 7(a)(2) is a stabilization measure that requires Federal agencies to ensure actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat.

5.1.1. Section 7(a)(1)

Section 7(a)(1) of the ESA states ''. . . Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species.'' The Secretary's role has been delegated to the Service, and the Service therefore consults with and assists Federal agencies to accomplish these programs.

Mitigation Goal: Development of landscape-scale conservation programs for listed and at-risk species that are designed to achieve a net gain in conservation for the species.

Guidance: One way that Federal agencies can meet their responsibility under section 7(a)(1) of the ESA is by working with the Service and other conservation partners to develop landscape-scale conservation plans that include compensatory mitigation programs designed to contribute to species recovery. Landscape-scale approaches to compensatory mitigation, such as conservation banking and in-lieu fee programs, are more likely to be successful if Federal agencies, especially those that carry out, fund, permit or otherwise authorize actions that can use these programs, are involved in their establishment and support their use. For example, the Federal Highway Administration, as part of its long-term planning process, can use its authorities to work with the Service and other conservation partners on conservation programs for listed species that may be impacted by anticipated future actions. The conservation programs can include identifying priority conservation areas, developing crediting methodologies to value affected species, and developing guidance for offsetting those impacts that is expected to achieve no net loss, or even a net gain, in conservation for the species. These tools and information can then be used by conservation bank sponsors and other mitigation providers to develop compensatory mitigation opportunities (*e.g.,* conservation banks) for use by the Federal Highway Administration, and also by State departments of transportation and other public and private entities seeking compensation to offset the impacts of their actions for those same species. The resulting compensatory mitigation program provides conservation for the species that would otherwise not have been achieved—a contribution to listed species conservation under section 7(a)(1) of the ESA by the Federal agency.

5.1.2. Section 7(a)(2)

Section 7(a)(2) of the ESA states, ''[e]ach Federal agency shall . . . insure that any action authorized, funded, or carried out, by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat.'' The Service determines through consultation under section 7(a)(2) whether or not the proposed action is likely to jeopardize the continued existence of listed species or destroy or adversely modify critical habitat. The Service then issues a

biological opinion stating our conclusion and, in the case of a finding of no jeopardy (or jeopardy accompanied by reasonable and prudent alternatives that can be taken by the Federal agency to avoid jeopardy), formulates an incidental take statement, if such take is reasonably certain to occur, that specifies the anticipated amount or extent of incidental take of listed species and specifies reasonable and prudent measures necessary or appropriate to minimize such impacts under section 7(b)(4) of the ESA. If the proposed action is likely to adversely affect critical habitat, the Service's biological opinion also analyzes whether adverse modification is likely to occur and specifies reasonable and prudent alternatives to avoid adverse modification, if available. If the listed species is a marine mammal, incidental taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act (MMPA; 16 U.S.C. 1361 *et seq.*) prior to issuance of an incidental take statement under the ESA. Appendix C of this policy provides additional guidance on authorities under the MMPA.

Mitigation Goal: The Service should work with Federal agencies to assist them in proposing actions that are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat, as required under section 7(a)(2) of the ESA, *and* encourage Federal agencies and applicants to include compensation as part of their proposed actions to offset any anticipated impacts to these resources that are not avoided to achieve a net gain or, at a minimum, no net loss in the conservation of listed species.

Guidance: The Service should coordinate with Federal agencies and encourage them to use their authorities under appropriate statutes (*e.g.,* Federal Land Policy and Management Act) to avoid and minimize adverse impacts to listed species and designated critical habitat using the full mitigation sequence. Compensation is a component of the mitigation sequence that can be applied to minimize adverse effects of actions on listed species and critical habitat. Furthermore, the Service can work with Federal agencies to establish compensatory mitigation programs such as conservation banking and in-lieu fee programs that incentivize offsetting the effects of their actions through the appropriate use of compensation while expediting regulatory processes for the Federal agencies and applicants. Due to economies of scale, such mitigation programs are particularly effective at providing more effective and cost-efficient compensation opportunities for offsetting the effects of multiple actions that individually have small impacts.

5.1.2.1. Proposed Actions and Project Descriptions

To better implement section 7(a)(2) of the ESA and prevent species declines, the Service will work with Federal agencies and applicants to identify conservation measures, using the full mitigation sequence, that can be included as part of proposed actions for unavoidable impacts to listed species and critical habitat to achieve, at a minimum, no net loss in the species' conservation. The mitigation sequence should be observed (*i.e.,* avoid first, then minimize, then compensate), except where circumstances may warrant a departure from this preferred sequence. For example, it may be preferable to compensate for the loss of an occupied site that will be difficult to maintain based on projected future land use (*e.g.,* the site is likely to be isolated from the population in the future) or climate change impacts. The Service will consider conservation measures, including compensatory mitigation, as appropriate, proposed by the action agency or applicant as part of the proposed action when developing a biological opinion addressing the effects of the proposed action on listed species and critical habitat. This consideration of beneficial actions (*i.e.,* compensatory mitigation) is consistent with our implementing regulations at 50 CFR 402.14(g)(8). Federal agencies should coordinate early with the Service on the appropriateness of such beneficial actions as compensation for anticipated future actions.

5.1.2.2. Jeopardy or Adverse Modification Determinations and RPAs

When the Service issues a biological opinion with a finding of jeopardy or adverse modification of critical habitat, we include Reasonable and Prudent Alternatives (RPAs) when possible. RPAs may include any and all forms of mitigation, including compensatory mitigation, that can be applied to avoid proposed actions from jeopardizing the existence of listed species or destroying or adversely modifying critical habitat, provided they are consistent with the regulatory definition of RPAs in 50 CFR 402.02.

5.1.2.3. No Jeopardy and No Adverse Modification Determinations and RPMs

When the Service issues a biological opinion with a finding of no jeopardy, we provide the Federal agency and applicant (if any) with an incidental take statement, if take is reasonably certain to occur, in accordance with section 7(b)(4) of the ESA. The incidental take statement specifies the amount or extent of anticipated take, the impact of such take on the species, and any reasonable and prudent measures (RPMs) and implementing terms and conditions determined by the Service to be necessary or appropriate to minimize the impact of the take. RPMs can include compensatory mitigation, in appropriate circumstances, if such a measure minimizes the effect of the incidental take on the species, and as long as the measure is consistent with the interagency consultation regulations at 50 CFR 402.14. RPMs should also be commensurate with and proportional to the impacts associated with the action. The Service should provide an explanation of why the measures are necessary or appropriate. If the proposed action includes conservation measures sufficient to fully compensate for incidental take, it may not be necessary to include additional minimization measures (beyond monitoring) through RPMs.

5.1.3. Section 7(a)(4)

Section 7(a)(4) of the ESA states, ''[e]ach Federal agency shall confer with [the Service] on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed . . . or result in the destruction or adverse modification of critical habitat proposed to be designated for such species.'' The conference is designed to assist the Federal agency and any applicant to identify and resolve potential conflicts at an early stage in the planning process.

Mitigation Goal: The Service should work with Federal agencies to assist them in proposing actions that are not likely to jeopardize the continued existence of any species proposed for listing or result in the destruction or adverse modification of any proposed critical habitat, in accordance with section 7(a)(4) of the ESA. Federal agencies and applicants should also be encouraged to include compensation as part of their proposed actions to offset any anticipated impacts to resources that are not avoided to achieve a net gain or, at a minimum, no net loss in their conservation.

Guidance: The Service should coordinate with Federal agencies and encourage them to use their authorities to avoid and minimize adverse impacts to proposed and at-risk species and proposed critical habitat using the full mitigation sequence. The Service may recommend compensatory mitigation for adverse effects to proposed or at-risk

species during informal conference or in a conference report or conference opinion, or the Federal action agency or applicant may propose compensatory mitigation as part of the action. If a conference opinion or report determines that a proposed action is likely to jeopardize the continued existence of a proposed species or adversely modify or destroy proposed critical habitat, the Service will include RPAs that may include compensatory mitigation. If the species is subsequently listed or critical habitat is designated prior to completion of the action, the Service will give appropriate consideration to compensatory mitigation when confirming the conference opinion as a biological opinion or if formal consultation is necessary. This consideration of beneficial actions is consistent with our implementing regulations at 50 CFR 402.14(g)(8).

5.2. Section 10—Conservation Plans and Agreements

5.2.1. Safe Harbor and Candidate Conservation Agreements

Under a candidate conservation agreement with assurances (CCAA), private and other non-Federal property owners may voluntarily undertake conservation management activities on their properties to address threats to unlisted species and to enhance, restore, or maintain habitat benefiting species that are candidates or proposed for listing under the ESA or other at-risk species in exchange for assurances that no further action on their part is required should the species become listed during the term of the CCAA. Under a safe harbor agreement (SHA), private and other non-Federal property owners may voluntarily undertake management activities on their property to enhance, restore, or maintain habitat benefiting species listed under the ESA in exchange for assurances that there will not be any increased property use restrictions as a result of their efforts that either attract listed species to their property or that increase the numbers or distribution of listed species already on their property during the term of the agreement. Both types of agreements are designed to encourage conservation of species on non-Federal land.

Mitigation Goal: Transitioning CCAAs and SHAs into long-term/permanent conservation that can serve as compensatory mitigation when appropriate and desired by landowners. Such transitions provide greater assurance that the species conservation efforts begun under the CCAA or SHA will persist on the landscape beyond the term of the original agreement.

Guidance: CCAAs and SHAs are not intended to be mitigation programs and do not require the site protection and financial assurances that meet the compensatory mitigation standards set forth in this policy; however, they are required to meet a similar conservation standard (*i.e.,* net conservation benefit) as compensatory mitigation projects, as described in the proposed amendments to the regulations concerning enhancement of survival permits under the ESA (81 FR 26769, May 4, 2016) and revisions to the policy implementing these proposed regulations (81 FR 26817, May 4, 2016). The conservation achieved through implementation of a CCAA or SHA may be 'rolled over' for use as compensatory mitigation if: (1) The CCAA or SHA permit has expired or is surrendered; (2) the landowner is in compliance with the terms and conditions of the CCAA or SHA at the time of transition; (3) any commitments for conservation for which financial compensation from public sources was received has been fulfilled and if not fulfilled is prorated and deducted from the mitigation credit assigned to the property; and (4) all other requirements for providing compensatory mitigation are met. If the Service believes the CCAA or SHA would provide greater conservation to the species as compensatory mitigation, then the Service should inform the landowner of this assessment and provide the landowner with the opportunity to transition their property from a CCAA or SHA site to a mitigation site. A mitigation instrument appropriate for the type of compensatory mitigation site established (*e.g.,* conservation bank instrument) is required. See section 6.2. *Eligible Lands* for additional guidance.

Landowners enrolled in CCAAs while the species remains unlisted can provide compensatory mitigation under a State or other non-Service mitigation program if the actions related to the mitigation are additional to those taken to satisfy the CCAA requirement. Should the species become listed before the CCAA expires, the landowner has the option to roll over the existing mitigation agreement to a Service-approved mitigation instrument that meets the standards established in this policy. See the Service's draft Policy Regarding Voluntary Prelisting Conservation Actions (79 FR 42525) for more information on these types of programs.

5.2.2. Habitat Conservation Plans

Section 10(a)(1)(B) of the ESA allows the Service to issue an incidental take permit for ''any taking otherwise prohibited by section 9(a)(1)(B) [of the ESA] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.'' Pursuant to section 10(a)(2)(A) of the ESA, an applicant must first submit a habitat conservation plan (HCP) that specifies, among other requirements, the ''. . . steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps.'' If under section 10(a)(2)(B) of the ESA the Service finds the issuance criteria are met by the applicant, including that the applicant will, ''to the maximum extent practicable, minimize and mitigate the impacts of such taking,'' the Service will issue a permit. Plant species and unlisted animal species may also be covered in the HCP, provided the applicant meets requirements for their coverage described in the implementing regulations. The Service incorporates these measures as terms and conditions of the permit. Regulations governing incidental take permits for endangered and threatened wildlife species are found at 50 CFR 17.22 and 17.32. The Service is required to conduct a section 7(a)(2) consultation on issuance of an incidental take permit.

Mitigation Goal: Consistent with the purposes and polices of the ESA, the Service should work with applicants to assist them in developing HCPs that achieve a net gain or, at a minimum, no net loss in the conservation of covered species and critical habitat. Though the statute does not require this of HCP applicants, applicants often will request additional measures for greater future assurances. This is generally achievable through programmatic approaches, which provide opportunities for the use of landscape-scale compensatory mitigation programs to offset impacts of actions.

Guidance: Compensatory mitigation should be concurrent with or in advance of impacts, whenever possible. Programmatic approaches are recommended when they will produce regulatory efficiency and improved conservation outcomes for the covered species. These HCPs operate on a landscape scale and often use conservation banks, in-lieu fee programs, or other compensatory mitigation opportunities established by mitigation sponsors and approved by the Service. These landscape-scale programmatic approaches can achieve a net gain in conservation for the covered species as a result of economies of scale. See the draft revised HCP Handbook (81 FR 41986) for the various options available to address compensatory mitigation for HCPs.

5.3. Other Sections of the ESA Where Compensatory Mitigation Can Play a Role

Section 4(d) of the ESA authorizes the Service to issue protective regulations that are necessary and advisable to provide for the conservation of threatened species. The Service used this authority to extend the prohibition of take (section 9) to all threatened species by regulation in 1978, through promulgation of a ''blanket 4(d) rule'' (50 CFR 17.31). This blanket 4(d) rule can be modified by a species-specific 4(d) rule (*e.g.,* Special Rule Concerning Take of the Threatened Coastal California Gnatcatcher (58 FR 65088)). Depending on the threats, the inclusion of compensatory mitigation in a species-specific 4(d) rule may help offset habitat loss, and could hasten recovery or preclude the need to reclassify the species as endangered.

Section 5 of the ESA provides authority for the Service and the U.S. Department of Agriculture, with respect to the National Forest System, to establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species through:

- Use of land acquisition and other authority under the Fish and Wildlife Act of 1956, as amended, the Fish and Wildlife Coordination Act, as amended, and the Migratory Bird Conservation Act, as appropriate; and
- Acquisition by purchase, donation, or otherwise, of lands, waters, or interests therein.

Establishment of compensatory mitigation programs that conserve listed or at-risk species on lands adjacent to National Forests could be used to offset losses to those species and their habitats by actions authorized by the Service and also help buffer National Forests from incompatible neighboring land uses.

6. General Considerations

6.1. Preferences

The appropriate form of compensatory mitigation (*i.e.,* preservation, restoration, enhancement, establishment, or a combination of some or all of these forms) must be based on the species' needs and the nature of the impacts adversely affecting the species. The Service has the following general preferences related to compensatory mitigation.

6.1.1. Preference for Strategically Sited Compensatory Mitigation

Preference shall be given to compensatory mitigation projects sited within the boundaries of priority conservation areas identified in existing landscape-scale conservation plans as described in the Service's draft Mitigation Policy (81 FR 12380, March 8, 2016). Priority conservation areas for listed species may be identified in a species status assessment, recovery plan, or 5-year review.

6.1.2. Preference for Compensatory Mitigation in Advance of Impacts

After following the principles and standards outlined in this policy and all other considerations being equal, preference will be given to compensatory mitigation projects implemented in advance of impacts to the species. Mitigation implemented in advance of impacts reduces risk and uncertainty. Demonstrating that mitigation is successfully implemented in advance of impacts provides ecological and regulatory certainty that is rarely matched by a proposal of mitigation to be accomplished concurrent with, or subsequent to, the impacts of the actions even when that proposal is supplemented with higher mitigation ratios. While conservation banking is by definition mitigation in advance of impacts, other third-party mitigation arrangements and permittee-responsible mitigation may also satisfy this preference by implementing compensatory mitigation in advance of impacts. In-lieu fee programs can also satisfy this preference through a ''jump start'' that achieves and maintains a supply of credits that offer mitigation in advance of impacts.

6.1.3. Preference for Consolidated Compensatory Mitigation

Mitigation mechanisms that consolidate compensatory mitigation on the landscape such as conservation banks, in-lieu fee programs, and habitat credit exchanges are generally preferred to small, disjunct compensatory mitigation sites spread across the landscape. Consolidated mitigation sites generally have several advantages over multiple, small, isolated mitigation sites. These advantages include:

- Avoidance of a piecemeal approach to conservation efforts that often results in small, non-sustainable parcels of habitat scattered throughout the landscape;
- Sites that are usually a component of a landscape-level strategy for conservation of high-value resources;
- Cost effective compensatory mitigation options for small projects, allowing for effective offsetting of the cumulative adverse effects that result from numerous, similar, small actions;
- An increase in public-private partnerships that plan in advance and a landscape-scale approach to mitigation to provide communities with opportunities to conserve highly valued natural resources while still allowing for community development and growth;
- Greater capacity for bringing together financial resources and scientific expertise not practicable for small conservation actions;
- Economies of scale that provide greater resources for design and implementation of compensatory mitigation sites and a decreased unit cost for mitigation;
- Improved administrative and ecological compliance through the use of third-party oversight;
- Greater regulatory and financial predictability for project proponents, greatly reducing the uncertainty that often causes project proponents to view compensatory mitigation as a burden; and
- Expedited regulatory compliance processes, particularly for small projects, saving all parties time and money.

