September 26, 2022

Via Regulations.gov Portal

U.S. Fish and Wildlife Service
MS: PRB/3W
5275 Leesburg Pike
Falls Church, Virginia 22041-3803

Re: Comments of the American Petroleum Institute, the Alaska Oil & Gas Association, The Petroleum Alliance of Oklahoma, and Western Energy Alliance on the U.S. Fish and Wildlife Service's Advanced Notice of Proposed Rulemaking to Establish Objectives, Performance Standards and Criteria for Species Conservation Banking under the Endangered Species Act; Docket No. FWS-HQ-ES-2021-0137.

Dear U.S. Fish and Wildlife Service:

The American Petroleum Institute, the Alaska Oil & Gas Association, The Petroleum Alliance of Oklahoma, and Western Energy Alliance (collectively "Industry Trades" or "We") submits these comments in response to the U.S. Fish and Wildlife Service's ("FWS's" or "the Service's") request for comments to assist the Service "in developing a proposed rule establishing objectives, measurable performance standards, and criteria for use, consistent with the Endangered Species Act, for species conservation banking."[1] The Industry Trades appreciate the Service's decision to solicit stakeholder feedback prior to proposing a rule to develop conservation banking regulations under the Endangered Species Act ("ESA" or "the Act").

Our Industry Trades members are dedicated to safely and responsibly developing and supplying critical energy resources and are committed to doing so in a manner that protects species and their habitat. Our members, particularly those in the upstream and midstream industry sectors, are frequently subject to the ESA and FWS regulations thereunder because of the proximity of their operations to threatened/endangered species or critical habitat.

Our members are also committed to implementing voluntary conservation measures to protect at-risk species and, where possible, avoid the need to list species under the Act. Indeed, they have undertaken significant conservation efforts to protect dozens of species across millions of acres of habitat.

Consistent with our industry's commitment to conservation and our members' frequent need to operate within the habitat of protected or at-risk species, the Industry Trades supported the 2021

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[1] 87 Fed. Reg. 45,067 (July 27, 2022).

National Defense Authorization Act's ("2021 NDAA's") requirement that FWS "issue regulations of general applicability establishing objectives, measurable performance standards, and criteria for use for species conservation banking programs, consistent with the ESA."[2] Although conservation banking is only one of several mechanisms for the conservation of species and their habitat, we believe it is an important tool for mitigating and offsetting potential impacts to species and their habitat.

These comments therefore reflect the industry's interest in FWS's promulgation of conservation banking regulations that accord with the well-defined role of conservation banking under the ESA and consistent with the goals of the 2021 NDAA. In order to be a fully effective tool in furtherance of the protection and recovery of species, the Service's conservation bank regulations must be clear, predictable, and transparent. Our members are proud of the conservation benefits that have been realized through their compensatory mitigation programs, and strongly wish to see the Service's conservation banking program structured in a way that maintains a focus on the effective conservation of species and their habitat by incentivizing landowner participation.

I. INDUSTRY TRADES' INTERESTS

The American Petroleum Institute (API) represents all segments of America's natural gas and oil industry, which supports more than 11 million U.S. jobs and is backed by a growing grassroots movement of millions of Americans. Our nearly 600 members produce, process and distribute the majority of the nation's energy, and participate in API Energy Excellence®, which is accelerating environmental and safety progress by fostering new technologies and transparent reporting. API was formed in 1919 as a standards-setting organization and has developed more than 700 standards to enhance operational and environmental safety, efficiency and sustainability.

The Alaska Oil and Gas Association (AOGA) is a professional trade association whose mission is to foster the long-term viability of the oil and gas industry for the benefit of all Alaskans. We represent the majority of companies that are exploring, developing, producing, transporting, refining, or marketing oil and gas on the North Slope, in the Cook Inlet, and in the offshore areas of Alaska.

The Petroleum Alliance of Oklahoma represents more than 1,400 individuals and member companies and their tens of thousands of employees in the upstream, midstream, and downstream sectors and ventures ranging from small, family-owned businesses to large, publicly traded corporations. Their members produce, transport, process and refine the bulk of Oklahoma's crude oil and natural gas.

Western Energy Alliance represents 200 member companies engaged in all aspects of environmentally responsible exploration and production (E&P) of oil and natural gas in the West. The Alliance represents independent oil and gas producers, the majority of which are small businesses with an average of fourteen employees.

As relevant here, our members explore for and develop essential energy resources on federal, state, and private natural gas and oil leases across the nation, both on and offshore. Responsibly

[2] Pub. L. 116–283, Section 329 (Jan. 3, 2020).

developing these resources and safely transporting them to consumers requires the construction and operation of pipelines, utility lines, offshore platforms, and other infrastructure. These and other actions can often occur in or near critical habitat for threatened or endangered species, and many of these actions can require federal authorizations that trigger consultation obligations under ESA Section 7. Our members' ability to responsibly explore for, develop, and transport natural gas and oil resources therefore often hinges on the availability of conservation mechanisms to minimize or mitigate potential impacts as part of the Section 7 consultation process or as part of the incidental take permitting process under a Section 10 habitat conservation plan ("HCP").

