



September 9, 2020

Roxanna Hinzman, Field Supervisor
US Fish and Wildlife Service
1339 20th Street
Vero Beach, FL 32960
roxanna_hinzman@fws.gov

Re: Impact of State Assumption of Clean Water Act Section 404 Permitting Responsibility on
Incidental Take Permits Under Eastern Collier Multiple Species Habitat Conservation Plan

SENT VIA E-MAIL

Dear Field Supervisor Hinzman,

Sierra Club, Conservancy of Southwest Florida, and the Center for Biological Diversity (collectively “Conservation Organizations”) write to raise our concerns regarding whether and how the Fish and Wildlife Service (“FWS”) will account for the impacts of state assumption of Clean Water Act section 404 permitting authority on implementation of the Eastern Collier Multiple Species Habitat Conservation Plan (hereafter “Eastern Collier HCP”), and associated Incidental Take Permits (ITPs). In a letter dated September 4, 2020, EPA announced that it had received a complete application from Florida regarding state assumption of Clean Water Act 404 permitting authority, and would make a decision to approve or disapprove of the program by December 17, 2020.¹ As detailed below, because the proposed Eastern Collier HCP deferred integral decisions to the 404 permitting stage, and the associated ESA consultations, FWS must address how state assumption of 404 permitting authority exacerbates the problems with the HCP’s reliance on those future processes. Approving the HCP and issuing ITPs without analyzing and accounting for this issue would be arbitrary and capricious, and violate both the Administrative Procedure Act and ESA.

¹ See Attachment 1 – Letter from Jeanne M. Gettle, Director Water Division, EPA Region 4.

As Conservation Organizations stated in comments on the proposed Eastern Collier HCP, the proposed HCP lacked any mechanism to ensure that the total acreage promised for preservation actually will be preserved, even if all of the development under the Covered Activities proceeds. The HCP entirely defers determinations about the areal extent and exact location of habitat in the Preserve Area that will be subject to easements/deed restrictions to compensate for projects in the Covered Activities Area to future permitting decisions, seemingly the Clean Water Act section 404 permitting, and associated consultation with FWS. For most of the Covered Species, the Applicants provide no clear commitments to specific ratios for mitigation. Even for Florida panthers, the HCP uses the Panther Habitat Assessment Methodology to show that enough habitat is theoretically available within the Preserve Area, but does not actually commit to providing compensation at least in accordance with that Methodology. Further, the HCP asserts that the Preserve Area contains more Panther Habit Units (PHUs) than necessary to compensate for losses in the Covered Area, which appears to mean that there would be lands within the Preserve Area that never become subject to deed restrictions or easements. That FWS subsequently altered the PHU requirements to reduce the ratios means that it is even more likely now that not all of the lands within the Preserve Area will be subject to deed restrictions or easements, even if all the Covered Activities are developed as proposed.

Since the premise of this HCP relies entirely on maintaining the contiguity of the lands in the Preserve Area, by ensuring that the *entire* Preserve Area is indeed “preserved,” it would be unlawful to conclude that such contiguity will be maintained when the reality is that lands within the Preserve Area will never become subject to permanent protections, and would remain vulnerable to sale or degradation. The HCP provided no apparent mechanism for ensuring that the location of habitat preservation would ensure maintenance of contiguity. Even if there had been a commitment to a specific mitigation-ratio, such a ratio would not in itself assure that contiguity would be maintained.

In sum, the proposed HCP left these critically important determinations to be made piecemeal during the CWA 404 permitting process for each project, evidently by FWS during the associated section 7 ESA consultation process for the 404 permits.

Now, deepening the problems created by this deficiency in the proposed HCP, it has become reasonably foreseeable that those project-specific determinations associated with the

CWA 404 permitting may occur in the absence of project-specific section 7 consultation with FWS. The Florida Department of Environmental Protection (FDEP) has made clear its intent that the Environmental Protection Agency (EPA) conduct a *one-time* ESA section 7(a)(2) consultation regarding Florida DEP's assumption of 404 permitting authority, and that it believes no further consultations with the Services will be required thereafter.² This is particularly concerning as Florida Fish and Wildlife Conservation Commission staff have raised concerns that FDEP lacks resources to conduct any analysis of wildlife impacts itself.³ It is also concerning because FDEP has reassured the ECPO that upon FDEP assuming 404 permitting authority, FDEP's analysis would be limited to checking that the project complies with the HCP, and seeking a concurrence from FWS regarding that compliance.⁴ FDEP Deputy Secretary John Truitt stated to ECPO representatives that:

We would simply review the project and its consistency with the HCP, get a concurrence letter from FWS (stating they agreed the project was consistent with the HCP) and issue the permit with a condition similar to “an applicant is responsible for complying with any other federal or state authorizations” or something similar to reference the HCP.⁵

Problematically, because the proposed Eastern Collier HCP itself lacks any meaningful mechanisms, standards, or requirements to ensure that the contiguity of the Preserve Area will actually be maintained, and instead defers those important decisions to the 404 permitting stage, “consistency” with the HCP itself cannot rationally ensure that contiguity will be maintained. And a concurrence that the project is “consistent with” the HCP similarly would be meaningless. FWS cannot just ignore the problem created if those future consultations, depended on in the HCP, do not occur.

Consequently, it is apparent that FWS must assess and address this problem in its analysis of the HCP, and in the Biological Opinion and Incidental Take Permit terms. The failure

² See Attachment 2 – Letters from FDEP to EPA. These letters were obtained from EPA Docket No. EPA-HQ-OW-OW-2020-0008 on regulations.gov.

³ See Attachment 3 – E-mail from FFWCC. This e-mail was obtained from the Florida Fish and Wildlife Conservation Commission as a Microsoft Outlook .pst file via a Florida Records Act request submitted by the Sierra Club.

⁴ See Attachment 4 – FDEP e-mail to ECPO members. This e-mail was obtained from FDEP as a HTML link via a Florida Records Act by the Conservancy of Southwest Florida.

⁵ See Attachment 4 – FDEP e-mail to ECPO members.

to do so will render any decision to issue the permits arbitrary and capricious, and in violation of the ESA's requirements under section 7 and section 10.

If you have questions or would like to discuss this matter, please contact Sierra Club Staff Attorney Karimah Schoenhut.

Sincerely,



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/s/ Amber Crooks
Amber Crooks
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/s/ Jaclyn Lopez
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Attachment 1

Letter from Jeaneanne M. Gettle, Director Water Division, EPA Region 4.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET, SW
ATLANTA, GEORGIA 30303-3104
September 4, 2020

To: Interested Parties

Subject: Notice of the State of Florida's Request to Assume Administration of a Clean Water Act Section 404 Program

Dear Sir or Madam:

The U.S. Environmental Protection Agency is hereby providing notice that on August 20, 2020, we received a complete package from the State of Florida requesting to assume administration of a Clean Water Act (CWA) Section 404 program. The CWA established the Section 404 program, under which the U.S. Army Corps of Engineers (Corps) may issue permits for the discharge of dredged or fill material into "waters of the United States" as identified in the CWA. Section 404(g)(1) of the CWA provides states and tribes the option of submitting to the EPA a request to assume administration of a CWA Section 404 program in certain waters within state or tribal jurisdiction.

To assume a Section 404 program, a state or tribe must have authority to administer a permit program that regulates discharges of dredged or fill material consistent within the requirements of the CWA and its implementing regulations at 40 C.F.R. Part 233 and submit to the EPA a request to administer the program. In addition, a state or tribe's program must: (1) be at least as stringent as required by the CWA and its implementing regulations; (2) provide for sufficient public participation; (3) ensure compliance with the *Section 404(b)(1) Guidelines* (40 C.F.R. Part 230), which provide environmental criteria for permit decisions; and (4) have adequate enforcement authority.

Any state that seeks to administer a Section 404 program under 40 C.F.R. Part 233 shall submit to the EPA Regional Administrator: (a) a letter from the Governor of the state requesting program approval; (b) a complete program description, as set forth in 40 C.F.R. § 233.11; (c) an Attorney General's statement, or a statement from the attorney for those state or interstate agencies which have independent legal counsel, as set forth in 40 C.F.R. § 233.12; (d) a Memorandum of Agreement with the EPA Regional Administrator, as set forth in 40 C.F.R. § 233.13; (e) a Memorandum of Agreement with the Secretary of the Army, as set forth in 40 C.F.R. § 233.14 and; (f) copies of all applicable state statutes and regulations, including those governing applicable state administrative procedures.

The EPA's receipt of the request by the State of Florida triggered the EPA's statutory review of the submission. The EPA has reviewed Florida's submission and consistent with 40 C.F.R. § 233.15 has determined that it is a complete request that meets the submittal requirements of 40 C.F.R. § 233.10. This program submission completeness determination does not constitute an evaluation of the merits of the submission. The EPA intends to approve or disapprove the program on or before December 17, 2020.

The EPA Region 4 Administrator, Mary S. Walker signed a notice regarding this matter on September 2, 2020 and the EPA is submitting this notice for publication in the *Federal Register* (FR). The notice is anticipated to be published in the FR in the near future and will: (1) solicit public review and comment on the State program during a 45-day period; (2) announce two public hearings that will be held during the comment period and; (3) solicit public review and comment regarding consultation under the National Historic Preservation Act. The pre-publication notice is available for review and may be accessed at: <https://www.epa.gov/aboutepa/about-epa-region-4-southeast>.

The State of Florida's program submission will be available through the EPA's docket (Docket No. EPA-HQ-OW-2018-0640) at www.regulations.gov upon publication of this notice in the FR. In the meantime, program request documents posted by the Florida Department of Environmental Protection (FDEP) may be accessed at: <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/404-assumption>. The State of Florida's program submission includes the following: a letter from Florida Governor Ron DeSantis requesting program approval; a complete program description; Florida Department of Environmental Protection General Counsel Justin G. Wolfe's statement; a Memorandum of Agreement with the EPA Region 4 Administrator; a Memorandum of Agreement with the Secretary of the Army; and copies of all applicable Florida statutes and regulations, including those governing applicable Florida administrative procedures.

Due to COVID-19, the EPA anticipates holding virtual public hearings. The dates and times of the virtual public hearings will be published in the FR and will be held not less than 30 days after the date of publication. Registration for the public hearings will be available upon the date of publication in the FR at: <https://www.epa.gov/aboutepa/about-epa-region-4-southeast>.

In accordance with 36 C.F.R. § 800.2(d), the EPA is providing information and seeking comment on the EPA's potential approval of Florida's request to assume a CWA Section 404 program and any potential effects of such approval on historic properties. The National Historic Preservation Act of 1966, as amended (NHPA), establishes historic preservation as a federal agency policy and provides for the identification and protection of historic properties and resources. Section 106 of the NHPA requires federal agencies to take into account the effects of their undertakings on historic properties that are listed or eligible for listing on the National Register of Historic Places and to provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment with regard to such undertakings. The EPA has determined that approval of a state program under these provisions is an undertaking pursuant to 36 C.F.R. § 800.16(y), and therefore, in accordance with Section 106 of the NHPA and the ACHP's implementing regulations at 36 C.F.R. part 800, the EPA has initiated consultation regarding the undertaking.

The EPA invites the public to provide comments on the EPA's decision to approve or disapprove the State of Florida's request to assume administration of a CWA Section 404 program, and on the EPA's undertaking under the NHPA and any potential effects on historic properties. Comments must be received on or before forty-five (45) days after the date of publication in the FR. The FR notice will provide instructions for submitting comments. If you wish to submit any comments prior to the publication of the FR notice, you may submit them via email to 404Assumption-FL@epa.gov, or via U.S. Post to:

U.S. EPA Region 4
Water Division, OWSPB
c/o Mr. Kelly Laycock
61 Forsyth St SW
Atlanta, Georgia 30303

If you have any questions regarding this matter, please contact Mr. Kelly Laycock at (404) 562-9262 or 404Assumption-FL@epa.gov.

Sincerely,

Jeaneanne M. Gettle, Director
Water Division

Attachment 2

Letters from FDEP to EPA

From: Valenstein, Noah <Noah.Valenstein@dep.state.fl.us>
Sent: Wednesday, July 17, 2019 4:10 PM
To: Leopold, Matt (OGC) <Leopold.Matt@epa.gov>; Ross, David P <ross.davidp@epa.gov>
Cc: Walker, Mary <walker.mary@epa.gov>; Wolfe, Justin G. <Justin.G.Wolfe@dep.state.fl.us>;
Wildeman, Anna <wildeman.anna@epa.gov>
Subject: 404 ASSUMPTION

Dear Mr. Leopold and Mr. Ross:

The Florida Department of Environmental Protection greatly appreciates the tremendous efforts by the U.S. Environmental Protection Agency over the last two years to facilitate state assumption under Section 404 of the Clean Water Act. As you both know, Section 404 assumption can streamline permitting processes, reduce costs and duplication of effort by state and federal authorities, and better align the 404 program with other delegated programs. The Trump Administration should be applauded for striving – in the spirit of cooperative federalism and environmental protection – to make 404 assumption a reality for more states. For our part, FDEP is continuing to move forward with efforts to apply for and obtain 404 assumption, which we hope to complete at the earliest possible opportunity. We are especially appreciative of the Administration's recent efforts to clarify the "assumable waters" issue. Looking ahead, FDEP remains committed to working closely with EPA, the U.S. Army Corps of Engineers, and other stakeholders on the state and federal rulemaking processes necessary to make 404 assumption a reality in Florida.

Though substantial progress in our state 404 application process has occurred, a significant barrier to effective Section 404 assumption remains. Specifically, where the Corps administers the 404 program, Section 7 of the Endangered Species Act embodies a streamlined and efficient process to ensure protection of endangered species, which may not be available when a state administers the 404 program. It is our understanding that other states have grappled with this ESA-based barrier to 404 assumption. With this concern in mind, FDEP recently retained outside counsel at Latham & Watkins and Baker Botts LLP to help FDEP evaluate the range of options under existing law for addressing and potentially resolving this concern. Based on that review, and as outlined in the enclosed white paper and summary paper, FDEP believes that EPA can and should engage in a one- time ESA Section 7 programmatic consultation with the Services in connection with the *initial review* of a state's 404 assumption application. This approach, which would bring state 404 permits within Section 7's exemption from take liability, is both lawful and good policy. Because of the unique statutory text and legislative history found in Section 404, as outlined in our white paper, this approach will not implicate any other EPA authority.

