



# Everglades Law Center, Inc.

*Defending Florida's Ecosystems  
and Communities*

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*Sent via Certified Return Receipt Mail and Electronic Mail*

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**RE: Sixty-Day Notice of Intent to Sue for Violations of the Endangered  
Species Act Related to the 2012 Cooperative Agreement between the  
U.S. Fish and Wildlife Service and the Florida Fish and Wildlife  
Conservation Commission**

Dear Secretary Salazar, Director Ashe, and Regional Director Dohner:

On behalf of the Center for Biological Diversity and Conservancy of Southwest Florida this letter serves as notice of our intent to sue the United States Department of the Interior, the United States Secretary of the Interior, and the United States Fish and Wildlife Service (hereafter referred to collectively as "FWS") for violating the Endangered Species Act (ESA), 16 U.S.C. §§ 1531–1544, in delegating its incidental take permitting authority to the Florida Fish and Wildlife Conservation Commission (FWC), by overreaching the authority granted under the ESA in forming a cooperative agreement with the FWC, and by failing to ensure against jeopardy or adverse modification. We provide this letter pursuant to the sixty-day notice requirement of the citizen-suit provision of the ESA, 16 U.S.C. § 1540(g).

As discussed below, FWS and FWC entered into a Section 6 cooperative agreement that purports to authorize the FWC to issue ESA incidental take permits. FWS' use of ESA Section 6, or any other mechanism, to sub-delegate incidental take-permitting authority to FWC reaches beyond what is contemplated or allowed in the Endangered Species Act, and is therefore, arbitrary, capricious, and is not in accordance with the ESA and its implementing provisions.

Furthermore, FWS' December 30, 2011 Biological Opinion on the Section 6 agreement is wholly inadequate in that it has not met the ESA's Section 7 requirements to ensure against jeopardy and adverse modification for the individual species listed.

## I. Background

On May 14, 2012, FWS and FWC entered into a cooperative endangered species conservation agreement (Cooperative Agreement).<sup>1</sup> Through the agreement, FWS delegated its authority to "issue a permit authorizing take of a Federally-listed species incidental to and not the purpose of an otherwise lawful activity" and to issue conservation permits for federally listed endangered and threatened species to the FWC.<sup>2</sup>

Prior to entering this cooperative agreement, FWS issued a Biological Opinion that found that this action is not likely to jeopardize listed species and is not likely to destroy or adversely modify critical habitat.<sup>3</sup> FWS also prepared an Environmental Assessment under the National Environmental Policy Act (NEPA), in which the FWS notes that this type of Section 6 agreement is unprecedented and "the first of its kind."<sup>4</sup>

## II. The Endangered Species Act

Congress enacted the ESA in 1973 "to provide a program for the conservation of . . . endangered species and threatened species" and to "provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved."<sup>5</sup> The ESA vests primary responsibility for administering and enforcing the ESA with the Department of the Interior and Department of Commerce who have delegated this responsibility to FWS and the National Marine Fisheries Service (NMFS) respectively.<sup>6</sup>

To achieve the ESA's purpose, FWS protects species by listing them as "endangered" or "threatened."<sup>7</sup> Listed species receive substantive protections of the ESA, including the designation of critical habitat,<sup>8</sup> the development of a recovery plan,<sup>9</sup> the prohibition of unlawful "take,"<sup>10</sup> and

<sup>1</sup> U.S. Fish and Wildlife Service & Florida Fish and Wildlife Conservation Commission, *Cooperative Agreement Between the United States Department of Interior Fish and Wildlife Service and Florida Fish and Wildlife Conservation Commission for the Conservation of Endangered and Threatened Fish and Wildlife* (2012), [http://www.fws.gov/northflorida/Guidance-Docs/FWC\\_Section\\_6/20120514\\_ca\\_FWS\\_FWC\\_2012\\_S6\\_CA\\_signed\\_web.pdf](http://www.fws.gov/northflorida/Guidance-Docs/FWC_Section_6/20120514_ca_FWS_FWC_2012_S6_CA_signed_web.pdf) (accessed Feb. 28, 2013).

<sup>2</sup> *Id.* at 5-6.

