

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STUART PIMM)
1 Bland Spring Place)
Durham, NC 27713,)

CENTER FOR BIOLOGICAL DIVERSITY)
378 N. Main)
Tucson, AZ 85701,)

ORON L. BASS, JR.)
28525 SW 2nd Ave.,)
Homestead, Fla. 33030,)

Plaintiffs,)

v.)

Civ. No. ____

DANIEL ASHE,)
Director,)
U.S. Fish and Wildlife Service)
1849 C Street, N.W.)
Washington, D.C. 20240,)

SALLY JEWELL,)
Secretary,)
U.S. Department of the Interior)
1849 C Street, N.W.)
Washington, D.C. 20240,)

LIEUTENANT GENERAL THOMAS P. BOSTICK,)
Chief of the U.S. Army Corps of Engineers)
Headquarters)
U.S. Army Corps of Engineers)
441 G Street, N.W.)
Washington, D.C. 20314-1000,)

Defendants.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. For decades, the U.S Army Corps of Engineers (“Corps”), with the approval and authorization of the United States Fish and Wildlife Service (“FWS” or “Service”), has regulated

water flows, diversions, and movements in Everglades National Park (“ENP”) in such a manner as to place the Cape Sable seaside sparrow (“Sparrow”) – a species listed as endangered under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (“ESA” or “Act”) – at ongoing, grave risk of extinction. This ongoing course of conduct violates the ESA’s strict prohibition on federal actions that “jeopardize the continued existence of any endangered species,” *id.* at § 1536(a)(2), and otherwise contravenes the obligations imposed on the Corps and FWS by section 7 of the ESA to engage in a “consultation” process that fully addresses the adverse impacts of agency actions on listed species. Accordingly, Plaintiffs – a leading conservation organization and two scientists who have spent much of their professional careers studying and attempting to conserve the Sparrow – are requesting that the Court remedy these ongoing violations of the ESA, including by ordering the Federal Defendants to engage in a consultation process that complies with the strictures of the ESA and its implementing regulations.

JURISDICTION

2. This action arises under the ESA and the Administrative Procedure Act, 5 U.S.C. §§ 551, 701-706 (“APA”). This Court has jurisdiction pursuant to 16 U.S.C. § 1540(g) and 28 U.S.C. §§ 1331 and 1346. To the extent required by law, Plaintiffs have properly given notice to Defendants of their claims under 16 U.S.C. § 1540(g)(2).

PARTIES

3. Plaintiff Dr. Stuart Pimm has been a professor of ecology for over thirty-five years. He graduated with honors from Oxford University in 1971 and received his Ph.D. in Ecology from New Mexico State University in 1974. He began working on ecology, species conservation, and related issues in 1971 and was named a Pew Scholar in Conservation in 1993.

He has been awarded numerous awards for his research, including the Kempe Prize for Distinguished Ecologists in 1994, the Dr. A. H. Heineken Prize for Environmental Sciences in 2006, and the Tyler Prize for Environmental Achievement in 2010. Dr. Pimm has been a professor of ecology at Duke University for forty years. Since 2002, he has been the Doris Duke Professor of Conservation Ecology at the Nicholas School of the Environment and Earth Sciences, Duke University.

4. Dr. Pimm has been studying and researching the Sparrow for more than twenty years. In 1989, he was asked by the National Park Service (“NPS”) to evaluate water management actions being considered to assist in the recovery of the Everglades and, as a result of that work, NPS asked him to conduct research regarding the Sparrow. In 1992, he began field work in the Sparrow’s south Florida habitat and he has returned annually since then to study the Sparrow during its breeding season, from mid-March into the beginning of June. His research grant for work on the Sparrow has been provided by the NPS and FWS, and he has published more than ten scientific papers discussing the Sparrow and its habitat, including “Endangered Cape Sable Seaside Sparrow Survival,” in the *Journal of Wildlife Management*; “Why Sparrow Distributions do not Match Model Predictions,” in *Animal Conservation*; “Water Levels, Rapid Vegetational Changes, and the Endangered Cape Sable Seaside Sparrow,” in *Animal Conservation*; and “The Importance of Dispersal Estimation for Conserving an Endangered Passerine Bird,” in *Conservation Letters*. For the last two decades, Dr. Pimm has been the principal scientific researcher of the Sparrow and its habitat.