Obtaining 404 assumption for the State of Florida is one of my highest priorities for FDEP at this time. To that end, I would respectfully request an opportunity to meet with you both in person in Washington DC at your next earliest availability. I have asked Justin Wolfe, FDEP's General Counsel, to help arrange that meeting.

Thank you for your time and attention to this matter, and for your service to our nation at EPA.

Sincerely,

Noah Valenstein
Secretary, Florida DEP

EPA’S AUTHORITY TO RESOLVE THE “INCIDENTAL TAKE” BARRIER TO STATE 404 ASSUMPTION

The Administration should be applauded for striving to make Section 404 assumption a reality for more states. A significant remaining barrier to 404 assumption, which EPA can and should resolve, arises from the “incidental take” provisions of the Endangered Species Act (ESA). Unique among EPA delegation statutes, Clean Water Act (CWA) Section 404 gives EPA discretion to consider the protection of listed species – and hence, engage in ESA Section 7 consultation – when initially deciding whether to approve state assumption. Consultation here allows for take coverage for state permittees and greatly improves the utility of 404 assumptions especially in states with many listed species. This approach is supported by statutory text, legislative history, and policy, and will not adversely impact EPA obligations under other delegation statutes.

Why is “incidental take” coverage a serious obstacle to 404 assumption?

Where the U.S. Army Corps of Engineers administers the 404 program, a streamlined process under ESA Section 7 allows for incidental take of listed species. However, thus far, where a state administers the 404 program, permittees must avoid entirely adverse impacts to listed species or otherwise seek an Incidental Take Permit from the USFWS and/or NMFS (“Services”) under ESA Section 10. This Section 10 process, with the requirement to prepare a Habitat Conservation Plan, can take years to complete and usually at much higher cost.

Why is this especially critical to Florida’s plans for 404 assumption?

This ESA-concern is a serious hurdle to establishing an effective and efficient 404 program in Florida, where 135 ESA-listed species occur (the third most of any state). It is estimated that approximately ten percent of 404 permits issued in Florida require some form of incidental take coverage. This includes many large real estate, mining, agriculture, and utility industry projects with significant economic benefits to Florida and its citizens. Thus, unless a solution is found for this issue, large-scale projects in Florida will almost always require extensive federal permitting under the ESA notwithstanding 404 assumption. Other states have also begun to raise this ESA-related hurdle to assumption.¹

What is the best solution for addressing the “incidental take” obstacle to 404 assumption?

EPA should engage in a *one-time* ESA Section 7 programmatic consultation with the Services in connection with the *initial* review of a state’s 404 assumption application. This would allow the Services to issue a programmatic Biological Opinion (“BiOp”) and a programmatic incidental take statement (“ITS”). The BiOp with ITS would identify procedural requirements for state 404 permits. These would support the Services’ determination that assumption would not result in jeopardy to any listed species and would bring that state’s 404 permits within Section 7’s exemption from take liability. This streamlined permitting process would reduce costs and duplication of effort by state and federal authorities.

As a general legal matter, when is ESA Section 7 triggered?

ESA consultation is triggered when an “agency has discretion in administering the [statute] to consider the protection of endangered or threatened species as an end.”² EPA lacks this discretion when approving state delegations under CWA Section 402.³ No court has ruled if 404 assumption triggers consultation.

¹ See Letter from Western Governors Association to David Ross, et al. (Oct. 10, 2018) (“[ESA] was identified as an area of potential complication in states’ assumption of Section 404 permitting authority...”).

² *Florida Key Dey v. Paulison*, 522 F.3d 1133, 1141 (11th Cir. 2008) (interpreting 16 U.S.C. 1536(a)(2)).

³ *NAHB v. Defenders of Wildlife*, 551 U.S. 644, 671 (2007) (“Nothing in [402(b)] authorizes the EPA to consider the protection of [listed] species as an end in itself when evaluating a [402] transfer application”).

Does the statutory text support ESA consultation when initially approving state 404 assumption?

Yes. Unlike Section 402, the text of Section 404 gives EPA discretion to consider protection of listed species. In fact, Section 404(h)(1) requires EPA, in deciding whether to approve state assumption, to determine whether the state has authority “[t]o issue permits which ... assure compliance with ... the [Section 404(b)(1)] guidelines...” In turn, the Section 404(b)(1) guidelines expressly prohibit state permits that “jeopardize the continued existence” of listed species or are likely to result in “the destruction or adverse modification of [critical] habitat.” 40 C.F.R. § 230.10(b)(3). And, under Section 404(g)-(h), EPA must share assumption applications with USFWS and “tak[e] into account” any USFWS comments.

Is this view consistent with the legislative history of Section 404?

Yes. In particular, the Senate Report accompanying the 1977 Amendments shows that the drafters understood these provisions to “preserve[] the Administrator’s *discretion* in addressing the concerns of [USFWS], yet affords them reasonable and early participation which can both strengthen the State program and avoid delays in implementation...” S. Rep. 95-370, at 78 (1977) (emphasis added).

Did EPA originally agree that approval of state 404 assumption triggered Section 7?

Yes. EPA engaged in Section 7 consultation for New Jersey’s assumption of the 404 program. After informal consultation and based on an agreement between EPA, the USFWS, and New Jersey, USFWS concurred that New Jersey’s assumption of the 404 program was not likely to adversely affect federally-listed species (and thus, USFWS did not issue a programmatic BiOp or ITS).

Was the “Silva Letter” – issued by the Obama Administration in 2010 – correct?

No. The brief letter signed by former Associate Administrator Silva in December 2010 resulted from a rushed review, ignored the actual text and legislative history of Section 404, and misapplied Supreme Court precedent. The Silva Letter had the effect – whether intended or not – of creating another serious hurdle to 404 assumption especially in states with many listed species.

How would consultation work in actual practice?

EPA would conduct a *programmatic* consultation with the Services as to its threshold decision whether to approve assumption. The Services’ regulations—including the existing rules and recently proposed changes—allow for programmatic consultation in these contexts. In response, the Services could issue a BiOp addressing whether assumption would jeopardize listed species, along with an ITS covering future state 404 permits. To help facilitate the process, the state agency could submit a Biological Assessment. 50 C.F.R. § 402.08. Moreover, EPA and any state may agree to extend the timeframe for 404 assumption review, which can be used to accommodate Section 7 consultation. *See* 50 C.F.R. § 402.14(e). A recent example – EPA’s Cooling Water Intake Structure Rule – shows how programmatic consultation (leading to a BiOp with ITS) has been used in a context with similar dynamics.

How long would it take EPA to complete consultation on a state assumption application?

With active support by the state and EPA, programmatic consultation and final approval of 404 assumption could be completed in less than a year.

Will this approach adversely impact other EPA statutory authorities involving state delegations?

No. Unlike Section 404, the approval criteria in the following state delegation/primacy statutes do not give EPA discretion to consider impacts to listed species at the time of approval: CAA Sections 111 and 112, SDWA Sections 1413 (PWS state primacy) and 1425 (UIC state primacy), RCRA Section 3006(b), and FIFRA Section 26. Nor do these statutes require EPA to engage with the Services.

****The enclosed white paper provides a more comprehensive legal analysis concerning EPA’s authority to undertake this approach.***



FLORIDA DEPARTMENT OF Environmental Protection

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3900 Commonwealth Boulevard
Tallahassee, FL 32399

Ron DeSantis
Governor

Jeanette Nuñez
Lt. Governor

Noah Valenstein
Secretary

June 25, 2020

SUBMITTED VIA E-MAIL TO: 404gESAconsultation@epa.gov

Docket ID No. EPA-HQ-OW-OW-2020-0008

The Honorable David P. Ross
Assistant Administrator, Office of Water
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue NW
Washington DC 20460

**Re: Request for Comment on Whether EPA's Approval of a Clean Water Act
Section 404 Program Is Non-Discretionary for Purposes of Endangered
Species Act Section 7 Consultation (published at 85 Fed. Reg. 30,953)**

Dear Assistant Administrator Ross:

On behalf of the Florida Department of Environmental Protection, I write in strong support of reconsideration of whether EPA should engage in consultation under Section 7 of the Endangered Species Act (ESA) as part of EPA's review of a state assumption application under Section 404 of the Clean Water Act (CWA). Last year, as part of discussions with EPA about Florida's application for Section 404 Assumption, FDEP provided a White Paper explaining why Section 7 consultation is applicable to EPA's review of FDEP's 404 assumption application. For the reasons uniquely applicable to State 404 assumption as set forth in the FDEP White Paper and the Federal Register notice, we believe EPA should determine that ESA Section 7 consultation is triggered when determining whether to grant a state's application for assumption. As part of that reconsideration, FDEP also recommends that EPA clarify that this analysis does not require Section 7 consultation for a variety of other permitting contexts such as nationwide permits under Section 404(e).

Update on Florida's 404 Assumption Process

FDEP received legislative approval to pursue assumption of the Section 404 permitting program in 2018. During the last two years, FDEP has collaborated with multiple state and federal agencies and stakeholders including Tribes, environmental organizations, and prospective permittees in preparing a program package FDEP intends to submit to EPA this summer. FDEP expects all regulations for the implementation of the program to be adopted under the state rulemaking process by July 3, 2020. The biological assessment, which FDEP is preparing on

behalf of EPA for purposes of obtaining a programmatic consultation under Section 7 of the Endangered Species Act, is likewise in its final stages and expected to be completed by early July.

Reasons to Support Reconsideration

State assumption of the Section 404 program is an important part of the CWA's cooperative federalism structure. Assumption can streamline permitting processes, reduce duplication of effort and overall expenditures by state and federal authorities, and better align the Section 404 program with other CWA programs for which states have authority. Virtually all states have delegated authority to administer the National Pollutant Discharge Elimination System permit program under CWA Section 402, as well as permitting programs under the Clean Air Act and other major environmental statutes. However, only two states have assumed authority for the CWA Section 404 program: Michigan in 1984 and New Jersey in 1994.

Recently, states have expressed renewed interest in the benefits of state assumption under Section 404. In response, the federal government has undertaken a review of various policies impacting state 404 assumption. As one part of that effort, EPA is reviewing whether to integrate ESA Section 7 consultation into the assumption application process, a step that would further help to streamline permitting requirements in a manner consistent with the ESA and CWA.

Under this approach, EPA would engage in a one-time ESA Section 7 programmatic consultation with the Services in connection with the initial review of a state's 404 assumption application. This would allow the Services to issue a programmatic Biological Opinion ("BiOp") and a programmatic incidental take statement ("ITS"). The BiOp with ITS would identify procedural requirements for state 404 permits. These would support the Services' determination that assumption would not result in jeopardy to any listed species and would bring that state's 404 permits within Section 7's exemption from take liability.

This streamlined permitting process, which would reduce costs and duplication of effort by state and federal authorities while also ensuring protection of species, is supported by statutory text, legislative history, and policy, and will not adversely impact EPA obligations under other delegation statutes.

Implications Related to Nationwide Permits

Importantly, because of the unique considerations arising under Section 404(g)-(h), section 7 consultation for State 404 Assumption does not also require consultation in a variety of other contexts such as nationwide permits. Those other contexts are quite different than state assumption determinations in ways that are directly relevant to evaluating whether Section 7 consultation is required. FDEP urges EPA to clarify this important distinction in its ultimate decision that results from this reconsideration.

By way of background, on April 15, 2020, a federal district court in Montana ruled that the U.S. Army Corps of Engineers ("Corps") violated the ESA by failing to engage in Section 7 formal consultation when it reissued Nationwide Permit 12 ("NWP 12"). Originally issued in 1977 and reissued in 2017, NWP 12 is a Corps' permit that authorizes discharges of dredged or fill

material into waters of the United States for construction, maintenance, repair, and removal of oil and gas pipelines, transmission lines, and associated facilities. In response to a lawsuit challenging a major pipeline project utilizing NWP 12, the district court ruled that the Corps failed to complete consultation under ESA Section 7(a)(2) before reissuing NWP 12. The court vacated (and blocked the use of) NWP 12 pending completion of Section 7 consultation. This decision is highly controversial and subject to ongoing litigation and appeals.

Section 7 consultation for State 404 Assumption does not undermine the Corps' position that the reissuance of NWP 12 does not require Section 7 consultation. In fact, the two positions are consistent in that they both maintain that Section 7 consultation is only necessary under the ESA when a federal action may affect listed species or critical habitat. In the case of State 404 Assumption, listed species or critical habitat may be affected depending on the state's particular application and program as well as the listed species and critical habitat located within the state that may be affected by state-issued 404 permits. For example, when New Jersey applied for 404 assumption, EPA engaged in informal Section 7 consultation and concluded that the assumption by New Jersey of the 404 program would not adversely affect listed species or critical habitat in that context. Likewise, in the case of nationwide permits, endangered species may or may not be affected depending on whether the nationwide permittees avoid impacting endangered species. NWP 12, in particular, covers minor wetlands impacts (less than ½ acre impacts) and does not authorize any activity that "might affect listed species or critical habitat" unless the Corps makes a "no effect" determination or completes Section 7 consultation on a site-specific basis.¹ The threshold question in both situations is whether the agency action affects endangered species.

Notwithstanding the fact that the issuance of nationwide permits and State 404 Assumptions share identical threshold questions, there are several fundamental differences between the two actions. For example, nationwide permits typically only cover certain categories of activities with "minimal" adverse environmental effects, whereas State 404 Programs take over permitting with respect to any and all activities subject to Section 404 of the CWA in the State. Likewise, for NWPs, the Corps retains full control of the permit program. The conditions in NWP 12 provide for Corps' control of consultation wherever warranted. In fact, the Corps has stated that it has engaged in thousands of Section 7 consultations for specific activities under nationwide permits. For State 404 Programs, the federal agencies transfer authority to the State for the entire permit program for all "assumable" waters. Though subject to EPA oversight, the State issues the permits and decides how species issues are addressed. Under FDEP's proposed approach, the biological opinion issued by the U.S. Fish & Wildlife Service to EPA in conjunction with the 404 Assumption determination would establish the terms and conditions to ensure no jeopardy/adverse modification when the State issues 404 permits.

¹ It is accepted that Army Corps permits of all kinds – individual, general, NWPs, etc. – may trigger formal consultation depending upon the circumstances (i.e., whenever an activity is likely to adversely affect listed species/habitat), but the Corps has chosen to impose conditions on NWP 12 (and certain other nationwide permits) to avoid impacts to species unless formal consultation is used.