Because of the significant extent to which our members' highly regulated activities are impacted by the availability of conservation mechanisms like Compliance Commitment Agreements with Assurances ("CCAA"), HCPs, in-lieu mitigation programs, permittee-responsible mitigation, and conservation banking, our industry has, for many years, and in a myriad of regulatory and legal proceedings, advocated for reasonable improvements to the Act and its implementing regulations that would decrease regulatory ambiguity, enhance the speed and efficiency of the consultation process, and provide the certainty and transparency necessary to facility investment in habitat conservation.

II. GENERAL COMMENTS

As the Service undertakes this effort to propose a rule establishing objectives, standards, and criteria for species conservation banking under the ESA, we urge FWS to be guided by Congress's terse but nonetheless clear directives in the 2021 NDAA as well as the statutory limits to the role and applicability of compensatory mitigation under the ESA. We also urge FWS to fully recognize that compensatory mitigation and conservation banking are not the same. "Compensatory mitigation" encompasses a broader suite of mechanisms that landowners and permittees can use to minimize, mitigate, or offset the potential impacts of their operations on species or habitat. Conservation banking is only one type of these conservation mechanisms; other mechanisms include in lieu fee programs and permittee-responsible mitigation.

We also urge FWS to ensure that its proposed conservation banking regulations reflect that compensatory mitigation mechanisms like conservation banking are often the last steps in a conservation hierarchy that focused first on avoidance, minimization, and restoration. This means that landowners and permittees that avoid, minimize, or restore habitat through other mechanisms may not need to offset impacts through conservation banking or other compensatory mitigation mechanisms.

Finally, as FWS undertakes this rule development effort, it should remain cognizant of the many concerns that we raised in the Service's previous efforts to adopt mitigation policies that claimed authority well beyond what Congress granted FWS through the ESA or any other statute.[3] These policies, which have since been withdrawn, purported to require compensatory mitigation in contexts in which it has never before been used, at unprecedented scales, on impracticable

[3] *See* 2016 Mitigation Policy, 81 Fed. Reg. 83,440 (Nov. 21, 2016); *See also* 2016 Compensatory Mitigation Policy, 81 Fed. Reg. at 95,316 (Dec. 27, 2016).

deadlines, for species over which FWS has no jurisdiction, and to achieve goals that FWS is not authorized to require permittees, applicants, and conservation sponsors to achieve. While FWS likely intended these policies to improve the clarity, predictability, and transparency of compensatory mitigation programs, as API and others cautioned at the time, if these policies were allowed to remain in effect, they would likely deter participants from engaging in compensatory mitigation by making the Service's approach to mitigation more costly, complex, burdensome, opaque, and unpredictable.

API and others also expressed concern about the piecemeal manner in which FWS attempted to restructure its approach to conservation and mitigation. Rather than amending its approach to compensatory mitigation by proposing and finalizing a single rule, FWS endeavored to restructure its conservation and mitigation program through multiple discrete policies that downplayed the magnitude of the overall changes and impeded stakeholder engagement.

We raise this issue again in these comments because at the same time FWS is soliciting feedback on regulatory changes to its conservation banking program, the White House Office of Management and Budget ("OMB") released two notices for the Service announcing both a new FWS Mitigation Policy and a new ESA Compensatory Mitigation Policy.[4] While we do not yet know the content of these potential new policies, we are concerned that FWS is once again attempting to restructure its approach to conservation and mitigation through piecemeal policy making rather than a single comprehensive rulemaking.

Moreover, given the Service's statutory requirement to promulgate regulations for an important compensatory mitigation mechanism like conservation banking, we see no reasoned basis why FWS would not also include within the forthcoming rulemaking the mitigation and compensatory mitigation changes it has already proposed and submitted to OMB. By segregating these three obviously related programmatic changes and treating the two as policies rather than duly promulgated rules subject to notice-and-comment procedures, FWS will needlessly complicate implementation of its changes, inhibit stakeholder engagement, and discourage more widespread voluntary conservation and participation in mitigation efforts. We therefore strongly encourage FWS to issue its forthcoming mitigation and compensatory mitigation policies alongside the Service's statutorily required regulatory updates to the conservation program within a single rulemaking.

1. <u>Congress's Express Directives in the 2021 NDAA</u>

While the 2021 NDAA contains a rather limited discussion of the conservation banking regulations that FWS must develop, it provides key information that must guide the Service's rulemaking. Section 329 of the 2021 NDAA reads in relevant part:

> the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service, shall issue regulations of general applicability establishing objectives, measurable performance standards, and criteria for use, consistent with

[4] *See* https://www.reginfo.gov/public/jsp/EO/eoDashboard.myjsp. Notice of Mitigation Policy (RIN: 1018-ZA07) and Notice of ESA Compensatory Mitigation Policy (RIN: 1018-ZA08) both received by OMB on March 22, 2022.