6.2. Eligible Lands

6.2.1. Lands Eligible for Use as Compensatory Mitigation

Compensatory mitigation sites may be established by willing parties on private, public, or Tribal lands that provide the maximum conservation benefit for the listed, proposed, and at-risk species and other affected resources. Maintaining the same classification of land ownership between the impact area and mitigation site may be important in preventing a long-term net loss in conservation, in particular a reduction in the range of the species. Because most private lands are not permanently protected for conservation and are generally the most vulnerable to development actions, the use of private lands for mitigating impacts to species occurring on any type of land ownership is usually acceptable as long as durability can be ensured. Locating compensatory mitigation on public lands for impacts to species on private lands is also possible, and in some circumstances may best achieve the conservation objectives for species, but should be carefully considered—see section 6.2.2. Use of Public Land to Mitigate Impacts on Private Land for additional guidance.

Good candidates for compensatory mitigation sites are unprotected lands that are high value for conservation and that are acceptable to the Service. Designations of high conservation value may include lands with existing high-value habitat or habitat that when restored, enhanced, established, or

properly managed will provide high value to the species. In addition to these general considerations, lands that may be good candidates for compensatory mitigation sites include:

- Lands previously secured through easements or other means but that lack the full complement of protections necessary to conserve the species (*e.g.,* buffer lands for a military installation that do not include management);
- Lands adjacent to undeveloped, protected public lands such as National Wildlife Refuges or State Wildlife Management Areas;
- Private lands enrolled in programs that provide financial compensation from public sources to landowners in exchange for agreements that protect, restore, or create habitat for federally listed or at-risk species for a limited period of time, such as the Service's Partners for Wildlife Program or some Farm Bill programs (*e.g.,* Environmental Quality Incentives Program) if additional conservation benefits are provided above and beyond the terms and conditions of the agreement or if the agreement/easement has expired;
- Private lands enrolled in programs that provide regulatory assurances to the landowner such as an SHA or CCAA that can be transitioned into compensatory mitigation, after all terms and conditions of the agreement have been met and the agreement has expired or the permit is surrendered in exchange for a mitigation instrument (see section 5.2.1. for additional guidance); and
- Private lands with existing conservation easements for which landowners have not received financial compensation from public sources or regulatory assurances from the Service.

See section 4.1. *Siting Sustainable Compensatory Mitigation* for other considerations when selecting a site suitable for compensatory mitigation.

Lands that generally do not qualify as compensatory mitigation sites include:

- Lands without clear title unless the existing encumbrances (*e.g.,* liens, rights-of-way) are compatible with the objectives of the mitigation site or can be legally removed or subordinated;
- Split estates (*i.e.,* lands which have separate owners of various surface and subsurface rights, usually mineral rights), unless a remedy can be found (see below for guidance on split estates);
- Private or public lands already designated for conservation purposes, unless the proposed compensatory mitigation project would add additional conservation benefit for the species above and beyond that attainable under the existing land designation;
- Private lands enrolled in government programs that compensate landowners who permanently protect, restore, or create habitat for federally listed or at-risk species (*e.g.,* Wetland Reserve Program easements administered by the USDA Natural Resources Conservation Service);
- Inventory and debt restructure properties under the Food Security Act of 1985 (16 U.S.C. 3801 *et seq.*); and
- Lands protected or restored for conservation purposes under fee title transfers.

Additional guidance on limitations involving Federal funding and mitigation, including grants, is provided in the Service's draft Mitigation Policy (81 FR 12380, March 8, 2016).

Lands with split estate ownership and laws and policies governing existing rights (*e.g.,* mining laws) may prevent land protection instruments (*e.g.,* permanent conservation easements) from providing sufficient protection from future development of mineral rights, including oil and gas exploration or development. Many potential high-value conservation properties throughout the United States are split estates. The risk of using split estate properties as compensatory mitigation should be carefully considered. When legal remedies to restore single ownership are not possible or practicable, other approaches to managing the risks may be available to bolster durability on split estates. A mineral deed acquisition, mineral assessment report, or subsurface use agreement are a few of the options for managing mineral rights on compensatory mitigation sites that provide varying levels of protection (Raffini 2012). Service personnel tasked with assessing the viability of split estates as mitigation sites should work with the Service's Realty Specialists and the Department of the Interior Solicitor to assess risks and possible remedies or other approaches.

6.2.2. Use of Public Land To Mitigate Impacts on Private Land

In general, the Service supports compensatory mitigation on public lands that are already designated for the conservation of natural resources to offset impacts to the species on private lands only if additionality is clearly demonstrated and is legally attainable. Additionality is a reasonable expectation that the conservation benefits associated with the compensatory mitigation actions would not occur in the foreseeable future without those actions. Offsetting impacts to private lands by locating compensatory mitigation on public lands already designated for conservation purposes generally risks a long-term net loss in landscape capacity to sustain species (*e.g.,* future reduction in the range of the species) by relying increasingly on public lands to serve conservation purposes. However, we recognize under certain circumstances this offset arrangement may provide the best possible conservation outcome for the species based on best available science. When this is the case, the Service will consider mitigation on public lands to offset impacts to the species on private lands appropriate if:

- Compensatory mitigation is an appropriate means of achieving the mitigation planning goal for the species;
- Additionality can be clearly demonstrated and quantified, and is supplemental to conservation the public agency is foreseeably expected to implement absent the mitigation (only conservation benefits that provide additionality are counted towards achieving the mitigation planning goal);
- Durability of the compensatory mitigation is ensured (see section 6.2.3. ''Ensuring Durability on Public Lands'');
- It is consistent with and not otherwise prohibited by all relevant statutes, regulations, and policies; and
- Private lands suitable for compensatory mitigation are unavailable or are available but cannot provide an equivalent or greater contribution towards offsetting the impacts to meet the mitigation planning goal for the species.

When the public lands under consideration for use as compensatory mitigation for impacts on private lands are National Wildlife Refuge (NWR) System lands, the Regional Director must recommend the mitigation to the Service Director for approval. Additional considerations may apply for NWR System lands for habitat losses authorized through the section 10/404 program (*i.e.,* Rivers and Harbors Act/ Clean Water Act); see the Service's Final Policy on the NWR System and Compensatory Mitigation Under the Section 10/404 Program (USFWS 1999).

6.2.3. Ensuring Durability on Public Lands

Ensuring the durability of compensatory mitigation on public lands presents particular challenges, especially regarding site protection assurances, long-term management, and funding assurances for long-term stewardship. Mechanisms available for ensuring durability of land protection for compensatory mitigation on public lands vary from agency to agency, are subject to site-specific limitations, and are likely to be politically and administratively challenging to secure. Some mechanisms may require a

legislative act while other mechanisms can be achieved administratively at various levels of an agency's organization. Tools such as protective designations, right-of-way grants, withdrawals, disposal or lease of land for conservation, conservation easements, cooperative agreements, and/or agreements with third parties (*e.g.,* conservation land use agreement or multiparty agreement), in combination with land use plans, may assist in providing durable site protections. Designations made through land use plans alone are not adequate to provide durability as they are subject to modification. Durability on public lands may require layering of tools to preclude conflicting uses and assure that protection and management of the mitigation land is commensurate with the scope, scale, and duration of the impacts to the species.

To ensure the durability of long-term management on public lands, there should be a high degree of confidence that incompatible uses are removed or precluded to ensure that uses of the public lands do not conflict with or compromise the conservation of the species for which the compensatory mitigation project was established. If the compensatory mitigation obligation will be met by the Federal agency or applicant, the authorization, permit, or license should include in whole or by reference a final mitigation plan as a formal condition of the authorization, permit, or license. If the compensatory mitigation obligation will be satisfied through use of a conservation bank or other third-party mitigation provider, then the authorization, permit, or license should identify the party responsible for providing the compensatory mitigation and the type(s) and amount(s) of credits that must be secured. Any agreements enabling mitigation on public lands should include provisions for equivalent alternative mitigation if subsequent changes in public land management directives result in actions on public land that are incompatible with the conservation needs of the species. These provisions should also be identified in the administrative and regulatory documents (*e.g.,* records of decision) that accompany the mitigation enabling agreements.

Ensuring funding to accomplish long-term management of compensatory mitigation on public lands is generally the same mechanism used for conservation banks and in-lieu fee programs on private lands. Government agencies are limited in their ability to accept, manage, and disburse funds for this purpose and must not be given responsibility for holding endowments for compensatory mitigation sites on public or private lands. These funds must be held by a qualified third party as described in section 8.3. *Qualifications for Holders of Site Protection and Financial Assurance Instruments.* A nonprofit organization with a conservation mission or similar organization that is formed in accordance with applicable State and Federal law may accept and administer private funds for the benefit of the public good, and may serve as a fiduciary for long-term management of funds for mitigation projects on public lands.

6.2.4. Transfer of Private Mitigation Lands to Public Agencies

Private mitigation lands may be transferred to public agencies with a conservation mission if allowed by applicable laws, regulations, and policies. The Service considers this to be generally consistent with this policy if:

a. The mitigation property is consistent with the agency's purposes;

b. All administrative and ecological performance criteria have been met, and the mitigation project is in compliance with the mitigation instruments;

c. The mitigation property has retired or forfeited any and all remaining mitigation credits;

d. The agency agrees to maintain the mitigation property in accordance with the long-term management plan developed for the mitigation property as part of the original mitigation instrument; and

e. Funding for the management, monitoring, and reporting of the mitigation lands continue to be held, managed, and disbursed by a qualified third party as described in section 8.3. *Qualifications for Holders of Site Protection and Financial Assurance Instruments.*

6.2.5. Compensatory Mitigation on Tribal Lands

Tribal lands are generally eligible as compensatory mitigation sites if they meet the standards and other requirements set forth in this policy. Ensuring durability, particularly site protection, is usually a sensitive issue for a tribal nation because a conservation easement entrusts the land to another entity (Terzi 2012), but acceptable entities may be available to hold easements (see section 8.2.3.5. ''Real Estate Assurances''). Financial assurances can be handled similarly to other governmental mitigation sponsors. Additional guidance regarding mitigation and Tribes is included in the Service's draft Mitigation Policy (81 FR 12380, March 8, 2016).

6.3. Service Areas

A service area is the geographic area assigned to a compensatory mitigation site within which credits for a specific resource (*e.g.,* a species) are utilized. The impacts for which mitigation is sought must be located within the designated service area for the species, unless otherwise approved by the Service. If a proposed action is located within the identified service area of a specific conservation bank, in-lieu fee program, or other third-party mitigation program or site, then the proponent of that action may offset unavoidable impacts, with the Service's approval, through transfer of the appropriate type and number of credits from that mitigation program or site. Use of the credits outside of service areas is subject to approval by the Service. Service areas that apply to all mitigation mechanisms may be designated by the Service's regional or field offices, usually through issuance of species-specific mitigation guidance. This approach generally improves regulatory consistency in areas where more than one compensatory mitigation mechanism is likely to be available (*e.g.,* banks, in-lieu fee programs, and permittee-responsible mitigation will all be used) and is helpful to Federal agencies and applicants when developing their project proposals.

The service area is an important component for a potential mitigation sponsor who will need to evaluate the market for credits prior to committing to a mitigation project. The mitigation sponsor has the responsibility to determine if a proposed mitigation project or program will be financially feasible and if they will move forward with the action. The mitigation instrument should clearly define any constraints that exist within the service area. These might include exclusion of areas that have been identified in an approved or developing HCP (*e.g.,* areas within which projects may not mitigate at conservation banks).

6.4. Crediting and Debiting

A credit is a defined unit representing the accrual or attainment of ecological functions and/or services at a mitigation site. Credits are often expressed as a measure of surface area (*e.g.,* an acre or hectare), linear distance of constant width (*e.g.,* stream miles), number of individuals or mating pairs of a particular species, habitat function (*e.g.,* habitat suitability index), or other appropriate metric that can be consistently quantified.

Metrics developed to support credits by measuring an increase in ecological functions and services at compensatory mitigation sites and those developed to measure an expected loss or debit in ecological functions and services at impact sites must be science-based, quantifiable, consistent, repeatable, and related to the conservation goals for the species. In general, the method of calculating credits at a mitigation site should be the same as calculating debits at project impact sites. If use of a common ''currency'' between credits and debits is not practicable, the conversion between crediting and debiting metrics must be transparent.

Credits are available for use as mitigation once they are verified and released by the Service. Credits are released in proportion to administrative and ecological milestones specified in the instrument (see section 6.6.3. ''Credit Release Schedules''). Credits are considered retired if they are no longer available for use as mitigation, including credits that have been transferred to fulfill mitigation obligations. Credits may also be voluntarily retired, without being used for mitigation, which may help achieve no net loss or net conservation benefit goals. Credits are not to be traded among developers or anyone else and cannot be re-sold. Once a credit has been transferred as mitigation for a particular action, it may not be used again.

A mitigation site may contain habitat that is suitable for multiple listed species or other resources in the same spatial area. When this occurs, it is important to establish how the credits will be stacked or bundled and if they can be unstacked and sold separately. See section 9.3. *Credit Stacking and Bundling* for guidance.

Compensatory mitigation programs that use credits are voluntary and permittees are never required to purchase credits from these compensatory mitigation sources. Pricing of credits is solely at the discretion of the mitigation provider.

6.5. Timelines

The Service does not have mandated timelines for review of conservation banks, in-lieu fee programs, or other compensatory mitigation projects that are not part of a consultation or permit decision. However, this does not mean that compensatory mitigation programs and projects are not a priority for the Service. Establishment of programmatic compensatory mitigation options for project proponents will provide efficiencies, particularly when developed in coordination with programmatic consultations and HCPs for large landscapes. These efficiencies include reducing the Service's ESA sections 7 and 10 workloads, expediting incidental take authorization for project proponents, and achieving better conservation outcomes for listed and other at-risk species.

6.6. Managing Risk and Uncertainty

Compensatory mitigation can be a valuable conservation tool for offsetting unavoidable adverse impacts to listed and at-risk species if the risk can be sufficiently managed. Predictions about the effectiveness of compensatory mitigation measures have varying degrees of uncertainty. Compensatory mitigation accounting systems (*e.g.,* debiting and crediting methodologies) should consider risk and adjust metrics and mitigation ratios to account for uncertainty. An exact accounting of the functions and services lost at the impact sites and gained at the mitigation sites is rarely possible due to the variability and uncertainty inherent in biological systems and ecological processes. To buffer risk and reduce uncertainty, it is often helpful to design compensatory mitigation programs and projects to achieve measures beyond no net loss to attain sufficient conservation benefits for the species. Designing conservation plans with mitigation that is expected to achieve more than no net loss in species conservation generally increases regulatory predictability and can result in shorter project reviews and facilitated permitting. The following risk management tools should be considered when developing proposals for compensatory mitigation programs and projects.

6.6.1. Adaptive Management

Adaptive management is an iterative approach to decision-making, providing the opportunity to adjust initial and subsequent decisions in light of learning with an overarching goal of reducing uncertainty over time. Frameworks such as the Service's strategic habitat conservation (SHC) model (USFWS and USGS 2006) and the Department's technical guidance regarding adaptive management (Williams et al. 2009) should be used both in the assessment of models used to inform metrics for compensatory mitigation programs as well as development and implementation of long-term management plans for individual compensatory mitigation projects.

The management of natural resources can be complex, and it will be even more challenging to make resource decisions in a structured and transparent way based on science to account for uncertainty in an environment that has always been dynamic but is now experiencing accelerated climate change. Incorporating adaptive management strategies into compensatory mitigation site management plans can help to manage risk and uncertainty for any type of mitigation project if clear goals, objectives, and measurable success criteria are defined in the management plan. The monitoring data can be used to determine if the desired results are being achieved or if management actions need to be modified. Adequate long-term funding assurances are also necessary for successful implementation of adaptive management.

