

and the Indian Affairs Records Schedule (IARS).

**STORAGE:**

Records are stored on paper and electronic storage media.

**RETRIEVABILITY:**

Records are retrieved using either:

(1) Identifiers linked to IIM Trust Fund account holders, such as name, Social Security Numbers, tribe, tribal enrollment, or census numbers, or

(2) Organizational links and identifiers such as account numbers, tribal codes, and IIM Trust Fund account codes.

**SAFEGUARDS:**

ART is maintained with controls meeting safeguard requirements identified in Departmental Privacy Act Regulations (43 CFR 2.51) for manual and automated records. Access to records in the system is limited to authorized personnel whose official duties require such access.

(1) Physical Security: Paper records are maintained in locked file cabinets and/or in secured rooms.

(2) Technical Security: Electronic records are maintained in conformity with Office of Management and Budget and Departmental guidelines reflecting the implementation of the Federal Information Security Management Act. Electronic data are protected through user identification, passwords, database permissions and software controls. These security measures establish different degrees of access for different types of users.

(3) Administrative Security: All DOI and contractor employees involved in any and all trust activities are required to complete Privacy Act, Records Management and Security Awareness trainings. The trainings are completed before an employee is permitted access to any trust data. Trainings are implemented on an annual basis.

**RETENTION AND DISPOSITION:**

ART is scheduled for permanent retention.

**SYSTEM MANAGER AND ADDRESS:**

Information Technology Program Manager, Office of Historical Trust Accounting, 1801 Pennsylvania Ave., NW., Suite 500, Washington, DC 20006.

**NOTIFICATION PROCEDURES:**

To determine whether your records are in this Privacy Act system of records, write to the Information Technology Program Manager at the address listed above. Provide the following information with your request:

(1) Proof of your identity.

(2) List of all of the names by which you have been known, such as maiden name or alias(es).

(3) Mailing address.

(4) Tribe, IIM Trust Fund account number, tribal enrollment or census number.

(5) Time period(s) during which the records may have been created or maintained, to the extent known by you (See 43 CFR 2.60).

**RECORDS ACCESS PROCEDURES:**

To request access to your records, write to the Information Technology Program Manager at the address listed above. Provide the following information with your request:

(1) Proof of your identity.

(2) List of all of the names by which you have been known, such as maiden name or alias(es).

(3) Mailing address.

(4) Tribe, IIM Trust Fund account number, tribal enrollment or census number.

(5) Time period(s) during which records may have been created or maintained, to the extent known by you.

(6) Description or identification of the records you are requesting (including whether you are asking for a copy of all of your records or only a specific part of them) and the maximum amount of money that you are willing to pay for their copying. (See 43 CFR 2.63.)

**CONTESTING RECORDS PROCEDURES:**

To request an amendment of a record, write to the Information Technology Program Manager at the address listed above (See 43 CFR 2.71). Provide the following information with your request:

(1) Proof of your identity.

(2) List of all of the names by which you have been known, such as maiden name or alias(es).

(3) Mailing address.

(4) Tribe, IIM Trust Fund account number, tribal enrollment or census number.

(5) Time period(s) during which the records may have been created or maintained, to the extent known by you.

(6) Specific description or identification of the record(s) you are contesting and the reason(s) why you believe the record(s) are not accurate, relevant, timely, or complete.

(7) Copy of documents or evidence in support of (6) above.

**RECORD SOURCE CATEGORIES:**

(1) The following DOI components: Bureau of Indian Affairs, Office of Trust Funds Management, Office of the Special Trustee, Minerals Management

Service, Bureau of Land Management, Office of Hearings and Appeals.

(2) Federal and state agencies.

(3) IIM Trust Fund account holders or their heirs. Depositors to and claimants against the accounts.

(4) Tribal offices, if the IIM function is contracted or compacted under the Indian Self-Determination and Education Assistance Act, Public Law 93-638, 88 Stat. 2203, as amended.

(5) Courts of competent jurisdiction, including tribal courts.

**EXEMPTIONS CLAIMED FOR THE SYSTEM:**

None.

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**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

[FWS-R9-ES-2008-N00166; 92220-1112-0000-FY08-EA]

**Endangered and Threatened Wildlife and Plants; Recovery Crediting Guidance**

**AGENCY:** Fish and Wildlife Service, Interior.

**ACTION:** Notice of availability.

**SUMMARY:** We, the U.S. Fish and Wildlife Service (Service), announce the availability of guidance to promote implementation of the Endangered Species Act. The guidance describes a crediting framework for Federal agencies in carrying out recovery measures for threatened and endangered species. The text of the guidance is included in this notice. Under the guidance, Federal agencies may show how adverse effects of agency activities to a listed species are offset by beneficial effects of actions taken elsewhere for that species. The combined effects of the adverse and beneficial actions must provide a net benefit to the recovery of the species.

**ADDRESSES:** The guidance may be downloaded from our Web site at <http://www.fws.gov/endangered/policy/june.2008.html>. To request a copy of the guidance, write to U.S. Fish and Wildlife Service, 420 ARLSQ, Washington, DC 20240, Attention: Recovery Crediting; or call 703-358-2171. You may also send an e-mail request to [recovery\\_crediting@fws.gov](mailto:recovery_crediting@fws.gov). Specify whether you wish to receive a hard copy by U.S. mail or an electronic copy by e-mail.

**FOR FURTHER INFORMATION CONTACT:** Direct all questions or requests for additional information about the guidance to Dr. Richard Sayers, Division

of Consultation, Habitat Conservation Planning, Recovery, and State Grants, U.S. Fish and Wildlife Service, 420 ARLSQ, Washington, DC 20240 (703-358-2171). Individuals who are hearing-impaired or speech-impaired may call the Federal Relay Service at 1-800-877-8337 for TTY assistance, 24 hours a day, 7 days a week.

#### SUPPLEMENTARY INFORMATION:

##### Background

The ultimate goal of the Endangered Species Act of 1973, as amended (ESA) (16 U.S.C. 1531 *et seq.*), is the recovery of endangered and threatened species and the ecosystems on which they depend. In administering the recovery provisions of the Act, the Service collaborates with many partners, including Federal, State, and local agencies, Tribal governments, conservation organizations, the business community, and private landowners.

Effective recovery planning and implementation depend in part on creative processes and agreements with Federal partners as well as other non-Federal partners in community-based recovery efforts. Examples of innovative conservation tools under the ESA include safe harbor agreements, habitat conservation plans, recovery permits, and conservation banks. The ultimate success of conservation and recovery of endangered and threatened species depends on a variety of innovations, such as these, that may be used in concert with one another or alone. We expect recovery credit systems (RCS) to complement them further. Additional information concerning these tools is available through the sources listed above under **ADDRESSES**.

The recovery credit approach provides Federal agencies with an additional recovery tool developed using existing authorities. As described below, this tool was initially established in Texas to allow Fort Hood Military Reservation to accrue credits for recovery measures that it arranged by contract with neighboring landowners. The type of arrangement we developed with Fort Hood can be applied by other Federal agencies that may obtain credit for advancing the recovery of a listed species, and this credit may be expended, or debited, to offset potential adverse effects of future actions. A recovery crediting system can allow a Federal agency to accrue credit for recovery actions in advance of effects resulting from any specific action that causes adverse effects. We expect this process to increase incentives for Federal agencies to use their authorities to further the purposes of the ESA.

Under section 7 of the ESA, the Fish and Wildlife Service conducts consultations with Federal agencies to advise them whether their actions are likely to jeopardize listed species or adversely modify critical habitat. Each Federal agency has a duty under section 7(a)(1) to use its authorities to further the purposes of the ESA by carrying out programs for the conservation of listed species. The Service and cooperating agencies can employ the consultation process to review agency programs and verify that they promote the recovery of one or more listed species. These consultations may establish a basis for adoption of RCS. In the discussion of procedures for consultation on an RCS, additional language has been inserted to note that action agencies should expressly state what the net benefit to recovery will be for the relevant species and how the proposed RCS will satisfy that standard (see section III.C.).