EPA's reconsideration of its legal position in the "Silvia Memo" has no bearing on the factual question of whether NWP 12 (or any other nationwide permit) *may affect* endangered species. The Silva Memo, which EPA is currently reconsidering, evaluates the legal issue of whether Section 7 consultation is triggered for state delegation statutes in light of the Supreme Court's decision in *NAHB v. Defenders of Wildlife*, 551 U.S. 644, 671 (2007). That legal question is simply not applicable to whether the issuance of nationwide permits may affect endangered species. Delegation/assumption statutes – such as Section 402 of the Clean Water Act for NPDES delegation and Section 404(g)-(h) for Section 404 State Assumption – provide that EPA "shall" approve delegation/assumption based on the listed criteria in the statute. In light of this "shall" language, the Supreme Court has made clear that additional factors – like Section 7 consultation – are not applicable to delegation statutes unless the delegation statute itself gives the agency the discretion to consider impacts to species as an end in itself. Of course, for other actions like the issuance of nationwide permits (for which Congress has not mandated issuance based on an exclusive list of factors or criteria), the *NAHB* analysis is not applicable.

In *NAHB*, the Supreme Court found that Section 402's delegation criteria did not encompass species impacts and, thus, did not trigger ESA consultation. The FDEP White Paper explains why Section 404(g)-(h), which requires EPA to make an assumption determination, gives EPA discretion to consider impacts to species, and thus, triggers Section 7 consultation. This threshold legal question is not applicable to whether the issuance of nationwide permits may affect endangered species. Section 404(e), which is the statute authorizing the issuance of nationwide permits, states that the Army Corps "may" issue nationwide permits. Unlike Section 402's delegation criteria or Section 404(h)'s assumption criteria, there is clearly no obligation in Section 404(e) to issue NWPs or to limit the issuance decision to certain required criteria. As previously stated, the Army Corps' issuance of all permits, including nationwide permit, may require formal consultation *if the issuance of that permit is likely to adversely affect listed species*.²

This understanding is reinforced by other recent federal government positions. On June 16, 2020, the Solicitor General (SG) filed an application with the U.S. Supreme Court to stay the NWP 12 injunction imposed by the federal district court in Montana. Explaining why the district court incorrectly applied the ESA's requirements, the Solicitor General stated: "The Corps reasonably determined that merely re-issuing NWP 12 would have no effect on listed species or critical habitat -- and therefore did not trigger any consultation requirement under the ESA -- because the regulatory scheme *and conditions in NWP 12 ensure that any necessary consultation occurs on an activity-specific basis*" (page 4, emphasis added). He further explained that the "Corps reasonably determined that, in light of the regulatory scheme and permitting conditions, the mere re-issuance of NWP 12 itself would have 'no effect' on protected species or critical habitat"

² Nor is the FDEP White Paper inconsistent with *National Wildlife Federation v. Dept. of Transportation*, No. 19-1609/10 (6th Cir. June 5, 2020), where the Sixth Circuit recently held that Section 7 consultation is not triggered by the U.S. Coast Guard's approval of spill plans under the Clean Water Act. In the relevant section of the CWA, 33 USC 1321(j)(5)(D), the approval criteria does not provide for the protection of listed species as an end in itself. In fact, unlike the criteria in Section 404(h), there is no mention whatsoever of species in the criteria for spill plan approvals.

(page 29) and that, “in doing so, the Corps relied principally on General Condition 18,” which allows the Corps to determine “whether consultation is in fact required on an activity-specific basis” (page 29). Additionally, the SG explains “[p]rogrammatic consultation about an agency action may be appropriate when a proposed agency action provides a framework for future proposed actions,” (page 30, citing 50 C.F.R. 402.02), but also explains that the ESA “does not require consultation for any framework programmatic action *that has no effect on listed species or critical habitat*” (page 30, emphasis added), and that the “Corps made such a ‘no effect’ determination here” (page 30). In setting forth these points, the Solicitor General saw no need to cite or discuss the *NAHB* case or other issues uniquely applicable to EPA’s approval of state delegation/assumption programs. The *NAHB* analysis at issue in the Silva Memo reconsideration is simply not applicable to the very different ESA consultation questions that arise in the NWP 12 litigation.

Given the importance of these issues, FDEP recommends that EPA address the legal reasons distinguishing Section 7 consultation for the unique circumstances arising under state 404 assumption from consultation for the issuance of nationwide permits.

In closing, Florida greatly appreciates EPA’s strong leadership on cooperative federalism, environmental protection, and the rule of law. We strongly urge EPA, as part of its ongoing review of FDEP’s application for Section 404 assumption, to complete the reconsideration of the “Silva Memo” and conclude that consultation for this purpose is lawful and appropriate.

FDEP stands ready to work with EPA to complete the assumption process in a timely manner in full accordance with law.

Thank you for your kind consideration of these comments.

Sincerely,

A handwritten signature in blue ink, consisting of a stylized 'N' followed by a horizontal line and a small dot.

Noah Valenstein
Secretary

Attachment 3

E-mail from FFWCC

From: Goff, Jennifer <jennifer.goff@MyFWC.com>
Sent: Wednesday, January 15, 2020 10:22 AM
To: Tucker, Melissa
Subject: FW: Requesting input on draft species list for Florida 404 assumption effort
Attachments: 11192019_Potential species list for Florida 404 Assumption_DRAFT.docx; Retained Waters List 8-23-19.docx

Follow Up Flag: Follow up
Flag Status: Flagged

FYI

Jennifer Goff
Conservation Planning Services
Florida Fish and Wildlife Conservation Commission
850-617-9548

From: Gregg, Lisa <lisa.gregg@MyFWC.com>
Sent: Tuesday, January 14, 2020 11:26 AM
To: Goff, Jennifer <jennifer.goff@MyFWC.com>
Cc: Hight, Jason <Jason.Hight@MyFWC.com>; Hoehn, Ted <ted.hoehn@MyFWC.com>; Guyas, Martha <martha.guyas@MyFWC.com>; Fitzwater, Jennifer <Jennifer.Fitzwater@MyFWC.com>
Subject: RE: Requesting input on draft species list for Florida 404 assumption effort

For what it is worth and since you asked - this is an absolutely horrible idea. FDEP permit processors can't keep up with their current workload now and appropriately consider the impacts of proposed actions to fish and wildlife resources even if you hand it to them on a platter, much less if you added to their workload. As a general rule, DEP has never considered federal ESA listing for their permitting processes. This would be a stark wake up call for them having to do both ESA and EFH consultations (as USACE is required to do) and quite frankly, it is way beyond their capabilities to do.

Thanks,
Lisa

From: Goff, Jennifer <jennifer.goff@MyFWC.com>
Sent: Tuesday, January 14, 2020 10:41 AM
To: Gregg, Lisa <lisa.gregg@MyFWC.com>
Cc: Hight, Jason <Jason.Hight@MyFWC.com>; Hoehn, Ted <ted.hoehn@MyFWC.com>; Guyas, Martha <martha.guyas@MyFWC.com>; Fitzwater, Jennifer <Jennifer.Fitzwater@MyFWC.com>
Subject: RE: Requesting input on draft species list for Florida 404 assumption effort

I met with Thomas and Jennifer on this yesterday. We will be talking to Larry on Thursday. Thank you for sending this along. I will contact Heather. If you have any input or concerns, please let me know.

Thanks, Lisa.

Jennifer Goff
Conservation Planning Services
Florida Fish and Wildlife Conservation Commission

From: Gregg, Lisa <lisa.gregg@MyFWC.com>
Sent: Tuesday, January 14, 2020 10:36 AM
To: Goff, Jennifer <jennifer.goff@MyFWC.com>
Cc: Hight, Jason <Jason.Hight@MyFWC.com>; Hoehn, Ted <ted.hoehn@MyFWC.com>; Guyas, Martha <martha.guyas@MyFWC.com>
Subject: FW: Requesting input on draft species list for Florida 404 assumption effort

Jennifer:

To what extent are we involved in this process? While this does not appear to affect how marine areas and most marine species are permitted, it will affect Gulf sturgeon, saltmarsh topminnow and smalltooth sawfish.

Martha – in a nutshell, DEP is looking to assume USACE permitting for these areas/species impacts.

Thank you,
Lisa

----- Forwarded Message -----

Subject: Requesting input on draft species list for Florida 404 assumption effort
Date: Fri, 22 Nov 2019 19:02:59 +0000
From: Mason, Heather <Heather.Mason@FloridaDEP.gov>
To: Williams, Larry <larry_williams@fws.gov>, jay_herrington@fws.gov <jay_herrington@fws.gov>, heath_rauschenberger@fws.gov <heath_rauschenberger@fws.gov>, David.bernhart@noaa.gov <David.bernhart@noaa.gov>
CC: Duncan, Mary J <Mary.J.Duncan@FloridaDEP.gov>

Hello Mr. Williams, Mr. Herrington, Mr. Rauschenberger, and Mr. Bernhart,

Florida is working to draft a programmatic biological assessment for submittal to EPA with our 404 assumption package. We have drafted a species list (attached) and request the Services' feedback on the species included on the list. We would also like to schedule a meeting or phone call with your agencies as soon as possible to discuss potential contents of the programmatic biological assessment.

The list should include any species that may use waters where Section 404 permitting authority will be assumed by the state ("state-assumed waters"). The US Army Corps of Engineers will retain permitting authority in all estuarine, marine, and tidal waters, as well as all navigable waters that are on the retained waters list provided by the Corps ("retained waters") (attached). To simplify, only fresh waters that are not on the retained waters list, and wetlands that are not within a 300 foot buffer from the shoreline of retained waters, may be assumed by the state.

We have a draft GIS file that may help with your review, which can be downloaded here:
<ftp://ftp.dep.state.fl.us/pub/outgoing/Layer/>

The Corps is still working to finalize the GIS file, but it is complete enough to be useful.

The proposed definition of retained waters is:

Those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark, including all waters which are subject to the ebb and flow of the tide shoreward to their mean high water mark, including wetlands adjacent thereto. The Corps will retain responsibility for permitting for the discharge of dredged or fill material in those waters identified in the Retained Waters List (Appendix A), as well as all waters subject to the ebb and flow of the tide shoreward to their mean high water mark that are not specifically listed in the Retained Waters List, including wetlands adjacent thereto landward to the administrative boundary. The administrative boundary demarcating the adjacent wetlands over which jurisdiction is retained by the Corps is a 300-foot guide line established from the ordinary high water mark or mean high tide line of the retained water. In the case of a project that involves discharges of dredged or fill material both waterward and landward of the 300-foot guide line, the Corps will retain jurisdiction to the landward boundary of the project for the purposes of that project only.

We greatly appreciate your assistance, and look forward to working with you on species concerns related to assumption.

If you have any questions about our proposed State 404 Program, please contact me at the number below, or by cell at (850) 758-1269.

If you have any questions about the draft species list or matters related to content of the biological assessment, please contact Mary Duncan at (850) 245-8227.



Heather Mason

Environmental Administrator

Florida Department of Environmental Protection

Submerged Lands and Environmental Resources Coordination

Heather.Mason@FloridaDEP.gov

2600 Blair Stone Road,

Tallahassee, FL 32399-2400

Office: (850) 245-8480

--

Pace Wilber, Ph.D.
HCD Atlantic Branch Supervisor
NOAA Fisheries Service
219 Ft Johnson Road
Charleston, SC 29412

843-460-9926 <----Office Number
843-568-4184 <----Office Cell Number
Pace.Wilber@noaa.gov

--

Jocelyn Karazsia
Fishery Biologist
NOAA National Marine Fisheries Service
Southeast Region, Habitat Conservation Division

Attachment 4

FDEP e-mail to ECPO members

From: Tom Jones <TJones@barroncollier.com>
Sent: Tuesday, May 05, 2020 3:31 PM
To: CSpilker <cspilker@collierenterprises.com>
Cc: Truitt, John <John.Truitt@dep.state.fl.us>
Subject: Re: [External] Re: HCP answer

Thanks John. This certainly gives us the reassurance we were looking for.

Sent from my iPhone

On May 5, 2020, at 3:10 PM, Christian Spilker <CSpilker@collierenterprises.com> wrote:

Thank you for taking the time to listen to our concerns as well as for your quick response! That is exactly the answer I was hoping for.

Regards,

Christian Spilker
Senior Vice President of Land
Collier Enterprises

On May 5, 2020, at 3:01 PM, Truitt, John <John.Truitt@dep.state.fl.us> wrote:

Mr. Jones and Mr. Spilker,

Again, thanks for the call this morning so I could better understand your concerns regarding the HCP. Understanding that an HCP is a complex, time and resource intensive process, I see why you would want to ensure that did not go to waste. I confirmed that existing or new HCP's would be used by the state to review state issued 404 permits as the Corps does so today.

Under our programmatic consultation process whereby we would ask EPA to do a consultation at the time of assumption to create a technical assistance process that the state could use moving forward with FWS to ensure ESA protections, we will still be allowed to use existing or new HCP's in 404 permit review. We would simply review the project and its consistency with the HCP, get a concurrence letter from FWS (stating they agreed the project was consistent with the HCP) and issue the permit with a condition similar to "an applicant is responsible for complying with any other federal or state authorizations" or something similar to reference the HCP. Any existing HCP's or new HCP's obtained after assumption would still be used to review state issued 404 permits just as the Corps uses them today; it would simply be the state getting a concurrence letter from FWS that the project is consistent with the HCP rather than the Corps doing so. I hope that helps clarify your concerns regarding the HCP.

JJT

<image001.jpg>

John J Truitt
Deputy Secretary, Regulatory Programs
Florida Department of Environmental Protection
E-mail: john.truitt@floridadep.gov
(850)245-2037

3900 Commonwealth Blvd
Tallahassee, FL 32399



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I talked with Doug Laye yesterday about the ITS for the East Collier BO, prompted by David's question about whether I had worked on it with Doug. We had a very interesting conversation. I'm forwarding the email he sent this morning.

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This is clearly a question that is above our pay grades to answer. Food for thought, I guess. I'm going to miss these ESA policy conundrums, but I'll get over it.

"Good judgment comes from experience. Experience comes from bad judgment."