6.6.2. Buffers

Buffers may be necessary to protect compensatory mitigation sites from edge effects. Undesirable edge effects may include increased opportunities for the introduction of invasive species, garbage dumping, erosion due to damaging runoff or other hydrological conditions on adjacent lands, noise, or a variety of other activities or conditions that would adversely affect the species. Small mitigation sites or sites with a high edge-to-area ratio are generally the most vulnerable to edge effects. Buffers may be able to reduce these risks when properly located, sized, and managed. If buffers also provide functions and services for the species or other resources of concern, compensatory mitigation credit will be provided at a level commensurate with the level of functions and/or services provided to the species.

6.6.3. Credit Release Schedules

One way to manage risk associated with the establishment of compensatory mitigation sites is by designing credit release schedules that only allow credit releases when specific performance criteria are met. Performance criteria should be designed with clear milestones that identify when risk and uncertainty have been substantially reduced. Phased credit release based on both ecological and administrative performance is highly recommended. This approach will buffer situations in which default or other unintended events occur, allowing for mitigation project remediation rather than failure. Administrative performance relative to credit release is usually based on durability such as funding a specific percentage of the endowment required for long-term site management by a set date, and on timely submission of reports. The mitigation instrument should provide a schedule for credit releases that are tied to achievement of appropriate milestones. The credit

release schedule should reserve a significant share of the total credits for release until after full performance has been achieved. Failure to meet these milestones requires compliance actions such as suspension of further credit releases to reduce risk and incentivize compliance.

6.6.4. Mitigation Ratios

Mitigation ratios can be used as a risk-management tool to address uncertainty, ensure durability, or implement policy decisions to meet the net gain or no net loss goal. However, ratios should be reserved for dealing with the true uncertainty of any mitigation program or for policy-based incentives and not to compensate for limited understanding of species' conservation needs. Mitigation ratios should be developed within the context of a landscape conservation plan and mitigation strategy that is designed to meet specific conservation goals for the species. The rationale for the required mitigation ratio must be justified and documented. Mitigation ratios must be based in science, readily explained and understood, and consistently applied. Effects contributing to the need for mitigation ratios may include, but are not limited to:

a. Type of compensatory mitigation (preservation, restoration, enhancement, establishment, or some combination of these types);

b. Temporal loss due to loss of functions and services to the species;

c. Temporal loss due to interruption of breeding and/or impaired fecundity as a direct or indirect result of the proposed action;

d. The likelihood of success of the mitigation site (*e.g.,* past permittee-responsible mitigation has been shown in many cases to have a low likelihood of success);

e. Degree of threat to the mitigation site by existing or anticipated future land use at adjacent sites;

f. Differences in the functions and services to be lost at the impact site and projected to be gained at the mitigation site;

g. Scarcity of the species or resources at the impact and mitigation sites;

h. Projected change in physical parameters affecting habitat condition as a result of processes such as climate change; and/or

i. Distance from the impact site.

Mitigation ratios can be adjusted to achieve conservation goals. For example, mitigation ratios may be adjusted upward to create an incentive for avoidance of impacts in areas of high conservation concern (*e.g.,* a zoned approach). Or they may be adjusted downward to provide an incentive for project applicants to use conservation banks or in-lieu fee programs that conserve habitat in high priority conservation areas rather than permittee-responsible mitigation, which is likely to be of lower quality due to smaller parcel size. Mitigation ratios may also be adjusted upward to move from a no net loss goal to a net gain goal. Such adjustments in mitigation ratios should be transparent, reasonable, and scientifically justified.

6.6.5. Reserve Credit Accounts

A reserve credit account can spread the risk among mitigation providers and provide added assurance that the goal for the mitigation project or program is achieved. It may be appropriate to establish a ''reserve credit account'' to manage risk associated with mitigation projects or programs that require additional assurances for contingencies. Potential uses of these accounts may include offsetting catastrophic natural events such as wildfire or flooding, adjacent land use that may negatively affect a mitigation site, or risk associated with split estates, as agreed to by the Service and defined in the mitigation instrument. In such cases, the use of reserve credits would allow the mitigation program to continue uninterrupted (*i.e.,* prevent the need for temporary suspension of credit transfers while the landscape recovers or the situation is resolved). Reserve credit accounts are not to be used as a substitute for site protection or financial assurances required under the standards set forth in this policy or to offset impacts of development projects or to otherwise balance credit-debit ledgers due to lack of mitigation provider participation or compliance. Remedial processes and actions for dealing with unsuccessful management actions or lack of compliance by mitigation providers must be clearly described in the mitigation instrument.

The number of reserve credits in the account should reflect a conservative estimate of the anticipated risk as determined by best available science and should be managed adaptively to changing conditions on the landscape. If expended, reserve credits should be replenished in accordance with a process and schedule clearly described in the mitigation instrument.

Reserve credit accounts may also be created to contribute to a net gain goal for a project or program. In this case the reserve credits are not used, but are immediately retired to provide an overall benefit. If both types of credits exist within a reserve credit account, then each type of credit must be accounted for separately and used for its intended purpose.

6.7. Disclaimer Provision

The signature of the Service on a mitigation instrument constitutes regulatory approval that the conservation bank, in-lieu fee program, or other mitigation project satisfies standards of biology and durability and can, therefore, be used to provide compensatory mitigation under the ESA in appropriate circumstances. The instrument is not a contract between the 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. Compensatory mitigation instruments and agreements shall not involve participation by the Service in project management, including receipt or management of financial assurances or long-term financing mechanisms. Compensatory mitigation programs and projects must comply with all applicable Federal, State, and local laws.

7. Compensatory Mitigation Mechanisms

Compensatory mitigation mechanisms can be divided broadly into habitat-based mechanisms and other non-habitat-based mitigation programs or projects. Whatever mechanism(s) are selected, compensatory mitigation is expected to provide either equivalent or additional conservation for the species to that lost as a result of the action.

7.1. Habitat-Based Compensatory Mitigation Mechanisms

Compensatory mitigation mechanisms based on habitat acquisition and protection may consist of restoration of damaged or degraded habitat, enhancement of existing habitat, establishment of new habitat, preservation of existing habitat not already protected, or some combination of these that offsets the impacts of the action and results in or contributes to sustainable, functioning ecosystems for the species. Preservation of existing habitat often includes a change in land management that renders the site suitable for the species or provides additional ecological function or services for the species. Preservation includes site protection and is a valid mechanism for achieving compensatory mitigation that, at a minimum, reduces threats to the species. Existing habitat that is not protected and managed for the long term is vulnerable to loss and cannot count toward recovery of listed species.

The five habitat-based mitigation mechanisms described below and compared in Table 1 differ by: (1) The party responsible for the success of the mitigation site (the permittee or a third party); (2) whether the mitigation site is within or adjacent to the action area (on-site) or elsewhere (off-site); and (3) whether credits are generated at the mitigation site for use by more than one action. All compensatory mitigation sites require site protection assurances, a management plan, and financial assurances. Habitat-based compensatory mitigation will be held to equivalent standards (the standards set forth in this policy) regardless of the mitigation mechanism(s) proposed. Habitat-based compensatory mitigation programs developed to credit conservation actions that benefit unlisted species should meet all compensatory mitigation standards set forth in this policy if they are intended to be used as compensatory mitigation for adverse impacts of actions undertaken after listing.

7.1.1. Permittee-Responsible Compensatory Mitigation

Permittee-responsible compensatory mitigation is a conserved and managed mitigation site that provides ecological functions and services as part of the conservation measures associated with a permittee's proposed action. Permittee-responsible mitigation sites are usually permanent, as most proposed actions with a need for compensatory mitigation are anticipated to result in permanent impacts to the species. The permittee retains responsibility for ensuring the required compensatory mitigation is completed and successful. This includes long-term management and maintenance when the mitigation is intended to be permanent. Permittee-responsible compensatory mitigation may be on-site or off-site, and each permittee-responsible mitigation site is linked to the specific action that required the mitigation. Permittee-responsible mitigation approved for a specific action is not transferable to other actions and cannot be used for other mitigation needs.

7.1.2. Conservation Bank Program

A conservation bank is a site or suite of sites established under a conservation bank instrument (CBI) that is conserved and managed in perpetuity and provides ecological functions and services expressed as credits for specified species that are later used to compensate for adverse impacts occurring elsewhere to the same species. The details of the establishment, operation, and use of a conservation bank are documented in a CBI that is approved by the Service. The signature of the bank sponsor and/or property owner on the CBI indicates their acceptance of the relevant terms, much like permit conditions are accepted by regulated entities. Bank sponsors may be public or private entities. Ensuring the required compensatory mitigation measures for a permitted action are completed and successful is the responsibility of the bank sponsor. The bank sponsor assumes liability for success of the mitigation through the transfer (usually a purchase by the permittee) of credits. Conservation banks provide mitigation in advance of impacts. An umbrella CBI can be established to facilitate approval and establishment of multiple bank sites over a specified period of time for a particular species, suite of species, habitat type, or ecosystem.

7.1.3. In-Lieu Fee Program

An in-lieu fee site is a conserved and managed compensatory mitigation site established as part of an in-lieu fee program that provides ecological functions and services expressed as credits for specified species and used to compensate for adverse impacts occurring elsewhere to the same species. In-lieu fee sites are usually permanent as most proposed actions with a need for compensatory mitigation are anticipated to result in permanent impacts to the species. In-lieu fee programs may be sponsored by a government agency or an environmental conservation-based not-for-profit organization with a mission that is consistent with species or habitat conservation. The in-lieu fee sponsor collects fees from permittees that have been approved by the Service to use the in-lieu fee program, instead of providing permittee-responsible compensatory mitigation. An in-lieu fee site that meets the mitigation requirements for the impacts of permittees' actions will be established when the in-lieu fee program has collected sufficient funds. The establishment, operation, and use of an in-lieu fee program requires an in-lieu fee program instrument which is approved by the Service and accepted by the sponsor, and the property owner(s). All responsibility for ensuring the required compensatory mitigation measures are completed and successful, including long-term management and maintenance, is transferred from the permittee to the in-lieu fee program sponsor through the transfer (usually purchase) of credits. In-lieu fee programs generally do not provide mitigation in advance of impacts.

In-lieu fee programs can also be established to fund non-habitat-based compensatory mitigation measures. See section 7.3 *Other Compensatory Mitigation Programs or Projects* for guidance on these types of programs.

7.1.4. Habitat Credit Exchange

A habitat credit exchange is an environmental market that operates as a clearinghouse in which an exchange administrator, operating as a mitigation sponsor, manages credit transactions between compensatory mitigation providers and project permittees. This is in contrast to the direct transactions between compensatory mitigation providers and permittees that generally occur through conservation banking and in-lieu fee programs. Exchanges provide ecological functions and services expressed as credits that are conserved and managed for specified species and are used to compensate for adverse impacts occurring elsewhere to the same species. Exchanges may be designed to provide credits for permanent compensatory mitigation sites, short-term compensatory mitigation sites, or both types of sites. Habitat credit exchanges may operate at a local or larger landscape scale, may consist of one or more mitigation sites, and may obtain credits from conservation banks or in lieu fee programs. Exchange administrators may be public or private entities. Exchanges developed for federally listed species will require Service approval through a habitat credit exchange instrument signed by the Service and the exchange administrator.

7.1.5. Other Third-Party Compensatory Mitigation

A compensatory mitigation site may be established by a third party to compensate for impacts to specified species for a single action taken by a permittee. The third-party mitigation site provides ecological functions and services that are conserved and managed for the species. Third-party compensatory mitigation sites are usually permanent, as most proposed actions with a need for compensatory mitigation are anticipated to result in permanent impacts to the species. Third-party mitigation sites may be located on-site or off-site. All responsibility for ensuring the required compensatory mitigation measures are completed and successful, including long-term management and maintenance, is transferred from the permittee to the third-party mitigation provider and/or property owner through a bill of sale between the parties. This arrangement requires a mitigation instrument approved by the Service and accepted by the permittee, the third-

party mitigation provider, and the property owner(s). Third-party mitigation sites do not generate credits that can be used for other actions. A separate mitigation instrument is required for each action that proposes to use a third party to provide a compensatory mitigation site, even if a portion of that site has been used to mitigate a previous action. When a mitigation provider plans to offset multiple projects at a single mitigation site, the Service's preference is to review and approve a conservation bank instrument or in-lieu fee program instrument (these mechanisms are designed to serve multiple permittees) rather than review multiple third-party mitigation instruments for multiple actions. Third-party mitigation sites may provide mitigation in advance of the impacts.

TABLE 1—COMPARISON OF HABITAT-BASED COMPENSATORY MITIGATION SITES ESTABLISHED UNDER DIFFERENT MECHANISMS

Mitigation mechanism	Responsible party	Credits generated	Instrument required	Liability transferable
Permittee-responsible Mitigation Site.	Permittee	No	No—Incidental Take Statement (linked to Biological Opinion), Incidental Take Permit (for HCPs), or other authorization.	No.
Conservation Bank	Bank Sponsor	Yes	Yes—Conservation Bank Instrument.	Yes.
In-lieu Fee Program Site	In-lieu Fee Sponsor	Yes	Yes—In-lieu Fee Program Instrument.	Yes.
Habitat Credit Exchange Site	Exchange Administrator, Mitigation Sponsor, or other identified responsible entity.	Yes	Yes—Habitat Credit Exchange Instrument.	Yes.
Other Third-party Mitigation Site	Third-party Mitigation Provider	No	Yes—Mitigation Instrument	Yes.

7.2. Short-Term Compensatory Mitigation

The concept of short-term compensatory mitigation has merit if it serves the conservation goals of the species. Short term compensatory mitigation may be appropriate in some situations to offset impacts that can be completely rectified by repairing, rehabilitating, or restoring the affected environment within a short and predictable timeframe. Under this policy, short-term compensatory mitigation includes rectifying the damage at the impact site and providing short-term compensation to offset the temporal loss caused by the action to achieve a conservation outcome that results in, at a minimum, no net loss to the species.

A short-term impact is defined in this policy as an action that meets the following criteria: (1) The impact is limited to harassment or other forms of nonlethal take; (2) the impact can be completely rectified through natural or active processes, and the site will function long term within the landscape at the same or greater level than before the impact; (3) restoration of the impact site can occur within a short and predictable timeframe based on current science and the knowledge of the species; and (4) all temporal loss to the species by the impact can be estimated and compensated. Opportunities for short-term compensation are likely to be very limited and may not apply to most species.

Inherent in applying short-term compensatory mitigation is the recovery of the affected species' populations to pre-disturbance levels and any additional increase in population levels that was anticipated to occur if the action had not taken place (*i.e.,* adjusted for temporal loss). Determining the amount and duration of compensatory mitigation needed requires substantial knowledge of the biology of the species (*e.g.,* abundance, distribution, fecundity). Actions that meet the criteria for short-term impacts are not limited to short-term compensatory mitigation as a mitigation option. The Service prefers mitigation mechanisms that protect conservation values in perpetuity. Permanent compensatory mitigation either at the same or a reduced mitigation ratio (determined by the Service) is usually an alternative. Conservation banks or in-lieu fee programs with available credits that meet the compensatory mitigation needs for actions with short-term impacts are usually a good alternative to short-term compensatory mitigation.

7.3. Other Compensatory Mitigation Programs or Projects

Compensatory mitigation is based on the concept of replacing or providing substitute resources or environments for the impacted resource (40 CFR 1508.20). However, mechanisms or conservation measures that do not exactly meet this definition, but that meet the conservation objectives for the specified species and are expected to compensate for adverse effects to species or their habitats, may be suitable as compensatory mitigation. These types of compensatory mitigation measures are acceptable if they are closely tied to recovery actions identified in species status assessments, recovery plans, 5-year reviews, or best available science on the threats and needs of the species. Compensatory mitigation of this type is often funded through an in-lieu fee program. Examples of potentially suitable compensatory measures include, but are not limited to:

a. Transfer and retirement of timber, water, mineral, or other severed rights to an already existing conservation site, thereby significantly reducing or eliminating the risk of future development on the site that would be incompatible with conservation of the species;

b. Restricting human use of waterways or other public spaces through legal means to allow for increased or exclusive use by the species;

c. Controlled propagation, population augmentation, and reintroduction of individuals of the species to offset losses from an action;

d. Captive rearing and release of individuals of the species to offset losses from an action;

e. Administering vaccination programs vital to species survival and recovery;

f. Gating of caves that serve as habitat for the species;

g. Construction of wildlife overpasses or underpasses to protect migratory passages for the species; and/or

h. Programs that reduce the exposure of the species to contaminants in the environment that are known to cause injury or mortality.

In rare circumstances, research or education that can be linked directly to the relative threats to the species and provide a quantifiable benefit to the species may be included as part of a mitigation package. Although research can assist in identifying substitute resources, it does not replace impacted resources or adequately compensate for adverse effects to species or habitat. See the Service's draft Mitigation Policy (81 FR 12380, March 8, 2016) for additional guidance on appropriate uses of research or education as mitigation.