The Service recognizes that recovery crediting is a particular mechanism within the broad concept of habitat credit trading. The Service may expand other types of crediting to entities other than Federal agencies or employ additional methods for Federal agencies. That is, we may be able to use credits as a measure of the benefit of recovery actions taken on Federal lands, and we may consider other credit trading systems, including conservation banks, for landowners who take recovery actions on their own land or other private lands. However, the guidance being adopted herein applies only for Federal agencies to accrue credits on non-Federal lands.

##### Viewing Documents

On November 2, 2007, we published in the **Federal Register** (72 FR 62258) a notice of availability and the complete text of draft guidance on RCS. An initial 30-day public comment period was opened at that time and subsequently re-opened for an additional 60 days, until February 25, 2008 (72 FR 73351, December 27, 2007).

The complete file for the recovery crediting guidance as well as the comments and materials we received are available for inspection, by appointment, during normal business hours at the Division of Consultation, Habitat Conservation Planning, Recovery, and State Grants, Room 420, 4401 North Fairfax Drive, Arlington, VA 22203-1601.

##### Summary of Comments and Recommendations

State and Federal government agencies, nongovernmental organizations, and private individuals

responded to our notice. In all, we received comments from more than 60 respondents. Some simply expressed support for or opposition to the concept of recovery crediting; others made more specific observations and recommendations. The latter were grouped thematically and are organized by category below with our responses.

##### Category 1—Level of Specificity

Issue 1. While some respondents supported the avoidance of specificity in the guidance, others recommended providing greater detail, particularly with respect to determining net conservation benefit, the valuation of credits, eligibility of species, and crediting and debiting standards and procedures. One respondent recommending greater detail in the guidance also recommended that we undertake a series of pilot projects to test the RCS concept and consider carrying out the guidance through adoption of a regulation. Some pointed to climate change as a specific widespread threat to species that should be accounted for in developing RCS.

Response 1. Our responses to suggestions for greater specificity on particular issues are presented under the discussion of those issues. Generally, we believe that it is necessary, particularly at this stage in the development of RCS, to strike a balance between clearly expressing the principles governing the mechanism and allowing individual RCS to adapt to local conditions and needs. A series of carefully monitored pilot projects may provide a basis for incorporating greater detail in a future iteration of this guidance or replacing it with a regulation.

With respect to the valuation of credits, we anticipate that a variety of quantitative measures may be employed under the guidance in different situations, such as number of individuals of a species, density of individuals over some measurable area, quantity of habitat displaying given characteristics, volume of flow in a given aquatic system, etc. In some cases it may also be possible to establish equivalencies between different measures. For example, habitat that is relatively abundant could be debited against scarce habitat of different character that requires restoration to promote recovery.

Climate change is one of the widespread effects (such as invasive species) that may be appropriate to consider on a case by case basis.

*Category 2—Adequacy of Appropriateness of the Net-Benefit Standard vs. Contribution To Recovery*

Issue 2a. Many respondents were concerned about the application of the net-benefit standard. Following is a summary of those concerns and our responses:

“Net conservation benefit” should be clearly and consistently defined in the guidance. This terminology should be consistently used throughout the guidance to avoid confusion and misapplication.

Response 2a. We agree and have revised our terminology. Because “net conservation benefit” has been applied with respect to other policies, such as the Safe Harbor policy, and the RCS process applies a different standard to Federal agencies through the ESA section 7 process, we have revised our language to refer consistently to the term “net benefit to recovery,” which is now defined in section I. C. of the final guidance.

Issue 2b. Some respondents contended that the draft guidance fails to set firm guidelines for ensuring a net conservation benefit; that the standard is too weak, and should be replaced by a stronger recovery standard; that the focus of the document is enabling Federal agencies to find new ways to mitigate the habitat destruction resulting from their activities; or that the practice of merely agreeing to avoid destruction of existing habitat should be discouraged as there would be no net gain.

Response 2b. Our intent for this guidance is that its implementation will provide greater flexibility and increased opportunities for Federal agencies to implement their responsibilities under section 7(a)(1) of the ESA, to enhance the recovery of listed species. We have attempted to clarify this intent by revising our terminology in the guidance by defining “net benefit to recovery” and consistently refer to a “net benefit to recovery” rather than a “net conservation benefit”.

Issue 2c. An RCS should generally be available over the full range of the species to provide maximum flexibility—differences in habitat quality should be reflected in the definition of the credit for that species.

Response 2c. We agree that in most cases where it is appropriate to develop an RCS, credits should be available throughout the species’ range, and habitat credits valued appropriate to the relative importance of the habitat to recovery. It is important to note that recovery credits may be accrued for recovery actions other than habitat

protection—they could be applied to needed research, management, or outreach actions, for example.

Issue 2d. Placement of an RCS should be focused on the benefit to species recovery and not proximity to public land. Listed species are more prevalent on private land.

Response 2d. The focus of recovery credits is on benefits to the species. In terms of habitat credits, proximity to public lands may well be important for some species because public lands often take the form of large tracts of land that will be protected from fragmentation and development in perpetuity. Because habitat connectivity is often of critical importance, private lands near large tracts of public lands may contribute more to connectivity than isolated tracts of private lands. This does not in any way discount the importance of private lands to the conservation and recovery of endangered species.

Issue 2e. Actions qualifying for a recovery credit should be measurable and outcome-based. A demonstrated positive response by the population of the target species in the area affected by the action should be the litmus test for evaluating the effectiveness or assigning a value to a recovery credit.

Response 2e. We agree. The standard of using current recovery plans or an equivalent, Service-approved document, which must tie the recovery criteria and recovery actions directly to addressing the threats to the species, should assure that recovery credits are based upon measurable, outcome-based actions.

*Category 3—Expanding Scope*

Issue 3a. Who can participate in Recovery Crediting Systems?

Response 3a. Under this guidance, recovery credits can only be established through an ESA section 7 consultation. The use of recovery credits is therefore limited to Federal action agencies, and only Federal action agencies may accrue, hold (bank), and use (debit) recovery credits. That does not mean that non-Federal entities cannot participate in the RCS process where appropriate. It is also important to note that other entities may be involved in consultation or acting on behalf of a Federal action agency and they may engage and participate in the recovery credit process and the consultation process as appropriate. Consultation is a responsibility of all Federal agencies, and the Federal action agency (a single Federal entity) is ultimately responsible for the accrual, use (debiting), and accounting of recovery credits. Other entities, Federal or non-Federal, may participate in RCS as appropriate, but a

non-Federal entity cannot accrue, hold (bank), or use (debit) recovery credits.

Issue 3b. Is the recovery credit process limited to federally listed species only?

Response 3b. Yes, RCS are limited to federally listed species because the authority for establishing and using an RCS is the ESA’s section 4(f) and section 7(a)(1), both of which apply only for listed species. The draft guidance clearly stated that recovery crediting is an optional process for a Federal agency to use its authorities to promote the conservation of listed species.

*Category 4—Comments on the Use of Federal Lands*

Issue 4a. Are recovery credits limited to actions on non-Federal lands or can credits be accrued from recovery activities on Federal lands? Several respondents noted that RCS should place a priority to carry out recovery actions and thus accrue recovery credits on Federal lands and, since the impacts are occurring on Federal lands, the impacts must be mitigated on Federal lands. One commenter noted that State or private lands should be used only as a last resort to mitigate for impacts on Federal lands.

Response 4a. The draft guidance stated that “a recovery credit system is a specific program established to provide recovery actions on non-Federal lands for specific species while creating a bank of credits that a Federal agency may use to offset the effects of its actions.” Only conservation that occurs on non-Federal lands can be counted as recovery credits.

The Service supports the mitigation of impacts using either Federal or non-Federal lands. As noted above, recovery credits were intended to promote the recovery of listed species on non-Federal land and to offset adverse effects to listed species from proposed Federal actions.