5. A large percentage of Dr. Pimm’s time during the year is spent observing, studying, and analyzing the Sparrow and its habitat. He also regularly takes family and friends

to visit Everglades National Park, including to observe the Sparrow and its natural habitat. Because of his longstanding professional and other interests in the Sparrow, for many years, Dr. Pimm has urged Federal Defendants, in accordance with the ESA's mandate, to take the actions that his research demonstrates is necessary to avoid the Sparrow's extinction and bring about its recovery. In particular, Dr. Pimm has urged Defendants to take actions necessary to protect a critical subpopulation of the Sparrow west of Shark River Slough in Everglades National Park because Dr. Pimm's research has documented that the Corps' actions in flooding this habitat, with the authorization of the FWS, is decimating the subpopulation and thereby threatening the species as a whole with extinction. However, Defendants have failed to take the remedial actions urged by Dr. Pimm, which has left the Sparrow in a highly vulnerable state. Defendants' violations of the ESA, as detailed in this Complaint, are injuring, and will continue to injure, Dr. Pimm's longstanding professional, research, recreational, aesthetic, and other interests in the Sparrow's survival and recovery.

6. Plaintiff Center for Biological Diversity (the "Center") is a national non-profit 501(c)(3) corporation headquartered in Tucson, Arizona, with offices in San Francisco, and Joshua Tree, California, Washington, D.C., New Mexico, Oregon, Minnesota, Vermont, Florida, Colorado, and Washington State. The Center works through science, law, and policy to secure a future for all species, great or small, hovering on the brink of extinction. The Center is actively involved in species and habitat protection issues throughout the United States and the world, including protection of plant and animals species from the impacts of global warming. The Center has more than 800,000 members and supporters throughout the United States and the world, including 2,069 members in Florida.

7. The Center brings this action on its own institutional behalf and on behalf of those of its members (including Dr. Pimm) and Board members who seek to observe and enjoy the Sparrow and who otherwise derive aesthetic, recreational, scientific, and other benefits from the Sparrow and its habitat. On behalf of its members, the Center and a predecessor organization, the Biodiversity Legal Foundation, have expended substantial organizational resources attempting to obtain protections for the Sparrow under the ESA and advocating the species' survival and recovery. The interests of the Center and its members in observing, studying, and otherwise enjoying the Sparrow have been harmed by Defendants' failure to comply with their legal duties under the ESA.

8. Until his retirement, plaintiff Oron Bass was the supervisory wildlife biologist at the South Florida Natural Resources Center in Everglades National Park and Dry Tortugas National Park. He was responsible for inventorying and monitoring for the parks' wildlife. In his 35-year career he has studied invertebrates, amphibians, reptiles, birds, and mammals, with his primary work focused on determining the status of federally listed threatened and endangered species occurring in the National Park Service areas of South Florida. He is a member of the U.S. Fish and Wildlife Service Cape Sable Seaside Sparrow and Florida Panther Recovery Teams and has spent much of his professional career on efforts to study and save the Sparrow from extinction. He has a lifetime love of native ecosystems in South Florida and has spent countless hours studying, observing, and enjoying the Sparrow and its habitat. His professional, recreational, aesthetic, research and other interests are being harmed by the failures of Federal Defendants to take actions required by the ESA to avoid the extinction and facilitate the recovery of the Sparrow.

9. Defendant Ashe is the Director of the FWS, which has been delegated primary responsibility for enforcing the ESA. He is sued solely in his official capacity.

10. Defendant Jewell is the Secretary of the Interior and is ultimately responsible for implementation of the ESA. She is sued solely in her official capacity.

11. Defendant Bostick is the Chief of the Corps, and is therefore responsible for the Corps' actions in jeopardizing the continued existence of the Sparrow. He is sued solely in his official capacity.

STATUTORY AND REGULATORY FRAMEWORK

12. Congress enacted the ESA to ensure that that the “ecosystems upon which endangered species and threatened species depend [are] conserved, [and] to provide a program for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531.