<sup>3</sup> U.S. Fish and Wildlife Service, *Intra-Service Biological Opinion: Amended Florida Section 6 Agreement*, [http://www.fws.gov/northflorida/Guidance-Docs/FWC\\_Section\\_6/20111230\\_bo\\_FWS-FWC\\_2012\\_S6\\_CA\\_BO\\_signed\\_web.pdf](http://www.fws.gov/northflorida/Guidance-Docs/FWC_Section_6/20111230_bo_FWS-FWC_2012_S6_CA_BO_signed_web.pdf) (accessed Feb. 28, 2013) [hereinafter *BiOp*].

<sup>4</sup> U.S. Fish and Wildlife Service, *Environmental Assessment: Endangered Species Act Section 6 Cooperative Agreement*, [http://www.fws.gov/northflorida/Guidance-Docs/FWC\\_Section\\_6/20111229\\_ea\\_FWS-FWC\\_2012\\_S6\\_CA\\_EA.pdf](http://www.fws.gov/northflorida/Guidance-Docs/FWC_Section_6/20111229_ea_FWS-FWC_2012_S6_CA_EA.pdf) at 11 (accessed Feb. 28, 2013) [hereinafter *EA*].

<sup>5</sup> 16 U.S.C. § 1531(b).

<sup>6</sup> *Id.* § 1532(15); 50 C.F.R. § 402.01(b) (2012).

<sup>7</sup> *Id.* §§ 1532(6), (20).

<sup>8</sup> *Id.* § 1532(5), 1533(a)(3)(A)(i).

<sup>9</sup> *Id.* § 1533(f).

<sup>10</sup> *Id.* § 1539(a).



federal agencies' avoidance of jeopardy and adverse modification via consultation with FWS.<sup>11</sup>

### A. Section 6

Section 6(c)(1) allows for the formation of cooperative agreements between the federal government and state agencies in order to facilitate the primary purpose of the Act, which is to conserve endangered and threatened species and the ecosystems upon which they depend.<sup>12</sup>

The statute allows for the FWS to enter into such agreements with states that have demonstrated that they will implement an "adequate and active program for the conservation" of listed species.<sup>13</sup> Congress has listed specific criteria that the FWS must consider when determining whether a cooperative agreement is "adequate and active." Each of these considerations is aimed at the state's ability to implement programs that provide for the conservation of listed species, and include such measures as the state's ability to acquire land and aquatic habitat for conservation and to conduct investigations directed at determining the survival of listed species.<sup>14</sup>

While the statute expressly includes requirements aimed at the direct conservation of listed species, it does not expressly or impliedly contemplate or allow the sub-delegation of any incidental take permitting power to the states.

### B. Section 7

Section 7(a)(2) requires each federal agency to engage in consultation with FWS to ensure that federal agency actions are "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species."<sup>15</sup> This requirement applies specifically to agency actions arising from the exercise of federal agencies' discretionary powers.<sup>16</sup> Agency actions include "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States."<sup>17</sup> The ESA implementing regulations set forth a specific process for consultation, and its completion is the only way to ensure that an action agency's affirmative duties under Section 7(a)(2) are satisfied. These regulations, along with provisions in Section 10, provide the methods for authorizing "incidental take" pursuant to 16 U.S.C. §§ 1536(b)(4)(iv) and 1536(o)(2).

Pursuant to this process, the action agency, here FWS, must "review its actions at the

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<sup>11</sup> *Id.* § 1536(a)(2).

<sup>12</sup> *See id.* § 1531(b).

<sup>13</sup> *Id.* § 1535(c)(1).

<sup>14</sup> *See id.*

<sup>15</sup> *Id.* § 1536(a)(2). Critical habitat includes "specified areas within the geographical area occupied by the species . . . on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection" and "essential areas" that are "outside the geographical area occupied by the species." *Id.* at § 1532(5)(A)(i)-(ii).

<sup>16</sup> 50 C.F.R. § 402.03; *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 665, 667-69 (2007); *see Florida Key Deer v. Paulison*, 522 F.3d 1133 (11th Cir. 2008) (quoting *Nat'l Ass'n of Home Builders*, 551 U.S. at 671) (defining the discretion required under Section 7(a)(2) as "the discretion 'to consider the protection of threatened or endangered species as an end in itself'").