8. Establishment and Operation of Compensatory Mitigation Programs and Projects

Compensatory mitigation programs and projects will be established subject to authorization from the Service or a combination of the Service and other Federal and/or State regulatory agencies. Compensatory mitigation proposals must meet minimum criteria described in this policy to be acceptable. Compensatory mitigation programs designed to serve multiple mitigation sites should discuss within the program documents how the minimum criteria described in this policy will be met by the program and what is required for each mitigation site. Service regional and field offices may provide more detailed guidance as needed for their jurisdictions. Any additional guidance, including checklists, templates, or assessment methods, will be posted on the Web site of the regional and/or field office that developed the guidance documents and on RIBITS. To the extent appropriate, regional and/or field offices should strive for consistency within and across jurisdictions when developing compensatory mitigation programs and species/resource specific mitigation guidance.

Service criteria for establishing compensatory mitigation projects should be compatible with criteria already established by statute in other Federal and/or State agencies so that mitigation programs and sites may satisfy the requirements of multiple agencies. While it is our intent to work with other Federal, State, and/or local agencies, the Service recognizes that there may be situations in which coordinated multi-agency processes do not exist, and project applicants may need to coordinate with each agency separately.

8.1. Agency Review Process

The purpose of the agency review is to provide guidance and feedback to prospective mitigation providers as they develop their mitigation project proposals and instruments, and to project applicants as they develop their conservation plans and measures as part of their proposed actions.

8.1.1. Service Review

The Service will conduct agency review when a mitigation proposal addresses solely Service-administered resources. When a mitigation proposal includes mitigation requirements by other agencies, a multi-agency team should be formed to complete the review. The agency review process details will be developed by the Service's regional and/or field offices.

8.1.2. Multiple Agency Review

We recognize that the Service has common goals with other Federal, State, and local agencies that may be served by collaborative review of mitigation project proposals. To facilitate collaboration, the Service's regional or field offices may develop collaborative review processes through a memorandum of understanding or/memorandum of agreement with other Federal, State, and/or local agencies.

For conservation banks, in-lieu fee programs, and habitat credit exchanges in which the sponsor seeks mitigation credits under multiple authorities, including species under Service authority, the Service will serve on the Mitigation Review Team (MRT) as chair or co-chair. MRTs consist of Service and other Federal, State, Tribal, and/or local regulatory and resource agency representatives that review mitigation documents and advise managers and decision-makers within their respective agencies or Tribes on the establishment and management of mitigation programs and projects. The Service representative is the chair of the MRT. Any other agencies that will also issue credits for resources under their jurisdiction and will be signatories to the instrument are designated as co-chairs of the MRT. If a government agency or Tribe is the compensatory mitigation project sponsor, that agency or Tribe is excluded from the MRT for that project.

For wetland and stream mitigation banks and in-lieu fee programs authorized by the U.S. Army Corps of Engineers (USACE) and U.S. Environmental Protection Agency (EPA), in which the mitigation sponsor also seeks mitigation credits for species under Service authority (*e.g.,* joint bank), the Service will serve on an interagency review team (IRT) as co-chair of that IRT, as set forth in the EPA–USACE 2008 Compensatory Mitigation Rule (33 CFR 332.8(b)(1)).

8.1.3. Dispute Resolution Process

When co-chairs on the MRT disagree on substantive aspects of a mitigation program or project under review and have exhausted all tools for resolution within the MRT, the issue can be elevated to the appropriate decision makers in their respective agencies. When a dispute arises between co-chairs on an IRT and the bank or in-lieu fee program under review is a joint mitigation-conservation bank or in-lieu fee program to which the Service and USACE are to be signatories, the Service will follow the dispute resolution process described in the EPA–USACE 2008 Compensatory Mitigation Rule (33 CFR 332.8(e)).

For consistency, it is recommended that the same MRT or IRT used for banks, in-lieu fee programs, and habitat credit exchanges also review other types of mitigation projects, such as permittee-responsible mitigation and other third-party mitigation arrangements, when practicable to ensure consistency in the application of this policy.

8.2. Proposal Process and Minimum Requirements

This policy identifies the minimum requirements for establishment and operation of compensatory mitigation programs or projects requiring Service approval. The Service's regional or field offices may develop more specific guidance or additional requirements. Each stage of the process is subject to approval by the Service, and the mitigation sponsor must obtain Service approval before moving on to the next stage in the process (*e.g.,* proposal to draft instrument). The Service's minimum requirements for compensatory mitigation are described for each stage of the process below.

8.2.1. Scoping

All prospective mitigation sponsors, Federal agencies, and applicants are encouraged to contact the Service early in their project planning processes. In the case of a conservation bank or in-lieu fee program the sponsor may engage the MRT or IRT by submitting a draft proposal, which includes enough information for the agencies to give informed feedback on site selection and overall concept. Habitat credit exchanges should engage the MRT early in the process. This scoping is optional, but highly recommended, as it provides the sponsor with an opportunity to

present their conceptual proposal and obtain feedback from the Service and other applicable regulatory agencies before embarking on costly analyses of their site(s). Early coordination with the MRT or IRT is especially helpful to new sponsors who have minimal experience with compensatory mitigation projects. Federal action agencies and applicants may submit a draft proposal that describes their proposed conservation measures for permittee-responsible mitigation early in the planning process.

In general, a more detailed draft proposal will better enable the Service to render a timely and informed opinion as to the suitability of a proposed mitigation site. A draft proposal is optional, but if submitted, must include at least the following:

a. Maps and aerial photos showing the location of the site and surrounding area;

b. Contact information for the applicant, mitigation sponsor, property owner(s), and consultants;

c. Narrative description of the property including: acreage, access points, street address, major cities, roads, county boundaries, biological resources (including the resource/species to be mitigated at the site), and current land use;

d. Narrative description of the surrounding land uses and zoning, including the anticipated future development in the area, where known;

e. Ownership of surface and subsurface mineral and water rights and other separated rights (*e.g.,* timber rights);

f. Existing encumbrances (*e.g.,* utility rights-of-way); and

g. Additional information as determined by the Service's regional and/or field office.

In addition, a conservation bank, in-lieu fee program, or habitat credit exchange draft proposal must also include:

a. Proposed service area(s) with map(s) and narrative(s); and

b. Proposed type(s) and number of credits to be generated by the program or project.

Umbrella conservation banks follow the same process as conservation banks, and must include at least one site in the proposal. The bank would become an umbrella bank as new sites are added.

The Service, MRT, or IRT, as appropriate, will review the draft proposal and provide comments to the mitigation sponsor or applicant. The mitigation sponsor or applicant may then choose to submit a complete or full proposal for formal review by the Service, MRT, or IRT, as appropriate.

8.2.2. Development of the Proposal

All mitigation sponsors must submit a full proposal describing their proposed mitigation program or project. Federal agencies/applicants include any proposed compensatory mitigation measures with the description of the proposed action. All proposals must include enough information at a sufficient level of detail for the Service to provide informed feedback. Mitigation sponsors and Federal agencies/applicants should be aware the Service has discretion to reject a proposed mitigation site that is unsuitable. In-lieu fee programs and habitat credit exchanges may develop a proposal prior to identifying specific sites, in which case they must include the non-site-specific information listed below.

Proposals must include, but are not limited to, the following:

a. Name of proposed mitigation site(s), conservation bank, or in-lieu fee program;

b. Maps and aerial photos showing the location of the site(s) and surrounding area;

c. Contact information for the applicant, mitigation sponsor/provider, property owner, and consultants;

d. Narrative description of the property including: acreage, access points, street address, major cities, roads, county boundaries, biological resources, and current land use;

e. Narrative description of the surrounding land uses and zoning, including the anticipated future development in the area, where known;

f. Description of how the site fits into conservation plans for the species;

g. Proposed ownership arrangements and long-term management strategy for the site;

h. Qualifications of the mitigation sponsor/provider to successfully complete the type of project proposed, including a description of past such activities by the mitigation sponsor/provider;

i. Preliminary title report showing all encumbrances on the proposed mitigation site;

j. Phase I Environmental Site Assessment evaluating the proposed site for any recognized environmental condition(s);

k. 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 mitigation;

l. Assurances of sufficient water rights to support the long-term sustainability of any proposed aquatic habitat(s); and

m. Additional information as determined by the Service's regional and/or field office.

In addition, a conservation bank, in-lieu fee program, or habitat credit exchange draft proposal must also include:

a. Description of the general need for the bank, in-lieu fee program, or credit exchange, and the basis for such a determination;

b. Proposed service area(s) with map(s) and narrative(s); and

c. Proposed type(s) and number of credits to be generated by the program or project.

In-lieu fee programs and habitat credit exchanges that do not provide mitigation in advance of impacts must also include:

a. Prioritization strategy for selecting mitigation sites and compensatory mitigation activities;

b. Description of any public and private stakeholder involvement in plan development and implementation, including any coordination with Federal, State, Tribal, and local resource management authorities; and

c. Description of the in-lieu fee program or exchange account.

8.2.3. Development of the Mitigation Instrument

A mitigation enabling instrument will be developed after the Service has approved a full proposal. This instrument sets forth the basis on which the Service has approved the proposal and the conditions to which it is subject. The Service's signature on the instrument constitutes the Service's regulatory conclusion that the proposal meets the applicable mitigation standards subject to any conditions. The sponsor's signature constitutes agreement to those terms. The final mitigation instrument may only be submitted subsequent to Service approval of the draft instrument. The draft instrument must be based on the proposal and must describe in detail the physical and legal characteristics of the mitigation site(s), conservation bank, in-lieu fee or habitat credit exchange program, and how it will be established and operated. The instrument must also include a closure plan that specifies responsibilities once all credits are transferred and/or forfeited, performance criteria are achieved, and financial obligations are met. The draft instrument must include the following items:

- Restoration or habitat development plan
- Service area maps
- Credit evaluation/credit table
- Management plans

- Real estate assurances
- Financial assurances
- Additional requirements for business entities
- Closure plan

8.2.3.1. Restoration or Habitat Development Plan

A restoration or habitat development plan is required if habitat is to be enhanced, restored, or established. This plan is typically submitted as an exhibit to the mitigation instrument. Minimum requirements for this plan include:

a. Baseline conditions of the mitigation site, including biological resources; geographic location and features; topography; hydrology; vegetation; past, present, and adjacent land uses; species and habitats occurring on the site;

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. Ecological performance criteria and a discussion of the suitability of the site to achieve them (*e.g.,* watershed/hydrology analysis and anticipated improvement in quality and/or quantity of specific functions, specific elements in recovery plan goals expected to be accomplished);

h. Maps detailing the anticipated location and acreages of habitat developed for species;

i. Monitoring methodologies to evaluate habitat development and document success in meeting performance criteria;

j. An approved schedule for reporting monitoring results;

k. A discussion of possible remedial actions; and

l. Additional information as determined by the Service's regional and/or field office.

8.2.3.2. Service Area Maps

The minimum requirement is a map showing the service area for each species or credit type proposed. The map must be at an appropriate scale to determine the boundaries at street level and contain a narrative description of the limits. The Service ultimately establishes service areas—see section 6.3 *Service Areas.*

8.2.3.3. Credit Evaluation/Credit Table

A credit evaluation is an explanation of the assessment undertaken to formulate the habitat value and total number of each type of credit. Credit evaluations are typically developed for banks and in-lieu fee programs, but may also apply to other types of mitigation provided by third parties. The credit evaluation should include a credit table showing the number and type of credits proposed for approval by the Service to transfer as compensation for unavoidable impacts to species as a result of permitted actions. Any spatially overlapping mitigation resources or credits must be clearly shown in the table with an explanation as to how these credits will be debited from the credit ledger. Overlapping, bundled, or stacked credits can be used only one time and for a single impact project. For details on the use of credits, see section 9.3. *Credit Stacking and Bundling.*

8.2.3.4. Management Plans

Management plans prescribe the management, monitoring, and reporting activities to be conducted for the term of the mitigation site (*e.g.,* in perpetuity for conservation banks). The management plan is often separated into two plans: the interim management plan and the long-term management plan. The interim management plan contains the requirements for managing and monitoring a mitigation site or bank from establishment until all performance criteria have been met, and the endowment fund has matured (at least 3 years after it has been fully funded) and can be drawn upon for long-term management expenses.

8.2.3.4.1. Interim Management Plan

Requirements for the interim management of a site may be the same or very similar to those for long-term management (this is often the case for sites that are preserved, and on which no habitat restoration or establishment is undertaken). In this case, the interim management requirements may be included with the long-term management requirements in one management plan. A combined interim and long-term management plan must make clear that this is the case, and must cover the period from establishment of a mitigation site or bank through the required duration of the mitigation project (in perpetuity for most compensatory mitigation sites).

When the requirements for the interim management of a site differ from those for long-term management, then the interim management plan may be a separate plan or a separate section within the long-term plan. At a minimum, the interim plan should include a description of:

a. All management actions to be undertaken on the site during this period;

b. All performance criteria and any monitoring necessary to gauge the attainment of performance criteria;

c. Reporting requirements;

d. Monitoring and reporting schedule; and

e. A cost analysis to implement the plan.

Reporting requirements include:

a. Copies of completed data sheets and/or field notes, with photos;

b. Monitoring results to date; and

c. A discussion of all monitoring results to date to achievement of the performance criteria.

8.2.3.4.2. Long-Term Management Plan

The long-term management plan is intended to be a living document based on adaptive management principles and should be revised as necessary to respond to changing circumstances (*e.g.,* changed conditions as a result of climate change). Revisions to the long-term management plan are subject to Service approval.

The long-term management plan must be incorporated by reference into the conservation easement or other site protection mechanism and should include at minimum:

a. Purpose of mitigation site establishment and purpose 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 mitigation 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 endowment);

g. Discussion of adaptive management principles and actions for reasonably foreseeable events, possible thresholds for evaluating and implementing adaptive management, a process for undertaking remedial actions, including monitoring to determine success of the changed/remedial actions, and reporting;

h. Rights of access to the mitigation area and prohibited uses of the mitigation 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.

Annual reports to the Service are necessary for the Service to fulfill its due diligence responsibilities in ensuring that authorized mitigation programs are successful and continue to meet their stated objectives. To that end, the reports must contain the appropriate level of detail, and at a minimum, must include:

a. Description of mitigation area condition, with photos;

b. Description of management activities undertaken for the year, including adaptive management measures, and expenditure of funds to implement each of these activities;

c. Management activities planned for the coming year; and

d. Results of any biological monitoring undertaken that year, including photos, copies of data sheets, and field notes. This level of documentation is important in verifying the conclusions reached by report preparers and can be essential in informing necessary adaptive management actions. In the interests of reducing paperwork, the Service may require that annual reports be submitted in electronic form and uploaded into RIBITS.

In-lieu fee programs and habitat credit exchanges that do not provide mitigation in advance of impacts must also include:

a. In-lieu fee or exchange program account description, including the specific tasks, equipment, etc., for which funds are to be used;

b. Methodology for determining the fee schedule(s);

c. Methodology and criteria for adding mitigation sites;

d. Timeframe in which the funds must be used for their intended purpose; and

e. Timeframe in which conservation must be implemented.

8.2.3.5. Real Estate Assurances

Real estate assurances ensure that a compensatory mitigation project or site will be available for use as mitigation for the duration specified in the permit or consultation and protect the site from development or other incompatible uses that are inconsistent with the conservation goals of the bank or other mitigation project. Proposed mitigation sites must be vetted prior to acceptance by the Service to ensure they are biologically appropriate and legally able to be encumbered with a site protection instrument. A perpetual conservation easement held by a qualified entity, not the fee title owner, is the required site protection instrument when mitigation is to be permanent and where not prohibited by law. Conservation easements and other site protection instruments are generally governed by State laws and vary from State to State. Where conservation easements are of limited duration by law (*e.g.,* 30 years), a clear schedule for re-recording of the easement prior to expiration should be identified. The property owner and easement grantee should identify and address this task in the conservation easement.

Granting a conservation easement on tribal land poses additional challenges due to Tribal sovereignty. State and local governments and nonprofit organizations are usually not acceptable to Tribes. A supportive service organization created by a consortium of Tribes is generally acceptable as an easement holder if the organization's representative for the Tribe proposing the bank or in-lieu fee program steps aside in any decision concerning matters arising from the bank's or in-lieu fee program's conservation easement. The Lummi Nation's Wetland and Habitat Bank provides an example (Terzi 2012).

For land that will be held in fee by Federal agencies that cannot accept land encumbered by a conservation easement, that Federal agency will be required to place the land under conservation easement upon transfer to a subsequent owner. Where perpetual conservation easements are prohibited by law, another and/or additional long-term site protection mechanism approved by the Service must be used.