Issue 4b. There was concern that the program could ultimately lead to the long-term degradation of Federal lands and a transfer of valuable fish and wildlife resources from lands held in public trust to private reserves. Respondents also recommended that Federal agencies strive to seek additional incentives to minimize loss of threatened and endangered species and their habitats on Federal lands. It was also noted that the full force of the Endangered Species Act does not apply on private lands, and that Federal activities on public lands should rarely, if ever, result in the net loss of habitat for listed species.

Response 4b. Federal agencies are mandated under section 7(a)(1) of the ESA to use their authorities to further

the conservation of listed species. Recovery crediting is simply one tool that agencies may use in order to do so, and will not be appropriate in all situations. Because public lands often provide extremely valuable large tracts of protected habitat, it will be incumbent upon the Service and an action agency to assure in each RCS established that any debiting action on Federal lands does not lead to long-term degradation of habitat for listed species, but in fact enhances the recovery of the species through additional private partnerships and other recovery actions. Credits could potentially be applied to actions on other public lands, as well as State or private lands. Recovery debits on Federal lands must be valued against a net benefit to recovery standard for any credit on private lands. This must include assurance of equivalent protections for the species on private lands *and* a net benefit, not an even trade of debits for credits. Issues of habitat size, quality, and connectivity must be considered, and Federal lands will continue to play a major role for most species.

#### *Category 5—Temporary vs. Permanent Credits*

Issue 5. Several respondents expressed concern over the concept of temporary credits, while others supported the exchange of temporary credits for temporary impacts. Some respondents did not believe the guidance provided enough information concerning the use and/or determination of temporary versus permanent credits. Concerns included the inadequacy of achieving species needs in the short term, lack of specific standards for in-perpetuity protection, and the use of temporary credits for outreach and research that could be traded for habitat impacts. A few comments recommended that only permanent credits be allowed, much like the situation in conservation banking, with even temporary impacts offset through a permanent credit system. One respondent questioned the manner in which temporary effects were quantified for the Fort Hood pilot project and how it could be applied to a national model.

Response 5. The Service has not attempted to outline specific details on what may constitute a “temporary” or “permanent” impact because of the multitude and range of direct and indirect effects that may occur from a variety of Federal actions. Such an attempt would ultimately fall short of capturing the concept of temporary or permanent credits. Instead, we believe the nature of effects are best described

during formal consultation, which requires a detailed effects analysis of the specific Federal action on listed species. We agree that, in most cases, the impact must be commensurate with the credit (while providing a net benefit to recovery), which is how the pilot project at Fort Hood is modeled. However, we do not want to preclude the inclusion of any recovery tasks (e.g., research, public outreach) that are necessary for delisting or downlisting of the target species in the development of RCS. The decision on the appropriate credit exchange, as well as the value of credits, would be made through the development of specific RCS. Thus, the guidance is intentionally general in outlining the concept of recovery crediting and does not rely on specific aspects from the pilot project at Fort Hood, which is still in the development phase.

Both temporary and permanent credits may be necessary components of an RCS. Using permanent credits to offset both temporary and permanent impacts is not precluded under this guidance, but developing appropriate temporary credits adds incentives for furthering the recovery of listed species. Because of the net benefit to recovery standard for crediting, temporary credits must provide a measurable contribution to the recovery of the target species.

#### *Category 6—Role of the States*

Issue 6. The Service received several comments from State natural resources agencies and other interested parties on the importance of and status of the States in working with the Service on recovery of listed species under the ESA. In addition, the comments stressed three elements in creating a functional RCS. First, that States, given their status under section 6 of the ESA, have a direct need to work in a collaborative partnership with the Service to develop an RCS and share the responsibility to ensure that an RCS works in partnership with Federal agencies, States, private landowners, Tribes, land trust organizations and other partners and stakeholders. Second, several State interest comments advocated that the Service create a science team to further develop this guidance, review other recovery or conservation tools, such as conservation banking, and then develop more detailed guidance for the Service to review in public comment. Third, several respondents recommended that the Service, in partnership with the States and other national partners, monitor a few pilot recovery credit projects first, review these with a national team, and then develop more credible RCS guidance.

Response 6. The Service agrees that the States play an important role as our conservation partners under section 6 of the ESA and other Federal fish and wildlife conservation laws. Each State was required to develop a State Wildlife Action Plan by October 2005 and implement its plan, with Service approval, by January 2007. These plans are now in place. Several Memoranda of Understanding (MOU) between the Service and the States and other partners reflect the importance of the States’ role in conservation of listed species and other species at risk.

The Service expects that appropriate scientific advisory groups will be formed to assist in the development of individual RCS, and will be capable of evaluating these systems as they are carried out. We decline to establish a national science team at this time, but may do so in the future if we determine that it is warranted, and may provide more informed detailed guidance at that time.

#### *Category 7—Scope and Transfer or Interstate Trading*

Issue 7a. One respondent asked whether recovery credits be accrued in one portion of a species’ range and used in another portion of a species’ range that may be some distance away.

Response 7a. Appropriate credits may be accrued and used anywhere within a species’ range. However, as discussed in the draft guidance, recovery plans, State plans and other guiding documents or groups, such as a recovery team, science or biology workgroup, etc., may prioritize particular areas for credit accrual and/or use based on the needs of the species.

Issue 7b. One respondent inquired whether credits should be transferable or traded among entities.

Response 7b. The draft guidance clearly stated, “Circumstances may arise in which a Federal agency may opt to sell or transfer banked credits to another agency.” Federal agencies may trade, transfer, or sell recovery credits to another Federal agency in accordance to the agencies’ scopes of authority. The Service does not usually participate in how a Federal action agency implements aspects of a consultation, such as carrying out activities described in a biological assessment or a biological opinion. If a Federal action agency contracts with a non-Federal entity or with another Federal entity to accomplish conservation actions for listed species, the Service may not be aware of or involved in that process. The Service’s role is work with the action agency and the action as it is presented to us in the consultation

process. The Service will examine credits and their availability for use during the consultation process and issue a biological opinion. The origin of the credits is not a concern for the Service. Put simply, the transfer or trading of credits among Federal agencies is acceptable, however, the Service will not engage in negotiation or trading activities among Federal agencies or their surrogates. The Federal action agency must accurately account for all credits and debits it offers to use during the consultation process, and the Federal action agency is ultimately responsible for all subsequent accounting and tracking of recovery credits.

Since State agencies and private entities do not have a consultation responsibility, there is no basis for them to design or implement an RCS without the involvement of a Federal action agency. Under this guidance, only RCS involving Federal agencies will be recognized by the Service during the consultation process.

*Category 8—RCS and Other Recovery Mechanisms (e.g., Conservation Banks)*

Issue 8. Several respondents noted similarities or differences between this guidance and the Service's conservation banking guidance issued in 2003 (68 FR 24753, May 8, 2003). Some considered conservation banking to be a superior method of protecting habitat with an established record of success, and recommended that RCS be abandoned in favor of conservation banking. Others recommended that a clear distinction be drawn between the two mechanisms, or that RCS be held to the same standards that apply for conservation banking, such as in-perpetuity protection, legally binding commitments, non-wasting endowments, and conservation easements. One respondent characterized RCS as potentially providing the functional equivalent of conservation banking. One respondent recommended that the Service examine the economic effects that establishment of RCS would have on the conservation banking industry. One submittal included a cost-benefit analysis supporting lower costs associated with recovery crediting in the Fort Hood area as compared to habitat protection through easement or acquisition.

Response 8. We appreciate the conservation value provided by existing conservation banking arrangements, and in fact described RCS as a complement to conservation banking in our November 2, 2007, notice. We do not intend to establish recovery crediting as an alternative to other conservation measures that are already playing a role

in conserving species, but rather to serve in situations that lend themselves to the particular features of recovery crediting. The most apparent distinguishing characteristics of recovery crediting are the possibility of encumbering property on a less than permanent basis and of protecting habitat in a dispersed array over a landscape. Some landowners may find non-permanent arrangements more attractive than conventional banks, and thus be induced to participate where they might not otherwise. The potentially dispersed nature of habitat covered by an RCS will demand vigilance on the part of the Service and its cooperators to avoid excessive habitat fragmentation. We do not plan to examine the economic effects of recovery crediting on conventional conservation banks, as we believe that doing so at this time would be excessively speculative. In a similar vein, it may not be valid to compare conservation measures through cost-benefit analyses because of the differing nature of the benefits provided by the various measures. In this context, we note that the Army has contracted for a study examining return on investment for the Fort Hood crediting system.

