



United States Department of the Interior

FISH AND WILDLIFE SERVICE

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In Reply Refer To:
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Memorandum

To: Field Supervisor, North Florida Field Office, Jacksonville, Florida

From: Assistant Regional Director, Atlanta, Georgia *Frank* *1/s/* *acting*

Subject: Intra-Service Biological Opinion: Amended Florida Section 6 Agreement *U*

This document is the Fish and Wildlife Service's (Service) Intra-Service Biological and Conference Opinion on the Service's entering into an amended section 6 Cooperative Agreement ("Agreement") with the Florida Fish and Wildlife Conservation Commission ("Commission"). The Service is authorized to enter into such agreements with states for the conservation of resident federally-listed endangered and threatened species pursuant to section 6(c) of the Endangered Species Act of 1973, as amended (Act) [16 U.S.C. § 1531, *et seq.*]. Section 7(a)(2) of the Act requires that Federal agencies shall 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 ("listed species") or result in destruction or adverse modification of its critical habitat. The Service's entering into the Agreement is a Federal action that is subject to consultation under section 7(a)(2) of the Act. The Service also prepared a programmatic Environmental Assessment on the proposed action to satisfy its obligations under the National Environmental Policy Act of 1969 (NEPA) [42 U.S.C. §§ 4321-4347].

The Service first entered into a section 6 cooperative agreement with the State of Florida in 1976. The initial agreement was renewed annually until 2001, when it was superseded by the agreement that currently exists between the Service and the Commission. Since then, the Service has renewed the existing agreement annually without modification in accordance with sections 6(c) and (e) of the Act. The proposed Agreement differs from the existing agreement in that it expressly and affirmatively authorizes the Commission to issue conservation permits and incidental take permits for listed species without prior issuance of a Federal permit by the Service's Regional Director, provided certain conditions are met.

This Biological Opinion is intended to function programmatically such that future section 7 consultations on certain actions under the Agreement, specifically the adoption of permitting guidelines for covered species, will tier from this document. A complete administrative record is on file at the Service's Atlanta, Georgia Southeast Regional Office.

CONSULTATION HISTORY

The Service and the Commission have been discussing and considering for several years a process that would provide for a more proactive approach to implement the rangewide conservation of listed species during permitting actions. Specifically, the genesis of the Amended section 6 Agreement was the Commission's 2010 adoption and revision of imperiled species rules at 68A-27.001 of the Florida Administrative Code (F.A.C.), *et seq.* These rules revised species listing procedures and added provisions at 68A-27.007 of the Florida Administrative Code (F.A.C.), authorizing the Commission's issuance of conservation and incidental take permits for listed species without prior issuance of such permits by the Service. The public was extensively involved in the development of the Commission's revised imperiled species rules at 68A-27.007(1), F.A.C. *et seq.*, through fifteen stakeholder sessions that occurred from February 2008 through July 2010, and three public comment periods: July 9-24, 2009; August 14-September 9, 2009; and, October 12-November 6, 2009. There was also opportunity for public comment at Commission meetings in September 2009 and December 2009, as well as at the Commission meeting when the rules were adopted in September 2010. At the September 2010 meeting, a majority of the public supported the rules.

A draft Environmental Assessment for this Action was published for public review on June 4, 2011. Following a 45 day extension, the comment period closed on August 19, 2011. Comments received have been incorporated into the amended agreement, as appropriate and/or addressed in the final Environmental Assessment on this proposed action.

BIOLOGICAL OPINION

DESCRIPTION OF THE PROPOSED ACTION

The Service proposes to amend its section 6 Cooperative Agreement ("Agreement") with the Florida Fish and Wildlife Conservation Commission ("Commission"). The Service is authorized to enter into such agreements with states for the conservation of resident federally-listed endangered and threatened species pursuant to section 6(c) of the Endangered Species Act of 1973, as amended (Act) [16 U.S.C. § 1531, *et seq.*]. The Service first entered into a section 6 cooperative agreement with the State of Florida in 1976. The initial agreement was renewed annually until 2001, when it was superseded by the agreement that currently exists between the Service and the Commission. Since then, the Service has renewed the existing agreement annually without modification in accordance with sections 6(c) and (e) of the Act.

Unlike the existing section 6 agreement, the proposed Agreement authorizes the Commission to issue conservation and incidental take permits for listed species thus eliminating the need for duplicate Commission and Service permits. Under section 2.b of the Agreement, authorized employees or agents of the Commission may, when acting in the course of official duties, take or issue a conservation permit authorizing the take of resident Federally-listed endangered species for purposes that are consistent with the Act, Chapter 68A-27, F.A.C., this Agreement, and the provisions of any section 6 grant agreement, provided that such taking is not reasonably anticipated to result in: (1) the death or permanent disabling of the specimen; (2) the removal of the specimen from the state of Florida; (3) the introduction of the specimen or any of its progeny into an area beyond the historical range of the species; or (4) the holding of the specimen in

captivity for a period of more than forty-five (45) consecutive days. Section 2.c of the Agreement grants the same authority to the Commission regarding take of threatened species for conservation purposes. These authorizations are codified in the Commission's newly adopted rule at 68A-27.007, F.A.C., which allow the Commission to issue permits for scientific and conservation purposes if specifically authorized to do so under a written agreement or regulatory delegation by the Service and where such permit would benefit the survival potential of the species. The rule defines a "scientific or conservation purpose" as one that furthers the conservation or survival of the species, including collection of scientific data needed for conservation or management of the species, and requires the Commission to consider certain factors in determining whether a permit applicant has demonstrated that such purpose would be served.

