

From: [Ya-Wei Li](#)
To: northflorida@fws.gov
Subject: Florida Section 6 Cooperative Agreement Assessment
Date: 08/19/2011 05:29 PM
Attachments: Comment letter on FI coop agmt - Aug 19 2011.pdf

To whom it may concern:

Please find attached the comments of the Defenders of Wildlife, Sea Turtle Conservancy, Audubon of Florida, and Florida Wildlife Federation on the proposed section 6 Cooperative Agreement between the U.S. Fish and Wildlife Service and the Florida Fish and Wildlife Conservation Commission, and on the Draft Environmental Assessment prepared for this agreement. Thank you for considering our comments.

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August 19, 2011

Via Electronic Mail

U.S. Fish and Wildlife Service
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RE: Cooperative Agreement Assessment

Defenders of Wildlife, Sea Turtle Conservancy, Audubon of Florida, and Florida Wildlife Federation submit the following comments on the proposed section 6 Cooperative Agreement between the U.S. Fish and Wildlife Service (Service) and the Florida Fish and Wildlife Conservation Commission (Commission) and on the Draft Environmental Assessment (Draft EA) prepared for this agreement. We commend the Service and the Commission for considering an innovative approach under the Endangered Species Act (ESA) and support the Service's objective of enhancing species recovery, engaging states as conservation partners, and promoting efficient implementation of the ESA through a section 6 cooperative agreement. However, we believe that the Cooperative Agreement and Draft EA, as originally proposed, require important revisions to achieve this goal. Our comments state our key concerns on the two documents and suggest potential solutions that would address these concerns while allowing you to achieve your goals.

I. Legal Framework for Delegating Incidental Take Authority

The proposed Cooperative Agreement and Draft EA imply that section 6(c) of the ESA provides the legal authority for the Commission to issue incidental take permits for federally-listed species. We believe that section 6(c) by itself would be legally inadequate to support such an initiative, and we understand that the Service is relying on additional provisions of the ESA to provide sufficient legal authority for this proposal. We would thus urge the Service to provide a complete explanation of its legal reasoning in support of this initiative. A detailed explanation is important because, although the proposed Cooperative Agreement is not a draft policy, it will become a precedent for future ESA actions under section 6 with important implications.

II. Conservation Benefits

Regulatory innovations such as the proposed Cooperative Agreement may allow the Service to implement the ESA more efficiently, but they should also produce greater conservation benefits to the maximum extent possible. Because the state permits issued under the proposed agreement could replace many section 10(a)(2) permits, they should require a framework that secures better conservation benefits through a balance of stronger avoidance, minimization, and compensatory mitigation measures.

The cooperative agreement proposes to improve the current permitting process by using state permitting criteria, provided they are “more stringent” than the federal criteria. Providing greater clarity on how the Service believes this to be the case would be helpful. On the one hand, the state criteria, as specified in 68A-27.007 of the Florida Administrative Rules, require permit applicants to show that their proposed activity “will not have a negative impact on the survival potential of the species.” This standard could be interpreted as being far more robust than the section 10(a)(2) standard because it implies “no net loss” to species and it explicitly shifts the burden of proving “no harm” to applicants. Further, the Draft EA states that the purpose and expected impact of the proposed action “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.” Because traditional HCPs are not required to contribute to the recovery of a species, the Florida criteria could be a higher standard.

On the other hand, the Florida criteria could also be interpreted as being less robust because it does not mandate that impacts be minimized and mitigated to the “maximum extent practicable,” as section 10(a)(2) does. Instead, it only requires that the Commission “consider” whether incidental take could “reasonably be avoided, minimized or mitigated by the permit applicant.” Another ambiguity is that if the Service is using an intra-Service section 7 consultation to authorize incidental take, it would appear to forgo an important benefit of many section 10(a)(2) permits: long-term conservation commitments that run with the land. Many incidental take permits contain conservation commitments that are filed in the land records for the affected county. For example, most of the HCPs covering Pacific Northwest forests contain binding commitments that run with the land for over 50 years, ensuring that in exchange for an upfront, short-term adverse impact (the authorized incidental taking), the affected species would receive long-term conservation benefits. We understand that the Commission believes it has the authority to make conservation commitments run with the land, but are unclear whether, under the proposed agreement, the Commission is in fact committing to do that. Providing clarity on this point would thus be helpful as well.