*Category 9—Adequacy of RCS Based on Documents Other Than Recovery Plans*

Several respondents were concerned about whether documents other than recovery plans should be used as the basis for an RCS. Following is a summary of those concerns and our responses:

Issue 9a. Acceptable documents should be more completely described.

Response 9a. We agree that what constitutes an acceptable document should be well defined. We have added language under section III.B., "planning and development phase" that more clearly defines acceptable documents.

Issue 9b. Documents should not be limited to those that are approved by the Service, even when recovery plans are available.

Response 9b. Section 4(f) of the ESA requires the Service to develop and implement recovery plans for listed species. Because an RCS must be based upon clearly identified actions that will address threats to the species, and that will contribute to its recovery, these actions should be part of a Service-approved document. However, that Service-approved document may be a conservation plan or framework, or include recommendations within a 5-year review that meet the standard of addressing threats and contributing to recovery of the species. Actions so identified in an RCS would be treated

on the same basis as those in a current recovery plan.

Issue 9c. Recovery credits should be based only upon approved and current recovery plans, and the Service should prioritize developing or updating plans before implementing an RCS.

Documents other than recovery plans referenced in the draft guidance may be insufficient to provide the necessary recovery tasks and measures to ensure a net benefit to recovery, or may be inadequate in their public participation. The guidance should include language that requires the recovery plan or equivalent conservation plan for a target species to be up-to-date and contain the best scientific data available.

Response 9c. We agree that a current recovery plan would generally be the best source for developing an RCS, and that it should be the generally applicable standard. The Service is working to streamline its processes for revising and updating recovery plans, and will consider the need for prioritizing those species for which an RCS might be beneficial. However, in some instances, it may be appropriate to utilize information from a Service-approved conservation plan or a recent 5-year review to develop an RCS with the best available scientific information on the needs of the species. We have added language under section III.B., "planning and development phase", that more clearly defines acceptable documents and how they should be used.

Issue 9d. Recovery plans are flawed and will not likely lead to recovery, so recovery credits should not be based upon them.

Response 9d. Recovery plans are developed with the participation of our partners in the scientific community as well as our partners in implementation and represent the best available science as applied to addressing the threats to species and their ultimate recovery. Recovery plans are one of the most important tools we have to ensure sound decisionmaking in the implementation and tracking of species recovery.

*Category 10—The Role of Monitoring*

Issue 10. We received numerous comments concerning responsibility and accountability for monitoring of RCS. Some believed the Service should oversee all monitoring plans and accounting of credits and debits. Some suggested that monitoring data should be equally shared among all stakeholders, while others recommended that an independent third party conduct monitoring to provide confidentiality assurances to private

entities participating in the system. Other comments suggested the Service's 5-year review process was inadequate to monitor the contribution of RCS to the status of target species. One respondent believed Federal agencies should not monitor their own systems due to the potential overlap of credits between two or more agencies. Several expressed concerns about funding shortfalls, including the ability for the Service to allocate funding and the costs to private entities for monitoring. Two comments believed the guidance should outline a remedial process for problems identified through monitoring (e.g., failure of credit to produce benefits).

Response 10. The Service intends to play an active role in all aspects of RCS development and implementation. The draft guidance may not have stated the Service's role as plainly as possible, but it was our intent that an oversight function would occur under credit accrual through "sanctioning" the credit, and under the debit process through a biological opinion. We have revised those sections to clarify the Service's role. We also believe that monitoring should be coordinated among our Federal and non-Federal partners in order to ensure a rigorous and transparent monitoring and reporting process. We agree that all stakeholders committed to participation under an RCS should be full partners and share equally in the information generated from monitoring. We also agree that an independent third party is acceptable for implementation of a monitoring plan. However, the prospect of granting assurances for some participants to remain anonymous is not within the Service's authority. Further, the Service believes that a monitoring plan that conceals certain information from certain participants would not adequately provide checks and balances in the system and would undermine the concept of Cooperative Conservation. The Service has experienced this situation through the pilot project at Fort Hood. Certain confidentiality assurances developed in the pilot have created challenges to the effectiveness monitoring process, which resulted in an individual funded project failing to produce credits.

The Service agrees that funding for monitoring and reporting is an important issue for a properly functioning RCS. In the guidance, we acknowledge the lack of resources within our agency to implement many recovery actions for listed species. For these reasons, the guidance invites participation from all potential stakeholders—Federal, State, private and nongovernmental—to produce a

more effective system and pool resources to ensure success. In this way monitoring plans can be developed and collaborated among participants, as expertise and resources allow, to meet the goals and objectives of each particular system.

The Service agrees that a process for corrective action or remediation based on feedback from monitoring should be developed within an RCS. However, it would be ineffective to generalize such a process in the guidance. Rather, those processes are best developed on a system-specific basis.

#### *Category 11—Military Related Comments*

Issue 11. The Service received a few comments from within the Department of Defense (DoD) and from other respondents on the role of the military working in partnership with the Service, States, private landowners, and other partners in developing potential RCS. Comments stressed four elements in creating a functional RCS:

First, that any credit-debit system must support a military installation in protecting its military mission and must allow flexibility for the target species' conservation with partners.

Second, the guidance should refer to Integrated Natural Resources Management Plans (INRMPs) as examples of Service-approved documents that could serve as the basis for developing an RCS on a military installation.

Third, given the unique nature of the DoD and challenges it engages in carrying out its core military missions and in meeting its obligations under the ESA, that there are unique opportunities to conduct initial pilot projects combined with the DoD's Range and Environmental Protection Initiative (REPI).

Fourth, DoD manages some 25 million acres of land on military installations that support multiple training needs across a wide geographical area, while maintaining a diversity of ecosystems and endangered species, creating a need for further collaborative conflict resolution over land use and endangered species conservation and recovery across those landscapes with private landowners, and other Federal, State, Tribal, and local government and other nongovernmental partners.

Response 11. Some of the best examples today of endangered species conservation partnerships involve military installations around the nation. The Fort Hood pilot project is an example of two themes expressed in many of the comments. First, that the Service, the States, and other

conservation partners should focus on the lessons learned from this pilot in applying it elsewhere and that it is only one example of a system we expect to help shape the guidance in the future. Second, that there are other potential pilot projects that may involve military installations, depending on the endangered species and potential applicability of an RCS that benefits the species, the military, and other partners.

The Service agrees that there is potential that some INRMPs being implemented at military installations can serve as recovery tools for certain endangered species, in tandem with recovery plans, State Wildlife Action Plans, and other conservation plans that target the species. The Sikes Act mandates that each military installation develop, implement, and revise an INRMP where significant natural resources occur on military lands with the mutual agreement by its two primary conservation partners, the Service and the appropriate State fish and wildlife agency. The Service acknowledges that the tri-partite MOU between DoD, the Service, and the Association of Fish and Wildlife Agencies (AFWA) for a Cooperative Integrated Natural Resources Management Program on Military Installations is a key agreement for cooperative conservation on military lands. INRMPs that include active conservation and management initiatives for endangered species can contribute to the recovery of a species. Supporting military installations' conservation efforts is a concerted effort by the DoD, the four Military Services, the DoD Legacy Management Program, the DoD REPI Program, the DoD Partners in Flight Program, the National Military Fish and Wildlife Association, and the Association of Fish and Wildlife Agencies. Other supporting MOUs are key to potential military installation—private landowner—State agency lands—other Federal lands conservation partnerships. These include the 2006 MOU between USDA, Natural Resources Conservation Service, the Service, and the AFWA to strengthen cooperation among the parties to proactively conserve plant and animal species-at-risk and their habitats, to foster the recovery of listed species, and address similar needs for State species of concern. A similar 2007 MOU exists between the DoD and the Service for bat conservation.