SecondFortune.com

Lucky Numbers: 10, 28, 20, 12, 1, 29

Jerry Ziewitz

Endangered Species Act Consultation Coordinator

Southeast Region, USFWS

10210 Miccosukee Road
Tallahassee, FL 32309
850-877-6513
jerry_ziewitz@fws.gov

----- Forwarded message -----

From: **Doug Laye** <doug_laye@fws.gov>

Date: Thu, Dec 12, 2019 at 8:45 AM

Subject: ITS

To: Jerry Ziewitz <jerry_ziewitz@fws.gov>

[illegible]

Doug

Notes from March 19, 2020 telecon -- David Dell, Rick Kanaski, and Tim Binzen

Tribal Consultation procedures for East Collier implementation

- Rick describes proposal in letters to tribes as “alternative process” allowed under section 106.
- Be clear to tribes what our process will be and ensure that they get something from us demonstrating we are considering their resources.
- Rick believes we would be on solid footing in regards to section 106 with the proposed alternative process.
- Tim concerned that tribes be informed of project proposals as soon as possible to provide them a chance for meaningful input.
- Agreed that having ECPO provide copy of SHPO consultation request (first request to SHPO) for us to relay to tribes would be optimal to fulfill our responsibility and provide tribes sufficient time to provide their input.
- We must be the one to relay ECPO’s document to the Tribes to maintain government to government relations.
- Tim asked for a clear copy of our proposed process for their review. Dell agreed pending other ECPO priorities.[notes](#)
- Rick emphasized that he is here to provide technical advice, appropriate language, or necessary sign-offs as we continue.

Rick made a suggestion concerning our section 106 implementation (he agreed we could consider this for other programmatic HCPs after ECPO). We could provide a project proponent or Tribe an internal Service assessment of cultural resources prior to SHPO consultation. Rick has his own sources to use for such a purpose.

Re: lawsuit for SR 29 and SR 82 BOs

Tawes, Robert <robert_tawes@fws.gov>

Tue 3/31/2020 5:22 PM

To: Cassler, Constance <constance_cassler@fws.gov>; Williams, Larry O <larry_williams@fws.gov>; Phillips, Catherine <catherine_phillips@fws.gov>

Cc: Hinzman, Roxanna <roxanna_hinzman@fws.gov>; Speights, Helen H <helen.speights@sol.doi.gov>; Wrublik, John <john_wrublik@fws.gov>

DELIBERATIVE/PRE-DECISIONAL INFORMATION and ATTORNEY/CLIENT PRIVILEGE

Hey everyone. I am going to offer a dissenting opinion here.

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Rob

From: Cassler, Constance constance_cassler@fws.gov

Sent: Monday, March 30, 2020 9 02 AM

To: Williams, Larry O larry_williams@fws.gov ; Phillips, Catherine catherine_phillips@fws.gov

Cc: Hinzman, Roxanna <roxanna_hinzman@fws.gov>; Speights, Helen H <helen.speights@sol.doi.gov>; Wrublik, John <john_wrublik@fws.gov>; Tawes, Robert <robert_tawes@fws.gov>

Subject: Re: lawsuit for SR 29 and SR 82 BOs

Larry,

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Connie

Constance L. Cassler, Ph.D.
Supervisory Fish and Wildlife Biologist
U.S. Fish and Wildlife Service
1339 20th Street
Vero Beach, Florida 32960
office: 772-469-4243
Fax: 772-562-4288
email constance_cassler@fws.gov

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From: Williams, Larry O <larry_williams@fws.gov>

Sent: Monday, March 30, 2020 6:21 AM

To: Cassler, Constance <constance_cassler@fws.gov>; Phillips, Catherine <catherine_phillips@fws.gov>

Cc: Hinzman, Roxanna <roxanna_hinzman@fws.gov>; Speights, Helen H <helen.speights@sol.doi.gov>; Wrublik, John <john_wrublik@fws.gov>; Tawes, Robert <robert_tawes@fws.gov>

Subject: Re: lawsuit for SR 29 and SR 82 BOs

Connie,

This sounds like a good plan. Please proceed (b)(5)DPP (b)(5)DPP (b)(5)DPP (b)(5)DPP (b)(5)DPP (b)(5)DPP (b)(5)DPP (b)(5)DPP

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Roxanna have done on these consultations!

I appreciate all the work you, John, and

Larry

From: Cassler, Constance <constance_cassler@fws.gov>

Sent: Friday, March 27, 2020 4:58 PM

To: Williams, Larry O <larry_williams@fws.gov>; Phillips, Catherine <catherine_phillips@fws.gov>

Cc: Hinzman, Roxanna <roxanna_hinzman@fws.gov>; Speights, Helen H <helen.speights@sol.doi.gov>; Wrublik, John <john_wrublik@fws.gov>; Tawes, Robert <robert_tawes@fws.gov>

Subject: lawsuit for SR 29 and SR 82 BOs

Hi Larry and Cathy,

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Please let me know if you have questions.

Thank you,

Connie

Constance L. Cassler, Ph.D.

Supervisory Fish and Wildlife Biologist

U.S. Fish and Wildlife Service

1339 20th Street

Vero Beach, Florida 32960

office: 772-469-4243

Fax: 772-562-4288

email: constance_cassler@fws.gov

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My June 3, 2020, Phone Conversation with Christian Spilker, ECPO

Tawes, Robert <robert_tawes@fws.gov>

Thu 6/4/2020 10:59 AM

To: Williams, Larry O <larry_williams@fws.gov>; Hinzman, Roxanna <roxanna_hinzman@fws.gov>; Cassler, Constance <constance_cassler@fws.gov>; Dell, David <david_dell@fws.gov>

Cc: Tirpak, John <John_Tirpak@fws.gov>; Phillips, Catherine <catherine_phillips@fws.gov>

DELIBERATIVE/PRE-DECISIONAL INFORMATION

Hey everyone. I spoke with Christian yesterday for around 30-40 minutes. I told him that we have been working on the draft biological opinion, but that there was still work to be done, and that we did not meet our internal deadline of sending the biological opinion to the Office of the Regional Solicitor on June 1. We talked in general terms regarding the analysis, including the need to get it right for future legal challenges.

[illegible]

I mentioned we were planning on cancelling the update call tomorrow in order to keep moving on the BO. David Dell sent out a cancellation notice this morning.

[illegible]

Next steps as I see them: Continue working diligently on BO. Review monitoring and adaptive management (MAM) already in HCP and have internal discussion on what else is needed. Present additional MAM measures to ECPO. This should be accomplished before June 26, allowing time for review of BO and proposed MAM measures by Cathy/John, and Leo if necessary.

Please let me know if you have any questions, comments or need additional information. Rob

Rob W. Tawes
Chief, Division of Environmental Review
U.S. Fish and Wildlife Service

South Atlantic, Gulf & Mississippi Basin Regions
1875 Century Boulevard
Atlanta, GA 30345
(w) 404/679-7142
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www.fws.gov

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Discussion Points

Supplemental and Clarified

Monitoring and Adaptive Management Measures

Monitoring events and expectations

- **Annual reports** submitted by permittees
 - Contents as described in ECPO HCP
 - Or; contents as modified in any ITPs for HOAs or enrolled landowners assuming they do not join ECPO
 - Ensure monitoring parameters, as listed below, addressed as appropriate
 - Service would re-evaluate and revise its panther PVA and traffic mortality modeling incorporating new information. The Service may identify concerns with panther population trends which it would communicate to ECPO.
 - Service or ECPO may identify potential issues warranting joint ECPO and Service consideration to possibly adapt HCP implementation (changed circumstances).
 - Issues to be considered may include those identified during implementation of HOA or enrolled landowner permits.
 - Possible adaptations should mostly be within bounds of adjusting implementation of the existing documents, but consideration of larger issues is not precluded.
 - Changes to BMPs
 - Adjustments to suggested HOA covenants
 - Adjustments to monitoring methods or intensity
 - Generally to incorporate lessons learned
- **Project-level concurrence/consistency review** by ECPO permittees
 - May be a corresponding process for enrolled landowner or HOA – to be defined in any ITPs issued to them.
 - Service evaluates the site-specific species survey and species-specific mitigation plan
 - Service evaluates the project-specific BMPs.
 - Are the mandatory BMPs included?
 - Are the defined goals (pasted below) of the BMPs satisfied?
 - Service is considering a possible “decision matrix” to set expectations and facilitate project-level review.
 - The decision matrix should help determine, yes or no, whether the BMPs proposed for a project would satisfy the defined goals for BMPs.

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- Any decision matrix could be referenced in a permit, but it needs to be adaptable. Its likely to be too detailed and subject to revision to be practicable as permit conditions. Should be mutual determination by Service and ECPO on the matrix and any future revisions. Perhaps post on the Service website
- **Periodic check-in** (major review involving panther stakeholder community in addition to ECPO, considers major adaptations)
 - Suggested interval based on level of development “build-out”: 15%, 30%, 50%, and 80%
 - “Build-out” based on: acreage of ground disturbance within development envelope.
 - Comprehensive evaluation of HCP progress, consider major adaptations to management plan.
 - Evaluation of panther status (including PVA and traffic effects) throughout the Plan area.
 - Identify panther population status, habitat trends, or anticipated land use changes that conflict with assumptions made in the HCP or the Service’s permit decision, and that currently threaten or may threaten HCP success.
 - Convene discussions among the panther stakeholder community:
 - State and County Highway agencies, County development authority, ECPO, FPPP members. (Include HOA and enrolled landowner permittees?)
 - Placement, Number, and Effectiveness of highway wildlife crossings
 - Panther use of Preserves/panther mortality in Preserves
 - Effectiveness of wildlife crossings
 - Other relevant issues
 - Identify remedial measures, with timetables and success criteria, to improve panther status or management effectiveness.
 - Measures under ECPO, HOA, or enrolled landowner control
 - Measures beyond ECPO, HOA, or enrolled landowner control
 - Depending on the issue and panther status, the Service may withhold project-level concurrences pending attainment of remedial measure success criteria or place other contingencies limiting or delaying future concurrences.
- **Changed circumstances** coordination
 - Either Service or permittee may raise issues related to plan implementation as they believe necessary or appropriate– standard permit condition based on No Surprises regulation. Example pasted below

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Parameters of concern to monitor panther status

- Internal trip capture
 - Traffic modeling assumes 50% capture rate, management benefit described in the HCP.
 - Development design, BMPs, and covenants responsibility of ECPO or enrolled landowner.
 - Project-level BMPs to be reviewed at project-level consistency check -- or corresponding process with enrolled landowner.
 - Expect to require some monitoring with trip counters – methods and intensity to be discussed
 - Lower than anticipated capture rates would/may need adaptation of implementation – to become HOA permittee responsibility.
 - Anticipate this in adaptive measures of any HOA permit
 - Feedback to ECPO permittees to adapt project-level BMPs and HOA covenants.
 - Alternative, “out-of-kind” adaptive measures may need to be addressed as changed circumstances or at the periodic check-in with the stakeholder community.
- Expenditure of dedicated 12.5 million from Marinelli Fund
 - Funding structure of Marinelli Fund should keep income in step with development levels.
 - Construction of mitigation measures by highway agencies is not under ECPO control.
 - Service and ECPO need to work cooperatively with the highway agencies and other panther stakeholders.
 - The periodic check-in gives structure to this coordination
- Exclusion of panthers from developments; and
- Panther mortality on roads internal to development
 - Development design and BMPs responsibility of ECPO or enrolled landowner.
 - Project-level BMPs to be reviewed at project-level consistency check -- or corresponding process with enrolled landowner.
 - Construction and filing covenants are responsibility of ECPO or enrolled landowner
 - Implementation, maintenance, monitoring, and adaptive measures to become HOA permittee responsibility
 - Anticipate this in adaptive measures of any HOA permit
 - Feedback to ECPO permittees to adapt project-level BMPs and HOA covenants.
- Placement, Number, and Effectiveness of highway wildlife crossings; and

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- Effectiveness of wildlife crossings
 - Service and ECPO need to work cooperatively with the highway agencies and other panther stakeholders.
 - The periodic check-in gives structure to this coordination
- Reduction in AR rodenticide in Plan Area
 - Restrictions against use in Preserve Lands responsibility of ECPO or enrolled landowner
 - Restrictions against use in developments
 - ECPO or enrolled landowner responsible for establishing covenants to restrict
 - HOA permittees responsible for enforcing within developments
- Panther use of Preserves;
- Panther mortality in Preserves; and
- Habitat restoration
 - Monitoring on Plan-wide basis would be ECPO's responsibility
 - Changes to FWC's data collection would be a changed circumstance
 - Might seek supplemental data collection (camera traps) in cooperation with FWC.
 - Project-level BMPs and HOA or enrolled landowner covenants and permits may create monitoring and management responsibilities for portions of the Plan Area
 - Adaptive management concerns, and responsive measures, identified and addressed in response to annual reports, at periodic check-ins, or as changed circumstances.
 - Responsibility for implementing adaptive responses may be shared among the panther stakeholder community.

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BMP Goals Provided by ECPO

- Designing master plans that (i) concentrate more intensive land uses within the center of mixed-use residential/commercial developments (town centers), located at a distance from habitat preservation areas outside the development area, and (ii) diminish land use intensities adjacent to habitat preservation areas (e.g., providing transitions from mixed- use town centers, to residential neighborhoods, to community open space areas, to surface water management (lakes), to project boundaries and project perimeter buffers);
- Minimizing impacts to native habitats within project boundaries that occur along the interface with habitat preservation areas external to the project;
- Utilizing a combination of design elements, including surface water management lakes, berms, structural buffers, fencing, and directional and/or low-level lighting along the periphery of Covered Activities to minimize the effects of light, noise, and human activity on areas outside the project boundaries, and to minimize human interactions with other Covered Species;
- Designing internal roadway networks and roadway elements to minimize the potential for wildlife-vehicle collisions within the lands designated for Covered Activities. These elements may include strategic selection of key road segments for wildlife crossing structures such as box culverts, small animal culverts, wildlife pipes, amphibian tunnels; the use of landscaping, curbs, fencing, and other barriers to direct wildlife to safe road crossing areas; wide, open road shoulders near crossings to maximize visibility for wildlife and motorists; and wildlife crossing signage (Kautz et al. 2010);
- Providing a sustainable mix of residential, commercial, retail, office, civic, and recreational land uses where these non-residential components minimize the need for residents to leave the development for basic needs (maintaining a high internal capture rate), thereby minimizing travel on the regional transportation network; and
- In the case of earth mining, establishing perimeter berms to separate the mine areas from adjacent preservation areas (where present adjacent to the mine), and limiting offsite transport of mining products to daylight hours.

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Example Changed Circumstances Permit Condition

From Coral Reef Commons

Standard language can be adapted to specific requirements

H. Unforeseen and/or changed circumstances may become apparent either to the Permittee and its authorized agents or to Service personnel. For purposes of implementation of this condition, unforeseen circumstances are defined as changes in circumstances affecting a species or geographic area covered by the HCP that could not reasonably have been anticipated by the HCP developers and the Service at the time of the HCP's negotiation and development and that result in a substantial and adverse change in the status of the covered species. Changed circumstances are defined as changes in circumstances affecting a species or geographic area covered by the HCP that can reasonably be anticipated by HCP developers and the Service and that can be planned for.