> the Endangered Species Act . . ., for mitigation banking offsetting effects on a species, or habitat of such species, that is endangered, threatened, a candidate for listing, or otherwise at risk under such Act. To the maximum extent practicable, the regulatory standards and criteria shall maximize available credits and opportunities for mitigation, provide flexibility for characteristics of various species, and apply equivalent standards and criteria to all mitigation banks.[5]

There are a few key parts of this provision that help define the rulemaking effort Congress compelled FWS to undertake. To begin, Congress instructed that FWS adopt standards for conservation banking through the issuance of *regulations* – not guidance or policy statements. As noted above, we believe that FWS should interpret this requirement as applicable to not only the Service's standards for conservation banks but also for the directly related mitigation and compensatory mitigation guidelines that FWS presently characterizes as policy statements.

This provision also includes Congress's clear admonition that the Service's forthcoming conservation banking regulations remain consistent with the ESA. This is highly important because, as detailed in Subsection II.2 below, FWS's 2016 Mitigation and Compensatory Mitigation Policies misconstrued the Service's authority under the ESA as allowing FWS to require permittees and landowners to provide compensatory mitigation beyond what was necessary to offset their potential impacts in order to achieve a value-described and impermissible "net conservation" standard.[6] The ESA and the Service's regulations thereunder allow applicants/permittee to use compensatory mitigation to offset their impacts under specific provisions of the Act (Sections 7 and 10), but neither the ESA nor FWS's implementing regulations allow the Service to require compensatory mitigation – to achieve a "net conservation gain" standard or otherwise.

Moreover, the 2021 NDAA's requirement that the Service's forthcoming species conservation bank regulations remain consistent with the ESA reflects Congress's intent that FWS refrain from adopting expansive new compensatory mitigation requirements under the guise of conservation banking regulations, or attempting to expand the conservation banking program under other purported statutory authorities to pursue policy goals unrelated to species conservation.

Finally, the 2021 NDAA reflects Congress's intent that FWS's regulations "maximize available credits and opportunities for mitigation." This instruction is quite meaningful because, in developing conservation banks and requirements for specific species conservation banks, there is often a trade-off between the simplicity and functionality of a simpler mechanism for calculating credits and debits (*e.g.*, one acre for one acre) and the granularity of a more complex credit calculation that seeks to determine habitat and conservation value of specific parcels. Congress's admonition that FWS must "maximize available credits and opportunities for mitigation" seemingly contemplates that the Service's forthcoming conservation banking regulations must

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[5] Pub. L. 116–283, Section 329 (Jan. 3, 2020).

[6] The Service's 2016 Mitigation and Compensatory Mitigation Policy's suggestion that it could compel compensatory mitigation and employ a "net conservation" standard represent only two of many additional concerns API noted in comments to FWS. For a full discussion, please see API's May 10, 2016 comments at FWS-HQ-ES-0126-0125, October 17, 2016 comments at FWS-HQ-ES-2015-0165-0308, and January 5, 2018 comments at FWS-HQ-ES-2015-0126-0364.

place a premium on simple and functional credit calculation mechanisms that expand mitigation opportunities and incentivize greater levels of participation.

Congress's requirement that FWS's regulations "maximize available credits and opportunities for mitigation" should also be construed as directing FWS to reasonably address known barriers to more widespread use of conservation banks. These barriers include overly complex or unclear requirements; the substantial time and resources necessary to establish and obtain approval for conservation banks; significant upfront costs typically required to ensure financial assurance for perpetual or long-term conservation measures; the availability of suitable land in specific regions/habitats for conservation banks; and uncertainty about potential new requirements or credit calculation changes when conservation objectives are not met due to unforeseen circumstances outside the control of the parties.

Each of these barriers to more widespread utilization of conservation banks is a result of FWS decisions to implement its conservation bank program in a very rigid and precautionary manner. While Congress certainly did not instruct FWS to implement the conservation bank program in a manner that would fail to protect species and their habitats, the 2021 NDAA's instruction that the Service's standards "maximize available credits and opportunities for mitigation" does reflect congressional awareness potentially greater conservation opportunities will never be realized if the Service's conservation banking program that is too rigid, complex, or uncertain to be broadly utilized.

