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Subject: Cooperative Agreement Assessment
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To Whom It May Concern:

Please find attached Sierra Club's comments on the proposed Endangered Species Act cooperative agreement between the U.S. Fish and Wildlife Service and Florida Fish and Wildlife Commission. Please accept them into the public record on this matter.

Regards,

Catherine Semcer
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August 19, 2011

To Whom It May Concern:

Please accept these comments into the record on behalf of Sierra Club with regards to the proposed Endangered Species Act (ESA) Section 6 Conservation Agreement between the U.S. Fish and Wildlife (FWS) Service and Florida Fish and Game Commission (FWC). With more than 1 million members and supporters across the country, Sierra Club is America's oldest and largest grassroots conservation and outdoor recreation organization. Over twenty eight thousand of our members reside in Florida and many more visit the state each year to pursue wildlife watching, fishing and other outdoor recreation activities. For this reason we have a strong interest in the proposal.

Sierra Club supports and encourages increased cooperation between state and federal agencies to conserve the nation's natural resources. We do however have specific questions and concerns with the proposal we would appreciate the Service answer, consider, and, where possible, address, before entering into the proposed agreement with the State of Florida.

Under What Authority Would The FWS Delegate ESA Section 10 Authority To The Commission?

Section 6 of the ESA lists the allowable kinds of cooperation between the federal government and the states to conserve ESA listed species. Nowhere in this list does the statute provide authorization to delegate federal ESA permitting responsibilities to the states as part of cooperative efforts. Indeed, ESA Section 10 gives permitting power specifically to the Secretary. For this reason the proposal strikes us as a very broad reading of the statute by the Regional Office and that giving FWC permitting authority would be an ESA violation, possibly leading to an increased litigation burden on the FWS. Before entering into an agreement based on such a novel reading of the law we urge the FWS to seriously consider the real authorities it has under the law and proceed in a way that respects the limits of the statute.

Even If Allowed Under the ESA, Does FWC Have The Ability To Meet The Responsibilities It Would Be Given?

Like many states, Florida is now working on a smaller budget than in years past. The legislature's 2011 Budget Conference cut the FWC budget by \$11.2 million. The budget for public meetings and engagement, critical to collecting information in the permitting process, was zeroed out. As was nongame wildlife research and other programs that support sound decision making. Similarly, Congress is currently actively considering deep cuts to the kinds of programs that make cooperation between state and federal agencies fruitful, like State Wildlife Grants.

Even if FWC fully intends to live up to the responsibilities it would be given under the proposed agreement, we doubt it has the necessary support to do so.

Past regulatory failures also call into question the ability of FWC to handle any new responsibilities, even with adequate support. There is a history of failing to act in a timely manner with the necessary action to prevent species on the state list from seeing additional declines. For example, between 1991 and 2007 FWC allowed the entombment of an estimated 94,000 gopher tortoises, resulting in the species declining enough to warrant a state listing as "threatened," whereas it has previously been one of simply "special concern." Even with this history, earlier this year FWC adopted changes to gopher tortoise permitting guidelines that reduced monitoring requirements with the objective of reducing development costs.

FWC regulations also limit the scope of the agency to the conservation of individual animals, nests, burrows, etc. and do not encompass the broader habitat conditions needed to support the conservation of listed species. The agency is commonly referred to as a non-regulatory and commenting agency that does not have the authority to regulate the uses of habitat. The proposed agreement is incapable of superseding existing state regulations and would diminish species conservation efforts, not add to them.

Before entering into the proposed agreement with FWC the FWS should consider to what degree FWC will be able to meet the terms of the agreement given current budgetary realities and past behavior. A failure to deliver on the part of FWC, for whatever reason, will encourage conflict, not cooperation like the agreement intends.

How Would Permits Be Revoked?

The ESA gives FWS the ability to revoke permits but the draft proposal and EA do not identify how, if at all, this authority would be given to FWC. Identifying the process through which a revocation would be initiated and adjudicated is crucial to making sure any agreement covers the whole permitting process and should be addressed by FWS and FWC before any agreement is entered into.

How Would The Public Input Be Solicited, Collected, Analyzed and Responded To?

The fish and wildlife of Florida are public trust resources, belonging to the people of Florida and, in the case of listed species, all Americans. The ESA requires that FWS publish notices of permit applications in the Federal Register and invite public comment. With permitting authority going to FWC under the

proposed agreement where would notices of permit applications be published and how, if at all would input from the people of Florida be solicited, collected, analyzed and responded to? Like we noted above, the Florida legislature has eliminated FWC's budget for public meetings and engagement. Identifying the process for public input and determining whether or not it is adequately supported by the state before entering into the proposed agreement is essential to fulfilling the public trust responsibilities of both agencies and should be presented to the public before any agreement is entered into.

How Could Permits Issued By FWC Be Challenged?

The ESA allows for FWS permitting decisions to be challenged by the public. The language of the draft proposal and EA does not identify how permitting decisions by FWC could be similarly challenged. Challenges, while often unpleasant, are also necessary to maintain the public trust doctrine in fish and wildlife conservation and the agencies should identify how they will be entertained before entering into the proposed agreement.

Preparation Of An EIS

To answer these and other important questions the FWS must prepare an Environmental Impact Statement under the National Environmental Policy Act. We also feel an EIS is warranted because of the unique, novel and precedent setting nature of the proposal and the potential for cumulative impacts on ESA listed species.

Thank you for taking these questions and comments into consideration. We look forward to continuing to work with both FWS and FWC on this and other matters impacting fish and wildlife conservation in Florida and around the country.

Sincerely,

Catherine E. Semcer
Senior Washington, DC Representative