Site protection instruments must meet the following requirements and are subject to Service approval:

a. The site protection instrument must designate the Service as a third-party beneficiary with rights of enforcement (may not apply to Federal land protection mechanisms).

b. The site protection instrument must incorporate the interim and long-term management plans for the mitigation site, as set forth therein.

c. The site protection instrument must, to the extent appropriate and practicable, prohibit incompatible uses (*e.g.,* clear cutting or mineral extraction) that might otherwise jeopardize the objectives of the compensatory mitigation project. Where appropriate, multiple instruments recognizing compatible uses (*e.g.,* fishing or grazing rights) may be used.

d. The site protection instrument must contain a provision requiring 60-day advance notification to the Service before any action is taken to void or modify the instrument or other site protection mechanism, including transfer of any title to or establishment of any other legal claims over the compensatory mitigation site.

e. If changes in statute, regulation, or agency needs or mission results in an incompatible use on public lands that have been set aside for compensatory mitigation through a Federal facility management plan or other similar mechanism, the public agency authorizing the incompatible use is responsible for providing alternative compensatory mitigation that is acceptable to the Service. The alternative compensation must be commensurate with and proportional to the loss in functions and services resulting from the incompatible use.

f. Service approval of a site protection instrument for permittee-responsible mitigation must be obtained in advance of, or concurrent with, the activity causing the authorized or permitted impacts. The Service will require a preliminary title report and title insurance for the mitigation site and will consider, at a minimum, the following attributes of the property:

- Title/ownership;
- Existing liens, mortgages, and other financial encumbrances on the site;
- Existing easements, rights-of-way, and other real property encumbrances on the site;
- Split estates (properties where the surface and subsurface mineral rights are under separate ownership);
- Ownership of water rights, timber rights, and any other severed rights; and
- Other attributes of the proposed mitigation site that may be incompatible with the purposes of the mitigation.

In the case of a split estate, the Service preference is for severed

mineral rights to be acquired by the property owner or mitigation sponsor and reattached to the title of the property that will be used for compensatory mitigation. However, in some cases, we may rely on a mineral assessment report, which provides a credible analysis of why the chances of anyone accessing any mineral resources on a proposed mitigation site would be so remote as to be negligible. The assessment must be performed by a registered professional geologist or professional engineer, and must contain their stamp with current certification. The assessment must take into consideration the scope of the rights that have been severed and provide a thorough and rigorous analysis as to why they believe that the minerals would not be accessed, including, but not limited to: (1) discussion of the mineral resources located in the area; (2) discussion of the mining history of the region; and (3) database records, maps, photos, and anything else that would support their findings. The acceptance of any specific real estate assurance is discretionary on the part of the Service and is subject to approval.

Other potential measures for managing risk associated with split estates are accounting for the future uncertainty in the crediting methodology or establishing a reserve credit account.

8.2.3.6. Financial Assurances

Financial assurances are necessary to ensure that compensatory mitigation projects will be successfully completed in accordance with a permit, consultation, or instrument, and any attendant performance criteria. The amount of the financial assurances will be reviewed by the Service and is expected to be based on the size and complexity of the compensatory mitigation project, the likelihood of success, the past performance of the project applicant or mitigation sponsor, and any other factors the Service deems appropriate to consider for any specific project. Financial assurances may be in the form of an endowment, performance bonds, escrow accounts, casualty insurance, letters of credit, or other appropriate instruments, depending on the purpose, duration, and entity providing the compensatory mitigation. The acceptance of any financial assurance is discretionary on the part of the Service and is subject to approval.

While the Service's regional and field offices have discretion to determine which forms of short-term financial assurance are acceptable, the long-term financial assurance must be in the form of a perpetual endowment for permanently protected sites. The mitigation provider must provide documentation of the rationale for determining the amount of the required financial assurance. In reviewing the proposed financial assurance, the Service will consider the cost of providing replacement mitigation, including costs for land acquisition, planning and engineering, legal fees, mobilization, construction and monitoring, and long-term stewardship.

Financial assurances should be in place prior to commencing the action authorizing the impact action.

8.2.3.6.1. Short-Term and Interim Financial Assurances

Short-term financial assurances are required in an amount adequate to guarantee performance of measures such as construction of habitat or initial fencing of the mitigation site. Short-term financial assurances are intended to be phased out once the compensatory mitigation project has been determined by the Service to be successful in accordance with its performance criteria. The Service-approved document must clearly specify the conditions under which the financial assurances are to be released to the project applicant, mitigation sponsor, or other financial assurance provider, including linkage to achievement of performance criteria specified in the mitigation instrument or management plan, or compliance with terms and conditions or a permit, as appropriate.

Interim financial assurances are required in an amount adequate to fund management and operation of the mitigation site until long-term financial assurances are available. The amount is expected to be calculated based on the projected cost of managing and monitoring the mitigation site for a period of at least 3 years after the long-term management endowment has been fully funded. Interim financial assurances are intended to be phased out once the endowment fund becomes available and may be released to the project applicant, mitigation sponsor, or other financial assurance provider, or may be used to fund the initial years of long-term management, as applicable. The mitigation instrument, permit, or biological opinion must clearly specify the conditions under which the financial assurances are to be released to the project applicant, sponsor, or other financial assurance provider, including linkage to funding the long-term endowment, and to specific management and operation tasks required by the management plan or interim management plan that are needed to maintain the mitigation site in accordance with the mitigation instrument, permit, or biological opinion.

The following apply to short-term and interim financial assurances:

a. Each form of financial assurance must include a provision that states the Service will receive notification at least 120 days in advance of any termination or revocation. For third-party assurance providers, this may take the form of a contractual requirement for the assurance provider to notify the Service at least 120 days before the assurance is revoked or terminated.

b. In the event a mitigation project has not met performance criteria as specified in the mitigation instrument or management plan, the financial assurance will be used for corrective action. Specific instructions for use must be included in the financial assurance instrument (*i.e.,* letter of credit, performance bond, escrow account, casualty insurance, etc.). These funds will be spent in accordance with the provisions of the instrument. When a standby trust is used (*e.g.,* performance bonds or letters of credit), all amounts paid by the financial assurance provider shall be deposited directly into the standby trust fund for distribution by the trustee in accordance with instructions in the mitigation enabling instrument, conservation easement, or other controlling document. Generally the entity holding the easement or long-term management endowment is an appropriate designee.

8.2.3.6.2. Long-Term Financial Assurances

Long-term financial assurances are required to ensure long-term stewardship of compensatory mitigation sites and must be in the form of a perpetual endowment. Endowments may be funded over time only when the funding source is the sale of mitigation credits or when the funding source is through legislative appropriation for government agency-sponsored projects. In such cases, a funding schedule and a target date for fully funding the endowment must be specified in the instrument. If an endowment is not fully funded by its target date, the Service may, at its discretion, negotiate a new target date or require that the endowment be fully funded within 30 days of the original target date.

Endowments must be held by qualified third parties who are subject to approval by the Service (see section 8.3. *Qualifications for Holders of Site Protection and Financial Assurance Instruments*). To be approved by the Service, the endowment holder must:

a. Hold, invest, and manage the endowment to the extent allowed by law and consistent with modern ''prudent investor'' and endowment law, such as the Uniform Prudent Management of Institutional Funds Act of 1972 (UPMIFA). UPMIFA incorporates a general standard of prudent spending measured against the purpose of the fund and invites consideration of a wide array of other factors.

b. Disburse funds on a timely basis to meet the stewardship expenses of the entity holding the property consistent with UPMIFA.

c. Use accounting standards consistent with standards promulgated by the Financial Accounting Standards Board or any successor entity (if a nonprofit) and with standards promulgated by the Governmental Accounting Standards Board or any successor entity (if a governmental entity).

d. Provide the Service with an annual fiscal report that contains at least the following elements:

i. Balance of each individual endowment at the beginning of the reporting period;

ii. Amount of any contribution to the endowment during the reporting period including, but not limited to gifts, grants, and contributions received;

iii. Net amounts of investment earnings, gains, and losses during the reporting period, including both realized and unrealized amounts;

iv. Amounts distributed during the reporting period that accomplish the purpose for which the endowment was established;

v. Administrative expenses charged to the endowment from internal or third-party sources during the reporting period;

vi. Balance of the endowment or other fund at the end of the reporting period;

vii. Specific asset allocation percentages, including, but not limited to, cash, fixed income, equities, and alternative investments; and

viii. Most recent financial statements for the organization audited by an independent auditor who is, at a minimum, a certified public accountant.

8.2.3.7. Additional Requirements for Business Entities

If the mitigation sponsor or owner of the mitigation site is a business entity, such as a Limited Liability Company (LLC), the sponsor/owner must provide the following documentation:

a. Articles of incorporation or equivalent documents;

b. Bylaws or other governing documents; and

c. List of board members, including biographies.

8.2.3.8. Closure Plan

The instrument must include a closure plan that describes at what point a mitigation project or program is ''closed'' and what responsibilities remain. Upon closure, the long-term stewardship phase begins, where the property owner is primarily responsible for managing the site as described in the long-term management plan, the easement holder is responsible for oversight as described in the real estate protection instrument, and the endowment holder is responsible for managing and making disbursements from the endowment fund as described in the endowment funding and management agreement or declaration of trust. Once a mitigation project or program is closed, it can no longer be used as mitigation for new impacts. Minimum criteria for closure for mitigation programs or sites are:

a. Transfer of all credits or forfeiture of any remaining credits;

b. Attainment of all performance criteria;

c. Endowment maturation;

d. Compliance with all terms of the mitigation instrument; and

e. Written acknowledgement from the Service that all closure criteria have been met.

8.3. Qualifications for Holders of Site Protection and Financial Assurance Instruments

Qualifications for entities entrusted with holding real estate protection instruments and/or financial assurance instruments intended to fund the stewardship of compensatory mitigation sites are essential in ensuring that mitigation is carried out for the duration specified in the permit or consultation. Holders of these instruments are proposed by the mitigation sponsor and are subject to approval by the Service. Minimum qualifications (listed below) must be met prior to Service approval of a mitigation program, project, or site.

Land trusts that are accredited by the Land Trust Accreditation Commission (Commission) and are in good standing will automatically meet the minimum requirements for holding real estate and financial assurance instruments and be approved by the Service. We recognize that the Commission has developed national standards for excellence, upholding the public trust, and ensuring that conservation efforts are permanent. We are confident that organizations successfully completing this rigorous process will meet the needs for long-term stewardship of mitigation lands. Therefore, the use of an accredited land trust as holder or grantee of a conservation easement is required in those areas where accredited land trusts are available and willing to hold easements for Service-approved mitigation sites. In the event that a land trust acting as grantee on a conservation easement or holding stewardship funds fails to maintain accreditation or otherwise loses accredited status, the Service may require that the conservation easement and/or endowment fund be transferred to another entity. Should other national or State accreditation programs that use the same rigorous criteria as the Commission be developed in the future, the Service may consider entities qualifying in those programs for an expedited approval process.

The Service recognizes that accredited land trusts willing to hold easements for Service-approved mitigation sites are not available in all areas. For those areas in which accredited land trusts are not available, holders of real estate and/or financial assurance instruments must meet these minimum qualifications prior to Service approval of a mitigation program or site:

a. A nonprofit organization or government entity having as its principal purpose and activity the direct protection or stewardship of land, water, or natural resources, including, but not limited to agricultural lands, wildlife habitat, wetlands, and endangered species habitat;

b. Adoption and demonstrated implementation of the Land Trust Alliances' Land Trust Standards and Practices;

c. For holders of easements or other long-term site protection mechanisms, an organization with a history of successfully holding land or easements in long-term stewardship for the above purposes that:

i. has been incorporated (or formed as a trust) for at least five years,

ii. is named as the Grantee on at least two conservation easements, and

iii. has successfully upheld their responsibilities under the conservation easements which they hold as Grantee;

d. For holders of financial assurances, a successful history of holding and managing funds for the above purposes consistent with requirements under UPMIFA; and,

e. A non-profit, non-governmental organization must also:

i. qualify for tax exempt status in accordance with Internal Revenue Code section 501(c)(3);

ii. have a Board of Directors comprising at least 51% disinterested parties;

iii. disclose the relationship between all board members and the mitigation provider and/or project applicant;

iv. be registered as a charitable trust with the appropriate State agency for the State in which the mitigation area is located, or otherwise comply with applicable State laws; and

v. adhere to generally accepted accounting practices that are promulgated by the Financial Accounting Standards Board, or any successor entity.

The National Fish and Wildlife Foundation (NFWF) is approved by the Service to hold financial assurance instruments. NFWF is organized under IRC section 501(c)(3), and was established by Congress in 1984 to support the Service's mission to conserve fish, wildlife and plant species. NFWF is one of the nation's largest non-profit funders for wildlife conservation, is transparent, and accountable to Congress, federal agencies and the public, and has a record for successfully managing endowments for permanent conservation. NFWF generally does not hold conservation easements.

Government agencies are limited in their ability to accept, manage, and disburse funds for the purposes described here and must not be given responsibility for holding endowments or other financial assurances for compensatory mitigation projects. These funds must be held by a third party as described in this section.

9. Criteria for Use of Third-Party Mitigation

9.1. Project Applicability

Activities regulated under section 7 or section 10 of the ESA may be eligible to use third-party sponsored mitigation, if the adverse impacts to the species from the particular project can be offset by transfer of the appropriate type and number of credits provided by the third party sponsored mitigation program. The impacts for which third party sponsored mitigation is sought must be located within the service area for the species provided by the third party sponsored mitigation program unless otherwise approved by the Service. In no case may the same credit(s) be used to compensate for more than one action. However, the same credit(s) may be used to compensate for a single action that requires authorization under more than one regulatory authority (*e.g.,* a vernal pool restoration credit that provides mitigation for a listed species under the ESA and wetlands under section 404 of the CWA).

Only credits that have been verified by the Service and released are considered available. Only available credits can be used to mitigate actions.

9.2. Transfer of Liability

The mitigation sponsor assumes liability for success of the mitigation through the transfer (usually a purchase by the permittee) of credits or other quantified amount of compensatory mitigation documented in a mitigation instrument. The credit sale must be recorded in a fully executed sales contract between the permittee and the mitigation sponsor that specifically states the transfer of liability to be legally binding. Service offices must retain a copy of the executed sales contract in the project file and maintain a copy in RIBITS (if the bank or mitigation project is tracked in RIBITS) or in the file for the authorized in-lieu fee program, or habitat credit exchange.

The Service's role is regulatory. The Service must approve credit transactions as to their conservation value and appropriate application for use related to any authorization or permit issued under the ESA. Service approval is usually through signature; however, the Service's signature as an approving entity on the sales contract does not mean the Service is party to the contract. Market and legal risks arising from the purchase and use of mitigation credits are borne solely by the parties to the sale of such credits. See section 6.7. *Disclaimer Provisions.*

9.3. Credit Stacking and Bundling

The Service recognizes the inherent efficiencies in leveraging multiple conservation efforts on the landscape and encourages these coordinated efforts. However, compensatory mitigation and other conservation actions that occur on the same mitigation site must be accounted for separately, and all aspects of the different actions must be managed and tracked in a transparent manner. Stacking mitigation credits within a mitigation site (*i.e.,* more than one credit type on spatially overlapping areas) is allowed, but the stacked credits cannot be used to provide mitigation for more than one permitted impact action even if all the resources included in the stacked credit are not needed for that action. To do so would result in a net loss of resources in most cases because using a species credit separately from the functions and services that accompany its habitat, such as carbon sequestration or pollination services, would result in double counting (*i.e.,* double dipping). Double counting is selling or using a unit of the same ecosystem function or service on the ground more than once. This can occur through an accounting error in which the credit is sold twice, and it also can occur when stacked credits are unstacked and one or more functions or services are sold separately. For example, a credit representing an acre of habitat is sold once as a species habitat credit for a permitted action and again as a carbon credit for a different action in a different location. The loss of species habitat at the first impact site included all functions and services associated with that habitat including carbon sequestration, so selling that same unit of compensatory mitigation again for carbon sequestration results in no carbon offset for the loss of carbon sequestration at the second impact location. Using a stacked credit separately to reflect its various values is an ecologically challenging accounting exercise.

Compensatory mitigation projects may be designed to holistically address requirements under multiple programs and authorities for the same action and may use bundled credits to accomplish this goal. For example, a stream credit may satisfy requirements for an U.S. Army Corps of Engineers section 404 CWA permit and issuance of incidental take authority under the ESA for a listed mussel species occurring in that stream, or a county-wide HCP may establish an in-lieu fee program for which a single fee is collected from project applicants for a permit which covers multiple mitigation obligations under Federal, State, and local authorities. In both these examples the bundled credit is used as a single commodity (*i.e.,* it is not unbundled or unstacked) and is only used once.