The Service agrees with the comment about the unique nature of DoD's military mission and the challenges it faces in carrying out its core mission while meeting its obligations under the ESA, and that there are various

opportunities to conduct initial pilot projects elsewhere in the nation combined with certain DoD conservation programs. As noted above, military installations, the Service, and the States work as collaborative partners under the Sikes Act and the tri-partite MOU at several installations and are promoting further collaborative partnerships with private landowners, State lands, other Federal agencies, Tribes, nongovernmental organizations, and other partners in the recovery of endangered species found on military lands and adjacent lands. The DoD conservation programs such as the DoD Legacy Program, the DoD REPI, and the DoD Partners in Flight Program are conservation tools that DoD uses effectively with conservation partners on endangered species, fish and wildlife, and other natural resources. As noted in the Service's response to comments under the Role of States, carrying out an effective RCS may lead to establishment of national and project-level science teams that can guide and target endangered species recovery actions. The Service recognizes a need to invite the DoD and military services to be represented on any future national science team. In any case where the military installation may be part of a potential pilot RCS, it is key that the military installation natural resources staff represent the military on a local science team to steer a pilot project with the Service, State, and other partners.

The Service also acknowledges that DoD and the four military services have balanced sustaining the military readiness mission with stewardship of natural resources including endangered species over a diverse range of ecosystems in the nation. DoD, the Service, and the States work on several conservation partnership teams to bring conservation resolution out of potential conflicts

#### *Category 12—Critical Habitat*

Issue 12. A variety of opinions were offered in response to our solicitation of comment on the relationship of RCS to critical habitat. One respondent recommended that there be no specific link between the two. Others suggested that areas covered by an RCS should not be designated as critical habitat, that existing designations be removed for areas covered by an RCS, that existing critical habitat be accorded high value for RCS coverage, or that RCS coverage be given explicit preference over critical habitat designation as a means of promoting conservation.

Response 12. We have declined to attempt articulating any explicit relationship between RCS and critical

habitat at this time. Given the wide range of opinion expressed and the relatively broad discretion we are afforded by the ESA in designating critical habitat, we believe that a relation between the two, if any, is most likely to arise in the context of future RCS applications and specific designations.

#### *Category 13—Legal Issues*

Issue 13a. Several respondents asserted that RCS would allow agencies to exceed their existing Congressional mandates under the ESA and other statutes.

Response 13a. RCS do not expand the authorities of the Service or the cooperating agencies.

Issue 13b. One respondent asserted that the Service is "literally authorizing increased endangered and threatened species take and habitat destruction/ degradation" with RCS.

Response 13b. This guidance does not authorize any take or habitat destruction. As plainly set out in the guidance, any actions taken under the guidance would be subject to section 7 consultation. It is the issuance of a future biological opinion with an incidental take statement that authorizes any take. Further, any action that may affect critical habitat would be subject to consultation as well.

Issue 13c. One respondent "reject[ed]" the authority of the Service to "weaken the section 7" consultation process by creating RCS that promote the take of species or the degradation of their habitat.

Response 13c. The respondent misunderstands the premise of section 7(a)(2). The ESA allows action agencies to take species and impact critical habitat if, after consultation with the Service, it is determined that those actions are not likely to jeopardize listed species or adversely modify or destroy critical habitat. Actions taken under an RCS will be subject to section 7 consultation. Further, because RCS require a net benefit to the recovery of the species concerned, there is no weakening of their section 7(a)(1) responsibilities.

Issue 13d. One respondent questioned what would happen if a landowner were not in compliance with an agreement.

Response 13d. As with any Federal agency action subject to consultation under section 7, an action taken under an RCS would be governed by the reinitiation clause of the section 7 regulations (50 CFR 402.16). That is, the Federal action agency would be required to reinitiate consultation if the action being implemented causes effects

to the species that were not considered during the consultation.

Issue 13e. One respondent asserted that Federal agencies cannot take actions that are likely to jeopardize listed species even if they have taken "previous actions that have been demonstrably effective in promoting that species' recovery."

Response 13e. We agree that action agencies cannot lawfully take actions that are likely to jeopardize listed species. Under an RCS, however, an action could not lead to jeopardy because the RCS must demonstrate a net benefit to recovery. Furthermore, the regulations implementing section 7 specifically speak to this point (see 50 CFR 402.14(g)(8)).

#### **Guidance**

The text of the guidance follows:

#### **Guidance on Recovery Crediting for the Conservation of Threatened and Endangered Species**

##### **I. Introduction**

##### *A. Purpose and Scope of Guidance*

This document is intended to provide guidance on the development, management, and use of recovery credits as a measure for mitigating adverse effects to and contributing to the recovery of species listed as threatened or endangered under the Endangered Species Act of 1973, as amended (ESA). The guidance should assist Service personnel in determining the applicability of recovery credits for the recovery needs of a species, fulfill the purposes of the ESA, and provide consistency in the establishment, management, and use of recovery credits. For more detailed guidance and information on various other recovery programs, we include a list of helpful documents in section VI of this guidance. These documents will help the reader have a more complete understanding of recovery programs as a whole.

Recovery crediting is an optional process for Federal agencies to use their authorities to further the conservation of listed species. Recovery credits can provide an additional means of implementing "conservation measures," commonly offered by Federal agencies to offset effects to listed species resulting from Federal actions. As noted in the Service's Consultation Handbook, "When used in the context of the Act, 'conservation measures' represent actions pledged in the project description that the action agency or applicant will implement to further the recovery of the species under review." For further discussion of conservation

measures, see *Endangered Species Consultation Handbook*, pp. 4–8. In a recovery crediting system (RCS), the action agency would present credits as part of its project description. A pledge represented by a credit must be a legally binding commitment such as a contract with a private landowner.

Some potential benefits of an RCS include (1) better and more cost-effective contributions to recovery through agency activities; (2) more exact analysis; and (3) increased predictability for all parties. The Service and its cooperators should closely evaluate the use of recovery credits as a conservation tool for each species or group of species; recovery credits may not be appropriate in some situations. In other cases, recovery credits may be a valuable tool in advancing the recovery of a species.

This guidance is general in nature, as each process developed for using recovery credits will differ based on a variety of circumstances. An RCS should be tailored to the specific circumstances under which it would be applied; ideally it should be based on the relevant recovery plans and, when recovery plans are lacking or inadequate for the design of an RCS, should rely on other Service-approved documents (see “III. B. Planning and Development Phase” below for examples). RCS may complement mitigation tools and conservation programs currently available, such as conservation banking. This guidance also does not attempt to closely define or assign roles to the agencies and other participants in an RCS; we anticipate that these roles will vary to some degree in response to the circumstances surrounding particular systems.

### B. Background

We have long recognized that effective recovery planning and implementation for listed species require cooperative processes, including recovery actions by Federal land managing agencies with adjacent landowners, local communities, Tribes, States, and other Federal agencies.

The concept of recovery credits was developed in Texas to allow the Department of Defense (DoD) to receive credit for recovery measures being implemented by Fort Hood Military Reservation. Fort Hood, which is home to the largest known population of the endangered golden-cheeked warbler within its breeding range, carries out recovery measures with neighboring landowners in an effort to offset adverse effects that may result from future on-base military readiness activities. In exchange for implementing recovery actions, DoD requested that these

actions be considered for “banking” to offset effects attributable to training activities.

Although the Fort Hood example is very specific and limited in scope, the general concept can be applied more broadly. Federal agencies may obtain credit for actions undertaken on non-Federal lands to advance the recovery of listed species, and this credit may be expended, or debited, to offset potential adverse effects of future actions. In other words, Federal agencies may “bank” recovery credits in advance in a particular RCS, and apply those credits at a later time to the analysis of an agency action. This process can add an incentive for Federal agencies to use their authorities to further the purposes of the ESA.