13. An “endangered” species is one that is “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). Section 9 of the ESA prohibits any “person,” which is define to include a federal agency, from “taking” any member of an endangered species without appropriate authorization from the FWS. *Id.* § 1538(a). The term “take” is broadly defined by the Act, and includes “to harass,” “harm,” “wound,” and “kill.” *Id.* § 1532(19). The FWS has further defined the term “harm” to include “significant habitat modification or degradation where it actually kills or injures wildlife by significant impairing essential behavioral patterns, including breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. The Service has defined “harass” to mean “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly

disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.” *Id.*

14. Section 7 of the ESA directs all federal agencies, in consultation with the FWS, to use their existing authorities to conserve threatened or endangered species, 16 U.S.C. § 1536(a)(1), and “conserve” means to “use [] all methods which are necessary to bring any endangered species or threatened species to the point at which the measures provided [by the ESA] are no longer necessary.” *Id.* § 1532(3).

15. Section 7 further requires all agencies to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence or any endangered species or threatened species.” 16 U.S.C. § 1536(a)(2). To carry out this obligation, the “action agency” must formally “consult” with the FWS before the action agency undertakes an action that may affect a listed species. 50 C.F.R. § 402.14. Such consultation, which must be based on the “best scientific and commercial data available,” 16 U.S.C. § 1536(a)(2), begins with a Biological Assessment (“BA”) prepared by the action agency, *id.* § 1536(c), and culminates in a Biological Opinion (“BiOp”) issued by the FWS assessing whether the action is likely to jeopardize the continued existence of the species. *Id.* § 1536(b). In assessing whether an action will jeopardize a species’ continued existence, the FWS’s implementing regulations require the Service to consider both whether the action threatens the immediate survival of the species as well as whether it stymies long-term recovery of the species to the point where that places the species at risk of extinction by maintaining it indefinitely in an inherently vulnerable state. *See* 50 C.F.R. § 402.02. If the FWS finds that an action will result in jeopardy, the Service must recommend “reasonable and prudent alternatives” (“RPAs”) that

“would not violate” the statutory prohibition on jeopardizing the continued existence of a species. 16 U.S.C. § 1536(b)(3)(A). On the other hand, if the FWS concludes that the proposed action is *not* likely to jeopardize the continued existence of the species, the FWS must issue a “written statement” – known as an “incidental take statement” (“ITS”) – specifying the amount of “incidental take” of the species that is permitted, *id.* § 1536(b)(4), as well as appropriate measures and conditions for minimizing the take. *Id.*

16. Reinitiation of formal consultation “is required and shall be requested by the Federal agency or by the [FWS], where discretionary Federal involvement or control over the action has been retained or is authorized by law,” and the “amount or extent of taking specified in the [ITS]” is exceeded, or “new information reveals effects of the action that may affect listed species . . . in a manner or to an extent not previously considered.” 50 C.F.R. § 402.16. Both during initial and reinitiated formal consultation, the action agency “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not” jeopardize the species’ continued existence. 16 U.S.C. § 1536(d).

FACTS GIVING RISE TO PLAINTIFFS’ CLAIMS

A. The Service’s ESA Consultations With The Corps Concerning the Sparrow Leading Up To The FWS’s 2010 BiOp

17. The Sparrow is a highly endangered species and has been since its listing under the predecessor to the ESA in 1967. For many years, the Service has acknowledged that the Sparrow “is at significant risk of extinction.” *Biodiversity Legal Foundation v. Norton*, 215 F. Supp. 2d 140, 141 (D.D.C. 2002). The species has an extremely restricted range in the

Everglades region of Florida, and its habitat has been decimated by changes to the hydrology of the Everglades, “caused in large part by the [Corps’] Central and Southern Florida Project (“C & SF Project”),” which has “rout[ed] floodwaters directly over the Cape Sable seaside sparrow’s western habitats and drains the eastern sparrow habitats . . . This combination of flooding and overdraining destroys the sparrow’s habitat.” *Biodiversity Legal Foundation v. Norton*, 285 F. Supp. 2d 1, 5 (D.D.C. 2003) (quoting FWS, *Balancing on the Brink: The Everglades and the Cape Sable Seaside Sparrow* (1998)).