9.4. Use of Credits for Mitigation Under Authorities Other Than the ESA

Compensatory mitigation projects established for use under one Service program (*e.g.,* Ecological Services) may also be used to satisfy the environmental requirements other Service programs (*e.g.,* Migratory Birds or Refuges) or other Federal, State, or local agency programs consistent with the laws and requirements of each respective program. However, the same credits may not be used for more than one authorized or permitted action (*i.e.,* no double counting of mitigation credits).

10. Compliance and Tracking

A tracking system is essential in ensuring compliance with the mitigation instruments used to implement compensatory mitigation programs described in this policy.

Tracking systems also facilitate consistency in the implementation of compensatory mitigation programs and projects. It is vital that the Service track compliance directly for permittee-responsible mitigation and, at a minimum, through third-parties responsible for operating compensatory mitigation programs or projects such as in-lieu fee programs and habitat exchanges. Minimum requirements for compliance and tracking are described below. More specific guidance (*e.g.,* monitoring report outlines or templates) may be developed or additional requirements may be set by Regional and/or Field.

Transactions (credit withdrawals) at a Service authorized mitigation program or project that are not related to ESA compliance and are not approved by the Service must be tracked in the same tracking system. The Service is not liable for any event or transaction that eludes detection through the Service's tracking function.

10.1. General Compliance

10.1.1. Conservation Banks, In-Lieu Fee Programs, Habitat Credit Exchanges

Conservation banks, in-lieu fee programs, and habitat credit exchanges must comply with the terms of their instruments, including meeting performance criteria and submitting required reports. Appropriate action will be taken if the Service determines a compensatory mitigation program is not meeting performance criteria or complying with the terms of the enabling instrument or site protection instrument. Such actions may include decreasing available credits, suspending the use of credits as mitigation, and/or determining that financial assurance resources should be used to perform remediation or alternative mitigation as provided by the mitigation instrument.

10.1.2. Permittee-Responsible Mitigation Projects

Permittee-responsible mitigation projects are linked to one permitted action, therefore no credits are available to reduce or suspend. Failure to complete mitigation or failure of a mitigation site to meet performance criteria may trigger reinitiation under 50 CFR 402.16 or suspension of a section 10(a)(1)(B) permit. If the Service determines that a permittee-responsible mitigation site is not meeting performance criteria, appropriate corrective actions will be taken, such as determining financial assurance resources should be used to perform remediation or alternative mitigation, as provided by the mitigation instrument.

10.1.3. Other Third-Party Mitigation Projects

Similar to conservation banks and in-lieu fee programs the responsibility for ensuring success of a mitigation project provided by a third party lies with the third party. Like permittee-responsible mitigation projects, these projects are linked to a single permitted action. If the Service determines that a third party mitigation project is not meeting performance criteria or is not in compliance with the mitigation instrument or site protection instrument, appropriate corrective actions will be taken, such as determining financial assurance resources should be used to perform remediation or alternative mitigation, as provided by the mitigation instrument.

10.2. Reporting

Reports will be required at least annually. Reports document the compensatory mitigation program's or project's performance. Reports generally include a description of the mitigation site conditions, attainment of performance criteria, status of the endowment fund or other financial assurance mechanism, expenditures, and management actions taken and expected to be taken in the future. See Section 8.2. *Proposal Process and Minimum Requirements* for other report requirements. Conservation banks, in-lieu fee programs, and habitat credit exchanges must also include a copy of the ledger with a record of all credit transactions to date.

Conservation banks, in-lieu fee programs, and habitat credit exchanges often have requirements for reaching milestones which lead to the release of credits to be made available for use as mitigation. Annual monitoring reports document the condition of the sites and the achievement of these milestones. Credits should not be released until all reports are submitted and verified.

10.3. Third-Party Monitoring of Real Estate Protection

Third-party monitoring of the real estate protection instrument (*e.g.,* conservation easement) is necessary to ensure the conservation values of the mitigation site are protected for the required duration. Annual reports to the Service, describing the site conditions and compliance/non-compliance with the site protections, must be built into the real estate protection instruments. The Service must be designated as a third-party beneficiary with rights of enforcement in the easement or similar site protection instruments. This is necessary to allow the Service continued access to the site and oversight authority after the conservation bank has closed or the in-lieu fee program or other compensatory mitigation mechanism has terminated. This third party beneficiary right shall not involve the Service in project management or receipt or management of financial assurance mechanisms.

10.4. Credit Transfers

Each use of credits as compensatory mitigation is subject to authorization by the Service. The Service will review each proposed use of credits to determine if the mitigation program is in good standing (*i.e.,* is in compliance with the instrument and site protection mechanism) and has the appropriate available credits. The criteria that determine whether a bank, in-lieu fee program, or habitat credit exchange is in good standing will be contained in its instrument and can include, but is not limited to meeting performance criteria, submitting reports, and funding the management endowment on schedule. If upon review, the Service determines that the mitigation program is not in good standing or does not have the appropriate available credits, then the sponsor will be notified of such determination. In such case, the use of the credits as compensatory mitigation will not be authorized until the sponsor corrects the deficiency. If upon review, the Service determines that the mitigation program is in good standing, the Service will provide authorization in writing approving the pending credit transfer. If there is a substantial delay between the Service's authorization of a pending credit transfer and the actual transfer of credits, an updated review of the mitigation program's standing may be conducted. It is the responsibility of the permittee to secure the transfer of credits in a timely manner or contact the Service and request reauthorization of the pending credit transfer.

10.5. Tracking Compensatory Mitigation

Monitoring reports and other documents used to evaluate compliance will be uploaded into the Service's Environmental Conservation and Online System (ECOS) or the Regulatory In-lieu fee and Bank Information Tracking System (RIBITS), as appropriate. Permittee-responsible mitigation is tracked in ECOS. Conservation banks are tracked in RIBITS. In-lieu fee programs and habitat credit exchanges will be tracked in RIBITS when sufficient modifications to RIBITS have been made to accommodate these mitigation mechanisms. Until that time, in-lieu fee programs and habitat credit exchanges must be tracked in databases

that can be accessed by the Service and the public, as appropriate. RIBITS can be accessed at: *https://ribits.usace.army.mil/.*

Documents uploaded into the RIBITS cyber repository will be available to the public to the extent allowed by law and in accordance with the requirements of mitigation instruments approved by the Service. At a minimum, mitigation instruments and credit ledgers will be visible to the public. Regional and/or Field Offices will determine the types of additional documents to be uploaded into the cyber repository and made visible to the public. Field Offices will coordinate with mitigation sponsors to ensure that credit ledgers are updated at least monthly.

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Appendix A: List of Acronyms and Abbreviations Used in This Policy

CCAA Candidate Conservation Agreement with Assurances
CEQ Council on Environmental Quality
CFR Code of Federal Regulations
CWA Clean Water Act
ECOS Environmental Conservation and Online System
EPA Environmental Protection Agency
ESA Endangered Species Act
FWCA Fish and Wildlife Coordination Act
HCP Habitat Conservation Plan
IHAs Incidental Harassment Authorizations
IRT Interagency Review Team
ITRs Incidental Take Regulations
MMPA Marine Mammal Protection Act
MRT Mitigation Review Team
NEPA National Environmental Policy Act
NWR National Wildlife Refuge
RPA Reasonable and Prudent Alternative
RPM Reasonable and Prudent Measure
RIBITS Regulatory In-lieu fee and Bank Information Tracking System
SHA Safe Harbor Agreement
SHC Strategic Habitat Conservation
UPMIFA Uniform Prudent Management of Institutional Funds Act
USACE United States Army Corps of Engineers
U.S.C. United States Code
USDA United States Department of Agriculture
USFWS United States Fish and Wildlife Service
USGS United States Geological Survey

Appendix B: Glossary of Terms Related to Compensatory Mitigation

Definitions in this section apply to the implementation of the U.S. Fish and Wildlife Service (Service) Endangered Species Act Compensatory Mitigation Policy and were developed to provide clarity and consistency. Some definitions are defined in Service authorities such as the Endangered Species Act or the National Environmental Policy Act, or in regulations or policies existing at the time this policy was issued. Other definitions have been developed based on compensatory mitigation practices. Definitions in the glossary do not substitute for statutory or regulatory definitions in the exercise of those authorities.

Action—an activity or program implemented, authorized, or funded, in whole or in part, by Federal agencies; or a non-Federal activity or program for which one or more of the Service's authorities apply to make mitigation recommendations, specify mitigation requirements, or provide technical assistance for mitigation planning (81 FR 12380; March 8, 2016).

Action area—all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action (50 CFR 402.02). See also ''*affected area.*''

Adaptive management—a systematic approach for improving resource management by learning from management outcomes. An adaptive approach involves exploring alternative ways to meet management objectives, predicting the outcomes of alternatives based on the current state of knowledge, implementing one or more of these alternatives, monitoring to learn about the impacts of management actions, and then using the results to update knowledge and adjust management actions. Adaptive management focuses on learning and adapting, through partnerships of managers, scientists, and other stakeholders who learn together how to create and maintain sustainable resource systems (Williams et al. 2009). As applied to compensatory mitigation, it is a management strategy that anticipates likely challenges associated with compensatory mitigation projects and provides for the implementation of activities to address those challenges, as well as unforeseen changes to those projects. It requires consideration of the risk, uncertainty, and dynamic nature of compensatory mitigation projects and guides modification of those projects to achieve stated biological goals. It includes the selection of appropriate measures that will ensure that the resource functions and services are provided and involves analysis of monitoring results to identify potential problems of a compensatory mitigation project and the identification and implementation of measures to rectify those problems (modified from 33 CFR 332.2).

Additionality—conservation benefits of a compensatory mitigation measure that improve upon the baseline conditions of the impacted resources and their values, services, and functions in a manner that is demonstrably new and would not have occurred without the compensatory mitigation measure (600 DM 6.4G).

Additive impacts, additive effects—the combined effects of past actions on a species, other resource, or community; impacts of an action may be relatively insignificant on their own, but when considered with the impacts from other actions as they accumulate over time collectively lead to significant overall loss or degradation of resources. See also ''*cumulative effects.*''

Affected area—the spatial extent of all effects, direct and indirect, of a proposed action to fish, wildlife, plants, or their habitats (81 FR 12380; March 8, 2016). See also ''*action area.*''

Affected resources—those resources that are subject to adverse effects of an action (81 FR 12380; March 8, 2016).

Applicant—any person who requires formal approval or authorization from a Federal agency as a prerequisite to conducting an action (50 CFR 402.02);

''person'' means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States (16 U.S.C. 1532(13)).

At-risk species—candidate species and other unlisted species that are declining and are at risk of becoming a candidate for listing under the Endangered Species Act. This may include, but is not limited to, State listed species, species identified by States as species of greatest conservation need, or species with State heritage ranks of G1 or G2.

Avoidance—avoiding the impact altogether by not taking a certain action or parts of an action (40 CFR 1508.20).

Bank Sponsor—any public or private entity responsible for establishing and, in most circumstances, operating a conservation bank. Bank sponsors are most often private individuals, companies, or Limited Liability Corporations; but may also be non-governmental organizations, Tribes, or government agencies. See also ''*mitigation sponsor.''*

Baseline—the pre-existing condition of a defined area of habitat or a species population that can be quantified by an appropriate metric to determine level of functions and/or services and re-measured at a later time to determine if the same area of habitat or species population has increased, decreased, or maintained the same level of functions and/or services.

Candidate Conservation Agreement with Assurances (CCAA)—a formal agreement between the Service or the National Marine Fisheries Service and one or more non-Federal parties who voluntarily agree to manage their lands or waters to remove threats to candidate or proposed species and in exchange receive assurances that their conservation efforts will not result in future regulatory obligations in excess of those they agreed to at the time they entered into the Agreement. The management activities included in the Agreement must significantly contribute to elimination of the need to list the target species when considered in conjunction with other landowners conducting similar management activities within the range of the species (USFWS CCAA Policy).

Candidate species (candidate)—any species being considered by the Secretary for listing as an endangered or threatened species, but not yet the subject of a proposed rule (50 CFR 424.02); a species for which the Service or the National Marine Fisheries Service has on file sufficient information on biological vulnerability and threats to support a proposal to list as endangered or threatened under the Endangered Species Act.

Compensatory mitigation (compensation)—compensation for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied, by replacing or providing substitute resources or environments (See 40 CFR 1508.20.) through the restoration, establishment, enhancement, or preservation of resources and their values, services, and functions. (600 DM 6.4C)

Compensatory mitigation project—compensatory mitigation implemented by the action agency, a permittee, or a mitigation sponsor. Compensatory mitigation projects include permittee-responsible mitigation, conservation banks, in lieu fee programs and sites, habitat credit exchanges, and other third party compensatory mitigation projects.

Conservation, conserve, conserving—to use and the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to the Endangered Species Act are no longer necessary (16 U.S.C. 1532(3)).

Conservation bank—a site, or suite of sites, established under a conservation bank instrument that is conserved and managed in perpetuity and provides ecological functions and services expressed as credits for specified species that are later used to compensate for impacts occurring elsewhere to the same species.

Conservation Bank Instrument (CBI), (Conservation Bank Agreement (CBA))—the legal document for the establishment, operation and use of a conservation bank. When a conservation bank is established jointly with a wetland mitigation bank, the instrument is often referred to as a Mitigation Bank Instrument (MBI) or Bank Enabling Instrument (BEI).

Conservation easement—a recorded legal document established to conserve biological resources for a specified duration, usually in perpetuity, on a identified conservation property and which restricts certain activities and requires certain habitat management obligations for the conservation property.

Conservation Land Use Agreement, Federal Facility Management Plan—real estate assurance mechanisms used by some Federal or State agencies that do not have the authority to limit use of the agency property by recording a restriction on deed such as a conservation easement.

Conservation measures (conservation actions)—measures pledged in the project description that the Federal agency or applicant will implement to minimize, rectify, reduce, and/or compensate for the adverse impacts of the development project on the species. Conservation measures designed to compensate for unavoidable impacts may include the restoration, enhancement, establishment, and/or preservation of species habitat or other measures conducted for the purpose of offsetting adverse impacts to the species. Upon issuance of a permit, license or other such authorization associated with the proposed project, implementation of that project requires implementation of the conservation measures as well as any other terms and conditions of the permit.

Conservation objective—a measurable expression of a desired outcome for a species or its habitat resources. Population objectives are expressed in terms of abundance, trend, vital rates, or other measurable indices of population status. Habitat objectives are expressed in terms of the quantity, quality, and spatial distribution of habitats required to attain population objectives, as informed by knowledge and assumptions about factors influencing the ability of the landscape to sustain the species (81 FR 12380; March 8, 2016).

Conservation plan (species conservation plan)—a plan developed by Federal, State, and/or local government agencies, Tribes, or appropriate non-governmental organizations, in consultation with relevant stakeholders, for the specific goal of conserving one or more listed or at-risk species. A conservation plan is developed using a landscape-scale approach and addresses the status, needs and threats to the species and usually includes recommended conservation measures for the conservation/recovery of the species. Examples of species conservation plans include species conservation frameworks, rangewide conservation plans, and conservation plans developed as part of a large landscape Habitat Conservation Plan.

Covered species—species specifically included in a Conservation Bank Instrument, Habitat Conservation Plan, Safe Harbor Agreement, Candidate Conservation Agreement with Assurances, rangewide conservation plan, or other such conservation plan for which a commitment is made to achieve specific conservation measures for the species.

Credit (species credit, habitat credit)—a defined unit representing the accrual or attainment of ecological functions and/or services for a species at a mitigation site or within a mitigation program.

Credit bundling—allowing a single unit of a mitigation site to provide compensation for two or more spatially overlapping ecosystem functions or services which are grouped together into a single credit type and used as a single commodity to compensate for a single permitted action. A bundled credit may be used to compensate for all or a subset of the functions or services included in the credit type but may only be used once, even if all functions and services represented in the credit type were not required for the permitted action. See also ''*credit stacking.''*

Credit stacking—allowing a single unit of a mitigation site to provide two or more credit types representing spatially overlapping ecosystem functions or services which can be unstacked and used as separate commodities to compensate for different permitted actions. Credit stacking can result in double counting (*i.e.,* a net loss of resources on the landscape) if the same functions or services are not also accounted for separately at all impact sites. See also ''*credit bundling''* and *''double counting.''*

Credit Transfer—the use, sale or conveyance of credits by a bank sponsor or mitigation provider to a permittee or other entity for the purposes of offsetting impacts of an action.