### C. What Is a Recovery Credit?

A recovery credit is a quantifiable unit of measure recognized by the Service representing a contribution to the recovery of a species listed under the ESA. For example, in its simplest form, one credit could equal a specified number of acres of habitat, the acreage necessary to support one nest of the target species, or a specified number of acre-feet of water secured. Recovery credits should be based on a commitment to implement recovery actions outlined in a particular species’ recovery plan or alternative Service-approved document. Each recovery credit, therefore, may be considered to be part of recovery implementation leading towards the downlisting or delisting goals of a threatened or endangered species, taking into account the debits that have occurred.

An RCS is a specific program established to implement recovery actions on non-Federal lands for specific species while creating a “bank” of credits that a Federal agency may use to offset the effects of its actions. That is, the Federal agency may develop and store credits to be used at a later time to offset particular adverse effects of its actions. The overall system must provide a net benefit to recovery for covered species. “Net benefit to recovery” is defined as follows: Enhancement of a species’ current status by addressing the threats identified at the time of listing or in a current status review. Net benefit to recovery represents the cumulative benefits of the recovery actions for a species identified in an RCS that contribute to the goal of downlisting or delisting the species, as specified in a current recovery plan or equivalent Service-approved document, after consideration of the debits applied to any adverse effects of a Federal agency action. A net benefit to recovery

will generally be found when an action directly or indirectly provides a material increase in a species’ population and/or a material enhancement, restoration, or protection of that species’ habitat.

Under this policy, only Federal agencies may apply recovery credits to the effects of their proposed actions, but the system is similar in principle to conservation banking and habitat conservation plans. Recovery credits must be realized to create a “bank” of credits before they can be used to compensate for adverse effects to listed species. Unlike the situation with conservation banks, the RCS may be used for either permanent or temporary effects. However, the positive effects of the credits may be temporary (e.g., secured by a term contract) only if the negative effects to be offset are also temporary and, further, if the accounting function of the recovery credit system ensures that benefits of the credits are achieved in a way so that there is a net benefit to recovery. The recovery actions represented by credits must take place within a geographic area that is biologically appropriate to offset the adverse effects, such as a recovery unit.

## II. Guidance Considerations

### A. Authorities

The ESA provides the basis and framework for this guidance. The ESA’s stated purposes include providing “a means whereby the ecosystems upon which [listed] species depend may be conserved” and “a program for the conservation of such [listed] species.” Under section 3 of the ESA, conservation is defined as “using all methods and procedures which are necessary to bring any [listed] species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.” Within the context of this guidance, these definitions help determine and evaluate appropriate conservation measures and benefits. Further, recovery planning is addressed under section 4(f) of the ESA, where provisions for the development of recovery plans for the “conservation and survival of [listed] species” are provided. A recovery plan is one of the most important tools to ensure sound decisionmaking throughout the recovery process.

Section 7(a)(1) of the ESA requires that all Federal agencies “in consultation with and with the assistance of the [Service], utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of [listed species].” The ESA gives broad

discretion to Federal agencies to determine the appropriate methods for implementation of section 7(a)(1). One possible method for agencies to utilize their authorities for the conservation of the species is through an RCS.

Establishing an RCS should result in a net benefit to the recovery of a listed species. That is, the status of the target species will improve because, overall, the crediting system must contribute to the recovery of that species. Of course, each Federal agency will have to balance its authorities, statutory obligations, and missions to determine if this policy is appropriate or viable for the agency's purposes. For example, a Federal agency will have to determine if it has authority to acquire interests in non-Federal lands.

#### *B. Goals and Objectives*

The goal of an RCS is to enhance the ability of Federal agencies to promote the recovery of listed species on non-Federal land and offset adverse effects to listed species from proposed actions. Objectives are (1) to produce a net benefit to recovery of the target species, (2) to increase the flexibility of Federal agencies to accomplish their missions while meeting their requirements under the ESA, and (3) to promote effective Federal/non-Federal partnerships for species recovery.

In order to meet the first objective, the standard for establishing recovery credits should be implementing actions within an approved recovery plan that has been identified as current by the Service office with lead for the species. The Service should prioritize updating or supplementing recovery plans that are not current for species for which an RCS is being considered, so that any new actions being considered are integrated with the recovery criteria and plan for the species. In some instances, a recovery plan may not be available for a species being considered for an RCS. If so, an alternative document such as a Service-approved conservation plan, strategy, or framework that has identified specific actions to address the threats to the species may be used. Examples of documents that can contribute to establishing an RCS include military Integrated Natural Resource Management Plans, State Wildlife Action Plans, 5-year status reviews, and biological opinions. However, those can be utilized in tandem with a recovery plan and any specific actions within alternative documents must be consistent with the goals, objectives, and recovery strategy identified in the species' recovery plan to address threats and promote recovery of the species. Providing credits for

recovery tasks allows Federal agencies to work together with other entities to more effectively use measures in achieving net benefits that contribute to recovery, rather than simply addressing on-site effects of particular projects. When it is possible to foresee the utility of an RCS during the preparation of a recovery plan, authors of a plan may incorporate elements of the system explicitly in the plan.

#### *C. Principles of Recovery Crediting*

Simply put, the recovery credit system is: (1) The development and accrual of credits, which would accomplish recovery tasks and have a net benefit to recovery for the target species; and (2) a subsequent Federal action, which uses (debits) some portion of the credits, as part of the Federal action to offset adverse effects.

Federal agencies can employ an RCS to accomplish recovery tasks as well as offset the adverse effects of their actions. Although Federal agencies with appropriate authorities may also purchase credits in a conservation bank or employ other mitigation or recovery measures, a Federal agency may want to establish a system specific to its needs. Recovery crediting works within the existing framework of the ESA and its implementing regulations. This guidance is intended to assist in the early stages of planning and development of a proposed RCS. While no two crediting systems are likely to be identical, this guidance addresses fundamental principles that would apply to all situations.

The general principles of establishing an RCS include—

##### The Recovery Crediting Process

- Information gathering and analysis;
- Planning and credit development phase; and
- Consultation on the credit accrual process (ordinarily combined with the consultation on the debiting process)

##### The Recovery Debiting Process

- Debit development phase;
- Programmatic debiting consultation; and

##### Project-Specific Application

- Project-specific consultation under programmatic consultation; and
- Actual debits of the credits.

While these principles are based on our experiences from multiple consultations, the Service believes that consultation can be achieved in many cases through a two-step consultation process: (1) A programmatic consultation to establish the recovery

credit and debiting process and (2) a project-specific consultation.

#### *D. Coordination Process*

The Service lacks the resources to implement many, if not most, recovery actions. Collaboration with a wide variety of potential stakeholders is essential for the implementation of recovery plans. An appropriate RCS can assist the Service, other Federal agencies, and their partners to achieve more effective implementation of recovery plans.

The Service and the Federal action agency will coordinate to ensure that the crediting system complies with all applicable laws. In particular, action agencies and the Service may need to review laws relating to privacy such as the Freedom of Information Act (FOIA) and the Privacy Act. Further, depending on the system used to create the recovery credits, action agencies and the Service may need to review the Federal Advisory Committee Act (FACA). The National Environmental Policy Act (NEPA) may be a relevant consideration as well. Service employees should consult with their appropriate solicitor's office for more specific advice with regard to these laws.

The Service will coordinate with appropriate Federal and State partners, and we will encourage State and local entities, both governmental and nongovernmental, to participate on the various workgroups and committees formed under the RCS that will be central to each process involved. For example, a local scientific committee may be established to assist the Service in defining recovery credits. While accrued recovery credits are used only by the Federal agency, the accrual process (as described below) is the key to success and should include participation by whatever non-Federal entities are appropriate.

### **III. Recovery Crediting Process**

#### *A. Information Gathering and Analysis Phase*

This phase involves the identification of threats and the actions needed to address those threats. Generally, the species' recovery plan, or other Service-approved document, will provide a framework for analysis. This analysis also establishes the means by which a credit in a recovery crediting system will be measured and accounted for. Information gathering and analysis involves the compiling of available information sources, identifying data gaps, and evaluation of target species. As stated above, a central element to defining an RCS is coordination with

appropriate Federal and State partners, as well as interested local and nongovernmental entities.