18. For decades the FWS has warned that the Corps’ activities in Sparrow habitat are jeopardizing the continued existence of the species and that “[i]f current trends continue, the Cape Sable seaside sparrow will likely be extinct” within the foreseeable future. *Biodiversity Legal Foundation*, 285 F. Supp. 2d at 5 (quoting *Balancing on the Brink*). Of particular concern is the impact of water releases by the Corps on the sparrow subpopulation west of Shark River Slough in Everglades National Park and in eastern Big Cypress Preserve – a subpopulation that has long been deemed by the Service to be “essential to the survival and recovery of the sparrow.” *Id.* at 6 (citing FWS, 3/23/00 internal memorandum). This subpopulation – known as “Subpopulation A” – supported over 40 percent of the estimated total population of 6,656 Sparrows (approximately 2,688 birds) in 1981, and nearly half of the total Sparrow population in 1991, but its status has drastically deteriorated since that time as a direct result of the Corps’ discharge of water in what should be the dry season through a series of gates known as the S12s and thereby flooding the nests and habitat of the Sparrow. FWS, Biological Opinion (11/17/10), at 43, 44 (“2010 BiOp”).

19. Subpopulation A has experienced the most dramatic Sparrow population change observed, declining from more than 2,600 birds in 1992 to 432 birds in 1993, a decrease of 84 percent; this subpopulation has subsequently remained at a low level of less than 450 sparrows. 2010 BiOp at 45 (citing Pimm *et al.*). The overall Sparrow population has also declined dramatically, as the Corps' actions have taken a severe toll over the last several decades on what was previously one of the most stable Sparrow subpopulations. *Id.* at 44. The overall population has declined from an estimated 6,576 sparrows in 1992 to 3,120 sparrows in 2009. *Id.* As summarized in a report by Dr. Pimm and other researchers, "large-scale water discharges into subpopulation A . . . have sharply curtailed sparrow breeding," and the subpopulation has "now been at a small fraction of [prior] levels for 16 years with no evidence of recovery." Pimm *et al.*, *Cape Sable Seaside Sparrow Annual Report* (December 2009).

20. Over the last two decades, the FWS has issued a series of Biological Opinions recognizing that various permutations of the Corps' ongoing activities are responsible for decimating Subpopulation A, and hence placing the species as a whole at grave risk, but the Service has nonetheless failed to insist that the Corps take the actions necessary to restore the subpopulation.

21. In 1995, the Service issued a BioOp concerning "Test Iteration 7 of the Experimental Program of Water Deliveries to Everglades National Park" FWS, *Biological Opinion for Test Iteration 7 of the Experimental Program of Water Deliveries to Everglades National Park*, at 3-4 (10/27/95) ("1995 BiOp"). While predicting that "[i]n the long term, the Experimental Program should help improve environmental conditions for the Cape Sable seaside sparrow," and "should benefit" Everglades National Park in the long-term, the Service conceded

that the “higher water levels and prolonged hydroperiods that are expected to occur in the marl prairies west of Shark River Slough during Test 7 would continue to preclude Cape Sable seaside sparrows from successfully reestablishing this critical subpopulation for another 2 to 4 years (this is almost one generation).” *Id.* at 17, 18. Because the “current status of the Cape Sable seaside sparrow contains a high risk of extinction before the species will be helped by those changes” that the Service predicted would ultimately “improve nesting provisions for the sparrow” in Subpopulation A, *id.* at 18, it was the “Service’s biological opinion that Test 7 is likely to jeopardize the continued existence” of the Sparrow. *Id.* at 20.

22. In setting forth, in the 1995 BiOp, an RPA intended to avoid jeopardy, the Service reiterated its view that “[o]ver the long-term, the combined Federal and State effort to restore the south Florida ecosystem should benefit” the Sparrow and, in particular, that “changes to the Central and Southern Florida Project and the Modified Water Delivery System should improve conditions in the Park, including western and northeast Shark River Slough.” 1995 BiOp at 20. In view of the assumption that the “long-term” status of Subpopulation A would somehow significantly improve based on unspecified measures to “restore the South Florida ecosystem,” the Service’s RPA focused on narrow measures “intended to avoid the likelihood of jeopardizing the continued existence of the Cape Sable seaside sparrow before those long-term solutions can take effect.” *Id.* (providing that water flows be “distributed in a manner that restores and maintains the short hydroperiod of the marl prairies and sloughs west of Shark River Slough, to the maximum extent possible within the operating constraints of Test 7”) (emphasis added). The Service’s ITS was likewise expressly premised on the assumption that, over the long-term,

the status of the Sparrow would improve demonstrably as a consequence of unspecified improvements in the Corps' habitat-altering activities. The ITS provided that:

[w]e anticipate that take of the Cape Sable seaside sparrow would occur in the form of harm by significantly modifying the sparrow's habitat in a way that significantly affects the sparrow's essential behavior patterns. The FWS believes that levels of incidental take will diminish in successive years as future modifications to the Central and Southern Florida Project help water levels in the Park become more favorable for [] the Cape Sable seaside sparrow . . .