The Agreement also authorizes the employees of the Commission, when acting in the course of official duties, to issue permits authorizing the take of resident Federally-listed species incidental to and not the purpose of an otherwise lawful activity provided:

1. The issued permit is consistent with provisions of a permitting guideline appended to the proposed Cooperative Agreement pursuant to the provisions of section 6 of the Agreement;
2. The permitting guideline will ensure that: the permit must only address incidental take; the permit must only address incidental take; the permit must include impact avoidance, minimization and mitigation measures in a manner consistent with the conservation (i.e., recovery) of the species; the permit must have a scientific or net conservation benefit; the permit must provide for adequate funding for conservation measures and procedures to deal with unforeseen circumstances; the permitted activity must have no net negative impact on survival and recovery of the species in the wild; the permit must contain other measures and assurances [e.g., duration of commitments, deed restrictions, monitoring, reporting, performance requirements, etc.] that the Service and/or Commission may require as being necessary or appropriate; the permit must meet any more restrictive conditions required by any subsequent amendments in Federal or State laws and regulations;
3. The permit provisions are enforceable by both the Service and the Commission;
4. The authorized take is not otherwise prohibited by other Federal treaty or statute beyond the Act;
5. The Service has conducted intra-agency consultation pursuant to section 7(a)(2) of the Act on the permitting guideline;
6. The permits will not exceed any incidental take thresholds specified in the intra-Service consultation;

7. The Service has completed the analysis required by the National Environmental Policy Act (NEPA) and noticed the availability of the resultant NEPA document for public comment in the Federal Register;
8. The Commission has provided opportunity for public stakeholder participation in development of its input into the Guidelines;
9. The Commission provides for realtime public access to permit applications, associated information, and permit decisions;
10. The Commission notifies the Service upon receipt of an application and issuance of a permit or provides access to a system that allows for the Service to monitor receipt of an application and issuance of a permit; and
11. The Commission provides for administrative challenge procedures of its final permit decision per Section 68-1.001; Section 68-1.008; and Chapter 28-106, F.A.C.

The Commission will not be authorized to issue incidental take permits for listed species upon the mere signing of the Agreement by the parties. One of the pre-conditions for the Commission's issuance of such permits is that Service and Commission cooperatively determine the actual species and species groups for which guidelines will be developed and then develop such guidelines. Such determinations will be based on the agencies' respective workloads, the value to species conservation, and the benefits to the regulated public. The permitting guidelines for a listed species will include, among other things, a suite of permitting requirements to avoid and minimize impacts to the species and to mitigate for take in a manner consistent with the conservation of the species. The guidelines also will incorporate approved Best Management Practices for the species. The permitting guidelines for a species will be developed within the context of recovery plans or similar landscape level conservation plans that are designed to provide for the survival and long term viability and recovery of the species. The permitting provisions of the Agreement could potentially apply to all of the listed species identified in 68A-27.007(1), F.A.C., with the exception of species for which no incidental take is currently authorized by the Federal government.

Prior to the adoption of permitting guidelines for a listed species, the Service will conduct a section 7(a)(2) intra-Service consultation on the guidelines. The primary focus of each consultation will be to determine whether implementation of the guidelines by prospective permittees is likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of designated critical habitat. The consultations also will address specific authorizations for incidental take as well as applicable reasonable and prudent measures, terms and conditions, and conservation recommendations. These intra-Service consultations will tier programmatically from this document.

The Agreement is intended to assure that state-issued permits for incidental take meet a standard that is as or more protective of listed species than that required by the Act, i.e., that the impacts of the taking must be minimized and mitigated to the maximum extent practicable and that the taking will not appreciably reduce the likelihood of the survival and recovery of the species.

Pursuant to 68A-27.007(2)(b), F.A.C., the Commission's standard for issuance of incidental take permits is when there is a scientific or conservation benefit and only upon a showing that the permitted activity will have no negative impact on the survival potential of the species. The Commission also is required to consider seven other factors in determining whether a permit may be issued. Given the Commission's permit issuance standard and factors to consider in permit issuance, the Agreement is expected to improve the current rate of recovery of species listed under the Act by influencing the nature, extent, and location of impact avoidance, minimization, and mitigation measures associated with the incidental take permitting process, and to reduce unnecessary duplication of effort. The rules recently adopted by the Commission in Chapter 68A-27, F.A.C., provide an opportunity to improve and enhance the ability of the Service and the Commission to conserve species at the landscape level, particularly with respect to development proposals.