<sup>17</sup> 50 C.F.R. § 402.02.

earliest possible time” to determine whether an action may affect listed species or critical habitat.<sup>18</sup> FWS and NMFS joint regulations broadly define “action” to include those “intended to conserve listed species or their habitat; the promulgation of regulations; the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-of-aid; or actions directly or indirectly causing modifications to the land, water, or air.”<sup>19</sup> The “action area” means “all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action.”<sup>20</sup>

Section 7(a)(2) of the ESA places two distinct obligations upon federal agencies. The procedural obligation requires agencies to initiate consultation with FWS to determine what effects the agency action may have on endangered and threatened species and their critical habitats.<sup>21</sup> The substantive obligation requires agencies to ensure that their actions will not jeopardize the continued existence of endangered and threatened species or destroy or adversely modify their critical habitats.<sup>22</sup>

FWS and NMFS joint regulations define “jeopardize the continued existence” to mean “[engaging] in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.”<sup>23</sup> “Destruction or adverse modification” means “a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.”<sup>24</sup> The joint regulations also require FWS to consider both recovery and survival impacts to listed species and critical habitat.<sup>25</sup>

To fulfill the Section 7(a)(2) consultation requirement, FWS must rely on the “best scientific and commercial data available,” and produce a biological opinion.<sup>26</sup> The biological opinion considers the “effects of the action,” including its direct and indirect effects, the “environmental baseline,” “interrelated or interdependent” actions, and “cumulative effects.”<sup>27</sup> The biological opinion explains “how the proposed action will affect the species or its habitat” and “states the opinion” of FWS as to whether the proposed action is likely to “jeopardize the continued existence of” listed species or “result in the destruction or adverse modification of critical habitat.”<sup>28</sup>

If FWS concludes in a biological opinion that the proposed action would likely result in jeopardy or the destruction or adverse modification of critical habitat, it must suggest reasonable and prudent alternatives to the proposed agency action.<sup>29</sup> If FWS concludes that the proposed action will not result in jeopardy or adverse modification, but is likely to result in the take of an

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<sup>18</sup> *Id.* § 402.14(a).

<sup>19</sup> *Id.* § 402.02.

<sup>20</sup> *Id.*

<sup>21</sup> 16 U.S.C. § 1536(a)(2).

<sup>22</sup> *Id.*

<sup>23</sup> 50 C.F.R. § 402.02.

<sup>24</sup> *Id.*

<sup>25</sup> *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 931 (9th Cir. 2008); *Gifford Pinchot Task Force v. United States Forest Serv.*, 378 F.3d 1059 (9th Cir. 2007).

<sup>26</sup> 16 U.S.C. § 1536(a)(2).

<sup>27</sup> 50 C.F.R. § 402.

<sup>28</sup> 16 U.S.C. § 1536; 50 C.F.R. § 402.14.

<sup>29</sup> *Id.* § 1536(b)(3)(A).



endangered or threatened species, FWS must provide an “incidental take statement.”<sup>30</sup> The incidental take statement must specify the impacts of the anticipated taking, must specify “reasonable and prudent” measures to minimize those impacts from the incidental take, must set forth mandatory terms and conditions that the action agency must follow to implement the reasonable and prudent measures, and must include monitoring and reporting requirements in order to monitor the impacts of incidental take.<sup>31</sup>

### C. Section 9

Section 9 makes it unlawful to “take” an endangered species.<sup>32</sup> “Take” is broadly defined as “harass, harm, pursue, hunt, shoot, wound, kill, capture, or collect, or to attempt to engage in any such conduct.”<sup>33</sup> Harm includes habitat modification when it “actually kills or injures wildlife by significantly impacting essential behavioral patterns, including breeding, feeding, or sheltering.”<sup>34</sup> Take can only be permitted through a valid incidental take statement contained in a biological opinion prepared by FWS or NMFS under Section 7 or through a valid incidental take permit issued by FWS under Section 10 of the Act.<sup>35</sup>

### D. Section 10

Section 10(a)(1)(A) allows for the issuance of permits for scientific purposes. Additionally, section 10(a)(1)(B) provides a limited exception to the “take” provisions of the ESA in the form of incidental take permits - take which is “incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.”<sup>36</sup>

In order to receive an incidental take permit, an applicant must prepare an acceptable “habitat conservation plan” (“HCP”).<sup>37</sup> The HCP must specify:

- (1) the impact which will likely result from such taking;
- (2) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
- (3) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and
- (4) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.<sup>38</sup>

The ESA authorizes the Secretary to issue an incidental take permit if the Secretary finds, after opportunity for public comment, that:

- (1) the taking will be incidental;

<sup>30</sup> 50 C.F.R. §§ 402.14(g)(7), (i).