Another concern is the Commission’s past record of not using its authority to regulate the use and development of habitat of state-listed imperiled species. We believe this concern could be addressed if the cooperative agreement or the EA expressly recognizes the Commission’s authority to regulate habitat.

To show that the proposed agreement is likely to achieve its objectives, including benefitting wildlife, we would recommend that the revised agreement and EA adopt the following measures. First, both documents should describe how the Commission plans to achieve the objectives of the proposed agreement. In particular, the documents should identify the applicable state standards for issuing incidental take permits and describe the extent to which they exceed the section 10(a)(2) standards (*e.g.*, minimize and mitigate impacts to the “maximum extent practicable”). If the state standard is intended to establish a “no net loss” criterion, the revised EA should further limit approved projects to those that will clearly provide a net benefit to species or not harm them. Second, the Commission should establish clear guidelines on how it will measure whether a project will have a “negative impact on the survival potential” of a species. Because species have widely varying biological characteristics, we believe that minimization and compensatory mitigation measures will be more successful for some species than for others.¹ We thus strongly encourage the Commission to focus its initial permitting guidelines on species for which it strongly believes that mitigation can effectively offset harms. Third, when land protection plays a significant role in offsetting take, the proposed agreement and EA should explain how state permitting would match the long-term conservation commitments provided by HCPs. And finally, within the cooperative agreement, the Commission should clarify its authority to protect habitat.

III. Public Notice and Comment on Permitting Guidelines and Individual Permits

The proposed Cooperative Agreement and Draft EA do not expressly indicate whether each permitting guideline and permit proposal will undergo federal or state public comment. If the Service does not provide an opportunity for public comment on draft permitting guidelines, citizens throughout the country will be denied the opportunity to express their views on the legal adequacy or appropriateness of incidental take authorizations under the ESA—an opportunity that would otherwise exist if incidental take permits were issued through the traditional channels of section 10(a)(2).² A related problem is that the implementation of the guidelines under state law may not be subject to several federal administrative accountability laws, including the Administrative Procedure Act (APA) and the Freedom of Information Act (FOIA). As a result, the guidelines could be shielded from the traditional legal standards for judging the appropriateness of federal agency decisions, including the “arbitrary and capricious” standard for judicial review.

¹ See, *e.g.*, Finkelstein M, Bakker V, Doak DF, Sullivan B, Lewison R, et al. (2008) *Evaluating the Potential Effectiveness of Compensatory Mitigation Strategies for Marine Bycatch*. PLoS ONE 3(6): e2480. doi:10.1371/journal.pone.0002480; Business and Biodiversity Offsets Programme, *Draft Resource Paper: No Net Loss and Loss-Gain calculations in biodiversity offsets*, available at: http://www.bbopconsultation.org/pci/resourcespapers/BBOP_DraftResourcePaper_NNL_16-6-2011_CONSULTATION.pdf

² Sections 10(a)(2)(B) and 10(c) require that all incidental take permits undergo public comment.

The proposed agreement is also silent on whether the Commission will provide the opportunity for public comment on individual draft permits and, if so, how that would happen. We understand that Florida law provides no mandatory notice and comment period before the issuance of draft take permits. As a result, if the Commission issues a permit that is inconsistent with a permitting guideline, it is unclear what opportunity exists for citizens to voice their concerns about the permit or challenge it. Another concern with the proposed agreement is that it does not expressly require the Service or the Commission to make all relevant documents and records associated with individual proposed permits available for public review. This stands in contrast to the requirements of section 10(c) of the ESA, which expressly requires that all information received as part of any incidental take permit application be made available “as a matter of public record at every stage of the proceeding.”

We believe that most of the above concerns can be addressed if the Service and the Commission take the following two steps. First is to create a federal opportunity for public comment on all draft permitting guidelines through a notice of publication and comment in the Federal Register. This would subject the guidelines to APA and FOIA requirements and create a public comment process that largely mirrors that used for programmatic habitat conservation plans and safe harbor agreements. The revised cooperative agreement should build this requirement into the guideline approval process.