2. <u>The Role of Compensatory Mitigation, and Therefore Conservation Banking, under the ESA</u>

Congress's directive in the 2021 NDAA that FWS's forthcoming conservation banking regulations remain consistent with the ESA is a highly relevant guideline because under the ESA, there is no mandatory obligation to improve or maintain the current status of affected resources. On the contrary, Sections 7 and 10 of the Act provide explicit standards regarding what may be required of applicants/permittees. While both of these sections contain mechanisms whereby applicants/permittees can use compensatory mitigation to offset impacts of their projects on listed species, Sections 7 and 10 cannot be read to require compensatory mitigation, much less specific compensatory mitigation mechanisms. Sections 7 and 10 further preclude the imposition of mitigation measures on applicants/permittees that require net conservation benefits, mitigation efforts on scales disproportionate to project impacts, protection of unlisted species, or prohibitions on siting projects in certain areas or habitats.

a. <u>ESA Section 7</u>:

Under Section 7(a)(2) of the ESA, each federal agency must "insure that any action authorized, funded, or carried out, by such agency . . . is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of

[critical] habitat."[7] In a Section 7(a)(2) consultation, FWS prepares a biological opinion to explain and document its determination of the potential impact of the federal action on the species or its habitat.

For actions that are not likely to jeopardize listed species or cause adverse modification of critical habitat, but that may nonetheless result in incidental take of listed species, the Service will include an incidental take statement ("ITS") in the biological opinion that specifies: (1) the impact of the incidental taking on species; (2) "reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact;" and (3) measures, if any, necessary to comply with the Marine Mammal Protection Act. ("MMPA").[8] The ITS also includes "terms and conditions" to implement the measures.[9]

Reasonable and prudent measures ("RPM") are defined as "those actions the Director believes necessary or appropriate to minimize the impacts, i.e., amount or extent, of incidental take."[10] While FWS has some discretion to design the elements of an ITS, they must be commensurate with and proportional to the impacts associated with the action.[11] Additionally, "[r]easonable and prudent measures, along with the terms and conditions that implement them, cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes."[12]

Thus, when FWS issues an ITS under ESA Section 7(a)(2), that ITS can only require the minimization of potential project impacts. While the means by which impacts are minimized can include various forms of mitigation, including conservation banks, the Service's ITS-issuance authority under Section 7(a)(2) does not allow FWS to require or recommend applicants/permittees to offset all potential project impacts or achieve a net conservation gain.

Similarly, when FWS issues a finding of jeopardy or adverse modification of critical habitat, the Service includes Reasonable and Prudent Alternatives ("RPAs") intended to avoid jeopardizing the continued existence of the species or destroying/adversely modifying critical habitat. As with RPMs, RPAs cannot alter the basic design, location, scope, duration, or timing of the action and may involve only minor changes.[13] RPAs can also only be applied to avoid or offset the presumed impacts of the proposed action.[14] Agencies can only adopt or require RPAs to the extent the

[7] The ESA Section 7 regulations define "jeopardize the continued existence of" as "to engage in an action that reasonably would be expected, directly or indirectly, to <u>reduce appreciably</u> the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02 (emphasis added). "Destruction or adverse modification" is defined as "a direct or indirect alteration that <u>appreciably diminishes</u> the value of critical habitat for the conservation of a listed species." 50 C.F.R. § 402.02 (emphasis added). Accordingly, the ESA allows for actions that may "reduce" the likelihood of survival and recovery of a listed species and that may "diminish" critical habitat—it is only when that reduction or diminishment becomes "appreciable" that it rises to the level of jeopardy or adverse modification of critical habitat.

[8] 16 U.S.C. § 1536(b)(4).

[9] 16 U.S.C. § 1536(b)(4).

[10] 50 C.F.R. § 402.02.

[11] 50 C.F.R. § 402.14.

[12] 50 C.F.R. § 402.14(i)(2).

[13] 50 C.F.R. § 402.14(i)(2).

[14] 50 C.F.R. § 402.02.

alternatives are consistent with the agencies' existing authorities and are shown to be economically and technologically feasible.[15]

While RPAs can include compensatory mitigation, they cannot be used to conscript applicants into mitigating impacts unrelated to the "intended purpose of the action." RPAs are not generalized conservation obligations that can be imposed on all parties' pursuing proposed actions that may jeopardize listed species or destroy/adversely modify critical habitat. RPAs are designed solely to offset the impacts anticipated from the proposed project, and may only be implemented if feasible and if consistent with the federal agency's legal authority. Under Sections 7(a)(2) and 7(a)(4), RPAs can only be required to offset impacts on species that are listed or proposed to be listed or on critical habitat that is designated or proposed to be designated.

b. ESA Section 10

Under ESA Section 10, an applicant for an incidental take permit ("ITP") must submit a habitat conservation plan ("HCP") that addresses several criteria, including the impacts resulting from the take of the species, and the steps that will be taken to minimize and mitigate such impacts.[16] And under Section 10(a)(1)(b), FWS will issue the permit if it finds, in part, that the applicant "will, to the maximum extent practicable, minimize and mitigate the impacts of such taking," and the survival and recovery of the species will not be appreciably reduced.