Although the Agreement and the Commission's rule at 68A-27.007, F.A.C., authorizes the Commission's issuance of conservation and incidental take permits, entities seeking such permits will not be required to obtain such permits through the Commission. Rather, they will have the option to utilize the Service's section 7 consultation and section 10 incidental take permitting processes, as applicable, to obtain such permits. For many, however, the action will provide a more streamlined and predictable permitting process. It is expected to allow businesses and lenders to plan ahead and incorporate permitting requirements and expenses into their business models, thereby reducing uncertainty and risk. Based on the results of prior programmatic permitting approaches, the Service believes that many prospective permit applicants will choose to use the state permitting process of the Agreement.

The Agreement does not eliminate the need for the Service to address actions that are neither permitted by the Commission nor covered by the Agreement or activities that are not in compliance with permitting guidelines. The Service also will engage in section 7 interagency consultations with other Federal agencies and process applications for incidental take permits under section 10 of the Act. Applicants who have an incidental take authorization via consultation associated with a Federal agency action will not need to obtain a Commission permit under this action.

STATUS OF THE SPECIES/CRITICAL HABITAT

The permitting authorizations of the Agreement could potentially apply to all Federally-listed species identified at 68A-27.007(1), F.A.C., any species currently proposed for listing or to candidate species, after a final listing action and to any critical habitat designated for the species with the exception of species for which no incidental take is currently authorized by the Federal government..

Although the Agreement could potentially apply to all listed species identified in the Commission's rule, species currently proposed or candidates for listing, Service data on the issuance of incidental permits show the following. From 2006 through 2010, the Service issued a total of 107 incidental take permits with a total of 78 permits issued in 2006 and 2007 likely due to the change in economic conditions. The species affected by such permits, the number of permits, and acreages impacted (some acreages overlap where multiple species occur in the same

location) are as follows:

- Florida Scrub-jay (87 permits; 1418.92 acres);
- Choctawhatchee Beach Mouse (1 permit; 2.65 acres);
- Perdido Key Beach Mouse (9 permits; 2.68 acres);
- Eastern Indigo Snake (2 permits; 13,374 acres);
- Bluetail Mole Skink (1 permit; 1.9 acres);
- Sand Skink (5 permits; 40.18 acres);
- Key Deer (1 permit; 168 acres); and
- Lower keys Marsh Rabbit (1 permit; 40 acres).

A complete list of species potentially affected by this proposed action is included below in Table 1.

Table 1. Resident Listed, Proposed and Candidate Species Occurring in Florida and Potentially Affected by the Proposed Action.

<u>SPECIES COMMON NAME</u>	<u>SCIENTIFIC NAME</u>	<u>STATUS*</u>
FISH		
Okaloosa darter	<i>Etheostoma okaloosae</i>	T
Gulf sturgeon	<i>Acipenser oxyrinchus</i> [= <i>oxyrhynchus</i>] <i>desotoi</i>	T
REPTILES		
Green sea turtle	<i>Chelonia mydas</i>	T
Hawksbill sea turtle	<i>Eretmochelys imbricata</i>	E
Kemp's ridley sea turtle	<i>Lepidochelys kempii</i>	E
Leatherback sea turtle	<i>Dermochelys coriacea</i>	E
Loggerhead sea turtle	<i>Caretta caretta</i>	T
Gopher tortoise	<i>Gopherus polyphemus</i>	C
Sand skink	<i>Neoseps reynoldsi</i>	T
Eastern indigo snake	<i>Drymarchon corais couperi</i>	T
Bluetail mole skink	<i>Eumeces egregius lividus</i>	T
American crocodile (FL population)	<i>Crocodylus acutus</i>	T
Atlantic salt marsh snake	<i>Nerodia clarkii taeniata</i>	T
AMPHIBIANS		
Frosted flatwoods salamander	<i>Ambystoma cingulatum</i>	T
Reticulated flatwoods salamander	<i>Ambystoma bishopi</i>	E
BIRDS		
Audubon's crested caracara	<i>Polyborus plancus audubonii</i>	T
Cape Sable seaside sparrow	<i>Ammodramus maritimus mirabilis</i>	E
Everglade snail kite	<i>Rostrhamus sociabilis plumbeus</i>	E
Florida grasshopper sparrow	<i>Ammodramus savannarum</i>	E