Second, the Commission should commit to a complementary process at the state level by agreeing to publish notices of draft guidelines in the Florida Administrative Weekly. The Commission could even take the additional step of accepting comments on draft guidelines *before* they are formally published. This would be particularly useful for the initial set of guidelines issued, which can be considered “test cases” for how to optimize future guidelines. We urge the Commission to consider offering public review and input of draft guidelines at the regular meetings of the Board of Commissioners.

On the issue of public review of individual draft permits, there are clear benefits to state-level public comment on the drafts. If this process is robust, we believe it will provide Florida residents with meaningful opportunities for public comment. For example, the Commission could post draft permits on its website and accept public comments on the drafts for at least 30 days. To ensure that interested citizens are informed about the availability of the drafts, the Commission should publish a notice of draft permit in the Florida Administrative Weekly and consider sending email notifications to all individuals who sign up for these alerts.

IV. Process of Permitting Incidental Take

The proposed Cooperative Agreement and Draft EA need to provide greater clarity on several issues concerning how incidental take would be authorized. First, it is our understanding that the Service intends to provide take authorizations via section 7(a)(2) incidental take statements,

which would set a maximum cap on the total level of incidental take that the Commission may authorize for species covered by a given set of permitting guidelines. If this is the case, the Service should be more specific on that point and articulate how the take authorization would transfer from the intra-Service incidental take statement to individual permittees.

Another issue to be addressed is how the Service would ensure that the level of authorized incidental take does not exceed the ESA's "jeopardy" threshold. We assume that this evaluation would occur as part of the intra-Service consultations on each permitting guideline and that each guideline would describe a maximum limit on the level of incidental take. As part of the Service's ESA Retrospective Regulatory Review, we understand that the Service may already be evaluating whether to issue incidental take authorizations based on acres of habitat modified (rather than the number of specimens taken). If the Service is considering using that approach under the revised cooperative agreement, we would urge the Service to proceed cautiously by monitoring the level of take the Commission issues and retaining adequate discretion to suspend the take authority when necessary to conserve the affected species.

We also assume that the proposed agreement is not intended to cover incidental take of sea turtles, whales and other marine species. Federal responsibilities for many of these species lie, in whole or in part, with the National Marine Fisheries Service, which is not a party to the cooperative agreement.

V. Monitoring, Enforcement, Suspension of Incidental Take Authority, and Annual Cooperative Agreement Renewals

To increase the chances that the proposed agreement would benefit species and improve ESA implementation, we believe that the agreement should include the following four components: (1) monitoring and reporting requirements for the Commission; (2) clear authority for both federal and Florida state agencies to enforce permit terms and conditions; (3) clear and broad authority for the Service to suspend individual permitting guidelines for cause and suspend the incidental take provisions of the cooperative agreement; and (4) reporting and performance requirements that the Commission must meet to ensure the renewal of this program as part of the annual review process for the cooperative agreement. Each factor is discussed in more detail below.

a. Monitoring and Reporting

The proposed agreement provides no information on how the Service would monitor the Commission's permitting activities. Because the Service does not plan to conduct section 7 consultations on individual permits, monitoring becomes important for ensuring that the total level of incidental take the Commission authorizes does not exceed the maximum amount authorized under the permitting guidelines. We urge the Service to address this concern by requiring the Commission to provide yearly reports indicating the levels of incidental take

authorized, the levels of net incidental take realized (if known), and whether permittees have been complying with their avoidance, minimization, and compensatory mitigation requirements. Considering that the Service currently lacks any comprehensive approach to tracking and monitoring cumulative take,³ such a monitoring and reporting recommendation presents an opportunity to begin addressing this issue.