As the text of Section 10 makes clear, FWS does not have authority to impose or recommend compensatory mitigation measures to achieve "net conservation gain" or "no net loss." Nor does this provision allow FWS to disfavor short-term mitigation as compensation for short-term impacts. Rather, the Service can only ensure that the applicant minimizes and mitigates the impact on listed species "to the maximum extent practicable."[17]

Thus, like Section 7 of the ESA, Section 10 expressly prohibits FWS from requiring or recommending compensatory mitigation that results in "net conservation gain," or landscape-scale mitigation/conservation. Nor do these statutory provisions allow FWS to impose compensatory mitigation requirements to address impacts to unlisted species or which require applicants/permittees avoid "high value" habitats, however defined. While the express provisions of ESA Sections 7 and 10 provide FWS sufficient guidelines in crafting regulations governing conservation banks, the 2021 NDAA's requirement that the Service's forthcoming regulations remain consistent with the Act makes it all the clearer that FWS's regulations must fully conform to, and not exceed, the Service's authority under the ESA.

III. RESPONSES TO THE SERVICE'S QUESTIONS

In the subsections that follow, the Industry Trades respond to each of the Service's six specific inquiries:

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[15] 50 C.F.R. § 402.02.
[16] 16 U.S.C. § 1539(a)(2)(A).
[17] ESA § 10(a)(1)(B)(ii).

1. What level of detail should be in the proposed rule to ensure equivalent standards are consistently applied to all forms of compensatory mitigation, including equivalence in covering the costs of mitigation whether they are on public or private lands?

FWS's request for comments states that the "Service intends to apply equivalent standards to all habitat-based compensatory mitigation mechanisms (including conservation banks, in-lieu fee programs, and permittee-responsible mitigation) for covered species."[18] To the extent this statement reflects the Service's intent to apply substantive ecological and conservation standards for conservation banks, in-lieu fee programs, and permittee-responsible mitigation while recognizing certain administrative and procedural differences, the Industry Trades areamenable to this approach. If FWS intends to harmonize the requirements for these different types of compensatory mitigation in a way that effectively requires or favors a particular type of compensatory mitigation, we oppose such an approach.

For instance, we believe FWS's regulations can provide clear and consistent metrics for assessing the extent of a project's potential impact and the type and extent of mitigation required to compensate for that impact. If FWS's regulations prohibited all forms of compensatory mitigation from releasing credits until compensatory mitigation projects have been fully implemented, however, such a requirement would effectively ban in-lieu fee programs and many permittee responsible mitigation efforts. Similarly, site selection requirements, financial assurance obligations, and advance approval requirements applicable to conservation banks may not be applicable to in-lieu fee programs or permittee-responsible mitigation, and may in fact dissuade or effectively preclude the use of these types of compensatory mitigation.

In evaluating the extent to which its regulations will impose equivalent standards, FWS must once again look to the 2021 NDAA, which requires the Service to "apply equivalent standards and criteria to all mitigation banks"[19] – not to the different forms of compensatory mitigation. And if FWS intends to apply equivalent standards more broadly than Congress allowed for in the 2021 NDAA, it must do so in a manner that comports with Congress's requirement that the Service's regulations "maximize available credits and opportunities for mitigation."

Thus, FWS's regulations may harmonize conservation standards and criteria, and provide similar levels of accountability across all forms of compensatory mitigation, but those regulations must also be crafted so that they continue to fully facilitate permittee-responsible mitigation, which has traditionally been the most utilized and successful compensatory mitigation mechanism – and in some places, like Alaska, may be the only option available to applicants/permittees. The U.S. Army Corps of Engineers ended the Conservation Fund's Alaska in lieu fee program on the North Slope as an option for permit applicants' use in meeting compensatory mitigation requirements for proposed project impacts in 2017. The Service's regulations should continue to promote the use of in-lieu fee programs as an alternate form of practicable third-party mitigation because in many areas, it is the only form of third-party compensatory mitigation available.

Different projects have widely different impacts depending on the extent of habitat modification, geographic scale, and duration of disturbance. And the three different forms of mitigation

[18] 87 Fed. Reg. at 45,077.
[19] Pub. L. 116–283, Section 329 (Jan. 3, 2020) (emphasis added).

mechanisms that have been developed to address these impacts collectively provide a broad range of options from which permittees/applicants can select based on their region, timing considerations, project scale, and cost. Any regulatory approach that eliminates or impedes the use of any of these mechanisms therefore contravenes Congress's mandate that FWS "maximize available credits and opportunities for mitigation."

Thus, for similar reasons, FWS should decline to adopt a nationally applicable debit-credit methodology based on whether the impacts or compensatory mitigation occur on federal or non-federal land. Mitigation efforts on public land can be quite valuable to the conservation of species and their habitats – particularly so in the Western United States and Alaska, where there are large continuous blocks of public lands and only smaller and more isolated blocks of private lands. Adopting a debit-credit methodology that dissuades mitigation on federal land would therefore greatly inhibit the superior conservation benefits that could be realized through mitigation of these large areas of public land. Such an approach would also substantially reduce – rather than maximize – the availability of credits and opportunities for mitigation through much of the United States.