The Permittee and the Service acknowledge that even with the above detailed provisions for mitigating and/or minimizing impacts, circumstances could arise which were not fully anticipated by this Permit and which are considered unforeseen. Such circumstances may become apparent either to the Permittee or to personnel of the Service. For purposes of implementation of this condition, unforeseen circumstances are defined as any significant, unanticipated adverse change in the status of species; any significant, unanticipated adverse change in impacts of the Project or in other factors upon which the HCP and Permit are based; or any other significant new information relevant to the Permit and Activity that was unforeseen by the Permittee and the Service that could give rise to the need to review the Permittee's conservation program.

[The following paragraph and items 1 through 3 are specific to Coral Reef Commons. If issued, we could put corresponding clauses for ECPO here.]

Any amendments made to the HCP or this Permit will be in accordance with Condition I.3, below. In order to better anticipate changes in regional environmental conditions that could, directly or indirectly, affect the status of one or more of the covered species, the Service and the Permittees will:

1. After the maintenance phase is attained, the Permittees and the Service, will meet every **5 years** **[check-in intervals as we determine]** to review the status of the covered species, regional environmental conditions, and cumulative effects. Based on this review, the Permittees and the Service will identify potential amendments to the Conservation Program as appropriate.

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2.If other landowners in the Richmond Pine Rocklands propose activities unknown to the Service at the time of Permit issuance, the Service will assess such proposed activities' effect on covered species and meet with the Permittees to discuss necessary or advisable coordination among landowners to enable the new proponents to pursue their proposed activities in compliance with the Endangered Species Act.

3. Within 30 days of the twenty-fifth anniversary of Permit issuance [*major status review as we are considering for the panther "check-ins"*], the Service and the Permittees will meet to review the status of the covered species, the status of regional environmental conditions, as well as the status of Project implementation, to determine if Permit renewal at the end of its term is desirable or possible. If so, the Service and Permittees will use best efforts to ensure any Permit renewal is made in accordance with Condition I.3, below.

I. The Permittee and the Service agree that modification and amendments to the Permittee's HCP and this Permit may occur through its effective term. The following procedures shall govern the modification and amendment process:

1. Either the Permittee or the U.S. Fish and Wildlife Service may propose modifications and/or amendments to the HCP or this Permit by providing written notice. Such notice shall include a statement of the reason for the proposed modification and an analysis of its environmental effects, including its effects on operations under the HCP and on the covered species. This analysis shall be conducted jointly by the Permittee and the Service contact office identified in Condition M, below. The Service or the Permittee will use best efforts to respond to a proposed modification or amendment within sixty (60) days of receipt of such notice. Absent any objection from the Service or the Permittee, and provided such proposed modification or amendment does not fall within the limits of Condition I.2, below, the proposed modification and/or amendment will be determined to be minor and shall become effective upon written approval by the Service or the Permittee. If the Service determines that a proposed modification or amendment would result in either of the conditions set forth in Condition I.2, below, such proposed modification or amendment must be processed in accordance with Condition I.4, below.

2. The Service will not propose or approve minor modifications or amendments to the HCP or this Permit if the Service determines that such modifications or amendments would result in operations under the HCP and Permit that are significantly different from those analyzed in connection with the HCP, adverse effects on the environment that are new or significantly different from those analyzed in connection with the HCP or additional take of the covered species that was not analyzed in connection with the HCP.

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3. Any amendment or modification shall conform to and be in accordance with all applicable legal requirements, including, but not limited to, the Endangered Species Act, the National Environmental Policy Act, and the U.S. Fish and Wildlife Service's regulations at 50 C.F.R. Parts 13 and 17.

RE: [EXTERNAL] RE: East Collier HCP: Adaptive Management Talking Points

Christian Spilker <CSpilker@collierenterprises.com>

Tue 7/14/2020 12:34 PM

To: Dell, David <david_dell@fws.gov>

Cc: Tawes, Robert <robert_tawes@fws.gov>; Cassler, Constance <constance_cassler@fws.gov>

Thanks, David We are confirmed on our end Bruce, Andrew, Tom and I will be participating

Regards,

Christian Spilker

Christian Spilker

Senior Vice President of Land

Collier Enterprises

2550 Goodlette Frank Rd North, #100

Naples, FL 34103

(239)261-4455

From: Dell, David [mailto:david_dell@fws.gov]

Sent: Tuesday, July 14, 2020 11:45 AM

To: Christian Spilker <CSpilker@collierenterprises.com>

Cc: Tawes, Robert robert_tawes@fws.gov ; Cassler, Constance constance_cassler@fws.gov

Subject: RE: [EXTERNAL] RE: East Collier HCP: Adaptive Management Talking Points

Thanks. We can use our usual call-in information. I'll send a calendar invite once we hear back.

██████████ ██████████

From: Christian Spilker <CSpilker@collierenterprises.com>

Sent: Tuesday, July 14, 2020 11:41 AM

To: Dell, David <david_dell@fws.gov>

Cc: Tawes, Robert robert_tawes@fws.gov ; Cassler, Constance constance_cassler@fws.gov

Subject: RE: [EXTERNAL] RE: East Collier HCP: Adaptive Management Talking Points

David,

I believe that will work for us. I am waiting on one respondent but please pencil us in.

Regards,

Christian Spilker

Christian Spilker
Senior Vice President of Land
Collier Enterprises
2550 Goodlette Frank Rd North, #100
Naples, FL 34103

(239)261-4455

From: Dell, David [mailto:david_dell@fws.gov]
Sent: Tuesday, July 14, 2020 10:47 AM
To: Christian Spilker <CSpilker@collierenterprises.com>
Cc: Tawes, Robert robert_tawes@fws.gov ; Cassler, Constance constance_cassler@fws.gov
Subject: Re: [EXTERNAL] RE: East Collier HCP: Adaptive Management Talking Points

Thanks Christian! Yes, how about 1-2pm tomorrow?

From: Christian Spilker <CSpilker@collierenterprises.com>
Sent: Tuesday, July 14, 2020 9:46 AM
To: Dell, David <david_dell@fws.gov>
Cc: Tawes, Robert <robert_tawes@fws.gov>; Cassler, Constance <constance_cassler@fws.gov>
Subject: Re: [EXTERNAL] RE: East Collier HCP: Adaptive Management Talking Points

David, is there a time tomorrow when we can huddle up?

Regards,

Christian Spilker
Senior Vice President of Land
Collier Enterprises

On Jul 9, 2020, at 6:55 AM, Dell, David <david_dell@fws.gov> wrote:

Christian Glad to hear from you Rob is away through next Wednesday, but Connie and I are available to continue this discussion We have 11 through 12 available today, and tomorrow afternoon after 1pm.

From: Christian Spilker CSpilker@collierenterprises.com
Sent: Wednesday, July 8, 2020 3:38 PM
To: Dell, David david_dell@fws.gov

Cc: Tawes, Robert robert_tawes@fws.gov ; Cassler, Constance constance_cassler@fws.gov
Subject: [EXTERNAL] RE: East Collier HCP: Adaptive Management Talking Points

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All,

I hope you had an enjoyable holiday weekend. We are prepared to discuss the talking points at your convenience.

Regards,

Christian Spilker

Christian Spilker
Senior Vice President of Land
Collier Enterprises
2550 Goodlette Frank Rd North, #100
Naples, FL 34103

(239)261-4455

From: Dell, David [mailto:david_dell@fws.gov]
Sent: Tuesday, June 30, 2020 10:09 AM
To: Christian Spilker CSpilker@collierenterprises.com
Cc: Tawes, Robert <robert_tawes@fws.gov>; Cassler, Constance <constance_cassler@fws.gov>
Subject: East Collier HCP Adaptive Management Talking Points

Christian: Attached are the talking points Rob agreed to transmit to you yesterday.

David Dell
US Fish and Wildlife Service
South Atlantic - Gulf and Mississippi Basin
Unified Regions
HCP and Safe Harbors Coordinator
404/679 7313
david_dell@fws.gov

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July 15, 2020

866-763-5944, code# 4528045

East Collier County MSHCP

Adaptive Management Discussion

Present: FWS: Roxanna Hinzman, Connie Cassler, David Dell

ECPO: Christian Spilker, Tom Jones

ECPO Consultants and Counsel: Andrew Turner, Bruce Johnson

Topics:

€ Tribal Consultations

- ⚡ Regional Director signed Seminole letter, transmitted to the Tribe, June 17
- ⚡ Still no word from the Tribe

€ Biological/Conference Opinion

- ⚡ Transmitted to Regional Solicitor for review, June 26
- ⚡ We know Vicki Mott is working in it

€ EIS

- ⚡ Aiming to have it ready for transmittal to Corps by end of this week
- ⚡ Discussing when to transmit to ECPO in relation to Regional Solicitor review
- ⚡ *Dell explained that we would prefer to withhold the ROD from ECPO review until we were closer to publication. It could not be made non-decisional. Plus, its only 5 pages.*
- ⚡ *Andrew sounded good with that. He is more concerned with the EIS.*

€ Adaptive Management Checkpoints

- ⚡ Purpose
 - ☐ Adaptive management in response to
 - Changed circumstances
 - Feedback on implementation results
 - ☐ Strengthen the jeopardy analysis in the biological opinion
 - Contingency plan
- ⚡ Questions or clarifications?
- ⚡ Discussion

It became clear that the Service does not fully appreciate ECPO's expectations for the HCP. We have been confusing community operations with the land-development side. ECPO intends their HCP to cover the conversion of the lands to projects. ECPO would sell a project site to a developer who would then draw up the project plan (incorporating BMPs) and set up association covenants.

ECPO sees our talking points as providing no certainty. It is now apparent that we likely will deal with the developer, not ECPO, concerning consistency checks, confirming BMPs, Corps MOU coordination, SHPO compliance, and transference to an HOA.

Christian expressed ECPO's surprise and dismay.

Bruce confirmed that, per CH 2 of the HCP, that ECPO does not assume operations of the community.

Andrew urged us to focus on the nature of the take authorized. Adaptive measures should focus on the Preserves.

ECPO can mandate certain things for their developers, including the rodenticide restrictions.

Rox reminded everyone that the adaptive measures document is a starting point for discussion, much is negotiable. Our intent is not to "dismay."

We have difficulty with the programmatic nature, we have to concern ourselves with the ongoing operation and occupation of the developments.

Some global comments on our adaptive management talking points.

Bruce cautioned against vague language such as "mostly" or the need for precision in any decision matrix.

Christian expressed concern about tying ECPO to the actions of third parties. They resist being held to third-party performance.

Christian suggested we hold a workshop on plan operations: how would the plan work at project level.

We will try for next week (July 20-24).

ECPO will share schedules with Dell, so that the Service can arrange an invitation.

Christian asked that we have David Shindle attend.

We will cancel the ECPO Update and the Service will use that time for workshop discussion.

Re: [EXTERNAL] Adaptive Management workshop

Christian Spilker <CSpilker@collierenterprises.com>

Tue 7/28/2020 3:45 PM

To: Dell, David <david_dell@fws.gov>

Cc: Tawes, Robert <robert_tawes@fws.gov>

Thanks David. Your attendee list appears to be correct on our end.

Regards,

Christian Spilker
Senior Vice President of Land
Collier Enterprises

On Jul 28, 2020, at 1:30 PM, Dell, David <david_dell@fws.gov> wrote:

Christian: Let's use our normal Update call-in: [REDACTED]

I'll send a calendar invitation shortly with a brief agenda. I got the attendance list from Bruce this morning; Bruce, you, Tom, Mitch, Danny, Andrew, and Brian

From: Christian Spilker <CSpilker@collierenterprises.com>

Sent: Tuesday, July 28, 2020 3:01 PM

To: Dell, David <david_dell@fws.gov>

Cc: Tawes, Robert <robert_tawes@fws.gov>

Subject: Re: [EXTERNAL] Adaptive Management workshop

David,

Do you intend to circulate a conference number or should I?

Regards,

Christian Spilker
Senior Vice President of Land
Collier Enterprises

On Jul 27, 2020, at 6:39 AM, Dell, David <david_dell@fws.gov> wrote:

Christian We are on for Wednesday, July 29, 12 30 2 30 pm

From: Christian Spilker <CSpilker@collierenterprises.com>

Sent: Friday, July 24, 2020 4:43 PM

To: Dell, David <david_dell@fws.gov>

Cc: Tawes, Robert <robert_tawes@fws.gov>

Subject: RE: [EXTERNAL] Adaptive Management workshop

David,

I can poll my gang about Friday if there is a window that day that is better for you.

Regards,

Christian Spilker

Christian Spilker
Senior Vice President of Land
Collier Enterprises
2550 Goodlette Frank Rd North, #100
Naples, FL 34103

(239)261 4455

From: Dell, David [mailto:david_dell@fws.gov]

Sent: Friday, July 24, 2020 10:44 AM

To: Christian Spilker <CSpilker@collierenterprises.com>

Cc: Tawes, Robert <robert_tawes@fws.gov>

Subject: Re: [EXTERNAL] Adaptive Management workshop

Christian: The Service tentatively agrees to Wednesday, July 29, 12:30 to 2:30pm, but are there other options?

I ask because we are not able to confirm today whether Rox's partial conflicts over the full two hours can be re scheduled or not. We expect to be able to confirm on Monday morning. Thank you.

From: Christian Spilker <CSpilker@collierenterprises.com>

Sent: Thursday, July 23, 2020 5:34 PM

To: Dell, David david_dell@fws.gov
Subject: RE: [EXTERNAL] Adaptive Management workshop

How about 12:30 to 2:30 on Wednesday?

Regards,

Christian Spilker

Christian Spilker
Senior Vice President of Land
Collier Enterprises
2550 Goodlette Frank Rd North, #100
Naples, FL 34103

(239)261-4455

From: Dell, David [mailto:david_dell@fws.gov]
Sent: Wednesday, July 22, 2020 9:47 AM
To: Christian Spilker CSpilker@collierenterprises.com
Subject: Re: [EXTERNAL] Adaptive Management workshop

Christian: Unfortunately, we can't get all our key participants on Tuesday afternoon. Would Wednesday be possible, or do you have suggested alternates? Thanks.