Id. at 22.

23. In February 1999, the Service transmitted a BiOp to the Corps for the "Modified Water Deliveries to Everglades National Park project, Experimental Water Deliveries Program, and the C-111 project." FWS, *Final Biological Opinion for U.S. Army Corps of Engineers Concerning Modified Water Deliveries to Everglades National Park, Experimental Water Deliveries Program, Canal 111 Project* (Feb. 19, 1999) ("1999 BiOp"). These "interrelated" projects involved various "structural components to be built" as part of the ongoing program ostensibly designed to restore the Everglades ecosystem, as well as an "operational plan for water delivery via these structures and others already in place." *Id.* In the 1999 BiOp, the Service stated that "three breeding subpopulations are critical to the long-term survival of the Cape Sable seaside sparrow," *id.* at 26, and that the loss of Subpopulation A "would lead to a high risk of extinction" for the Sparrow, *id.* at 67, but that the Corps' activities were continuing to harm Subpopulation A. *Id.* at 27. Specifically, relying on the research conducted by Dr. Pimm, the Service explained that "in 1998, the total number of birds west of Shark River Slough declined again to 192 birds," and that "Pimm (1997) predicts that without changes in current water management practices, the Cape Sable seaside sparrow will become extinct within two decades." *Id.* at 70.

24. In the 1999 BiOp, the Service concluded that the Corps' "Experimental Program" for water delivery – which was continuing to flood the marl prairies of Western Shark River Slough during the Sparrow nesting season – was "likely to jeopardize the continued existence" of the Sparrow. *Id.* at 77. The Service prescribed another short-term RPA and ITS that would be in effect until the Corps' "Modified Water Deliveries" program was scheduled to be implemented in 2003. *Id.* at 86-87. Under this RPA and ITS – which continued to allow more than half of the Sparrow's breeding habitat to be flooded each year – the Service assumed that the remaining habitat would "support 522 pairs or a population of 1,044 birds at a density of 1 pair per 54 acres." *Id.* at 87.

25. In March 2002, the Service issued an amendment to its 1999 BiOp, based on the Service's review of the Corps' request that the Service consider "Alternative 7R" under an "Interim Operational Plan" ("IOP-Alt. 7R") as a potential substitute RPA for the one adopted in the 1999 BiOp. FWS, *Final Amended Biological Opinion for the U.S. Army Corps of Engineers, Interim Operation Plan ("IOP") for Protection of the Cape Sable Seaside Sparrow (3/28/02)* ("2002 BiOp"). The 2002 BiOp conceded that, far from satisfying the Service's prediction of more than a 1,000 sparrows under the 1999 BiOp, in 2001, the "total number of birds west of Shark River Slough declined once again to approximately 128 individuals," and "[s]ub-population A estimates for 2001 are less than 5 percent of what they were in 1992." *Id.* at 17. Nonetheless, the Service did not require the Corps to satisfy more stringent standards than those set forth in the 1999 BiOp; instead, the Service authorized the Corps to implement IOP-Alt. 7R because, in continuing to allow flooding of Subpopulation A habitat during the

nesting season, it would “provid[e] as much protection to the sparrow” as provided under the demonstrably inadequate 1999 BiOp. *Id.* at 34, 35.

26. In 2006, in conjunction with preparing a Supplemental Environmental Impact Statement required by Court order, the Corps reinitiated consultation regarding IOP-Alt7R. The proposed action was the “continuation of the IOP and the operations of the IOP structures and impoundments” in the C & SF Project. FWS, *Formal Consultation Concerning Interim Operational Plan* (11/17/06), at 6 (“2006 BiOp”). The 2006 BiOp explained that the subpopulation had failed to rebound from the extraordinarily low level of 128 sparrows reported in the 2002 BiOp. *Id.* at 29. The 2006 BiOp stated that “[s]ubpopulation A has suffered the most dramatic sparrow population changes observed, declining from more than 2,600 birds in 1992 to 432 birds[] in 1993, a decrease of 84 percent” and that

this subpopulation has remained at a low level since then. In 2001, Subpopulation A declined again, from an estimated 400 to 488 birds in 2000 to 128 in 2001, or about a 68 percent decline. Since that time, [the] subpopulation has remained at or below this level.