	<i>floridanus</i>	
Florida scrub-jay	<i>Aphelocoma coerulescens</i>	T
Piping plover	<i>Charadrius melodus</i>	T
Red cockaded woodpecker	<i>Picoides borealis</i>	E
Roseate tern	<i>Sterna dougallii dougallii</i>	T
Whooping crane	<i>Grus americana</i>	E, XN
Wood stork	<i>Mycteria americana</i>	E
MAMMALS		
Anastasia Island beach mouse	<i>Peromyscus polionotus phasma</i>	E
Choctawhatchee beach mouse	<i>Peromyscus polionotus allophrys</i>)	E
Perdido Key beach mouse	<i>Peromyscus polionotus trissyllepsis</i>	E
Southeastern beach mouse	<i>Peromyscus polionotus niveiventris</i>	T
St. Andrew beach mouse	<i>Peromyscus polionotus peninsularis</i>	E
Rice rat	<i>Oryzomys palustris natator</i>	E
Florida salt marsh vole	<i>Microtus pennsylvanicus dukecampbelli</i>	E
Florida panther	<i>Puma concolor coryi</i>	E
Florida bonneted bat	<i>Eumops floridanus</i>	C
Gray bat	<i>Myotis grisescens</i>	E
Indiana bat	<i>Myotis sodalis</i>	E
Key deer	<i>Odocoileus virginianus clavium</i>	E
Key Largo cotton mouse	<i>Peromyscus gossypinus allapaticola</i>	E
Key Largo woodrat	<i>Neotoma floridana smalli</i>	E
Lower Keys marsh rabbit	<i>Sylvilagus palustris hefneri</i>	E
West Indian manatee	<i>Trichechus manatus</i>	E
INVERTEBRATES		
Squirrel Chimney Cave shrimp	<i>Palaemonetes cummingi</i>	T
Bartram's hairstreak butterfly	<i>Strymon acis bartrami</i>	C
Florida leafwing butterfly	<i>Anaea troglodyta floridalis</i>	C
Miami blue butterfly	<i>Cyclargus thomasi bethunebakeri</i>	E
Schaus swallowtail butterfly	<i>Heraclides aristodemus ponceanus</i>	E
Chipola slabshell (mussel)	<i>Elliptio chipolaensis</i>	T
Choctaw bean	<i>Villosa choctawensis</i>	PE
Fat threeridge (mussel)	<i>Amblema neislerii</i>)	E
Fuzzy pigtoe (mussel)	<i>Pleurobema strodeanum</i>	PT
Gulf moccasinshell (mussel)	<i>Medionidus penicillatus</i>	E
Highlands tiger beetle	<i>Cicindela highlandensis</i>	C
Narrow pigtoe (mussel)	<i>Fusconaia escambia</i>	PT

Ochlockonee moccasinshell (mussel)	<i>Medionidus simpsonianus</i>	E
Oval pigtoe (mussel)	<i>Pleurobema pyriforme</i>	E
Purple bankclimber (mussel)	<i>Elliptoideus sloatianus</i>	T
Round ebonyshell (mussel)	<i>Fusconaia rotulata</i>	PE
Shinyrayed pocketbook (mussel)	<i>Lampsilis subangulata</i>	E
Southern kidneyshell (mussel)	<i>Ptychobranthus jonesi</i>	P
Southern sandshell (mussel)	<i>Hamiota (=Lampsilis) australis</i>	PE
Stock Island tree snail	<i>Orthalicus reses</i>	T
Tapered pigtoe (mussel)	<i>Fusconaia (=Quincuncina) burkei</i>	PT

***E = endangered, T = threatened, XN = experimental population, PE = proposed endangered, PT = proposed threatened, C = candidate.**

ENVIRONMENTAL BASELINE

Status of the Species within the Action Area

All of the above species are covered by the proposed amended cooperative agreement. Some species populations may be in decline, others stable, and others improving. However, only a small subset are likely to become the subject of future permit guidelines and subsequent permits pursuant to Section 2 of the proposed amended cooperative agreement. Rather than attempt to provide a status of each of these species here, a status of these species will be provided in the step-down biological opinion on the guidelines that would be prepared at that time. We anticipate that the Action Area will include all areas that would be directly or indirectly affected by the activities associated with permits that are issued. The Action Area also will include any habitat that is occupied or potentially occupied by a listed species, which could include most, if not all, of the terrestrial and aquatic habitats in Florida.

Factors Affecting the Species Environment within the Action Area

The species' environments and factors affecting those environments are unique to each species or suite of species that will be addressed in the permitting guidelines and analyzed in subsequent NEPA documents and section 7 intra-Service consultations.

For purposes of this consultation, Florida's State Wildlife Action Plan, published in 2006 by the Commission, contains the most recent comprehensive compilation of information relative to fish and wildlife conservation in Florida and provides a context for the action. The Plan is incorporated herein by reference and can be found at http://myfwc.com/WILDLIFEHABITATS/Legacy_StrategyDownload.htm. The following is an excerpt from the Plan and is used with the permission of the Commission.

In the last 50 years Florida's population has grown from less than three million people to more than 17 million. Florida ranked fourth in U.S. population (U.S. Census Bureau 2000), but Florida's population density is approximately double that of the most populous state, California.