From: Christian Spilker <CSpilker@collierenterprises.com>
Sent: Tuesday, July 21, 2020 4 55 PM
To: Dell, David <david_dell@fws.gov>
Subject: [EXTERNAL] Adaptive Management workshop

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David,

In herding cats on my end it appears that the afternoon of the 28th would work for a workshop from ECPO's perspective. Would you poll your crew and let me know if that will work for you?

Regards,

Christian Spilker

Christian Spilker
Senior Vice President of Land
Collier Enterprises
2550 Goodlette Frank Rd North, #100
Naples, FL 34103

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Opening Remarks

Service:

Clarify transitions of responsibility

Clarify respective responsibilities/expectations

Clarify adaptive measures appropriate for the high-level checkpoints

Identify that there will be lower-level adaptive management responses

With transitions clarified, we can designate where the adaptive management responsibilities lie

ECPO:

The Service's Essential Goals

- 1) Address ESA issuance criteria --- Criteria of most relevance to Operations:
 - a) Plan will not jeopardize covered species
 - b) Minimize and mitigate to the maximum extent practicable
 - c) Assure conservation plan implementation
 - d) Assure funding of conservation plan
- 2) Fulfill other, non-ESA, or non-section 10, Federal requirements
 - a) Tribal Consultations
 - b) National Historic Preservation Act, section 106
 - c) Corps of Engineers 404/state wetland permit consultations

To achieve its essential goals, the Service has these objectives:

- 3) Maintain parameters supporting assumptions made for BO analyses
- 4) Maintain corridor functions
- 5) Ensure project designs incorporate BMPs to satisfy management goals established by HCP
- 6) Ensure projects constructed in accordance with BMPs
- 7) Ensure BMPs are implemented successfully as projects are occupied through time
- 8) Maintain implementation oversight: ECPO, enrolled landowners, developers, and HOAs
- 9) Establish and follow the section 7 MOU with the Corps of Engineers -- Adapt and revise upon State assumption
- 10) Seek participation by County (Service-County, or Service-County-ECPO as parties are willing)

Transitions

- Transition from ECPO to developer
- Transition from developer to HOA
- Transition to enrolled landowner
- Transition from enrolled landowner to HOA

Operations: Who does what?

- ECPO
- Developer
- HOA
- Enrolled landowner
- Service

Other Questions

What is a better generic term instead of “HOA”? Board of Directors, Master Association, etc.?

Any relationship or coordination among ECPO, enrolled landowners, developers, and HOAs?

- Annual reports
- Adaptive measures
- Checkpoints

Need to specify who makes Marinelli contributions, and when

Workshop Agenda

Attendance: Service: Rob Tawes, Roxanna Hinzman, Connie Cassler, Ken McDonald, David Dell, David Shindle, John Tirpak

ECPO: Christian Spilker, Tom Jones, Danny Sutton, Mitch Hutchcraft

ECPO counsel and contractor: Andrew Turner, Brian Levey, Bruce Johnson

Issues and Agreements:

- *New owners (developers) need to know obligations and assurances*
- *ECPO seemed OK with the transition from ECPO to developer as we envision it*
- *They are conceptually OK with deed restrictions to notify a landbuyer of the HCP and its requirements.*
 - *Andrew requested a suggested framework or language*
- *Internal capture rate scares them, but concerns were alleviated when it was clarified that Marinelli Fund could go toward alternative measures as part of a community effort.*
- *Bruce reminded us that the RLSA already requires a basement level of internal capture by virtue of its requirement to provide certain ratios of commercial and shopping venues in a development.*
- *Ken alerted ECPO about some details to go into the BO - Ken will share these:*
 - *Check-in intervals*
 - *Structure/contents of the consistency checks*
- *Bruce states that Ave Maria already accounts for 11% build-out of development area, however, Ken has been figuring to start at 15% of what remains after Ave Maria is deducted.*

Opening Remarks

ECPO: continually compare HCP approach to existing section 7 project by project approach

Service

- Presenting high-level requirements and transitioning down to specifics
- Collaborative session
- Want to clarify all parties expectations/planned implementation
- What do we need from each other?

Clarify transitions of responsibility

- ECPO to developer
- Developer to HOA
- ECPO to enrolled landowner

Commented [CC1]: Is this where ECPO is going to tell us how their process works? My recollection of our last meeting with ECPO is that the workshop was for ECPO to tell us about their process from the landowner to developer to HOA, and then for us to tell them about how we see our process working.

I don't think we want to launch into our process without first hearing how their process works.

Clarify respective responsibilities/expectations

Commented [CC2]: ECPO's, the Service's, or both?

Clarify adaptive measures appropriate for the high-level checkpoints

Commented [CC3]: Service

Identify that there will be lower-level adaptive management responses

Commented [CC4]: Service

With transitions clarified, we can designate where the adaptive management responsibilities lie

Commented [CC5]: Service

The Service's Essential Goals (Needs?)

- 1) Address ESA issuance criteria --- Criteria of most relevance to Operations:
 - a) Plan will not jeopardize covered species
 - b) Minimize and mitigate to the maximum extent practicable
 - c) Assure conservation plan implementation
 - d) Assure funding of conservation plan
- 2) Fulfill other, non-ESA, or non-section 10, Federal requirements
 - a) Tribal Consultations
 - b) National Historic Preservation Act, section 106
 - c) Corps of Engineers 404/state wetland permit consultations

To achieve its essential goals, the Service has these objectives:

- 3) Maintain parameters supporting assumptions made for BO analyses (not all of previous list of parameters under this bullet, the others are below)
 - a) Internal trip capture
 - b) Expenditure of dedicated \$12.5 million from Marinelli Fund
 - c) Exclusion of panthers from developments
- 4) Maintain corridor functions
 - a) Wildlife movement
 - b) Habitat value
 - i) Conservation easements to offset project site impacts
 - ii) Conservation easement management to enhance and maintain habitat value
 - iii) Use of Marinelli Fund to assist with panther use of and persistence in corridors
- 5) Ensure project designs incorporate BMPs to satisfy management goals established by HCP
 - a) Concurrence or consistency check
 - b) Coordinate cultural resource information (copy of ECPO/developer's SHPO submittal) with Tribes as early as possible
- 6) Ensure projects constructed in accordance with BMPs
- 7) Ensure BMPs are implemented successfully as projects are occupied through time
- 8) Maintain implementation oversight: ECPO, enrolled landowners, developers, and HOAs
 - a) Annual reports
 - b) HCP compliance monitoring
 - c) HCP effectiveness monitoring
 - d) Adaptive management
 - e) Course corrections
 - i) What do these look like
 - ii) What ECPO controls, vs 3rd parties
 - iii) Developers and HOAs and enrolled landowners
 - f) Monitor to ensure BO assumptions are satisfied or revise BO modeling as needed

- 9) Establish and follow the section 7 MOU with the Corps of Engineers
 - a) Adapt and revise upon State assumption
- 10) Seek involvement by County (Service-County, or Service-County-ECPO as parties are willing) *not so immediate need to dig deep with ECPO, but present as our longterm objectives*
 - a) Highway planning, wildlife crossing planning
 - b) A coordinating body would facilitate identification and implementation of adaptive measures
 - c) County RLSA? The County is a vested party
 - d) More incentive to seek a Service-County MOU on wildlife crossings, etc.
 - e) Involve County in adaptive management discussions, including checkpoints
 - f) Participate in County's RLSA 5-year reviews
 - g) Ask ECPO how we might involve the County
 - h) Code compliance to ensure HOAs and community issues with implementation
 - i) Shindle's example of differences among communities (consistent implementation) and Publix dumpster – nuisance bears
 - ii) How deep into HOA functions do we get?
 - i) Begin discussing this with DEP as state assumes 404
 - j) Enroll FWC and county, they will be first line responders to community issues

TRANSITIONS

- Important to Service because we need the assurances that BMPs will be planned, constructed, and implemented in accordance with HCP
- Transition from ECPO to developer
 - When to transfer?
 - Negotiation of project-specific BMPs and project plan before or after transfer
 - SHPO and Corps coordination before or after transfer
 - **Deed restriction on transfers from ECPO to developers?**
 - Part 13.25 calls for a joint, written submittal by ECPO and developer
 - We could require this submittal to begin the BMP and project plan negotiation [*We have a vital decision space here. The transfer depends upon our approval of the transfer request -- it is in fact a permit application by the developer. I could see ECPO resisting us withholding transfer approval til after a project plan and BMPs have been approved, but this is a potential pause-point to ensure a project meets HCP goals. Although we don't control their closing date, we do not have to issue a transferred permit until we are satisfied that it meets ESA and HCP requirements. Concerning ECPO resistance on this, could be serious*

given yesterday's comparison by Christian of the current section 7 approach versus the proposed section 10 approach. This could be one of the crucial discussions at our workshop. Pays to look in the HCP, see CH 7.7.1, ECPO allows for this, but we may be proposing more than they expect.]

- Wait until we settle on project plan and BMPs before issuing a transferred permit, then begin SHPO, Corps coordination?
 - A partial permit transfer could serve as the consistency check, although not sure if we need to revise MOU language. Just as the MOU provides for concurrence to satisfy Corps' section 7 responsibility, any permit transfer approval would do the same. We can produce a concurrence letter faster than a transferred permit.
- Transition from developer to HOA
 - Could use our approval of covenants to clear developer to transfer to HOA. Need to have the covenants in place to fund, implement, and maintain BMPs.
 - Discuss how this works with ECPO?
- Transition to enrolled landowner
 - Similar concerns as with a developer, but once ECPO points the landowner our way, we go through a normal permit review.
 - Assuming the enrolled landowner adopts the HCP, we would only negotiate project-specific adjustments, BMPs, SHPO, and Corps coordination.
 - Enrolled landowner would fall under the section 7 MOU.
 - Allow for possibility of enrolled landowner to developer transfer, same as ECPO
- Transition from enrolled landowner to HOA
 - Same as for developer to HOA transfer

To meet these objectives, the Service proposes the following roles and responsibilities:

OPERATIONS

Who does what?

- ECPO:
 - Make property available for development projects (meaning either residential, commercial, or earth mining)
 - Transfer project sites to developers along with HCP requirements

- Deed restriction?
 - Simple notice that an HCP affects the property
 - Stays with the property if developer sells to another entity
 - Enroll eligible landowners along with HCP requirements
 - Probably similar to a developer, but subject to individual situation
 - Maintain Preserve lands
 - Commitment to maintaining current uses upon permit issuance
 - Conservation easements as lands are committed as sending units
 - Timing in relation to developer's permit transfer?
 - Manage preserves in accordance with HCP and conservation easements
 - Up to individual ECPO permittee who owns the sending unit?
 - Establish Marinelli Fund and ensure the initial and ongoing contributions
 - Per-acre, per-unit, and per-transaction [need to clarify with ECPO]
 - Is ECPO the only party responsible for this? Would the developer, enrolled landowner, or HOA be responsible in the future?
 - If a developer, HOA, or other third party collects moneys designated for Marinelli Fund, ensure that these are transferred into the Fund
 - Annual reporting
 - Participate in checkpoints
- Developer:
 - Accepts obligations of HCP via partial permit transfer from ECPO (13.25)
 - Assumes a developer would hold a permit for a few years before HOA assumes control – clarify with ECPO
 - Produces project plan
 - Universal BMPs
 - Appropriate BMPs to satisfy BMP goals
 - Covenants to ensure continued funding and implementation of BMPs by HOAs
 - Responsible for coordination with Service and others
 - Annual reporting
 - Project planning
 - Early coordination with Corps (per MOU) and Service
 - POTENTIAL ISSUE: section IV.A. of the Corps MOU refers to the consistency check and concurrence to ECPO and the Corps that a project is consistent with the HCP. To us, “concurrence” means that we are satisfied with project-specific BMPs. It might mean something less to ECPO.

- SHPO review provided to Service
- Consistency check with Service
- Marinelli Fund contributions?
 - Per-unit and per-transaction?
- Need a hold-point to ensure developer meets obligations of their permit before transfer to HOA
- Is Gargiulo an outlier? I.e., are they actually the developer?
 - Consider tailoring any permit conditions for ECPO to either transfer to developer, or to develop project themselves
- Invited to checkpoint while their ITP is active?

Developers

- Responsible for construction of residential and commercial properties
- Responsible for HCP Consistency Check with the Service
- Responsible for implementing conservation measures and BMPs relevant to construction activities
- Responsible for collecting Impact Fees at time of sale to individual property owners and transferring balance to Marinelli Fund
- Responsibility for Land management ends with property sale to individual property owner

- HOA:
 - Accepts obligations of HCP via permit transfer from developer
 - Not a formal 13.25 permit transfer from developer, developer would be required to establish the HOA with covenants to implement HCP, subject to Service approval. Approval by the Service would be a logical point to transfer responsibility to the HOA. Write any permit in this sense so as to avoid Part 13.25 transfer.
 - Covenants
 - Funding and implementation of BMPs
 - Annual reporting
 - Marinelli Fund contributions?
 - Per-transaction?
 - Invited to checkpoint?

HOA/Property Managers

- Responsible for governing residential communities and commercial properties

- Responsible for managing communities and properties in accordance with HCP
- Responsibility terminates at expiration of ITP

- Enrolled landowner:
 - Negotiates enrollment with ECPO
 - Accepts obligations of HCP via individual permit application
 - *Responsibilities similar to those of a developer*
 - Produces project plan
 - Do this as part of individual permit application, Service should be involved with landowner/ECPO negotiation for early alert and input
 - Appropriate BMPs to satisfy BMP goals
 - Covenants to ensure continued funding and implementation of BMPs by HOAs
 - Layout of project should be consistent/compatible with delineation of HCP development and preserve lands.
 - Responsible for coordination with Service and others
 - Other than annual reporting, do this as part of individual permit application
 - Annual reporting
 - Project planning
 - Early coordination with Corps (per MOU) and Service
 - SHPO review provided to Service
 - Consistency check with Service
 - Marinelli Fund contributions?
 - Need a hold-point to ensure enrolled landowner meets obligations of their permit before transfer to HOA
 - Service review and covenant approval can wait til some time after the permit transfer.
 - Invited to checkpoint?