<sup>31</sup> *Id.* § 402.14(i).

<sup>32</sup> 16 U.S.C. § 1538(a)(1); 50 C.F.R. § 17.31.

<sup>33</sup> 16 U.S.C. § 1532(19).

<sup>34</sup> 50 C.F.R. § 17.31.

<sup>35</sup> *Id.* § 1536(o)(2).

<sup>36</sup> *Id.* § 1539(a)(1)(B).

<sup>37</sup> *Id.* § 1539(a)(2)(A).

<sup>38</sup> *Id.*

- (2) the applicant will, to the maximum extent practicable, minimize and mitigate the impact of such taking;
- (3) the applicant will ensure that adequate funding for the HCP will be provided;
- (4) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild;
- (5) the measures required by the Secretary in the HCP will be met; and
- (6) the Secretary has received such other assurances as he or she may require that the HCP will be implemented.<sup>39</sup>

The incidental take permit “shall contain such terms and conditions as the Secretary deems necessary or appropriate to carry out the purposes [of Section 10], including, but not limited to, such reporting requirements as the Secretary deems necessary for determining whether such terms and conditions are being complied with.”<sup>40</sup> The Secretary must also revoke a permit if he or she finds that the permittee is not complying with the terms and conditions of the permit.<sup>41</sup>

The Secretary must publish notice in the Federal Register for each application for an incidental take permit, inviting comments from interested parties.<sup>42</sup> Information received by the Secretary as a part of any application for an incidental take permit must be available to the public as a matter of public record at each stage of the proceeding.<sup>43</sup>

### III. FWS’ Violation of ESA Section 6

FWS violated ESA Section 6(c)(1) by overstepping the authority granted in Section 6 to enter into cooperative agreements with states. Congress does not “hide elephants in mouseholes” - that is, Congress does not delegate authority on matters of important political or economic importance to agencies in a “vague or cryptic fashion.”<sup>44</sup> Congress clearly and expressly stated that the general purpose of Section 6 is to further the overall conservation mission of the ESA by facilitating, to the maximum extent possible, cooperation between the FWS or NMFS and state conservation agencies. No mention of the sub-delegation of incidental take permitting authority is made in the statute, and in fact, the only cooperation expressly noted in Section 6 is for consultation between the states and the Services before the acquisition of land or water resources. For FWS to interpret Section 6 to give it the authority to delegate incidental take-permitting authority to the state is to place an elephant in a mousehole.

Beginning in 1976, FWS and FWC have maintained cooperative agreements that are harmonious with the conservation spirit of Section 6.<sup>45</sup> The new cooperative agreement that grants incidental take permitting authority to the FWC is unprecedented in any state and far exceeds the authority granted to FWS by Congress through Section 6 of the ESA.

<sup>39</sup> *Id.* § 1539 (a)(2)(B).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* § 1539 (a)(2)(C).

<sup>42</sup> *Id.* § 1539(c).

<sup>43</sup> *Id.*

<sup>44</sup> *U.S. v. Franck's Lab, Inc.*, 816 F. Supp 2d 1209, 1238 (M.D. Fla. 2011).

<sup>45</sup> *BiOp supra* n. 3 at 1.



No previous cooperative agreement has sub-delegated to a state agency the authority to issue take permits, as it is apparent that Congress intended that the power to make such critical determinations with respect to the nation's endangered and threatened species be retained at the federal level. While Congress included Section 6 to facilitate efficient implementation of ESA provisions at the state level, Congress did not intend for critical powers such as the issuance of take permits to be sub-delegated – and certainly not through Section 6 cooperative agreements; this is reflected in the plain language of the statute that specifically refers to matters of land and water resource acquisition in furtherance of conservation, whereas there is no mention whatsoever of take permitting sub-delegation. The previous iterations of the Section 6 agreement between the FWS and the FWC complied with the plain language of the statute and focused primarily on the conservation purpose of the ESA. By significantly amending the traditional Section 6 cooperative agreement that has existed since 1976, the FWS has, as it admits, entered into unprecedented and “unique” territory.<sup>46</sup>

FWS has unlawfully overreached and exceeded its ESA authority by granting and sub-delegating the authority to issue incidental take permits to the FWC. FWS' approval of the 2012 Conservation Agreement with FWC is therefore arbitrary and capricious and not in accordance with the ESA.