Florida's most densely populated urban areas include Miami, Orlando, Tampa, and Jacksonville. The 2030 population projection for Florida is an 80 percent increase to 28.7 million people (U.S. Census Bureau 2000). Based on this forecast, Florida would rank third in population at that time.

Florida's economy is increasingly recognized as tied to its natural and human-created amenities. Florida's current economic growth is not primarily due to the traditional bases of growth such as agriculture, resource extraction, and manufacturing (Kiker and Hodges 2002). However, despite declines over the past century, agriculture and forestry are still major uses of the landscape and continue to contribute to Florida's economy.

Tourism is the largest industry in Florida and contributes \$53 billion a year to the state's economy. Seventy-one million visitors are drawn to Florida each year from across the United States and many foreign countries. Visitors come to see the many entertainment attractions in Florida and to enjoy Florida's moderate climate and abundant natural resources, including clear waters, world-class beaches, coral reefs, parks, rivers, and lakes.

Florida's economy and its communities also strongly benefit from money and jobs created by industries based on natural resources, which include a \$17 billion forestry industry, a \$6.6 billion fishing industry, and a \$14.6 billion boating industry. Florida seaports form another important part of the state's economy; the seaports support a \$35 billion cargo and trade industry, with 288,000 jobs, and a \$20 billion cruise ship industry, which embarks almost half of the nation's cruise passengers each year.

Florida is an ecologically diverse region ranging in climate from the temperate to the subtropical. It is relatively flat with a maximum elevation in the north of approximately 330 feet (100 meters), and much of the state below elevations of 100 feet (30 meters).

Northern Florida is within the southern temperate zone and consists of broad alluvial riparian habitats, and upland flats and ridges once dominated by longleaf pine communities. The central peninsula consists of broad flatlands once dominated by longleaf and slash pine, dry and wet prairies and sandy ridges with scrub and sandhill communities harboring numerous rare and endemic species (Myers 1990). The southern tip of the peninsula, though heavily modified by development, still contains tropically-influenced hammocks, swamps, rocklands, and marshes of the Big Cypress Swamp, Everglades, and the Florida Keys.

Rivers originating in the southern Appalachians and Piedmont are an important ecological component in north Florida that harbor increasingly rare mollusk and fish species. Lakes are very common in the Florida peninsula, and Lake Okeechobee in south Florida is one of the largest lakes in North America. Numerous springs are also characteristic of the vast limestone regions of north and central Florida. Springs, limestone caves, and sinks support many rare aquatic invertebrates (Deyrup and Franz 1994). Estuarine ecosystems include productive salt marsh communities in the northern half of the state, mangrove communities in the southern half of the peninsula and seagrass communities statewide.

The Gulf of Mexico and Atlantic Ocean significantly influence a climate that is generally

warm and humid. Summer thunderstorms are frequent, and lightning-caused fires are an extremely important ecological process that has shaped many upland and wetland communities for millennia (Myers and Ewel 1990). Rains vary from highly seasonal patterns in south Florida with heavy rains occurring mainly in the summer to more even year-round rainfall in northern Florida. North Florida's rainfall is more frequent in winter due to the influence from continental frontal systems (Chen and Gerber 1990).

Freezes occur every year in north Florida but are extremely rare in south Florida. Freeze events have a strong influence on the range of tropical species up the Florida peninsula. Tropical species range farther north along the coasts, which are better buffered from freeze events than interior areas because of the warm waters of the Atlantic and Gulf of Mexico (Harris and Cropper 1992).

Florida's wildlife is a mixture of southern temperate, neotropical, and southwestern species. Sea level rise and fall have been a dominating biogeographic force. For example, the Florida scrubjay, Florida mouse, eastern diamondback rattlesnake, and gopher tortoise are all closely related to species found in western North America, as a result of semiarid habitat that stretched into Florida during the much lower sea levels of the early Pleistocene periods (Webb 1990). Tropical species have colonized Florida by flying across the Gulf of Mexico or by riding Gulf Stream currents and include numerous plants, wading bird species, and raptors such as the snail kite and short-tailed hawk (Rodgers et al. 1996). In fact, Florida is a premier birding destination due to the various tropical species that can only be seen or are best seen here (Kale and Maehr 1990). Temperate species include the red-cockaded woodpecker, and various amphibians, fish, and mollusk species (Gilbert 1992; Moler 1992; Deyrup and Franz 1994; Rodgers et al. 1996).

Florida has 755 known native terrestrial vertebrates including frogs, snakes, lizards, mice, and birds (Florida Fish and Wildlife Conservation Commission, 1999; Florida Fish and Wildlife Conservation Commission, 2002a; Moler 1999; Deyrup and Franz, 1994). In addition, at least one thousand marine fish species inhabit Florida's nearshore waters, which encompass about one fourth of all the fish species known in the western hemisphere north of the equator. Florida has approximately 30,000 species of terrestrial invertebrates and thousands more in aquatic and marine system (Whitney et al. 2004). Several species of marine vertebrates including whales, dolphins, sea turtles, and the Florida manatee inhabit Florida's waters.