Within this phase, two important issues should be addressed: (1) Evaluation of the recovery needs of the target species, and (2) determination whether an RCS is feasible based on the recovery needs of the listed species. Critical to both issues is the ability to evaluate measurable recovery benefits to the target species. RCS will vary in details, and some listed species may not be appropriate for inclusion in a credit system based on their recovery needs. Examples may include—

- Species with poorly understood threats,
- Species for which even minimal incidental take is likely to result in a jeopardy determination,
- Species with recovery plans that provide only interim objectives due to a lack of information necessary for recovery such that a net benefit to recovery cannot be determined, or
- Species for which credits cannot easily be valued due to the nature of threats (e.g., a local endemic threatened by impoundment of a river).

#### *B. Planning and Development Phase*

This phase uses the results of the information gathering and analysis to establish in detail what constitutes a credit. As in other recovery programs, the planning and development phase is likely to be the most important and time-consuming part of the process. Although debiting of credits will not come into play until after the credits are established (e.g., after restoration or management actions have achieved their goals), the debiting must be considered in the credit development phase in order to meet the standard of a net benefit to recovery of the species. As part of the planning process, Federal agencies may identify future needs, locations of future projects, types of future projects, and associated project activities. Values may be assigned to different tasks within a recovery plan or alternative Service-approved planning document based on priority, and the use of debits may be limited depending on the needs of the species' recovery. In addition, the RCS must integrate monitoring and reporting of both accrual and debiting of credits.

Any RCS should address the threats that caused the species to be listed, advance the recovery goals of the species, and must be based on sound scientific principles. That is, the system must demonstrate the relationship between the conservation value of the recovery measure as it applies to the credit.

As stated above, in instances where a recovery plan is not specific, is not available, or is outdated, the Service may consider other documents to establish recovery crediting. We will use information that we determine represents the best available scientific information on the needs of the species. The Service should prioritize updating or supplementing recovery plans that are not current for species for which an RCS is being considered, so that any new actions being considered are integrated with the recovery criteria and plan for the species. An alternative document such as a Service-approved conservation plan, strategy, or framework that has identified specific actions to address the threats to the species may be appropriate in some instances. Examples of documents that can contribute to establishing an RCS include military Integrated Natural Resource Management Plans, State Wildlife Action Plans, 5-year status reviews, and biological opinions. However, these can be utilized in tandem with a recovery plan, and any specific actions within alternative documents must be consistent with the goals, objectives, and recovery strategy identified in the species' recovery plan to address threats and promote recovery of the species.

Credits should be valued based on recovery tasks, or analogous measures, available to a Federal agency. This phase will develop values to be assigned to recovery tasks, ensuring that a net benefit to recovery is realized for the target species. Credit values are based upon achieving measurable objectives, and higher priority recovery tasks would generally receive more credit than lower priority ones. Ranking threats may be accomplished among or within tasks in a recovery plan. For example, various Federal conservation programs use a project selection process based on several considerations. Higher value (i.e., more credit) is typically placed on potential projects that—

- Preserve long-term habitat.
- Address high-priority recovery needs.
- Are larger in size (i.e., habitat size or quality).
- Are adjacent or in proximity to public lands or other permanently protected areas.
- Target a specific geographic focus area (e.g., recovery unit).
- Benefit multiple species.
- Establish corridors to accommodate migration or connect fragmented habitat.

In this phase, the temporal nature of potential effects on or needs of the species would be analyzed. Many

species require active management (e.g., invasive species control, prescribed fire, etc.) or public outreach to contribute to recovery or research to support recovery. Thus, some credits may be temporary in nature, provided the action meets the recovery needs of the species. Temporary credits could be used to offset temporary adverse effects in appropriate situations that still allow a net benefit to recovery. For example, many transportation and linear utility projects require temporary workspace for construction, which is later returned to pre-construction conditions. An agency could accrue credits for the restoration and temporary protection of degraded habitat to mitigate for habitat that has temporary adverse effect, with the duration of credit based on benefits achieved at the restored site and eventual restoration of the affected site.

In its simplest form, a single Federal agency would identify a recovery action(s) for establishment of an RCS. For example, a recovery plan may call for the permanent preservation of a viable population in a particular recovery unit. A Federal agency may identify that need, and develop a process for accruing credits through conservation easements that would meet that objective of the recovery plan (preserving the viable population). Credits reflecting habitat protection or restoration would be considered to be banked when conditions on the ground indicate completion of the recovery task. More complex crediting systems may involve multiple Federal agencies and may assign credits to several or all tasks within a recovery plan. In either case, a single Federal agency would be the holder of credits. Whenever possible, other partners should be included in the development process (e.g., State agencies, nongovernmental organizations, etc.), and they may play a major role in implementing the credit accrual process.

Finally, in the development phase, it is important to address the transferability of accrued credits. Circumstances may arise in which a Federal agency may opt to sell or transfer banked credits to another agency. These situations should be considered early and be included in the crediting process, but may be defined in greater detail within the debiting process.

#### *C. Consultation on Credit Accrual Phase*

Upon completing the development of a proposed crediting process the Federal action agency will consult on the process under section 7 of the ESA. Ordinarily, a programmatic consultation will address both the crediting and

debiting processes; in rare cases separate consultations may address the two processes. The use of a proposed crediting system is a discretionary Federal action that “may affect” a listed species, and therefore requires section 7 consultation. This consultation determines whether a proposed agency action is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat. For the process developed to accrue credits, the net effect on the target species should be beneficial. In some instances, temporary adverse effects may be necessary to achieve the maximum recovery benefit to the target species. For example, a survey may involve some level of taking of a listed species. In these cases, it may be necessary to consult formally on the credit accrual process, if it is anticipated that incidental take may occur as a result of credit acquisition. An agency requesting initiation of consultation on an RCS must include in its initiation package an adequate explanation of the net benefit to recovery that the RCS will provide to the relevant species and the specific means by which it will be provided.

As discussed above, although a Federal agency needs to consider how credits will be debited while determining how they will be accrued, once it establishes an RCS through the section 7 consultation process, a Federal agency may begin accruing credits through the procedures outlined in the plan.

#### IV. Recovery Debiting Process

##### A. Debit Development Phase

This phase establishes the standards according to which credits will be used. This phase may be conducted separately or concurrently with the credit accrual planning and development. An advantage of considering crediting and debiting at the same time is that a better match may be achieved between the credits accrued and the debiting needs. Establishing the guidelines for debit use and other factors, limitations, accounting, and monitoring and reporting may be created as a stand-alone document, but will eventually become the “Project Description” within a biological assessment or evaluation, and subsequent biological opinion. In addition, the debit process could consider the possibility of Federal agencies other than the Federal agency that established the RCS being able to use credits.

Consideration of debits includes ensuring that agencies maintain a net benefit to recovery gained by credit

accrual. In general, credits that accomplish tasks in a species’ recovery plan would normally meet a net benefit to recovery standard. However, because credits would be used for mitigation, it is important to ensure the debit process does not limit, counter, or preclude necessary recovery objectives and is developed in reliance on a recovery plan or analogous document. Examples of using a debiting process to ensure a benefit to recovery include—

- Using biologically appropriate mitigation ratios in habitat-based crediting (e.g., more than one credit for each debit necessary to fully offset adverse effects).
- Maintaining a credit balance that ensures an incremental increase in the species’ recovery status.
- Restricting use of debits to areas not deemed essential in recovery plans or a Service approved conservation plan, strategy, or framework that has identified specific actions to address the threats to the species.
- Limiting the types of activities available for debiting.

Similar to planning the crediting phase, it is essential that an activity or action’s potential effects to the target species be sufficiently understood in order for it to be included in the debiting process. In some instances, the effects of even well-understood actions may possess some level of uncertainty. The debiting process should be designed to accommodate uncertainty that is evaluated based on a clearly stated and explained set of assumptions.