#### **IV. FWS' Violations of ESA Section 7(a)(2)**

FWS violated Section 7(a)(2) of the ESA in issuing the December 30, 2011 Biological Opinion for the sub-delegation of take authority to FWC by not meeting its consultation responsibilities under Section 7(a)(2), by not basing its Biological Opinion on the best scientific data available, by including ineffective and nonspecific Reasonable and Prudent Measures in its Biological Opinion, and by limiting federal oversight of incidental take in preventing the reinitiation of federal consultation.

##### **A. Procedural Violations of Section 7(a)(2)**

FWS has not met its consultation responsibilities under Section 7(a)(2), which requires FWS to engage in consultation to determine whether its delegation of incidental take-permitting authority “is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [critical] habitat.”<sup>47</sup> Under Section 7(a)(2), each federal agency must ensure “that any action authorized, funded, or carried out by such agency” is not likely to jeopardize endangered species, threatened species, or critical habitat.<sup>48</sup> ESA regulations provide that formal consultation may encompass “a number of similar individual actions within a given geographic area” or “a segment of a comprehensive plan.”<sup>49</sup> However broad the agency action, FWS must consider it “as a whole.”<sup>50</sup>

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<sup>46</sup> *EA supra* note 4.

<sup>47</sup> 16 U.S.C. § 1536(a)(2); *Loggerhead Turtle v. County Council of Volusia County, Fla.*, 120 F. Supp. 2d 1005, 1012 (M.D. Fla. 2000).

<sup>48</sup> 16 U.S.C. § 1536(a)(2).

<sup>49</sup> 50 C.F.R. § 402.14(c).

<sup>50</sup> *Id.*; *Lane County Audubon v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1992); *Nat'l Wildlife Fed'n v. Brownlee*, 402 F. Supp. 2d 1, 10 (D.D.C. 2005).



The cooperative agreement is more than an agreement to cooperatively enforce the ESA—it is an act of delegation. The authorization of the delegation of FWS duties to the FWC via the cooperative agreement represents an action under the ESA for which consultation is required, and FWS acknowledged that it is obligated to enter into consultation on this action.<sup>51</sup>

In issuing its Biological Opinion, FWS broadly engaged in intra-service consultation with respect to the “Service’s entering into an amended Section 6 Cooperative Agreement” with the FWC which “expressly and affirmatively authorizes the Commission to issue conservation permits and incidental take permits for listed species without prior issuance of a Federal permit.”<sup>52</sup> The Biological Opinion is intended to operate programmatically such that future consultation on FWC permitting guidelines will tier from the Biological Opinion. That the 2011 Biological Opinion is intended to operate programmatically does not and cannot satisfy FWS’ present Section 7(a)(2) obligations to ensure that the delegation of take authority to the state will not result in jeopardy or adverse modification.

In fulfilling the Section 7 consultation requirement, FWS must use the best scientific and commercial data available, which is necessary to determine what level of take will not cause jeopardy to the species at issue.<sup>53</sup> The “best scientific and commercial data” standard exists “to ensure that the ESA [is not] implemented haphazardly, on the basis of speculation or surmise.”<sup>54</sup> FWS’ Biological Opinion however, does not include any scientific or commercial data beyond a mere listing of Florida’s threatened and endangered species, and as such it does not provide any basis for which a determination of no jeopardy can be found.<sup>55</sup> While FWS has claimed that it will not speculate with respect to the negative effects that may arise as a result of the sub-delegation of permitting powers to the state, it nevertheless has engaged in significant speculation that flies directly in the face of the best scientific and commercial data standard by assuming a finding of no jeopardy or adverse modification.

Moreover, FWS makes little attempt in the Biological Opinion to discuss the effects of the proposed action on the listed species as required by 50 C.F.R. §402.14(h), dismissing such analysis as too “speculative.” The effects it does discuss are only the predicted beneficial effects, such as “greater acreages protected” and “more landscape-level conservation initiatives.” This generic analysis that emphasizes only vague positive effects while entirely eschewing the potential negative impacts that such a broad permitting program might have on the state’s listed species falls well short of the Biological Opinion requirements of the ESA.