Eleven vertebrate species and/or subspecies are believed to have been extirpated or driven to extinction since the arrival of Europeans in Florida, including the red wolf, Caribbean monk seal, bison, Goff's pocket gopher, Chadwick beach cotton mouse, pallid beach mouse, ivory-billed woodpecker, Carolina parakeet, passenger pigeon, dusky seaside sparrow, and Bachman's warbler.

EFFECTS OF THE ACTION

Factors to be Considered

Given the Commission's permit issuance standard and factors to consider in permit issuance, the Agreement is expected to improve the current rate of recovery of species listed under the Act by

influencing the nature, extent, and location of impact avoidance, minimization, and mitigation measures associated with the incidental take permitting process, and to reduce unnecessary duplication of effort.

Analysis for Effects of the Action

At this stage the effects of the action are too speculative, or conjectural to lend themselves to meaningful analysis given that, at this juncture, the Service and the Commission have not yet determined the listed species whose take would be authorized through the Agreement. The environmental effects of the action could occur in any habitat that is occupied or potentially occupied by a listed species, which would include most, if not all, of the terrestrial and aquatic habitats in Florida. Notwithstanding the foregoing, we have described the general scope and effect of the changes below.

The action is expected to neither increase nor decrease the number of permitted activities. Its purpose, and expected impact, is to influence the nature, extent, and location of impact avoidance, minimization, and mitigation measures in a manner that is more consistent with the recovery of the listed species

To gauge the potential number of actions that will be affected by the action in the near term, the Service reviewed the section 10(a)(1)(B) incidental take permits issued in Florida since 2006. This period encompassed the height of the economic boom in Florida as well as the current downturn. Given current economic conditions in Florida, the Service believes that the number of permits that will be issued in the next 5 years will not exceed the number issued from 2006 to 2010, and that the number represents a conservative assessment of the effects on the environment. It is also possible that the species that were impacted by some of the previously issued permits will not be affected by the action but that other species will be impacted. The listed species for which permitting guidelines will be adopted have yet to be determined. Nonetheless, the Service believes this is a reasonable assessment of the scope of the action.

As previously stated, from 2006 through 2010, the Service issued a total of 107 incidental take permits, which included:

- 87 permits for the Florida Scrub-jay impacting 1418.92 acres;
- 1 permit for the Choctawhatchee Beach Mouse impacting 2.65 acres;
- 9 permits for the Perdido Key Beach Mouse impacting 2.68 acres;
- 2 permits for the Eastern Indigo Snake impacting 13, 364 acres;
- 1 permit for the Bluetail Mole Skink impacting 1.9 acres;
- 5 permits for the Sand Skink impacting 40.18;
- 1 permit for the Key Deer impacting 168 acres; and
- 1 permit for the Lower Keys March Rabbit impacting 40 acres.

As stated above, the objective of the action is to influence the nature, extent, and location of impact avoidance, minimization, and mitigation measures in a manner more consistent with the recovery of the species. These measures often include:

- habitat protection through easement or acquisition;
- planting of desirable vegetation;
- removal of undesirable vegetation;
- control of vegetative succession;
- translocation of affected individuals of species;
- removal of invasive species; and/or
- restoring or mimicking natural ecological processes such as burning or flooding.

We expect to see greater acreages protected, improved, and located in areas that are more compatible with species' recovery, which is not a requirement for permit issuance under section 10(a)(1)(B) of the Act, as well as more landscape-level conservation initiatives that when implemented will conserve biodiversity. To obtain an incidental take permit under the action, habitat of equal or greater value would likely be secured and located within a management area expected to be maintained as part of the recovery strategy for the species or within a viable subpopulation of the species. This type of mitigation would improve the conservation value of the mitigation.

Species Response

Based on the figures above, we expect that the effect of this action would be to recognize state permits representing a subset of the type of permits listed above, and that the individual and cumulative impacts would at a minimum have no net adverse effects on the species. By influencing the nature, extent, and location of impact avoidance, minimization, and mitigation measures in a manner that is more consistent with the recovery of the listed species, the action is likely to have a positive effect on species in comparison to current Service take authorizations under sections 7 and 10 of the Act.

CUMULATIVE EFFECTS

Cumulative effects include the effects of future State, tribal, local or private actions that are reasonably certain to occur in the action area considered in this biological opinion. Future Federal actions that are unrelated to the proposed action are not considered in this section because they require separate consultation pursuant to section 7 of the Act. There are any number of possible future State, tribal, local or private actions that may affect the listed, proposed and candidate species occurring in the state of Florida. However, at this time we are not aware of any specific actions that would not otherwise be subject to future section 7 consultations.