As such, if FWS intends to adopt "equivalent standards" it should define those based on conservation outcomes, and not the specific compensatory mitigation mechanisms employed to achieve those outcomes. Not only is such an approach necessary to broadly promote compensatory mitigation and beneficial conservation outcomes throughout the United States, it is compelled by Congress in the 2021 NDAA.

2. **What level of detail should be in the proposed rule regarding durability and additionality standards to both achieve equivalent standards across mitigation mechanisms and provide species conservation?**

The Industry Trades do not believe that the Service's forthcoming conservation bank regulations should attempt to harmonize standards for additionality and durability across all forms of compensatory mitigation. For one, as explained in Section II.1. above, the 2021 NDAA directed FWS to focus its rulemaking effort exclusively on conservation banks – not in-lieu fee mitigation or permittee-responsible mitigation. For another, as discussed in Section II.2. above, no provision of the ESA allows FWS to require or recommend applicants/permittees to undertake mitigation that achieves an additionality standard.

In the Service's 2016 Mitigation and Compensatory Mitigation Policies, FWS explained "additionality" as follows:

> A compensatory mitigation measure is additional when the benefits of a compensatory mitigation 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.[20]

[20] 81 Fed. Reg. at 83,482.

While applicants/permittees are free to design compensatory mitigation programs to achieve this "additionality" standard, ESA Section 7 and 10 require only the minimization of impacts. FWS has no authority under ESA Sections 7 and 10 to require applicants/permittees to enact measures that improve upon baseline condition.

While there may be instances where FWS may require conservation banks to achieve some type of improvement over the baseline condition of impacted resources or physical or biological features necessary to the conservation of listed species in order to generate credits that could be used to mitigate or offset impacts elsewhere, the "additionality" objective is not relevant to other forms of mitigation, such as in-lieu fee and permittee-responsible mitigation. As such, even if the 2021 NDAA granted FWS the authority to adopt standards for mitigation mechanisms other than conservation banks, an "additionality" requirement would not be amenable to equivalent standards. Moreover, an "additionality" standard would also likely undermine voluntary efforts that landowners or project proponents may otherwise be willing to undertake because those voluntary actions would improve baseline conditions, thereby requiring more extensive and costly mitigation efforts to satisfy an "additionality" standard.

For similar reasons, we believe it will be difficult, and potentially unnecessary, for FWS to promulgate equivalent "durability" standards for different types of mitigation mechanisms. According to the 2016 Mitigation Policies, "[a] mitigation measure is durable when the effectiveness of the measure is sustained for the duration of the associated impacts of the action, including direct and indirect impacts."[21] As indicated by this definition, the requisite duration of the effectiveness of a mitigation measure can vary widely depending on the duration of the impact being mitigated.

For conservation banks, which are generally designed to protect habitat in perpetuity, the standards for ensuring durability must necessarily be more extensive and robust. The durability standards for mechanisms employed to mitigate short-term impacts, on the other hand, need not be as detailed or restrictive. These two types of mitigation necessarily require two different durability standards because they serve different roles in the conservation of listed species.

Short-term compensatory mitigation is a valuable conservation tool because it can be implemented quickly and efficiently. And because short-term mitigation can be implemented quickly and efficiently, it has been a well-utilized conservation tool. Multiple individual short-term mitigation projects can also be stacked over time to create a comprehensive, long-term conservation benefit.

If FWS attempts to promulgate "equivalent" durability standards that inhibit short-term mitigation in order to favor larger, more complex mitigation projects, such a rule would remove this accessible and nimble approach and risk losing the participation of those project proponents that would only engage in compensatory mitigation if it could be implemented quickly and at a cost that is justified by the project for which the mitigation would be undertaken.

Short-term mitigation should be allowed to compensate for projects with short-term impact. If FWS promulgates a "durability standard" for all types of mitigation that requires long-term or

[21] 81 Fed. Reg. at 83,482.

permanent protections for ephemeral disturbances, such a rule would impermissibly cease to be requiring compensation for a project's potential impacts. Rather, an "equivalent" durability standard of this type would allow FWS to use the issuance of a permit to exact permanent compensatory mitigation or other longer-term conservation efforts from land users, amounting to charging a fee for obtaining a permit.

While FWS may have some flexibility in crafting its regulations for conservation banks, it cannot structure its compensatory mitigation program to dissuade the use of the most accessible, most utilized, and therefore most successful type of compensatory mitigation. As such, while FWS may promulgate durability standards, it cannot do so in a way that favors conservation banks or other perpetual or long-term mitigation mechanisms to the detriment of short-term mitigation.