Additionally, FWS’ Biological Opinion violates the ESA by relying on “incremental-step consultation.”<sup>56</sup> Even if FWS could satisfy its present Section 7(a)(2) obligations through promised future consultations that would “tier out” from the present Biological Opinion, the Opinion on the Section 6 cooperative agreement still does not fulfill FWS’ obligations under the Act. The

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<sup>51</sup> *BiOp*, *supra* n. 3, at 1.

<sup>52</sup> *Id.*

<sup>53</sup> 16 U.S.C. § 1536(a)(2).

<sup>54</sup> *Bennett v. Spear*, 520 U.S. 154, 176 (1997).

<sup>55</sup> *BiOp*, *supra* n. 3, at 6 – 8.

<sup>56</sup> See e.g., *Conner v. Burford*, 836 F.2d 1521 (9th Cir. 1988); 50 C.F.R. § 402.14(k) (incremental step consultation only permitted where the underlying action is authorized by a statute that allows the agency to take incremental steps toward the completion of the action).



Biological Opinion, however, is not adequate to determine the direct, indirect, and cumulative effects of the full range of possible projects or actions on all listed species.

Further problematic is the Biological Opinion's determination that the cooperative agreement is not anticipated to result in incidental take. A primary purpose for amending the cooperative agreement with the state of Florida is to authorize FWC to issue incidental take, and thus obviously the proposed action under consideration in the Biological Opinion is likely to result in incidental take. Any determination to the contrary is arbitrary, capricious, unsupported, and in violation of the ESA.

Furthermore, because the cooperative agreement by its own terms is likely to result in incidental take, FWS' Biological Opinion violates the ESA by failing to include a legally valid incidental take statement. The Biological Opinion's incidental take statement fails to specify the amount or extent of anticipated incidental take, fails to set forth a trigger for when the reinitiation of consultation on the cooperative agreement would be required, fails to specify reasonable and prudent measures to minimize such take, fails to set forth terms and conditions to implement the reasonable and prudent measures, and fails to include monitoring and reporting requirements, in violation of the ESA.<sup>57</sup>

Another critical flaw with this process is that holders of state incidental take permits would not be subjected to reinitiated federal consultations when the circumstances surrounding their original permit awards changed. Thus, there would be no federal oversight to ensure that changes in permitting situations did not lead to jeopardy. FWS's own regulations require it to reinitiate consultation where discretionary federal involvement or control of an action is retained and new information reveals that the action will affect endangered species, threatened species, or critical habitat in a manner or degree not previously considered.<sup>58</sup> Specifically, FWS must reinitiate consultation if the amount or extent of taking increases from the originally specified amount in the incidental take statement, if new information becomes available that reveals new or more serious effects of the action, if the federal action changes in such a manner that it creates new effects on species that were not before considered, or if a new species is listed or habitat designated that may be affected by the federal action.<sup>59</sup> With FWC-authorized take, each discrete, state-issued individual-take permit will not be subject to FWS's reinitiated consultations. And even if FWS's regulations regarding reinitiation of consultation did apply to State-issued incidental take permits, FWS has not explained how it would reinitiate consultation on a permit for which it never provided consultation to begin with.

Thus, FWS has not satisfied its ESA Section 7 obligation to adequately consult on its delegation of take-permitting authority to the state.

## **B. Substantive Violation of Section 7(a)(2)**

The FWS' failure to fulfill the procedural requirements of Section 7(a)(2) outlined in the section above has given rise to its failure to uphold and fulfill the substantive provisions of the ESA. By neglecting its obligation to enter into effective and meaningful consultation and produce a

<sup>57</sup> 16 U.S.C. § 1536(b)(4); 50 C.F.R. §§ 402.14(i); 402.16.

<sup>58</sup> 50 C.F.R. § 402.16.

<sup>59</sup> *Id.*

legally valid Biological Opinion that is based on the best available scientific and commercial data, FWS has neglected the fundamental, substantive purpose of Section 7 of the ESA: to ensure the activities it authorizes will not jeopardize endangered or threatened species, or adversely modify their critical habitat.