Id. at 29.

27. The 2006 BiOp acknowledged that “[s]uch small populations are particularly at risk from a catastrophic event or events such as fire and significant rainfall during the breeding season,” 2006 BiOp at 29-30; that “[c]onsistent with past evaluations, maintaining and restoring sparrow Subpopulation A is essential to maintaining the overall sparrow population”; and that the “extirpation of Subpopulation A would represent a significant reduction in the distribution of the sparrow.” 2006 BiOp at 29-30, 66. Nonetheless, the 2006 BiOp again authorized the Corps’ maintenance of the admittedly inadequate status quo which, the BiOp conceded, was “not expected to improve the status of this subpopulation.” *Id.* As in past BiOps, the Service

confined its analysis to another short increment of time, finding that the “continued operation of [the] IOP for 4 years is expected to remain consistent with the RPA in the Service’s 1999 Biological Opinion,” *id.* at 73 – i.e., the same RPA that had consistently failed to accomplish the Service’s stated objective of restoring Subpopulation A to a size sufficient to forestall extirpation through stochastic events and to provide a bulwark against the loss of the Sparrow as a whole. While conceding that “[l]arge increases in the number of sparrows within Subpopulation A or large improvements in the condition of habitat in the area are not expected under the IOP,” the 2006 BiOp concluded that “the impacts from IOP *over the next 4 years* are not anticipated to appreciable [sic] reduce the likelihood of survival and recovery of the sparrow.” *Id.* (emphasis added).

B. The 2010 BiOp

28. In 2010, the FWS prepared a BiOp addressing the further continuation of the IOP as well as the potential effects of proposed operations for the Everglades Restoration Transition Plan, Phase 1 (“ERTP-1”), which represents a purported “transition between the IOP and implementation” of the Comprehensive Everglades Restoration Plan (“CERP”). 2010 BiOp at 13. The 2010 BiOp continued the FWS’s longstanding policy, pattern, and practice of issuing short-term BiOps that endorse demonstrably and empirically inadequate approaches to preserving and restoring Subpopulation A.

29. Other statements in the BiOp reinforced that the Corps’ management of Sparrow habitat would likely be even less accommodating of Sparrow conservation than had previously been the case. While the document stated that the “overall” purpose of ERTP-1 was “to utilize operational flexibilities in order to *improve* conditions for the Everglades snail kite” and

“*enhance* wood stork and native habitats,” the BiOp conceded that the transition plan’s goal would be satisfied if the Corps accomplishes no more than merely “*maintain[ing]*” the existing, admittedly inadequate “nesting and habitat requirements” for the Sparrow. *Id.* at 13 (emphasis added). The BiOp authorized and endorsed this biologically inadequate and unlawful objective while conceding that the overall Sparrow population remains less than half of what it was in 1981, *id.* at 43 (explaining that in 1981, there were an estimated 6,656 Sparrows distributed across six subpopulations, compared with an estimate of 3,184 sparrows in 2007); that the overwhelming majority of Sparrows (79%) occurs within a single subpopulation (B); and that Subpopulation A continues to be severely depleted. *Id.* The data presented in the 2010 BiOp further demonstrated that in 2009 the population estimate was only 96 sparrows – 3.5% of what it was in 1981 – and the fifth lowest total ever recorded. *Id.*

30. As in past BiOps, the Service in the 2010 BiOp stressed the importance of recovering Subpopulation A. The 2010 BiOp explained that “with 90 to 97 percent of sparrows concentrated within two subpopulations (B and E), the species vulnerability to stochastic events is particularly acute,” and that “[m]ore important than trying to delineate populations, is recognizing that protecting the subspecies from catastrophic events will require maintaining sparrows over as wide an area as possible. *This recognition actually provides a more compelling rationale for maintaining subpopulation A than the need to maintain three populations did, since subpopulation A is the only subpopulation west of SRS.*” *Id.* at 46-47 (emphasis added); see also *id.* at 48 (“Small populations are particularly at risk from a catastrophic event or series of events, such as fire or major rainfall during the breeding season