3. **How should the proposed rule incorporate monitoring, financial assurances, and publicly accessible mitigation data tracking systems to ensure a compensatory mitigation mechanism is meeting its performance standards?**

It is unclear whether this question asks about incorporating monitoring, financial assurances, and mitigation data tracking standards for "compensatory mitigation mechanisms" generally rather than specifically with respect to conservation banks, as Congress directed in the 2021 NDAA. The Industry Trades suspect it is the latter because each of the items in this question have a unique application in the context of conservation banking and are therefore not appropriate to include in a single standard broadly applicable to each of the various different mitigation mechanisms.

For instance, while financial assurance is typically required for conservation banks to ensure they are capable of conserving habitat in perpetuity, it has not been required for in-lieu fee mitigation projects, which collect fees from applicants/permittee upfront and then use those fees to initiate compensatory mitigation projects at a later date.

Monitoring requirements also differ significantly depending on the mitigation mechanism. Conservation banks and in-lieu fee mitigation projects may require long-term monitoring and periodic reexamination of the continued compatibility of the mitigation project with conservation goals. Permittee-responsible mitigation that occurs on-site and/or other types of short-term mitigation, on the other hand, are generally amenable to monitoring through direct observation and typically do not require planning for long-term monitoring and conservation success.

Moreover, regulations that FWS may promulgate regarding monitoring and adaptive management for conservation banks would necessarily need to differ based on the mitigation mechanism as well as the specific provision of the ESA under which the mitigation is conducted. With respect to an HCP, FWS regulations implementing the No Surprises Rule specify the obligations and responsibilities for both the permittee and the FWS to address and respond to "changed circumstances" and "unforeseen circumstances."[22] Importantly, if there are changed circumstances that were not addressed in an HCP, FWS cannot require the implementation of any additional conservation and mitigation measures without the permittee's consent.[23]

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[22] 50 C.F.R. § 17.3.
[23] 50 C.F.R. §§ 17.22(b)(5)(ii), 17.32(b)(5)(ii).

Similarly, if unforeseen circumstances occur, the Service can only require minimal additional measures of the permittee. The original terms of the HCP must be maintained to the maximum extent possible and, importantly, FWS may not require the "commitment of additional land, water, or financial compensation or additional restrictions on the use of land, water, or other natural resources" without the permittee's consent.[24] At a minimum, for application of compensatory mitigation in the HCP context, FWS's forthcoming standards must recognize the importance of the No Surprises Rule and clearly state that remediation and alternative mitigation will not erode the protections afforded by the No Surprises Rule.

Further, any standard for monitoring the performance of mitigation measures should utilize widely accepted methods that are clear and straight-forward and should avoid reliance on methods that are highly technical, complex, and complicated. Such an approach will promote stakeholder understanding of natural resource management decisions and allow assessments of mitigation measures, and the need for such measures, to be more transparent and accepted.

When such methods are not available, FWS should use existing best available scientific information. Where it is not possible to assess impacts of an action in a quantitative manner, FWS needs to provide criteria and analytical approaches that specify how such non-quantitative impacts will be reviewed and incorporated into the mitigation assessment. To the extent that FWS employees apply "best professional judgment" to assess impacts and to develop mitigation requirements, these qualitative measures should be consistent with established scientific practices. FWS must clearly explain how this judgment was exercised, what factors were considered, and the implications of this judgment.

4. **<u>What are the hurdles to species bank establishment that are within the Service's authority to address through regulation?</u>**

The Industry Trades believe that the following hurdles to more widespread use of conservation banking can be effectively addressed through regulatory changes and improvements to FWS management of the conservation banking program:

- Adopt guidelines regarding the types of changes that require adaptive management. Absent reasonable guidelines that sufficiently rein in an ever-changing process, project developers will lack the certainty necessary to adopt budgets and attract financing.
- Identify reasonable limits to financial assurance requirements. While we recognize the importance of financial assurance when conserving land in perpetuity, FWS's regulations should recognize that the requirement to provide substantial financial assurance prior to establishing a conservation bank presents a significant barrier to many entities interested in conservation banking.
- Define habitat. The Industry Trades supported the Service's first-ever definition of habitat in 2020,[25] and opposed FWS's decision to rescind and refrain from replacing this definition

[24] 50 C.F.R. §§ 17.22(b)(5)(iii), 17.32(b)(5)(iii).
[25] 85 Fed. Reg. 47,333 (Dec. 16, 2020).

a year later.[26] We believe that FWS's 2020 definition reasonably interpreted "habitat" and did so in a way that promoted a common understanding of this term and, if allowed to remain, could have helped provide for better informed and focused conservation efforts.

- Coordinate regulatory approaches and management with state and tribal partners. FWS shares jurisdiction with states and tribes over many of the same species and habitats, but states and tribes often have more direct on-the-ground experience that could be better utilized by the Service. FWS should explore ways to more effectively partner with states and tribes in reviewing, establishing, and monitoring conservation banks and the metrics by which credits are generated and debited.

- Provide opportunities for regulated entities and presumptive applicants/permittees to participate in the development and approval of, or provide feedback on, proposed conservation banks that are intended to supply credits to those stakeholders.