##### B. Programmatic Debiting Consultation

The debiting process as part of an RCS is subject to consultation under section 7(a)(2) of the ESA. Programmatic consultation addresses programs or groups of similar actions implemented by a Federal agency. A non-jeopardy biological opinion also determines the amount or extent of anticipated incidental take, if any.

In implementing an RCS, the programmatic approach will be necessary due to the nature of credit and debit concepts, and to ensure a net benefit to recovery of the species. The Federal action subject to consultation is the establishment of the debiting process and actions included therein. Under programmatic consultation, much of the effects analysis is completed upfront, rather than repeatedly for each individual action. By completing this analysis beforehand in a programmatic biological opinion, the anticipated effects of the action agency’s future projects can be added into the environmental baseline prior to their actual completion. When both

accrual and debiting processes are considered together in consultation, a more accurate analysis of the benefits of the RCS is possible than would be the case were they to be addressed separately. The appended and tiered methods of programmatic consultation involve a two-stage consultation process that would be appropriate here. The first stage is programmatic and analyzes the potential landscape-level effects that may result from the debiting process. The second stage addresses project-specific effects of each individual project under the action agency’s program and previously included in the programmatic biological opinion. The prior consultation at a programmatic level is intended to expedite this second stage; to the extent that it is possible to anticipate project-specific effects at a programmatic level, they need not be revisited in any detail later on.

A Federal agency may include recovery measures in a proposed action as mandatory, non-discretionary actions or activities that will minimize adverse effects to listed species. An RCS would formalize that process and mitigate adverse effects to listed species by taking measures (accruing recovery credits) that may be included as conservation measures for a specific project in a specific geographic location. The Service would consider the use of recovery credits when it analyzes potential jeopardy to the species and destruction or adverse modification of any critical habitat in a biological opinion. The ESA requires the Service to specify any necessary or appropriate minimization of the effects of incidental take exempted in a biological opinion. Because recovery credits would be acquired in advance of a specific Federal action and may not be associated with incidental take resulting from the proposed action itself, they would normally offset the effects of incidental take with respect to the RCS standard of net benefit to recovery, but would not necessarily minimize the effects on individuals affected by the proposed action *as required by section 7(b)(4)(C) of the ESA*. Therefore, the biological opinion may still require reasonable and prudent measures and terms and conditions that address the incidental take resulting at the project-specific level. These must fit within the context of “minor changes” as described at 50 CFR 402.14(i)(2).

The end product of programmatic consultation will be a comprehensive biological opinion issued to the Federal action agency that describes in detail or incorporates by reference the crediting and debiting processes and all actions and activities involved. It will evaluate

all potential effects of the actions (debits) as well as the credits accrued and used to offset the effects and provide a jeopardy analysis for listed species and destruction/adverse modification analysis for designated critical habitat if applicable. The consultation would consider all listed species that may be affected, not just the target species, and any designated critical habitat occurring in the action area for the jeopardy/adverse modification analysis.

The programmatic biological opinion may not be able to describe take at the programmatic level. In this case, the specific take authorization and associated reasonable and prudent measures and terms and conditions would be described in site-specific biological opinions. If the overarching biological opinion can describe, with appropriate documentation from the action agency, the project-specific actions, then a list of reasonable and prudent measures and terms and conditions can be included, and no additional opinion is needed for those actions. The Service must develop reasonable and prudent measures and terms and conditions in close coordination with the action agency. This coordination may identify specific measures the action agency will incorporate at the project-specific level.

### C. Project-Specific Consultation

As individual projects are proposed, the action agency provides project-specific information as described in the programmatic biological opinion. This information should include, but not be limited to, the specific areas to be affected, the species and critical habitat that may be affected, a description of anticipated effects (in reference to those already analyzed in the programmatic biological opinion), a description of any additional effects not considered in the programmatic consultation, appropriate reasonable and prudent measures and terms and conditions, the resulting debits as ranked in the programmatic opinion, and the credit balance resulting from the action. The project-level consultation should be an expedited process because most of the needed analysis will have occurred at the programmatic level. This is an added incentive for Federal agencies to use programmatic consultation and recovery crediting.

### V. Monitoring

A monitoring program is essential to the success and the credibility of an RCS, both for the crediting and debiting aspects of the process. The scope of the monitoring plan should be

commensurate with the crediting system's recovery framework, based on the goals and objectives of the species' recovery plan; the monitoring should measure the objectives as implemented by the crediting system. Ultimately, the Federal action agency is responsible for accounting for credits and compliance with the debiting process as determined through the programmatic biological opinion. However, the Service will provide technical assistance in the monitoring plan and contribute to the monitoring process through the development of terms and conditions within biological opinions, as well as reviewing and providing concurrence, if warranted, under project-specific consultations. Additionally, the Service will be responsible for periodic review of the species' environmental status, either through an established protocol or more conventional methods (e.g., 5-year review, programmatic biological opinions, etc.).

In general, monitoring may comprise two elements: effectiveness monitoring and compliance monitoring. Effectiveness monitoring will evaluate the credit valuation and accrual process in achieving the goals and objectives of recovery actions. This monitoring focuses on the crediting process, involves principles of adaptive management, and includes all implementation partners. The responsibility of effectiveness monitoring belongs to the Federal agency that accrues and holds credits, although other entities would be involved. When the credit accrual process results in a biological opinion from the Service, effectiveness monitoring provisions are part of the project description. Any coverage under the incidental take statement, therefore, is dependent on the action agency carrying out the action as described in the project description.

Compliance monitoring audits and accounts for credits and debits and ensures proper implementation of the agency action. Any monitoring and reporting must be incorporated into the project description as an integral part of implementing the RCS.

Although an RCS is a focused tool for Federal agencies to make a positive contribution towards the recovery of listed species while creating flexibility for offsetting effects of their other actions, the Service encourages the development and use of other types of crediting systems to meet other needs and circumstances. In addition, this guidance by no means restricts Federal agencies from developing or using other crediting systems such as conservation banks. An RCS is one method by which

a Federal agency may contribute towards its section 7(a)(1) responsibilities. The Service encourages Federal agencies to develop other programs that would also contribute to the recovery of listed species on Federal and non-Federal lands.

### VI. References

The following is a list of documents that would be useful for establishing an RCS. Some are in draft form, but are readily available to Service personnel through Regional Offices or the Washington Office.

- U.S. Fish and Wildlife Service. 1990. Policies and guidelines for planning and coordinating recovery of endangered and threatened species. Washington, DC. 14pp. + appendices.
- U.S. Fish and Wildlife Service. 1999. Final Safe Harbor Policy. 64 FR 32717, June 17, 1999.
- U.S. Fish and Wildlife Service. 2003. Guidance for the Establishment, Use, and Operation of Conservation Banks.
- U.S. Fish and Wildlife Service and National Marine Fisheries Service. 1998. Endangered Species Act Consultation Handbook: Procedures for Conducting Section 7 Consultations and Conferences. Washington, DC.
- U.S. Fish and Wildlife Service and National Marine Fisheries Service. 2004 (updated 2006). Draft Endangered and Threatened Species Recovery Planning Guidance.
- Williams, B.K., R.C. Szaro, and C.D. Shapiro. 2007. Adaptive Management: The U.S. Department of the Interior Technical Guide. Adaptive Management Working Group, U.S. Department of the Interior, Washington, DC.

**Authority** The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: July 25, 2008.

**H. Dale Hall,**

*Director, Fish and Wildlife Service.*

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## DEPARTMENT OF JUSTICE

### Antitrust Division

#### Notice Pursuant to the National Cooperative Research and Production Act of 1993—Intersocietal Accreditation Commission

Notice is hereby given that, on June 25, 2008, pursuant to Section 6(a) of the National Cooperative Research and Production Act of 1993, 15 U.S.C. 4301 *et seq.* ("the Act"), Intersocietal Accreditation Commission ("IAC") has filed written notifications simultaneously with the Attorney General and the Federal Trade Commission disclosing (1) the name and