Critical habitat—specific areas within the geographical area occupied by the species at the time it is listed as threatened or endangered under the Endangered Species Act, on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations

or protection; and specific areas outside the geographical area occupied by the species at the time it is listed, which are determined by the Secretary of the Department of the Interior to be areas essential for the conservation of the species (16 U.S.C. 1532(5)(A)).

Cumulative effects—those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation under the Endangered Species Act (50 CFR 402.14(g)(3)). Under the National Environmental Policy Act cumulative effects are defined as the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions (40 CFR 1508.7).

Debit—a defined unit representing the loss of ecological functions and/or services for a species at an impact site. Debits should be expressed using the same metrics used to value credits at mitigation sites.

Direct effects—those effects to the species or other resource that are caused by the action and occur at the same time and place (81 FR 12380; March 8, 2016).

Double-counting (double-dipping)—using a credit, however defined, representing the same unit of ecosystem function or service on a mitigation site more than once. This is not allowed.

Durability—the condition or state in which the measurable environment benefits of the compensatory mitigation project or measure is sustained, at a minimum, for the duration of the associated impacts (including direct and indirect impacts) of the authorized action. To be durable, mitigation measures effectively compensate for remaining unavoidable impacts that warrant compensatory mitigation, use long-term administrative and legal provisions to prevent actions that are incompatible with the measure, and employ financial instruments to ensure the availability of sufficient funding for the measure's long-term monitoring, site protection, and management (600 DM 6.4G).

Effects (effects of the action)—changes in the environmental conditions caused by an action that are relevant to the species or other resources (81 FR 12380; March 8, 2016), including the direct, indirect, and cumulative effects of the action on the species and other activities that are interrelated to, or interdependent with, that action as defined at 50 CFR 402.02. See also ''*cumulative effects.*''

Endangered species—any species which is in danger of extinction throughout all or a significant portion of its range (16 U.S.C. 1532(6)).

Endowment—as used in this policy, funds that are conveyed solely for the long-term stewardship of a mitigation property and are permanently restricted to paying the costs of management and stewardship of that property. The management of endowment funds is generally governed by state and federal laws, as applicable. Endowments do not include funds conveyed for meeting short term performance objectives of a mitigation project.

Enhancement—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. Compare with ''*restoration.*''

Establishment (creation)—construction of habitat of a type that did not previously exist on a mitigation site but which will provide a benefit to the species and does not negatively affect other resources of concern. Compare with ''*restoration.*''

Fee title (fee)—an interest in land that is the most complete and absolute ownership in land; it is of indefinite duration, freely transferable and inheritable.

Fish or wildlife—any member of the animal kingdom, including without limitation any mammal, fish, bird (including migratory, non-migratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate (16 U.S.C. 1532(8)).

Functions—the physical, chemical, and biological processes that occur in ecosystems (33 CFR 332.2); functions are the ecological processes necessary for meeting species' habitat and lifecycle needs.

Habitat—an area with spatially identifiable physical, chemical, and biological attributes that supports one or more life-history processes for the species (81 FR 12380; March 8, 2016).

Habitat Conservation Plan (HCP)—a planning document that describes the anticipated effects of a proposed activity on the taking of federally-listed species, how those impacts will be minimized and mitigated, and how the plan will be funded (16 U.S.C. 1539). The HCP is required as part of an incidental take permit application to the Service or the National Marine Fisheries Service (see ''*incidental take*'').

Habitat credit exchange (habitat credit exchange program)—a market-based system that operates as a clearinghouse in which an exchange administrator, acting as a mitigation sponsor, manages credit transactions between compensatory mitigation providers and permittees or others authorized to implement actions that adversely affect protected species.

Impact(s) (of an action)—adverse effects relative to the affected resources (81 FR 12380; March 8, 2016). More specifically under this policy, adverse effects on the species or its habitat anticipated in a proposed action or resulting from an authorized or permitted action.

Incidental take—take of any threatened or endangered species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by a Federal agency or an applicant (50 CFR 402.02). Incidental take may be authorized for threatened or endangered species through section 7 or 10 or for threatened species through a rule codified under section 4(d) of the Endangered Species Act. See also, ''*take*'').

Indirect effects—those effects to the species that are caused by the action at a later time or another place, but are reasonably certain to occur (50 CFR 402.02).

In-kind—a resource of a similar structural and functional type to the impacted resource (33 CFR 332.2); when used in reference to a species, in-kind means the same species.

In-lieu fee program—a program involving the restoration, establishment, enhancement, and/or preservation of habitat through funds paid to a governmental or non-profit natural resources management entity to satisfy compensatory mitigation requirements for impacts to specified species or habitat (modified from 33 CFR 332.2).

In-lieu fee program instrument—the legal document for the establishment, operation, and use of an in-lieu fee program (33 CFR 332.2). See also, ''instrument.''

In-lieu fee program sponsor—any government agency or non-profit natural resources management organization responsible for establishing, and in most circumstances, operating an in-lieu fee program. See also, ''sponsor.''

In-lieu fee site—a compensatory mitigation site established under an approved in-lieu fee program.

Instrument, agreement—the document that reflects the regulatory decision by the FWS that the conservation bank or other compensatory mitigation program or project satisfies applicable biological and durability standards and can, therefore, be used to provide compensatory mitigation under the ESA in appropriate circumstances. The instrument must be signed by the mitigation sponsor and landowner to reflect their acceptance of the terms. The instrument is not a contract between FWS 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.

Interagency Review Team (IRT)—an interagency group of Federal, Tribal, State, and/or local regulatory and resource agency representatives that reviews documentation for, and advises the district engineer for the U.S. Army Corps of Engineers on, the establishment and management of a wetland or stream mitigation bank or an in-lieu fee program (33 CFR 332.2 and 332.8(b)). When the wetland or stream mitigation bank or in-lieu fee program sponsor also seeks credits authorized by the Service, then the Service becomes a co-chair of the IRT. See also, ''*Mitigation Review Team.*''

Joint bank—a mitigation bank that that has been designed to holistically address mitigation requirements under multiple programs and authorities for the same types of actions or activities.

Landscape—an area encompassing an interacting mosaic of ecosystems and human systems that is characterized by a set of common management concerns. The landscape is not defined by the size of the area, but rather by the interacting elements that are relevant and meaningful in a management context (600 DM 6D).

Landscape-scale approach—an approach to conservation planning that applies the mitigation hierarchy for impacts to resources and their values, services, and functions at the relevant scale, however narrow or broad, necessary to sustain, or otherwise achieve established goals for those resources and their values, services, and functions. A

landscape-scale approach should be used when developing and approving strategies or plans, reviewing projects, or issuing permits. The approach identifies the needs and baseline conditions of targeted resources and their values, services and functions, reasonably foreseeable impacts, cumulative impacts of past and likely projected disturbance to those resources, and future disturbance trends. The approach then uses such information to identify priorities for avoidance, minimization, and compensatory mitigation measures across that relevant area to provide the maximum benefit to the impacted resources and their values, services, and functions, with full consideration of the conditions of additionality and durability (600 DM 6E).

Listed species—any species or subspecies of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the Endangered Species Act (50 CFR 402.02). Listed species are found in 50 CFR 17.11–17.12.

Management plan—the stewardship plan prepared to instruct the land manager in the operations, biological management and monitoring, and reporting for the compensatory mitigation site to, at a minimum, maintain the functions and services for specified species and other resources on the mitigation site. These are generally long-term plans that include a detailed estimate of the itemized costs for all management actions required by the plan. These annual costs are used to estimate the size of the endowment that will be needed to maintain and monitor the mitigation site for the intended duration.

Mitigation (mitigation hierarchy, mitigation sequence)—as defined and codified in the Council on Environmental Quality (CEQ) National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) regulations (40 CFR 1508.20), mitigation includes:

- Avoid the impact altogether by not taking the action or parts of the action;
- minimize the impact by limiting the degree or magnitude of the action and its implementation;
- rectify the impact by repairing, rehabilitating, or restoring the affected environment;
- reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action; and
- compensate for the impact by replacing or providing substitute resources or environments.''

This sequence is often condensed to: Avoidance, minimization, and compensation.

Mitigation bank—a site, or suite of sites, where resources (*e.g.,* wetlands, streams, riparian areas) are restored, established, enhanced, and/or preserved for the purpose of providing compensatory mitigation for impacts authorized by Department of the Army permits (33 CFR 332.2). Mitigation banks may include credits authorized by other agencies to compensate for impacts to other (non-Clean Water Act 404) resources. The term ''mitigation bank'' is sometimes used in the broad sense to include mitigation and conservation banks.

Mitigation Bank Instrument (Mitigation Bank Enabling Instrument)—the legal document for the establishment, operation, and use of a wetland and/or stream mitigation bank approved by the U.S. Army Corp of Engineers (33 CFR 332.2). See also, ''*conservation bank instrument''* and ''*mitigation instrument.''*

Mitigation Instrument (Mitigation Enabling Instrument)—the legal document for the establishment, operation, and use of a compensatory mitigation project or site. Examples of specific types of mitigation instruments include: Conservation bank instrument, in-lieu fee program instrument, and habitat credit exchange instrument.

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.

Mitigation Review Team (MRT)—an interagency group of Federal, State, Tribal and/or local regulatory and resource agency representatives that reviews mitigation documents for, and advises their respective agency decision-makers on, the establishment and management of a compensatory mitigation program or project. See also, ''*Interagency Review Team.''*

Mitigation sponsor (mitigation project sponsor, sponsor, mitigation provider)—any public or private entity responsible for establishing, and in most circumstances, operating a compensatory mitigation program or project such as a conservation bank, in-lieu fee program, or habitat credit exchange (modified from 33 CFR 332.2).

Off-site—a mitigation area that is located neither on or adjacent to the same parcel of land as the impact site (33 CFR 332.2).

On-site—a mitigation site located on or adjacent to the same parcel of land as the impact site (33 CFR 332.2).

Performance criteria—observable or measurable administrative and ecological (physical, chemical, or biological) attributes that are used to determine if a compensatory mitigation project meets the agreed upon conservation objectives identified in a mitigation instrument or the conservation measures proposed as part of a permitted or otherwise authorized action.

Permit or license applicant—see ''*applicant.*''

Permittee—any person who receives formal approval or authorization, generally in the form of a permit or license, from a Federal agency to conduct an action. See also, ''*applicant.''*

Permittee-responsible mitigation—activities or projects undertaken by a permittee or an authorized agent or contractor to provide compensatory mitigation for which the permittee retains full responsibility. As used in this policy, permittee-responsible mitigation also includes compensatory mitigation undertaken by Federal agencies to offset impacts resulting from actions carried out directly by the Federal agency.

Perpetuity—endless or infinitely long duration or existence; permanent.

Plant—member of the plant kingdom, including seeds, roots and other parts thereof (16 U.S.C. 1532(14)); fungi including spores and other parts thereof; and other non-wildlife species.

Practicable—available and capable of being done after taking into consideration existing technology, logistics, and cost in light of a mitigation measure's beneficial value and a land use activity's overall purpose, scope, and scale (81 FR 12380; March 8, 2016).

Preservation—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 resources elsewhere.

Proponent (project proponent)—the agency proposing an action, and if applicable, any applicant(s) for agency funding or authorization to implement a proposed action (81 FR 12380; March 8, 2016). For purposes of this policy any person, organization, or agency advocating a development proposal that is anticipated to result in adverse impacts to one or more listed or at-risk species. See also, ''*applicant''* and ''*permittee.''*

Proposal—a compensatory mitigation project proposal that includes a summary of the information regarding a proposed conservation bank, in-lieu fee program, or other compensatory mitigation project or program at a sufficient level of detail to support informed comment by the Mitigation Review Team (MRT).

Release of credits—a determination by authorized decision-makers within agencies that are signatories to a compensatory mitigation project instrument, in consultation with the MRT, that credits associated with the approved instrument are available for sales or use. Credits are released in proportion to milestones specified in the credit release schedule as specified in the instrument.

Reserve credit account—credits set aside in reserve to offset force majeure or other unforeseen events as agreed to by the Service and defined in the mitigation instrument, allowing a mitigation program to continue uninterrupted.

Resources (resources of concern)—fish, wildlife, plants, and their habitats for which the Service has authority to recommend or require the mitigation of impacts resulting from proposed actions (81 FR 12380; March 8, 2016).

Restoration—repairing or rehabilitating habitat for the benefit of the species on a mitigation 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.

Retired credit—a credit that is no longer available for use as mitigation. Credits that have been sold or otherwise used to fulfill a mitigation obligation are considered retired. Credits may also be voluntarily retired or forfeited, without being used for mitigation.

Safe Harbor Agreement (SHA)—formal agreement between the Service or National Marine Fisheries Service and one or more non-Federal property owners in which property owners voluntarily manage for listed species for an agreed amount of time providing a net conservation benefit to the species and, in return, receive assurances from the Service or National Marine Fisheries Service that no additional future regulatory restrictions will be imposed (USFWS Safe

Harbor Policy). Under the Safe Harbor Policy, ''net conservation benefit'' is defined as contributing to the recovery of the listed species covered by the SHA.

Service Area—the geographic area within which impacts to the species or other resources of concern can be mitigated at a specific compensatory mitigation site, as designated in its instrument.

Species—the term ''species'' includes any species, subspecies of fish, or wildlife, or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature (16 U.S.C. 1532(16)).

Strategic Habitat Conservation (SHC)—a framework for setting and achieving conservation objectives at multiple scales based on the best available information, data, and ecological models. Full implementation of SHC requires four elements that occur in an adaptive management loop: (1) Biological planning, (2) conservation design, (3) delivery of conservation actions, and (4) monitoring and research.

Take—means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect a federally listed species, or to attempt to engage in any such conduct (16 U.S.C. 1532(19)). ''Take'' applies only to fish and wildlife, not plants.

Temporal loss—the cumulative loss of functions and/or services relevant to the species attributed to the time between the loss of habitat functions and/or services or individuals of the population(s) caused by the action and the replacement of habitat functions and/or services or repopulation of the species at the compensatory mitigation site to the same level had the action not occurred.

Threatened species—any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range (16 U.S.C. 1532(20)).

Unavoidable impact—an impact for which an appropriate and practicable alternative to the proposed action that would not cause the impact is not available (81 FR 12380; March 8, 2016).

Appendix C: Requirement of the Marine Mammal Protection Act

Section 5 of this policy addresses sections of the ESA under which the Service has authority to recommend or require compensatory mitigation for species or their habitat. Specific regulatory requirements exist for marine mammals under the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1361 *et seq.*) (MMPA), whether or not they are also listed or proposed for listing under the ESA. The MMPA prohibits the take (*i.e.,* hunting, killing, capturing, or harassing; or the attempt to hunt, kill, capture, or harass) of marine mammals, and enacts a moratorium on the import, export, and sale of marine mammals and their parts and products. There are exemptions from and exceptions to the prohibitions. Section 101(a)(5) allows for the authorization of incidental, but not intentional, take of small numbers of marine mammals by U.S. citizens while engaged in a specified activity (other than commercial fishing) within a specified geographical region, provided certain findings are made. Specifically, the Service must make a finding that the total of such taking will have no more than a negligible impact on the marine mammal species and will not have an unmitigable adverse impact on the availability of these species for subsistence uses. Negligible impact and unmitigable adverse impact are defined in 50 CFR 18.27(c).

Section 101(a)(5)(A) provides for the promulgation of Incidental Take Regulations (ITRs), which can be issued for a period of up to 5 years. The ITRs set forth permissible methods of taking pursuant to the activity and other means of effecting the least practicable adverse impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance. In addition, ITRs include requirements pertaining to the monitoring and reporting of such takings.

Section 101(a)(5)(D) established an expedited process to request authorization for the incidental, but not intentional, take of small numbers of marine mammals for a period of not more than 1 year if the taking will be limited to harassment, *i.e.,* Incidental Harassment Authorizations (IHAs). Harassment is defined in section 3 of the MMPA (16 U.S.C. 1362).

As stated in section 17 of the ESA, no provision of the ESA shall take precedence over any more restrictive conflicting provision of the MMPA.

Mitigation Goal: To avoid or minimize to the greatest extent practicable adverse impacts on marine mammals, their habitat, and on the availability of these marine mammals for subsistence uses.