. . . [i]f a large fire were to occur in this subpopulation [B] there is a possibility the entire remaining [sparrow] population may be reduced by 60 percent or more; the area has not burned in over a decade.”). While recognizing, “[c]onsistent with past evaluations, [that] maintaining and restoring sparrow subpopulation A is essential to maintaining the overall sparrow population,” and that the “extirpation of subpopulation A would represent a significant reduction in the distribution of the sparrow, and would be the most challenging area in which to restore a self-sustaining subpopulation,” the 2010 BiOp expressly found that the ERTTP-1 operations are “*not expected to improve the status of this subpopulation,*” but, rather, at best “appear to [be] sufficient to *maintain* this subpopulation” in its highly depleted state “for the next 5 years.” *Id.* at 145 (emphasis added); *id.* at 182 (“Large increases in the number of sparrows within Subpopulation A or large improvements in the condition of habitat in the area are not expected to occur under ERTTP-1, or the period when the IOP remains in place.”).

31. The 2010 BiOp nonetheless concluded that the “action, as proposed, is not likely to jeopardize the continued existence” of the sparrow because the Corps’ actions, “through January 1, 2016,” are “expected to remain consistent with previous operational plans and the RPA in the Service’s 1999 Biological Opinion” – *i.e.*, the same “operational plans” and RPA that had proven to be incapable of restoring the subpopulation whose recovery the Service has repeatedly declared to be essential to reducing the prospects for extinction of the species as a whole. The BiOp justified this result by asserting that the minimal “level of nesting” anticipated to occur under the IOP and ERTTP-1 would be “sufficient to maintain Subpopulation A for the next 5 years or until such time additional CERP projects can be brought on-line which will shift flows to the east away from Subpopulation A.” *Id.* at 181. However, the BiOp made no effort

to delineate those “additional CERP projects” that would in fact be “brought on-line” to improve the status of Subpopulation A, let alone set forth a schedule for when and how those projects will in fact be implemented.

32. By letter dated August 13, 2013, Plaintiffs provided Defendants with formal notice, pursuant to the ESA’s citizen suit provision, that the 2010 BiOp and the Corps’ reliance on that document, as well as the agencies’ longstanding policy and practice of relying on short-term BiOps that do not accurately or lawfully analyze the impacts of the Corps’ operations on the Sparrow and Subpopulation A in particular, violates the ESA and implementing regulations in multiple ways. Plaintiffs’ 2013 Notice Letter explained that (1) the FWS’s own explication, over the course of many years, of the best available scientific data establishes that the Corps’ actions are in fact jeopardizing the continued existence of the Sparrow by keeping Subpopulation A in a continuously precarious state; (2) the FWS’s limitation of the 2010 BiOp to a five-year period of analysis precluded the Service (as in past BiOps) from meaningfully analyzing the actual impact of the Corps’ activities on the species, in violation of the ESA’s implementing regulations and case law applying them; (3) the 2010 BiOp’s reliance on unspecified future CERP actions also contravened the “best available” science as well as court rulings holding that future remedial measures may be taken into account in the FWS’s jeopardy determination only if such measures are clearly delineated and binding on the action agency; and (4) the 2010 BiOp violated the ESA by failing independently to analyze the impact of the Corps’ actions on the Sparrow’s recovery prospects, in violation of the ESA’s implementing regulations and judicial interpretations of them.

33. Plaintiffs' 2013 Notice of Violations did not result in any modifications in the 2010 BiOp or in any material changes in the Corps' actions that are jeopardizing the continued existence of the Sparrow.

C. The Corps' Failure To Satisfy Even The Inadequate And Legally Deficient Requirements Of The 2010 BiOp.

34. Developments since Plaintiffs sent their 2013 Notice of Violations provide even further proof that the longstanding approach to section 7 of the ESA adopted by the Corps and FWS is in fact jeopardizing the continued existence of the Sparrow in violation of the ESA.

35. In November 2014, the Corps acknowledged that, based on an "annual assessment for Water Year 2014," "it appears that the annual population estimate of [Sparrows] has fallen below the reinitiation trigger defined within" the 2010 BiOp and, accordingly, the Corps requested reinitiation of formal consultation. 11/17/14 Letter from Eric P. Summa, Chief, Environmental Branch to Larry Williams, FWS; *see also* Jacksonville District Corps of Engineers, *Annual Assessment Report: Water Year 2014* (November 2014).