- Expand opportunities to use conservation banks on a voluntary basis to prevent the need to list species. While the ESA does not permit the Service to require mitigation for unlisted species, FWS can develop regulations that better incentivize voluntary conservation and pre-listing use of conservation banks.

- Establish review and approval deadlines, improve agency accountability and consistency, and devote more resources to mitigation and conservation. While we recognize that FWS does not have unlimited resources, the Service should recognize that protracted review and approval processes, unclear requirements, inconsistent determinations, opaque processes, and uncertain outcomes all frequently cited by would-be conservation partners as reasons for declining to pursue conservation banking specifically and proactive conservation generally.

5. <u>How should the proposed rule align with 2008 Rule provisions to maintain compatibility between mitigation banks and species banks where appropriate?</u>

Wherever possible, FWS should align its forthcoming rules with existing U.S. Army Corps of Engineers ("USACE") rules in order to avoid competing priorities or confusion on expectations/requirements. Indeed, to the fullest extent possible, FWS's forthcoming conservation banking regulations should allow credits to be generated and debited for both impacts to aquatic resources and listed species within those habitats.

Consistent with the 2021 NDAA's requirement that FWS maximize available credits and opportunities for mitigation, the Service's conservation bank regulations should also attempt to replicate those aspects of the 2008 Rule that have worked well. For instance, FWS's forthcoming conservation banking regulations should encourage and allow for the full use of all forms of compensatory mitigation. The Service's rule should also adopt simple debit-credit methodologies and streamlined approval processes to encourage widespread use of compensatory mitigation mechanisms like conservation banks.

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[26] 86 Fed. Reg. 59,353 (Oct. 26, 2021).

FWS should also coordinate with USACE and other stakeholders to better understand what aspects of the 2008 Rule have not worked well and therefore should be avoided in the Service's forthcoming conservation banking regulations. For instance, some API members have reported that the USACE program fails to properly account for regional variability in the regulations and instead relies upon language in the preamble, which in our experience is too readily ignored. According to these API members, national USACE and EPA offices often implement the 2008 Rule in a manner that pressures the regions to conform to a national standard that simply does not work in states like Alaska, and specifically on the North Slope.

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

As noted in our response in Subsection III.1. above, we do not believe that FWS should prohibit or dissuade potential conservation bank projects on federal land, tribal land, or any other land based on ownership status. While federal and tribal lands may already be subject to a certain level of existing protections, prohibitions on future disturbances or habitat modifications do not address legacy conditions from prior use or existing habitat degradation and/or unsuitability for newly listed species or recent/potential migrants. In fact, land use protections are far different from, and a poor substitute for, opportunities and incentives to create or improve habitat. Nor are such habitat improvements likely to be undertaken by tribes and federal land use agencies on a sufficiently broad scale given the large amount of federal and tribal land and limited budgets for such improvements. Indeed, conservation banking and other compensatory mitigation projects may provide the only realistic opportunity for near-term habitat improvements on these types of lands.

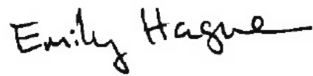
And importantly, for a variety of reasons, siting conservation banks on federal or tribal lands can allow for superior conservation outcomes. Federal and tribal lands can provide opportunities to site conservation bank projects in unique habitats and ecotypes that are not widely available on private land. Federal and tribal lands can also often provide opportunities to protect and improve habitat across large and contiguous landscapes and allow for habitat connectivity that cannot be achieved on private lands alone.

Moreover, in many parts of the country, and particularly the Western United States and Alaska, where there are large continuous blocks of federal and tribal lands and only smaller and more isolated blocks of private lands, federal and tribal lands likely provide the only areas suitable for conservation banking projects and other compensatory mitigation. Adopting a nationally-applicable debit-credit methodology that dissuades conservation banking or other mitigation on federal or tribal land would therefore greatly inhibit the superior conservation benefits that could be realized through mitigation of these large areas, and would also substantially reduce – rather than maximize – the availability of credits and opportunities for mitigation through much of the United States.

IV. CONCLUSION

Thank you for your time and attention. Our members remain committed to safely and responsibly developing and supplying critical energy resources in a manner that protects species and their habitat, and we look forward to working with the Department and FWS on valid, reasonable efforts to improve and strengthen species conservation banking under the ESA. Please do not hesitate to contact us if you have any questions.

Sincerely,



Emily Hague
Senior Policy Advisor
American Petroleum Institute
(202) 682-8260
hague@api.org

Tamara S. Maddox
Regulatory & Legal Affairs Manager
Alaska Oil & Gas Association
(907) 272-1481
maddox@aoga.org

Angie Burckhalter
SVP of Regulatory & Environmental Affairs
The Petroleum Alliance of Oklahoma
(405) 601-2124
angie@okpetro.com

Kathleen Sgamma
President
Western Energy Alliance
(303) 623-0987
ksgamma@westernenergyalliance.org