CONCLUSION

After reviewing the current status of the species, the environmental baseline for the action area, the effects of the proposed action and the cumulative effects, it is the Service's biological opinion that implementing the amended cooperative agreement, as proposed, is not likely to jeopardize the continued existence of the federally listed, proposed and candidate

species resident in Florida, and is not likely to destroy or adversely modify designated critical habitat. The action is expected to neither increase nor decrease the number of permitted activities impacting listed species. It provides authorization for incidental take permits that meet a conservation standard that is as or more stringent than the standard for issuance of section 10(a)(1)(B) permits and that affords equal if not greater protections than sections 7(a)(2) or 10(a)(1)(B). Based on these considerations it is the Biological Opinion of the Service that entering into the Agreement, in and of itself, is not likely to jeopardize the continued existence of any listed species, particularly given that the Service will engage in step down section 7 intra-Service consultations on permitting guidelines prior to authorizing the Commission to issue incidental take permits for a species. Moreover, the Agreement will be re-assessed annually through the renewal process of section 6 of the Act. The Agreement is likely, however, to reduce the adverse impact of permitted activities on listed species and enhance the survival and recovery of the species.

INCIDENTAL TAKE STATEMENT

Section 9 of the Act and Federal regulation pursuant to section 4(d) of the Act prohibit the take of endangered and threatened species, respectively, without special exemption. Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. Harm is further defined by the Service to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Harass is defined by the Service as intentional or negligent actions that create the likelihood of injury to listed

species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. Incidental take is defined as, take that is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to and not intended as part of the agency action is not considered to be prohibited taking under the Act provided that such taking is in compliance with the terms and conditions of this Incidental Take Statement.

The measures described below are non-discretionary, and must be undertaken by the Service so that they become binding conditions of any grant or permit issued pursuant to the Section 6 Agreement, as appropriate, for the exemption in section 7(o)(2) to apply. The Service has a continuing duty to regulate the activity covered by this incidental take statement. If the Service (1) fails to assume and implement the terms and conditions or (2) fails to require the applicant to adhere to the terms and conditions of the incidental take statement through enforceable terms that are added to the permit or grant document, the protective coverage of section 7(o)(2) may lapse.

AMOUNT OR EXTENT OF TAKE ANTICIPATED

Based on the best available data, no incidental take is anticipated by the mere signing of the Amended Section 6 Agreement. Incidental take will be assessed during the consultation process for site-specific actions (species permitting guidelines) under the umbrella of this larger planning document. Therefore, no incidental take is authorized via this biological opinion.

EFFECT OF THE TAKE

Future incidental take authorized by the step down consultations on species permitting guidelines will have no net negative effect on listed species in that permits must be consistent with the conservation of the species. Thus, the Service has determined that the level of anticipated take is not likely to result in jeopardy to affected species or adverse modification of critical habitat.

REASONABLE AND PRUDENT MEASURES

Any reasonable and prudent measures for listed, proposed or candidate species will be included in the step down biological opinion on the individual species permitting guidelines and in the guidelines.

TERMS AND CONDITIONS

In order to be exempt from the prohibitions of section 9 of the Act, the Service must comply with the following terms and conditions, which implement the reasonable and prudent measures described above and outline required reporting/monitoring. These terms and conditions are nondiscretionary.

1. The issued permit is consistent with provisions of a permitting guideline appended to the proposed Cooperative Agreement pursuant to the provisions of section 6 of the Agreement;
2. The permitting guideline will ensure that: the permit must only address incidental take; the permit must only address incidental take; the permit must include impact avoidance, minimization and mitigation measures in a manner consistent with the conservation (i.e., recovery) of the species; the permit must have a scientific or net conservation benefit; the permit must provide for adequate funding for conservation measures and procedures to deal with unforeseen circumstances; the permitted activity must have no net negative impact on survival and recovery of the species in the wild; the permit must contain other measures and assurances [e.g., duration of commitments, deed restrictions, monitoring, reporting, performance requirements, etc.] that the Service and/or Commission may require as being necessary or appropriate; the permit must meet any more restrictive conditions required by any subsequent amendments in Federal or State laws and regulations;
3. The permit provisions are enforceable by both the Service and the Commission;
4. The authorized take is not otherwise prohibited by other Federal treaty or statute beyond the Act;
5. The Service has conducted intra-agency consultation pursuant to section 7(a)(2) of the Act on the permitting guideline;
6. The permits will not exceed any incidental take thresholds specified in the intra-Service consultation;

7. The Service has completed the analysis required by the National Environmental Policy Act (NEPA) and noticed the availability of the resultant NEPA document for public comment in the Federal Register;
8. The Commission has provided opportunity for public stakeholder participation in development of its input into the Guidelines;
9. The Commission provides for real-time public access to permit applications, associated information, and permit decisions;
10. The Commission notifies the Service upon receipt of an application and issuance of a permit or provides access to a system that allows for the Service to monitor receipt of an application and issuance of a permit; and
11. The Commission provides for administrative challenge procedures of its final permit decision per Section 68-1.001; Section 68-1.008; and Chapter 28-106, F.A.C.