## **V. FWS' Violation of Section 9**

Section 9 of the ESA prohibits "take" of endangered species.<sup>60</sup> "Take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."<sup>61</sup> The ESA "not only prohibits the acts of those parties that directly exact the taking, but also bans those acts of a third party that bring about the acts exacting a taking...a governmental third party pursuant to whose authority an actor directly exacts a taking of an endangered species may be deemed to have violated the provisions of the ESA."<sup>62</sup> However, any taking that is in compliance with the terms and conditions of an incidental take statement shall not be considered to be a prohibited taking.<sup>63</sup> Therefore, the incidental take statement "acts as a safe harbor, exempting the specified amount of incidental taking from the take prohibition of ESA section 9."<sup>64</sup> Because FWS' Biological Opinion is invalid and legally flawed, and lacks a legally valid incidental take statement, any take that occurs pursuant to the Section 6 agreement does not enjoy protection from the take prohibition of Section 9. Accordingly, all incidental take authorized by the cooperative agreement is in violation of Section 9 of the ESA.

## **VI. FWS' Violation of ESA Section 10**

Section 10 of the ESA explicitly provides that "the Secretary" may permit incidental take.<sup>65</sup> While the Secretary may delegate this issuance of incidental take permits under Section 10 to FWS, there is no indication whatsoever that Congress intended through Section 10 that the Secretary or FWS may sub-delegate such authority to a state agency or official.<sup>66</sup> In authorizing FWS to issue and authorize incidental take through the 2012 Cooperative Agreement, FWS has violated and remains in violation of Section 10 of the ESA.<sup>67</sup>

Section 10 also requires that no incidental take permit may be issued unless the applicant has submitted to the Secretary a habitat conservation plan that meets statutory requirements, which the Secretary finds to be adequate after public notice, and provides that the Secretary shall revoke a permit if she or he finds that the permittee is not complying with the terms and conditions of the permit.<sup>68</sup> By failing to include these minimum statutory requirements in the 2012 Cooperative Agreement, FWS has violated Section 10.<sup>69</sup>

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<sup>60</sup> 16 U.S.C. § 1538(a); 50 C.F.R. § 17.31 (a).

<sup>61</sup> 16 U.S.C. § 1532(19).

<sup>62</sup> *Strahan v. Cox, et al.*, 127 F.3d 155 (1st Cir. 1997).

<sup>63</sup> 50 C.F.R. § 402.14(i)(5); 16 U.S.C. § 1536(o)(2).

<sup>64</sup> *Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 530 (9th Cir. 2010).

<sup>65</sup> 16 U.S.C. § 1539.

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> *Id.* § 1539(a).

<sup>69</sup> *Id.*



Section 10 further requires that prior to the issuance of any incidental take permit the Secretary shall publish notice in the Federal Register and allow for public comment.<sup>70</sup> By failing to require the same level of public notice and comment for individual take permits issued by FWC, FWS has further violated Section 10 in approving the 2012 Cooperative Agreement.<sup>71</sup>

## **VII. Other Violations**

In addition to the aforementioned violations, FWS' approval and implementation of the Section 6 agreement is in violation of the Endangered Species Act, as well as other federal laws, in the following ways:

- Congress has not authorized sub-delegation of the Endangered Species Act;
- Any such sub-delegation would be an agency action subject to the rulemaking provision of the APA, including notice and comment;
- The Conservation Agreement unlawfully deprives citizens of their right to enforce provisions of the ESA through Section 11;
- The Conservation Agreement unlawfully removes the applicability of federal laws and oversight that are vital to government transparency, such as the Freedom of Information Act, Federal Advisory Committee Act and the APA; and
- FWS violated NEPA in developing and authorizing the Cooperative Agreement.

## **VIII. Conclusion**

If FWS does not act within 60 days to correct these violations of the ESA, the Center for Biological Diversity and Conservancy of Southwest Florida will pursue litigation in federal court. The Center and Conservancy will seek injunctive and declaratory relief, and legal fees and costs regarding these violations. An appropriate remedy that would prevent this litigation would be for FWS to immediately amend the 2012 Cooperative Agreement and revoke its delegation of incidental take permitting authority under Section 10(a)(1)(B) to the state.

If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact Jason Totoiu at (561) 568-6740 or [jason@evergladeslaw.org](mailto:jason@evergladeslaw.org). Thank you for your attention to this matter.

Sincerely,



Jason Totoiu  
General Counsel  
Everglades Law Center

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<sup>70</sup> *Id.* § 1539(c).

<sup>71</sup> *Id.*



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Cc: Nick Wiley, Executive Director, Florida Fish & Wildlife Conservation Commission