- Service (need to firm up order and timing in relation to other review steps)
 - Coordination with ECPO and other permittees, review annual reports, communicate concerns and questions, suggest adaptations, implementation oversight as provided by ESA and regulations and stepped down in ITPs
 - Coordinate with ECPO, developer, or enrolled landowner as land transfer/enrollment is considered
 - Participate in project-level planning coordination
 - Input on project design and BMPs to assure consistency with HCP

- Participates in Corps pre-project meeting
- Per Rick Kanaski's suggestion, consider coordinate internally on cultural resource issues to inform Tribal consultation
- Provides ECPO, developer, or enrolled landowner concurrence letter for them to submit with wetland permit application
- Coordinates project plans with Tribes for their cultural resource review – must be early enough to allow Tribes to meaningfully influence SHPO review. Suggest having developer provide us SHPO consultation request simultaneously with their submittal to SHPO.
- Provides Corps courtesy copies of all communications to Tribes
- Participates in checkpoints
- Maintains sight of covered species recovery “big picture” and how that may suggest adaptations to the HCP and non-ECPO permittees

ISSUES TO CLARIFY WITH ECPO

Who holds a permit -- and when?

○

What is a better generic term instead of “HOA”? Board of Directors, Master Association, etc.?

Any relationship or coordination among ECPO, enrolled landowners, developers, and HOAs?

- Annual reports
- Adaptive measures
- Checkpoints

Need to specify who makes Marinelli contributions, and when

Where do our adaptive measures fit?

Who does what and when?

What are the fundamental assumptions for the BO about preserve management/wildlife crossings/internal capture that might threaten HCP success that are controlled by third parties (not ECPO or any follow-on permittee)?

Anti-coagulant [and neurotoxic](#) rodenticides

Wildlife underpasses/fencing/ROWs managed by Fed/State/County DOTs

Panther recovery status

Internal capture rates?

September 10, 2020

East Collier HCP

Service and DEP: first discussion of assimilating new state process into HCP

Service: Rob Tawes, Heath Rauschenberger, David Dell, Rafael Gonzalez, Connie Cassler

DEP: Mary Duncan

FWC: Jennifer Goff

Intro to HCP

- Background, description
 - Project by project review and consistency
 - HCP is programmatic, so consistency checks will be needed to ensure satisfaction of HCP objectives
 - Tribal consultation and section 106
 -
- Draft MOU with Corps
 - Has DEP staff seen it?
 - Would DEP be able to adapt it to new State process?
 - *Should be able to*
 - *Had to explain they would reference an ITP rather than a BO*

Outstanding Questions:

How much of ECPO plan area is retained vs. Assumed waters?

So far safe assumption is that all are assumed, need to confirm

Would Corps still be involved? I.e., would DEP assumption moot the draft Corps MOU

- Bringing Corps into this discussion?

Need to schedule a follow-up to explore NHPA issues further.

There will be a programmatic MOU between DEP and FWS (RD signature level)

- Plug ECPO (existing draft Corps MOU) into that, or do a stand-alone MOU equivalent the current draft?

Phone Call with Christian Spilker, ECPO, October 9, 2020

Tawes, Robert <robert_tawes@fws.gov>

Fri 10/9/2020 12:47 PM

To: Phillips, Catherine <catherine_phillips@fws.gov>; Williams, Larry O <larry_williams@fws.gov>

Cc: Tirpak, John <John_Tirpak@fws.gov>; Hinzman, Roxanna <roxanna_hinzman@fws.gov>; Cassler, Constance <constance_cassler@fws.gov>; Dell, David <david_dell@fws.gov>

Hey everyone,

Christian called me today to check on the status of our BO updates. He was prompted to call as we had cancelled the external update call for this morning, and he is getting timeline pressure from the other ECPO members.

I told him that we were working through RD comments on the biological opinion.

He stated that he intends to reach out to Leo on timeline considerations, so I wanted to give y'all a heads up that may be happening.

We also discussed the 404 assumption and how the wetland permitting/HCP interface would be handled under FDEP. I told him that we had discussed with FDEP, and shared the draft COE 404 MOU with them, but had not had further discussions. We may need to have a three way discussion involving ECPO and FDEP. I think ECPO would like a stand alone MOU between us, FDEP, and FWC regarding the HCP but I also think that may not be needed. FDEP will defer to us on HCPs and already issued ITSs in accordance with their species coordination process, their handbook, and Florida Administrative Code.

Please let me know if you have questions or additional information. Rob

Rob Tawes

Manager, Division of Environmental Review

U.S. Fish and Wildlife Service

South Atlantic, Gulf & Mississippi Basin Regions

1875 Century Boulevard

Atlanta, GA 30345

404/679-7142

<http://www.fws.gov/southeast/>

www.fws.gov

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Re: Phone Conversation With Christian Spilker, ECPO, 12/9/20

Williams, Larry O <larry_williams@fws.gov>

Fri 12/11/2020 9:29 AM

To: Tawes, Robert <robert_tawes@fws.gov>; Dell, David <david_dell@fws.gov>; Tirpak, John <John_Tirpak@fws.gov>; Cassler, Constance <constance_cassler@fws.gov>; Hinzman, Roxanna <roxanna_hinzman@fws.gov>

Cc: Rauschenberger, Heath <heath_rauschenberger@fws.gov>

Thanks Rob.

(b)(5)DPP (b)(5)DPP (b)(5)DPP I'll also explain that it's still going through legal review. I feel inclined to share this because they need to know we see a way to make it successful. I'll also explain the development of the future with and future without scenarios.

From: Tawes, Robert, Robert <robert_tawes@fws.gov>

Sent: Friday, December 11, 2020 8:45 AM

To: Williams, Larry O <larry_williams@fws.gov>; Dell, David <david_dell@fws.gov>; Tirpak, John <John_Tirpak@fws.gov>; Phillips, Catherine <catherine_phillips@fws.gov>; Cassler, Constance <constance_cassler@fws.gov>; Hinzman, Roxanna <roxanna_hinzman@fws.gov>

Cc: Rauschenberger, Heath <heath_rauschenberger@fws.gov>

Subject: Re: Phone Conversation With Christian Spilker, ECPO, 12/9/20

Hi Larry - totally your call, but

b)(5)DPP b)(5)DPP b)(5)DPP b)(5)[b](5)DPP b)(5)DPP b)(5)DPP

(b)(5) DPP David and I will emcee, and I was thinking some general comments from you and John supporting the review and the project would be good. Again - your call. Rob

Rob Tawes

Manager, Division of Environmental Review

U.S. Fish and Wildlife Service

South Atlantic, Gulf & Mississippi Basin Regions

1875 Century Boulevard

Atlanta, GA 30345

404/679-7142

<http://www.fws.gov/southeast/>

www.fws.gov

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From: Williams, Larry O <larry_williams@fws.gov>

Sent: Friday, December 11, 2020 8:36 AM

To: Tawes, Robert <robert_tawes@fws.gov>; Dell, David <david_dell@fws.gov>; Tirpak, John <John_Tirpak@fws.gov>; Phillips, Catherine

<catherine_phillips@fws.gov>; Cassler, Constance <constance_cassler@fws.gov>; Hinzman, Roxanna <roxanna_hinzman@fws.gov>

Cc: Rauschenberger, Heath <heath.rauschenberger@fws.gov>

Subject: Re: Phone Conversation With Christian Spilker, ECPO, 12/9/20

Re: [EXTERNAL] COSWFL comment enclosures - Bellmar

Dell, David <david_dell@fws.gov>

Mon 3/22/2021 9:04 AM

To: Mcdonald, Kenneth <kenneth_mcdonald@fws.gov>; Cassler, Constance <constance_cassler@fws.gov>; Kelso, Charles <charles_kelso@fws.gov>; Shindle, David <david_shindle@fws.gov>

Cc: Tawes, Robert <robert_tawes@fws.gov>

(b)(5) DPP (b)(5) DPP (b)(5) DPP (b)(5) DPP (b)(5) DPP (b)(5) DPP
Connie:
(b)(5) DPP (b)(5) DPP

[illegible]

From: Mcdonald, Kenneth <kenneth_mcdonald@fws.gov>

Sent: Monday, March 22, 2021 8:54 AM

To: Cassler, Constance <constance_cassler@fws.gov>; Kelso, Charles <charles_kelso@fws.gov>; Dell, David <david_dell@fws.gov>; Shindle, David B <david_shindle@fws.gov>

Subject: Re: [EXTERNAL] COSWFL comment enclosures - Bellmar

[illegible]

Ken

Kenneth McDonald
Fish & Wildlife Biologist
Florida Ecological Services Field Office
1339 20th Street
Vero Beach, Florida 32960-3559
Office: 772.469.4284
Fax: 772.562.4288
kenneth_mcdonald@fws.gov

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Energy and persistence will conquer all things

- Benjamin Franklin

From: Cassler, Constance <constance_cassler@fws.gov>

Sent: Monday, March 22, 2021 8:42 AM

To: Mcdonald, Kenneth <kenneth_mcdonald@fws.gov>; Kelso, Charles <charles_kelso@fws.gov>; Dell, David <david_dell@fws.gov>; Shindle, David B <david_shindle@fws.gov>

Subject: Fw: [EXTERNAL] COSWFL comment enclosures - Bellmar

Hi all,

The attached relate to one of the villages proposed in the ECMSHCP.

Connie

Constance L. Cassler, Ph.D.
Supervisory Fish and Wildlife Biologist
U.S. Fish and Wildlife Service
1339 20th Street
Vero Beach, Florida 32960
office: 772-469-4243
Fax: 772-562-4288
email: constance_cassler@fws.gov

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From: Hinzman, Roxanna <roxanna_hinzman@fws.gov>

Sent: Thursday, March 18, 2021 2:50 PM

To: Cassler, Constance <constance_cassler@fws.gov>; Wrublik, John <john_wrublik@fws.gov>

Subject: Fw: [EXTERNAL] COSWFL comment enclosures - Bellmar

FYSA

1339 20th Street | Vero Beach, Florida 32960
Direct line: 772-469-4309 | Office: 772-562-3909 ext. 309
Cell 772-532-1247 | Fax 772-562-4288 | roxanna_hinzman@fws.gov

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From: Julianne Thomas <JulianneT@conservancy.org>
Sent: Thursday, March 18, 2021 1:40 PM
To: jsharris@sfwmd.gov <jsharris@sfwmd.gov>; Goff, Jennifer <jennifer.goff@myfwc.com>
Cc: Hinzman, Roxanna <roxanna_hinzman@fws.gov>
Subject: [EXTERNAL] COSWFL comment enclosures - Bellmar

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Here are the two documents I meant to attach to my last email but did not..... Sorry!

Fw: [EXTERNAL] FW: FDEP RAI Responses (Bellmar - 18CEM3016)

Cassler, Constance <constance_cassler@fws.gov>

Wed 8/4/2021 10:00 AM

To: Tawes, Robert <robert_tawes@fws.gov>; Dell, David <david_dell@fws.gov>; Hinzman, Roxanna <roxanna_hinzman@fws.gov>; McDonald, Kenneth <kenneth_mcdonald@fws.gov>; Shindle, David B <david_shindle@fws.gov>

Cc: Rivera, Jose J <jose_rivera@fws.gov>

 1 attachments (253 KB)

0-Letter-Schwetje 072321 FDEP RAI Responses.pdf;

Hi,

Here is the request for the Service to look at the Bellmar project through the 404 process. I have asked that this review be put on hold until we make a decision on the HCP. I'm not sure if what the response will be or if the state is able to pause the review. We made a similar request for Rivergrass and I don't think we have heard back on that one.

Does anyone have suggestions about other things we should do related to these requests?

Connie

Constance L. Cassler, Ph.D.
Supervisory Fish and Wildlife Biologist
U.S. Fish and Wildlife Service
1339 20th Street
Vero Beach, Florida 32960
office: 772-469-4243
Fax: 772-562-4288
email: constance_cassler@fws.gov

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From: Kelso, Charles <charles_kelso@fws.gov>

Sent: Tuesday, July 27, 2021 11:09 AM

To: Phillips, Bryan <Bryan.Phillips@MyFWC.com>

Cc: Rivera, Jose J <jose_rivera@fws.gov>; Carey, Robert L <robert_carey@fws.gov>

Subject: Re: [EXTERNAL] FW: FDEP RAI Responses (Bellmar - 18CEM3016)

Bryan,

I'm temporarily assigned to a detail in our regional office. I'll forward this information to our Florida 404 assumption and environmental review leads. Because this project is also a portion of the ECMSHCP application, I'm alerting that team as well.

Chuck Kelso
U.S. Fish and Wildlife Service
Florida Ecological Services Field Office
1339 20th Street
Vero Beach, FL 32960-3559
(772)469-4241
Charles_Kelso@fws.gov

From: Phillips, Bryan <Bryan.Phillips@MyFWC.com>

Sent: Monday, July 26, 2021 3:08 PM

To: Kelso, Charles <charles_kelso@fws.gov>

Cc: Hight, Jason <Jason.Hight@MyFWC.com>; Cucinella, Josh <Josh.Cucinella@MyFWC.com>

Subject: [EXTERNAL] FW: FDEP RAI Responses (Bellmar - 18CEM3016)

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Chuck:

Are you still the FWS reviewer for the Bellmar Community project (ST404 #396364)? The applicant provided a response to the Request for Additional Information late Friday afternoon (7/23). The response files are available in Oculus through the following link:

[https://depdms.dep.state.fl.us:443/Oculus/servlet/shell?command=hitlist&\[freeText=\]&\[folderName=\]&\[profile=Permitting_Authorization\]&\[creator=\]&\[entityType=any\]&\[createdDateTo=\]&\[catalog=45\]&\[searchBy=Profile\]&\[sortBy=Document+Date\]&\[createdDate=\]&{County=_EQ_COLLIER}&{District=_EQ_SD}&{Facility-Site+ID=_EQ_ST404_396364}](https://depdms.dep.state.fl.us:443/Oculus/servlet/shell?command=hitlist&[freeText=]&[folderName=]&[profile=Permitting_Authorization]&[creator=]&[entityType=any]&[createdDateTo=]&[catalog=45]&[searchBy=Profile]&[sortBy=Document+Date]&[createdDate=]&{County=_EQ_COLLIER}&{District=_EQ_SD}&{Facility-Site+ID=_EQ_ST404_396364})

If you are no longer reviewing this project, do you know who is?

Thanks.

Bryan Phillips
Conservation Planning Services
Florida Fish and Wildlife Conservation Commission
3911 Hwy 2321
Panama City, Florida 32409-1658

Office: 850-767-3646

From: Schwetje, Toby <Toby.Schwetje@FloridaDEP.gov>

Sent: Friday, July 23, 2021 4:02 PM

To: Phillips, Bryan <Bryan.Phillips@MyFWC.com>

Subject: FW: FDEP RAI Responses (Bellmar - 18CEM3016)

[EXTERNAL SENDER] Use Caution opening links or attachments

Hello Bryan,

The RAI response for Belmar just came in, there is a link below.