We also emphasize that the Service should treat the proposed agreement as a “regulatory experiment” because there are various uncertainties and risks that cannot be eliminated at this time. This further underscores the importance of monitoring, reporting, and making corrections to the permitting process when necessary. Put another way, the Service should approach regulatory innovations from an adaptive management perspective, in which the Service learns from and adjusts for its mistakes and successes.

b. Authority to Enforce Permits

The cooperative agreement should clarify that both the Service and the Commission may enforce the terms of a state incidental take permit. Either the agreement or the EA should then specify the legal basis for an enforcement action. For example, would a permit violation be challengeable under Chapter 120 (“Administrative Procedure Act”) of the Florida statutes and would it violate section 9 of the ESA? To address this concern, each state permit should expressly incorporate the “terms and conditions” of its overarching incidental take statement and indicate that a violation of these provisions is also a violation of the ESA.

c. Suspension of Permitting Guidelines and Incidental Take Authority

The proposed Cooperative Agreement does not address the Service’s authority to suspend or revoke a permitting guideline. We believe the Service should clarify its authority to unilaterally suspend any guideline if there is an excess number of permits that fail to conform to that guideline or if there is generally a lack of compliance with permit terms and conditions. The Service should also retain broader authority to suspend only the incidental take provisions of the cooperative agreement, instead of the entire agreement itself, should serious problems arise under the incidental take program. The proposed agreement establishes a near impossible standard for suspending the delegation of incidental take authority for a species. As we have previously noted to the Service and the Commission, Clause 8 of the agreement seems to require the Service to find that Florida’s conservation program is no longer “adequate and active” for all federally-listed species in the state before it could suspend the incidental take authority for any particular species. Although the agreement has an “amendment” provision, it does not address our concerns because it requires the Commission to concur with any proposed amendments. Similarly, although the proposed agreement contains a “termination” provision, we believe the

³ See U.S. Government Accountability Office, *The U.S. Fish and Wildlife Service Has Incomplete Information about Effects on Listed Species from Section 7 Consultations*, GAO-09-550 (May 2009).

Service should not be required to resort to such drastic measures simply to suspend the incidental take delegation. For these reasons, the Service should provide itself with broader authority to suspend only the incidental take delegation.

d. Cooperative Agreement Renewal

Section 6 cooperative agreements are typically renewed without public review or comment. The absence of public review is a problem for this particular proposed agreement because the agreement provides Florida with far more authority to regulate federally-listed species than most states receive. We believe the agreement should establish clear evaluation and renewal criteria for the incidental take program and incorporate them into the annual cooperative agreement renewal process.

VI. Precedent Set for Other States

We believe that the State of Florida's laws to protect endangered species are more robust than those of most other states. This includes a definition of "take" that mirrors the ESA's regulatory definition, requirements for recovery plans, standards for incidental take permitting, and meaningful opportunities for public input into state processes. While Florida's system could be improved, it nonetheless sets a high bar in state leadership on endangered species conservation. It is partly because of these reasons that we believe the proposed cooperative agreement can benefit species and improve permitting efficiency if implemented carefully and thoughtfully, and funded adequately.

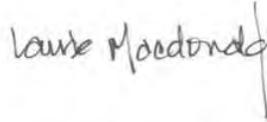
Given the precedential nature of this innovative agreement, we believe it is essential that the Service expressly state the specific high threshold that other states would have to meet in order to gain access to an incidental take authorization program similar to Florida's. This would help insure that states with less protective and effective endangered species laws and policies would be denied approval for similar cooperative agreements with incidental take delegation. We, thus, urge the Service to develop clear approval standards for delegating incidental take authority to states and to describe these standards in the EA and revised cooperative agreement. Establishing these standards would also incentivize other states to refine and improve their state imperiled species laws, thus making the state potentially eligible to receive federal incidental take authority. The standards should include, but not necessarily be limited to, the state having laws that meet or exceed the ESA standard in the following respects: authority to regulate the take of a covered species from habitat modification, incidental take permitting authority, public transparency and participation, enforcement authority, and mitigation requirements. We believe that adopting these and other standards will enable the Service to expand its partnership with states, and in the process benefit imperiled wildlife and improve the ESA's efficiency.

Thank you for considering our comments. If you have any questions or wish to discuss further, please contact Tim Male at TMale@defenders.org or (202) 772-3227, or Laurie Macdonald at LMacdonald@defenders.org or (727) 823-3888.

Sincerely,



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