Guidance: Where appropriate, ITRs and IHAs can provide considerable conservation and management benefits to marine mammals. ITRs include a process for U.S. citizens to obtain a Letter of Authorization (LOA) for activities proposed in accordance with the ITRs. The Service evaluates each request for an LOA based on the specific activity and geographic location, and determines whether the level of taking is consistent with the findings made for the total taking allowable under the applicable ITRs. If so, the Service may issue an LOA for potential incidental take due to the specific project and will specify the period of validity and any additional terms and conditions appropriate to the request, including mitigation measures designed to minimize interactions with, and impacts to, marine mammals. The LOA will also specify monitoring and reporting requirements to evaluate the level and impact of any taking. Depending on the nature, location, and timing of a proposed activity, the Service may require applicants to consult with potentially affected subsistence communities in Alaska and develop additional mitigation measures to address potential impacts to subsistence users. Regulations specific to LOAs are codified at 50 CFR 18.27(f).

An IHA prescribes permissible methods of taking by harassment and includes other means of affecting the least practicable impact on marine mammal species or stocks and their habitats, paying particular attention to rookeries, mating grounds, and areas of similar significance. In addition, the IHA will include appropriate measures that are necessary to ensure no unmitigable adverse impact on the availability of the species or stock for subsistence purposes in Alaska. IHAs also specify monitoring and reporting requirements pertaining to the taking by harassment. Both the promulgation of ITRs and requests for IHAs are subject to a 30-day public comment period.

The Service shall recommend mitigation for impacts to species covered by the MMPA that are under our jurisdiction consistent with the guidance of this policy. Proponents may adopt these recommendations as components of proposed actions. However, such adoption itself does not constitute full compliance with the MMPA.

Request for Information

We intend that a final policy will consider information and recommendations from all interested parties. We, therefore, invite comments, information, and recommendations from governmental agencies, Indian Tribes, the scientific community, industry groups, environmental interest groups, and any other interested parties. All comments and materials received by the date listed above in **DATES** will be considered prior to the approval of a final policy.

In addition to more general comments and information, we ask that you comment on the following specific aspects of the draft new policy:

(1) Compensatory mitigation standards set forth in section 4 of the draft policy.

(2) The clarity of the information in section 6. General Considerations.

(3) The clarity of the information in section 8. Establishment and Operation of Compensatory Mitigation Programs and Projects.

If you submit information via *http://www.regulations.gov,* your entire submission—including any personal identifying information—will be posted on the Web site. If your submission is made via a hardcopy that includes personal identifying information, you may request at the top of your document that we withhold this information from public review. However, we cannot guarantee that we will be able to do so. We will post all hardcopy submissions on *http://www.regulations.gov*.

Determinations Under Other Authorities

As mentioned above, we intend to apply this policy when considering the adequacy of compensatory mitigation programs, projects, and measures proposed by Federal agencies and applicants as part of a proposed action and mitigation sponsors. Below we discuss compliance with several

Executive Orders and statutes as they pertain to this policy.

National Environmental Policy Act (NEPA)

We have analyzed the draft new policy in accordance with the criteria of the National Environmental Policy Act (NEPA) (42 U.S.C. 4332(c)), the Council on Environmental Quality's Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500–1508), and the Department of the Interior's NEPA procedures (516 DM 2 and 8; 43 CFR part 46).

Issuance of policies, directives, regulations, and guidelines are actions that may generally be categorically excluded under NEPA (43 CFR 46.210(i)). However, our initial analysis has determined the draft new policy may not be purely administrative in nature and may not meet the requirements for a categorical exclusion (40 CFR 1508.4 and 43 CFR 46.210(i)). While reliance on a categorical exclusion may be possible for this proposed action, extraordinary circumstances may be present, as outlined in 43 CFR 46.215. Therefore, although the draft new policy may qualify for a categorical exclusion, we announce our intent to prepare an environmental assessment (EA) pursuant to the National Environmental Policy Act (NEPA) of 1969, as amended, to assist our agency in its decision (per 40 CFR 1501.3) and avoid delays that may arise should there be public concern that we did not perform a thorough NEPA analysis. We request comments on the scope of the NEPA review, information regarding important environmental issues which should be addressed, the alternatives to be analyzed, and issues that should be addressed at the programmatic stage in order to inform the site-specific stage. This notice provides an opportunity for input from other Federal and State agencies, local government, Native American Tribes, nongovernmental organizations, the public, and other interested parties.

Paperwork Reduction Act of 1995

This proposed policy contains information collection requirements that we have submitted to the Office of Management and Budget (OMB) for review and approval under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

OMB Control No.: 1018–XXXX.

Title: Compensatory Mitigation Program.

Service Form Number: None.

Type of Request: New.

Description of Respondents: Businesses, organizations, and State, local, and tribal governments.

Respondent's Obligation: Required to Obtain or Retain a Benefit.

Frequency of Collection: On occasion for plans/instruments; annually for reports.

ANNUAL BURDEN ESTIMATES

Activity	Number of respondents	Number of responses	Completion time per response	Total annual burden hours
Phase I—Mitigation Proposal:				
Private Sector*	8	8	1,756	14,048
State, Local, Tribal Govts	2	2	1,756	3,512
Phase II—Mitigation Instrument:				
Private Sector	8	8	1,214	9,712
State, Local, Tribal Govts	2	2	1,214	2,428
Phase III—Operation, Management, Monitoring, and Reporting:				
Private Sector	112	112	787	88,144
State, Local, Tribal Govts	28	28	787	22,036
Totals	160	160	.....	139,880

* Private sector includes businesses, non-profit organizations, farms, and ranches.

Estimated Annual Nonhour Burden Cost: $2,396,570. Costs vary considerably and will depend on the size and complexity of each project or monitoring year. These expenses include, but are not limited to: Travel expenses for site visits, studies conducted, and meetings with the Service and other agencies; training in survey methodologies and certifications, equipment needed for habitat construction, equipment needed for surveys and monitoring, special transportation such as all-terrain vehicles or helicopters, and data management.

ANNUAL NONHOUR BURDEN ESTIMATES

Activity	Annual number of responses	Nonhour burden ($)	Annual nonhour burden ($)
Phase I—Mitigation Proposal—Private Sector	8	$17,500	$140,000
Phase I—Mitigation Proposal—State, Local, Tribal Govts	2	17,500	35,000
Phase II—Mitigation Instrument—Private Sector	8	65,833	526,664
Phase II—Mitigation Instrument—State, Local, Tribal Govts	2	65,833	131,666
Phase III—Operation, Management, Monitoring, and Reporting—Private Sector	112	11,166	1,250,592
Phase III—Operation, Management, Monitoring, and Reporting—State, Local, Tribal Govts	28	11,166	312,648
Total	.....	.....	2,396,570

We are proposing to collect the following information:

Phase I: Information collected as part of the mitigation proposal process for a mitigation proposal as part of an individual action; or a mitigation proposal for a conservation/mitigation bank, in-lieu fee program, habitat credit exchange, that is intended to serve multiple actions; or other third-party sponsored mitigation site or program proposal that is intended to serve one or multiple actions. The draft proposal includes, but is not limited to:

1. Maps and aerial photos showing the location of the mitigation site and surrounding area;

2. Contact information for the applicant, mitigation sponsor, property owner(s), and consultants;

3. Narrative description of the property including: Acreage, access points, street address, major cities, roads, county boundaries, biological resources (including the resource/species to be mitigated at the site), and current land use;

4. Narrative description of the surrounding land uses and zoning along with the anticipated future development in the area, where known;

5. Description of how the site fits into conservation plans for the species or meets species specific criteria;

6. Proposed ownership arrangements and long-term management strategy for the site;

7. Qualifications of the mitigation sponsor/provider to successfully complete the type of project proposed, including a description of past such activities by the mitigation sponsor/provider;

8. Preliminary title report showing all encumbrances (*e.g.,* utility rights-of-way) on the proposed mitigation site, including ownership of surface and subsurface mineral and water rights and other separated rights (*e.g.,* timber rights);

9. Phase I Environmental Site Assessment evaluating the proposed site for any recognized environmental condition(s);

10. 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 mitigation; and

11. Assurances of sufficient water rights to support the long-term sustainability of any proposed aquatic habitat(s).

In addition, the draft proposal for a conservation bank, in-lieu fee program, habitat credit exchange, or other third-party sponsored mitigation project intended to be used by multiple actions also includes, but is not limited to:

1. Name of proposed mitigation site(s), conservation/mitigation bank, in-lieu fee program, or habitat credit exchange;

2. Proposed service area(s) with map(s) and narrative(s); and

3. Proposed type(s) and number of credits to be generated by the program or project. In-lieu fee programs and habitat credit exchanges that do not provide mitigation in advance of impacts also include:

1. Prioritization strategy for selecting mitigation sites and compensatory mitigation activities;

2. Description of any public and private stakeholder involvement in plan development and implementation, including any coordination with Federal, State, Tribal, and local resource management authorities; and

3. Description of the in-lieu fee program or exchange account.

Phase II: If the Service supports development of the mitigation proposal, the following information is collected as part of a fully developed mitigation instrument for a conservation/mitigation bank, in-lieu fee program, habitat credit exchange, or other third-party mitigation project; or equivalent applicable information regarding mitigation for an individual action: A fully developed mitigation instrument/agreement that includes, but is not limited to:

1. A description of the framework of the mitigation program/project;

2. The roles and responsibilities of each party (*e.g.,* project applicant or mitigation sponsor, property owner, the Service, and any other government agencies that are on the interagency team overseeing development of the mitigation program or project);

3. A closure plan (this can be in the form of an exhibit) that specifies responsibilities once all credits are transferred and/or forfeited, performance criteria are achieved, and financial obligations are met; and

4. The following exhibits, as applicable:

A. Restoration or habitat development plan, which includes, but is not limited to:

(1) Baseline conditions of the mitigation site, including biological resources; geographic location and features; topography; hydrology; vegetation; past, present, and adjacent land uses; species and habitats occurring on the site;

(2) Surrounding land uses and zoning, along with the anticipated future development in the area;

(3) Historic aerial photographs and/or historic topographic maps (if available), especially if restoration to a historic condition is proposed;

(4) Discussion of the overall habitat development goals and objectives;

(5) Description of activities and methodologies for establishing, restoring, and/or enhancing habitat types (if applicable);

(6) 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);

(7) Ecological performance criteria and a discussion of the suitability of the site to achieve them (*e.g.,* watershed/hydrology analysis and anticipated improvement in quality and/or quantity of specific functions, specific elements in recovery plan goals expected to be accomplished);

(8) Maps detailing the anticipated location and acreages of habitat developed for species;

(9) Monitoring methodologies to evaluate habitat development and document success in meeting performance criteria;

(10) An approved schedule for reporting monitoring results; and

(11) A discussion of possible remedial actions.

B. Service area maps for each credit type proposed;

C. Credit evaluation/credit table;

D. Management Plans—Interim (if applicable) and long term management plans that describe the management, monitoring, and reporting activities to be conducted for the term of the mitigation project or program. The interim management plan includes, but is not limited to:

(1) Description of all management actions to be undertaken on the site during this period;

(2) Description of all performance criteria and any monitoring necessary to gauge the attainment of performance criteria;

(3) Monitoring and reporting schedule;

(4) Cost analysis to implement the plan; and

(5) Description of reporting requirements. Reporting requirements include, but are not limited to:

(a) Copies of completed data sheets and/or field notes, with photos;

(b) Monitoring results to date; and

(c) A discussion relating all monitoring results to date to achievement of the performance criteria.

The long-term management plan includes, but is not limited to:

(1) Purpose of mitigation site establishment and purpose of long-term management plan;

(2) Baseline description of the setting, location, history and types of land use activities, geology, soils, climate, hydrology, habitats present (after the mitigation site meets performance criteria), and species descriptions;

(3) Overall management, maintenance, and monitoring goals; specific tasks and timing of implementation; and a discussion of any constraints which may affect goals;

(4) 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;

(5) Reporting schedule for ecological performance and administrative compliance;

(6) Cost-analysis of all long-term management activities, cross-referenced with the tasks described in 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 endowment);

(7) Discussion of adaptive management principles and actions for reasonably foreseeable events, possible thresholds for evaluating and implementing adaptive management, a process for undertaking remedial actions, including monitoring to determine success of the changed/remedial actions, and reporting;

(8) Rights of access to the mitigation area and prohibited uses of the mitigation area, as provided in the real estate protection instrument;

(9) Procedures for amendments and notices; and

(10) Reporting schedule for annual reports to the Service. Annual reports include, but are not limited to:

(a) Description of mitigation area condition, with photos;

(b) Description of management activities undertaken for the year, including adaptive management measures, and expenditure of funds to implement each of these activities;

(c) Management activities planned for the coming year; and

(d) Results of any biological monitoring undertaken that year, including photos, and copies of data sheets and field notes. This level of documentation is important in verifying the conclusions reached by report preparers, and can be essential in informing necessary adaptive management actions. In the interests of reducing paperwork, the Service may require that annual reports be submitted in electronic form, and uploaded into the Regulatory In-lieu Fee and Bank Information Tracking System (RIBITS).

E. Description of the form(s) of real estate assurance to be used and qualifications of proposed holder(s) of the assurance(s) and any related assurance documentation such as a Minerals Assessment Report (if applicable); and

F. Description of the form(s) of financial assurances (short, interim, and long term assurances) to be used and the qualifications of proposed holder(s) of the assurance(s).

In-lieu fee programs and habitat credit exchanges that do not provide mitigation in advance of impacts also include, but are not limited to:

1. In-lieu fee or exchange program account description, including the specific tasks, equipment, etc., for which funds are to be used;

2. Methodology for determining the fee schedule(s);

3. Methodology and criteria for adding mitigation sites;

4. Timeframe in which the funds must be utilized; and

5. Timeframe in which conservation must be implemented.

Business entities (*e.g.,* Limited Liability Company) also include the following documentation, but are not limited to:

1. Articles of incorporation or equivalent documents;

2. Bylaws or other governing documents; and

3. List of board members, including biographies.

Phase III: Operation, maintenance, monitoring, and reporting of approved mitigation projects and programs (*e.g.,* a conservation bank or in-lieu fee program) that have been implemented/established, including mitigation conducted as part of an individual action by an agency/applicant. A report submitted to the Service in accordance with the terms of the mitigation instrument, permit, biological opinion or other Service approved agreement or authorization under the ESA that includes, but is not limited to:

1. Description of mitigation project or program, with photos;

2. Description of management activities undertaken for the year or period specified in the mitigation instrument, including adaptive management measures, and expenditure of funds to implement each of these activities;

3. Management activities planned for the coming year or period specified in the mitigation instrument; and

4. Results of any biological monitoring undertaken that year, including all information requirements described above under section 4.D. Management Plans, including photos, and copies of data sheets and field notes;

5. Annual report(s) on site visit from holder(s) of real estate assurance(s) in accordance with the Management Plan and including verification of current qualifications to hold such assurance(s); and

6. Documentation of any changes in land ownership or management responsibility.

Conservation/mitigation banks, in-lieu fee programs, and habitat credit exchanges also include information on credit transactions in the form of a Credit Sale Agreement, between the purchaser of any mitigation credit and the seller of the credit(s), which includes, but is not limited to, the following information:

1. Name of Seller;

2. Name of Purchaser (or Permittee, or Project Applicant, or other purchasing entity);

3. Name of Bank, Program, or Exchange;

4. Type of credit;

5. Number of credits;

6. Permit or biological opinion or file number associated with the credit transaction (if applicable);

7. Date of transaction.

In the interests of reducing paperwork, the Service may require that any of the forgoing documentation, but especially annual reports and credit transactions, be submitted in electronic form, and uploaded into the Regulatory In-lieu Fee and Bank Information Tracking System (RIBITS).

We invite comments concerning this information collection on:

- Whether or not the collection of information is necessary, including whether or not the information will have practical utility;
- The accuracy of our estimate of the burden for this collection of information;
- Ways to enhance the quality, utility, and clarity of the information to be collected; and
- Ways to minimize the burden of the collection of information on respondents.

If you wish to comment on the information collection requirements of this proposed policy, send your comments directly to OMB (see detailed instructions under the heading Comments on the Information Collection Aspects of this Proposal in the **ADDRESSES** section). Please identify

your comments with 1018–BB72. Please provide a copy of your comments to the Service Information Collection Clearance Officer (see detailed instructions in the **ADDRESSES** section).

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175 ''Consultation and Coordination with Indian Tribal Governments,'' and the Department of the Interior Manual at 512 DM 2, we have considered possible effects on federally recognized Indian tribes and have determined that there are no potential adverse effects of issuing this policy. Our intent with the policy is to provide a consistent approach to the consideration of compensatory mitigation programs, projects, and measures, including those taken on Tribal lands. We will work with Tribes as applicants proposing compensatory mitigation as part of proposed actions and with Tribes as mitigation sponsors.

Authority

The authorities for this action include the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*) and the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

Dated: August 18, 2016.

Stephen D. Guertin,

Acting Director, U.S. Fish and Wildlife Service.

[FR Doc. 2016–20757 Filed 8–31–16; 4:15 pm]

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