CONSERVATION RECOMMENDATIONS

Section 7(a)(1) of the Act directs Federal agencies to utilize their authorities to further the purposes of the Act by carrying out conservation programs for the benefit of endangered and threatened species. Conservation recommendations are discretionary agency activities to minimize or avoid adverse effects of a proposed action on listed species or critical habitat, to help implement recovery plans, or to develop information. The action which is the subject of this Biological Opinion is a conservation action consistent with and furthering the purpose of section 7(a)(1).

REINITIATION NOTICE

This concludes formal consultation and conference on the proposed action. The Service may confirm the conference opinion as a biological opinion issued through formal consultation if proposed or candidate species are subsequently listed or critical habitat is designated. If the Service reviews the proposed action and finds that there have been no significant changes in the action as planned or in the information used during the conference, the Service will confirm the conference opinion as the biological opinion on the project and no further section 7 consultation will be necessary. As provided in 50 CFR §402.16, reinitiation of formal consultation is required where discretionary Federal agency involvement or control over the action has been retained (or is authorized by law) and if: (1) the amount or extent of incidental take is exceeded; (2) new information reveals effects of the agency action that may affect listed species or critical habitat in a manner or to an extent not considered in this opinion; (3) the agency action is subsequently modified in a manner that causes an effect to the listed species or critical habitat not considered in this opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action. In instances where the amount or extent of incidental take is exceeded, any operations causing such take must cease pending reinitiation.

LITERATURE CITED

The following citations appear in the text referenced in the “Affected Environment” in the Florida Fish and Wildlife Conservation Commission’s State Wildlife Action Plan (Florida Fish and Wildlife Conservation Commission. 2005. Florida’s Wildlife Legacy Initiative. Florida’s Comprehensive Wildlife Conservation Strategy. Tallahassee, FL):

Chen, E. and J. F. Gerber. 1990. Climate. Pages 11-34 *in* Myers, R. L. and J. J. Ewel, editors. Ecosystems of Florida. University of Central Florida Press. Orlando, Florida, USA.

Deyrup, M. and F. Franz (eds.). 1994. Rare and endangered biota of Florida. Volume IV. Invertebrates. University Press of Florida. Gainesville, Florida, USA.

Florida Fish and Wildlife Conservation Commission. 1999. Checklist of Florida’s mammals. Tallahassee, Florida, USA.

Florida Fish and Wildlife Conservation Commission. 2002a. Checklist of Florida’s birds. Tallahassee, Florida, USA.

Gilbert, C.R. (ed). 1992. Rare and endangered biota of Florida. Volume II. Fishes. University Press of Florida. Gainesville, Florida, USA.

Harris, L. D. and W. P. Cropper. 1992. Between the devil and the deep blue sea: implications of climate change for wildlife in Florida. Pages 309-324 *in* Peters, R. L. and T. E. Lovejoy, editors. Global warming and biological diversity. Yale University Press. New Haven, Connecticut, USA.

Kale, H. W., Jr. and D. S. Maehr. 1990. Florida's birds: a handbook and reference. Pineapple Press, Inc. Sarasota, Florida, USA.

Kiker, C. F. and A. W. Hodges. 2002. Economic benefits of natural land conservation: case study of northeast Florida. Final report submitted to Defenders of Wildlife in support of sponsored project agreement. University of Florida, Institute of Food and Agricultural Sciences. Gainesville, Florida, USA.

Moler, P. E. (ed). 1992. Rare and endangered biota of Florida. Volume III. Amphibians and reptiles. University Press of Florida. Gainesville, Florida, USA.

Moler, P. E. 1999. Checklist of Florida’s amphibians and reptiles. Florida Fish and Wildlife Conservation Commission, Nongame Wildlife Program. Tallahassee, Florida, USA.

Myers, R. L. 1990. Scrub and high pine. Pages 150-193 *in* Myers, R. L. and J. J. Ewel, editors. Ecosystems of Florida. University of Central Florida Press. Orlando, Florida, USA.

Myers, R. L. and J. J. Ewel (eds). 1990. Ecosystems of Florida. University of Central Florida Press. Orlando, Florida, USA.

- Rodgers Jr., J. A., H. W. Kale II and H. T. Smith (eds). 1996. Rare and endangered biota of Florida. Volume V. Birds. University Press of Florida. Gainesville, Florida, USA.
- U.S. Census Bureau. 2000. 2000 Census of Population and Housing. Washington, D.C., USA. [<http://www.census.gov/main/www/cen2000.html>]
- U.S. Fish and Wildlife Service and U.S. Census Bureau. 2002. National survey of fishing, hunting, and wildlife-associated recreation (2001).
- Webb, S. D. 1990. Historical biogeography. Pages 70-102 *in* Myers, R. L. and J.J. Ewel, editors. Ecosystems of Florida. University of Central Florida Press. Orlando, Florida, USA.
- Whitney, E., D. B Means and A. Anne. 2004. Priceless Florida: natural ecosystems and native vegetation. Pineapple Press, Inc. Sarasota, Florida, USA.