Toby Schwetje

ERP Environmental Specialist III

Florida Department of Environmental Protection

South District Office

Toby.Schwetje@FloridaDEP.gov

Office: 239.344.5631

Internal: 8-5631



<http://www.surveygizmo.com/s3/3461063/SD-DEP-Pre-Application-Meeting-Request>

[FDEP South District Home Page](#) [FDEP Business Portal](#) [FDEP Information Portal](#)

ERP APPLICATION FORMS: <https://floridadep.gov/water/submerged-lands-environmental-resources-coordination/content/forms-environmental-resource>

New SPGP Effective December 31st - For more information: <https://www.saj.usace.army.mil/Missions/Regulatory/Public-Notices/Article/1703359/state-programmatic-general-permit-spgp-v-state-of-florida/>

From: Latoya Johnson <LatoyaJ@passarella.net>

Sent: Friday, July 23, 2021 4:59 PM

To: SD_ERP_Permit <SD_ERP_Permit@dep.state.fl.us>

Cc: Schwetje, Toby <Toby.Schwetje@FloridaDEP.gov>; Kenneth Passarella <kenp@passarella.net>; Heather Samborski <HeatherP@passarella.net>

Subject: FDEP RAI Responses (Bellmar - 18CEM3016)

Good afternoon Toby,

The attached FDEP RAI Responses for Bellmar was posted to the following FDEP ftp site for your access. Please contact our office if you have any questions.

FDEP FTP Site: : <ftp://ftp.dep.state.fl.us/pub/incoming/South%20District%20Incoming/Passarella/>

Thank you,

Latoya Johnson

Administrative Assistant

Passarella & Associates, Inc.

Offices in Florida and South Carolina

13620 Metropolis Avenue, Suite 200

Fort Myers, Florida 33912

Phone (239) 274-0067 Fax (239) 274-0069

www.passarella.net

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Go Green! Print this email only when necessary

[]



October 9th, 2020

Sent via electronic mail

Roxanna Hinzman, Field Supervisor
U.S. Fish and Wildlife Service
1339 20th Street
Vero Beach, FL 32960
roxanna_hinzman@fws.gov

Re: Response to Letter from Sierra Club, Conservancy of Southwest Florida, and the Center for Biological Diversity Re: Impact of State Assumption of Clean Water Act Section 404 Permitting

Ms. Hinzman:

The Eastern Collier Property Owners (ECPO)¹ provide the following response to the September 9, 2020 letter from the Sierra Club, Conservancy of Southwest Florida, and the Center for Biological Diversity (collectively “Commenters”). In their letter, the Commenters question how the U.S. Fish and Wildlife Service (FWS or the Service) will address Florida’s potential assumption of Clean Water Act (CWA) section 404 permitting authority in the Service’s review and implementation of the Eastern Collier Multiple Species Habitat Conservation Plan (ECMSHCP or the Plan), and associated Incidental Take Permits (ITPs). ECPO responds as briefly summarized below and further detailed in this letter.

- Florida’s assumption of CWA section 404 permitting, if approved by the U.S. Environmental Protection Agency (EPA), would not change the habitat conservation plan measures in the ECMSHCP or the incidental take proposed to be authorized by the ITPs.
- The ECMSHCP and proposed ITPs would not defer critical decisions about either the configuration or extent of preservation areas to the CWA section 404 permitting stage.
- The Service is completing internal (intra-service) Endangered Species Act (ESA) section 7 consultation on the proposed ITPs, which is separate from ESA section 7 consultation between EPA and FWS on Florida’s application to assume 404 permitting authority.

¹ The ECPO members are companies that own land in eastern Collier County, Florida. ECPO members include (in alphabetical order): Alico, Inc.; Barron Collier Investment, Ltd.; Collier Enterprises Management, Inc.; Consolidated Citrus Limited Partnership; English Brothers Partnership; Gargiulo, Inc.; Half Circle L Ranch, LLP; Heller Bros. Packing Corp.; JB Ranch; Owl Hammock Immokalee, LLC; Pacific Land, Ltd.; and Sunniland Family Limited Partnership. ECPO members collectively own approximately 85 percent of the private land within eastern Collier County, Florida, as well as other land in southern and central Florida outside the eastern Collier County area.

I. Background

A. ECPO's Multiple Species Habitat Conservation Plan Under ESA Section 10.

The ECMSHCP will permanently preserve over 106,000 acres of privately held land with an estimated value of over \$1 billion – land that could otherwise be developed – to provide valuable habitat for the Florida panther and eighteen other protected species in Southwest Florida. The Plan also limits the acreage of land where the ITPs would provide incidental take coverage for new development² to a maximum of 39,973 acres over the next 50 years, and limits the areas within which such ITP coverage would apply to contiguous sites with less valuable habitat (primarily previously disturbed agricultural lands), thereby avoiding impacts to large contiguous areas with higher value habitat and permanently preserving wildlife dispersal corridors that provide crucial linkages between existing public conservation lands (and, even as to areas with relatively low or no habitat value, avoiding fragmentation by identifying previously cleared lands for ITP coverage). The ECMSHCP ensures coordinated landscape-scale planning for future development, avoiding piecemeal development that could fragment valuable contiguous habitat, and will provide a revenue stream that will create a multi-million dollar fund for species conservation activities. The ECMSHCP describes likely impacts to species, steps to minimize and mitigate those impacts, funding to implement those steps, and alternatives considered by the applicants.

The ECPO members prepared the ECMSHCP in support of their applications for ITPs pursuant to ESA section 10. The ITPs would not authorize development, but would instead authorize “take” of federally listed species incidental to “covered activities,” i.e., residential and commercial development and earth mining activities. 16 U.S.C. § 1539. The form of incidental take authorized by the ITPs is, for most species, limited to unintentional harassment.³ Specifically, the light, sound, and/or vibration created by construction and earth mining activities may disturb or annoy species, and it is possible that individual members of some species could be disturbed to such an extent that normal behavioral patterns, such as feeding, sheltering, and breeding, are significantly disrupted, resulting in “take” in the form of “harassment.” 50 C.F.R. §17.3. No intentional take (such as hunting, capturing, or killing) will occur, and no such take authorization has been requested. The ECMSHP is designed to avoid, minimize and mitigate the effects of authorized incidental take, including through the conservation of valuable habitat and wildlife dispersal corridors described above.

B. Florida's Proposed Assumption of CWA Section 404 Permitting.

CWA section 404 authorizes the U.S. Army Corps of Engineers (Corps) to permit the discharge of dredged or fill material into “waters of the United States.” 33 U.S.C. § 1344. A

² The 45,000 acres of land identified for development under the HCP include the 5,027-acre Town of Ave Maria, for which Federal permitting and section 7 consultations have been completed. The acreage of Covered Activities that would receive take coverage under the ITPs, therefore, is actually 39,973 acres.

³ By their nature, the covered activities will not pose a lethal threat to most species. As explained in the HCP, while unlikely, it is possible that certain ground-burrowing species – including gopher tortoise, gopher frog, eastern indigo snake, and eastern diamondback rattlesnake – as well as the Florida bonneted bat – may be harmed by the covered activities (e.g. injured or killed as a result of ground disturbance, such as excavation). However, the applicants will undertake surveys and numerous avoidance measures to reduce if not eliminate such risk of harm.

state may assume authority to administer the 404 program within its jurisdiction if its permitting standards and procedures are at least as stringent as the federal program. 40 C.F.R. § 233.1(d). On August 20, 2020, Florida submitted an application to assume permitting responsibility for discharges of dredged or fill material into waters of the United States within the State in accordance with the CWA. If EPA approves the application, the Florida Department of Environmental Protection (FDEP) would administer 404 permits for many inland waters (i.e. “assumed” waters), while the Corps would continue to administer 404 permits in “retained” waters, which generally include traditional navigable waters (including navigable rivers), coastal waters, and wetlands abutting those waters. Pursuant to the Retained Waters List in FDEP’s draft State 404 Program Applicant’s Handbook, we anticipate that FDEP would be responsible for administering 404 permits for discharges of dredged or fill material into waters of the United States within the ECMSHCP area following assumption. On September 16, 2020, EPA published a notice in the *Federal Register* confirming that Florida’s application for assumption was complete and that it intends to approve or disapprove the request by December 17, 2020. 85 Fed. Reg. 57,853 (Sept. 16, 2020).

II. ECPO’s Responses to the Concerns Raised by the Commenters.

A. The Habitat Conservation Plan Measures and Authorized Incidental Take Would Not Change as a Result of State Assumption.

FDEP’s assumption of CWA section 404 permitting responsibility would not change the habitat conservation or mitigation measures in the ECMSHCP or the incidental take proposed to be authorized by the ITPs under ESA section 10. The ECMSHCP and ITPs function independently of any future CWA 404 permits that may be required for activities within the HCP area, and their requirements would apply equally with or without 404 permits, and regardless of whether the Corps, FDEP, or any other entity administers the 404 permit process. ITPs and CWA section 404 permits are issued by separate agencies under separate statutory authorities for separate types of impacts. ITPs regulate incidental take of listed species caused by a project, while 404 permits authorize discharges of dredged or fill material into “waters of the United States” during construction of a project. Although both types of permits may apply to a single project, an ITP or its associated HCP does not depend on a 404 permit to function.

The proposed ITPs would authorize only limited types of incidental take of specified covered species under ESA section 10, and the ECMSHCP will offset the impacts of that take by conserving habitat and otherwise specifying avoidance, minimization, and mitigation measures. The Service will authorize and control the take in the same manner regardless of whether a covered activity requires a CWA 404 permit and, if so, regardless of which agency administers the 404 permit. The ITPs and ECMSHCP would not authorize or control discharges of dredged or fill material into “waters of the United States,” which instead requires authorization under CWA section 404 by the Corps, or by FDEP if assumption is approved.

All ECMSHCP covered activities will be subject to the requirements of the Plan and conditions of the ITPs, regardless of whether or not a 404 permit is required for a discharge of dredged or fill material into “waters of the United States” or which agency issues the 404 permit.

B. Critical Decisions About the Configuration and Extent of Preservation Areas Would Not Be Deferred to the CWA 404 Permitting Stage.

The ECMSHCP and ITPs would not defer critical decisions to the project permitting stage. The Plan specifies areas that provide limited habitat value (generally because the land was previously cleared and graded for agricultural fields) where up to 45,000 acres of covered activities can occur (of which up to 39,973 acres would be new development and 5,027 acres constitutes Ave Maria), and designates over 106,000 acres of private land that is of substantially greater habitat value to be preserved as mitigation for the covered activities. More precisely, the Plan provides a 49,276-acre “envelope” within which a maximum of 45,000 acres of current and future development may occur. This allows the property owners some planning and site design flexibility, where future projects may wish to make minor adjustments (e.g., to avoid wetlands impacts) while maintaining the overall configuration and extent of the preservation areas. At the end of the 50-year term, under the full 45,000-acre development scenario, 106,442 acres would be preserved.

Covered activities cannot occur under the ECMSHCP unless corresponding preservation lands are first placed under a permanent conservation easement. The Plan specifies the process under which preservation is calculated and accomplished. This process is based on a Panther Habitat Unit calculation, but takes into account the specific biological needs of all covered species (and the extent of Florida panther mitigation generally over-mitigates for impacts to the other covered species). This process also provides incentives for landowners to preserve the most ecologically valuable lands first.

The conservation easements will be recorded in advance of covered activities. Neither the requirement to record the easements nor the identification of lands to be preserved is contingent on the 404 permitting process. Indeed, a covered activity will be required to place the same amount of preservation lands under a conservation easement regardless of whether any portion of that activity requires a CWA 404 permit for a discharge of dredged or fill material into waters of the United States. The applicants will be subject to and FWS will oversee this process under the ITPs irrespective of whether or the extent to which 404 permits are required for a project, and regardless of which agency is responsible for administering 404 permitting.

C. Section 7 Consultation on EPA’s Approval of Florida’s 404 Program Is Separate from FWS’s Intra-Service Consultation on the Proposed ITPs.

ESA section 7 consultation between EPA and FWS on FDEP’s application to assume 404 permitting authority is separate from FWS’s internal (intra-service) section 7 consultation on ECPO’s proposed ITPs. The two consultations involve different actions by different agencies under different statutory authorities (FWS issuance of ITPs under the ESA versus EPA approval of state assumption under the CWA). The Service is in the process of concluding a two-year intra-service section 7 consultation on the ITP applications and the ECMSHCP.

The proposed ITPs would require project-specific reviews for consistency with the ITPs and with the biological opinion. The results of the section 7 consultation for the ITPs, including the biological opinion, will facilitate the project-specific reviews that will be required for the proposed ITPs. In addition, any future 404 permits would require coordination with and review

by the Service prior to issuance, regardless of whether the permit is issued by the Corps, FDEP or any other entity. Furthermore, the Biological Opinion for the ECMSHCP and proposed ITPs would be subject to standard reinitiation of consultation provisions. Thus, reinitiation of section 7 consultation would be required for any covered activity within the Plan area that does not meet the definition of a covered activity (meaning that it has not been considered under the intra-service section 7 consultation), or that otherwise required reinitiation under ESA section 7 regulations.

The ECMSHCP also contains a number of provisions to ensure that no impacts to covered species occur that were not already considered by the biological opinion, and that the permittees will meet their obligations under the Plan. For example, the ITPs and ECMSHCP also require annual monitoring reports for each permit and the Plan as a whole, tracking development activities and recordation of conservation easements as they occur. In addition, FWS and the applicants have agreed in principle to conduct mandatory "milestone" reviews of the Plan based upon pre-established percentages of the total acreage of covered activities implemented to date. The annual monitoring and milestone reviews would allow FWS and the permittees to adjust and fine-tune objectives and procedures numerous times over the 50-year term of the ITPs, independent of 404 administration.

III. Conclusion

Due to the regulatory framework of the ESA and CWA, Florida's assumption of CWA section 404 permitting would not change the habitat conservation or mitigation measures in the ECMSHCP or the incidental take proposed to be authorized by the ITPs. In addition, the Plan does not defer to the 404 permitting stage critical decisions about the configuration and extent of the preservation areas. At the end of the 50-year term, up to 106,442 acres would be preserved if the permittees develop all 45,000 acres designated for covered activities. And, finally, the ESA section 7 consultation between EPA and FWS on FDEP's application to assume 404 permitting authority is separate from FWS's intra-service section 7 consultation on the proposed ITPs.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Christian Spilker', with a stylized flourish at the end.

Christian Spilker
Collier Enterprises on behalf of Eastern Collier Property Owners (ECPO)