36. In requesting reinitiation of consultation, the Corps acknowledged that Subpopulation A "has not recovered" under various water management regimes implemented by the Corps since 1998, including the "2012-2014 ERTTP operations." At the same time, the Corps sought to shift responsibility from its own ongoing deleterious activities by asserting that "[t]here are several factors that influence population size including competition, predation, and prey availability," and that "[r]ecent research suggest[s] that sparrow populations are slow to recover, or cannot recover, once they reach very small populations sizes," and that Everglades National Park "has been identified as a hotspot for methylmercury, which has been shown to have sub-lethal effects on songbirds resulting in reduced reproductive success." *Id.* Accordingly, the

Corps committed to taking no concrete remedial action in the foreseeable future to address its own culpability in the Sparrow's plight but, yet again, sought to defer any action indefinitely by promising "future restoration" under CERP that will at some unspecified time and in some undefined manner address the Sparrow's needs assuming that the species does not become extinct in the meantime. *Id.*

37. In December 2014, the FWS agreed with the Corps that reinitiation of formal consultation is warranted based on the "exceedance of triggers identified in the November 17, 2010 ERTTP" BiOP. 12/12/14 Letter from FWS to Corps. While agreeing that the Sparrow is "suffering from small population effects," the Service did not accept the Corps' suggestion that the Corps' ongoing actions have no bearing on Subpopulation A's continuing struggles. To the contrary, the FWS stressed that it has "*become apparent to the Service that further modifications to the current water management regime are needed to conserve and recover the sparrow.*" *Id.* (emphasis added). The Service also provided the Corps with the Service's annual report pertaining to the impact of the Corps' operations on the Sparrow, which further elucidates the rationale for reinitiation of formal consultation and, according to the FWS, will also "be used as the basis for discussions regarding ERTTP-2 for which a new Biological Opinion must be prepared by January 2016." *Id.*; see FWS, *Review of U.S. Army Corps of Engineers Everglades Restoration Transition Plan Annual Assessment Report: Water Year 2013 and Initial Analysis of Water Year 2014* (10/6/14) ("2014 FWS Review").

38. The 2014 FWS Review evaluates data submitted by the Corps and finds that, "as a result of the 2014 [Sparrow] population survey, the reinitiation trigger [in the 2010 BiOp] was exceeded" because the overall population estimate for 2014 was "below the baseline of 2,915

[birds] specified in the reinitiation trigger.” 2014 FWS Review at 21. According to the review, “[t]his decline in the population estimate appears to be largely attributable to a sizable drop in number of breeding males counted in” Subpopulation A. *Id.*

39. The 2014 FWS Review finds that the Corps’ approach of continuing to allow inundation of Subpopulation A during critical time frames, while promising to adopt measures sufficient to at least mitigate the most devastating effects of those actions, did not succeed in accomplishing even the minimal, legally inadequate objectives of the 2010 BiOp. The review states that “[r]ainfall events were expected to continue to affect the hydrologic conditions within [Subpopulation A] during the nesting season,” but that various “protections” promised by the Corps “were anticipated to be sufficient to minimize the detrimental effects of these rainfall events on sparrow reproduction over the period of ERTP-1 operations.” 2014 FWS Review at 21. However, according to the 2014 review, “[b]ased on the most recent population surveys, *these protections do not appear to be sufficient*” even to sustain Subpopulation A in its anemic condition over the short run, let alone to bring about the species’ recovery over the long run. *Id.* (emphasis added). The review further explains that:

[t]he operations of ERTP-1, like IOP before it, were expected to maintain hydrologic conditions to support suitable sparrow habitat within portions of [Subpopulation A] that were sufficient to maintain the subpopulation until Modwaters was completed. Large increases in the number of sparrows were not expected to occur under ERTP-1, or the period when the IOP remained in place. *However, the operation of the IOP and ERTP-1 was designed to avoid jeopardizing the [Sparrow], and was anticipated to sustain [Subpopulation A], which is necessary for overall population health.* Some improvements to hydrologic conditions within [subpopulations C and F] were expected to result in improved habitat conditions and possibly larger number of sparrows. *Based on the results of the most recent population surveys in these subpopulations, these habitat improvements and increased [Sparrow] numbers are not apparent.*

2014 FWS Review at 21-22 (emphasis added).

40. The 2014 FWS Review further specifically finds that the “constraints” imposed by the 2010 BiOp on the Corps’ activities are proving demonstrably inadequate to prevent the loss of Subpopulation A. Although the review finds that the Corps did not exceed the BiOp’s requirement that the Corps generally maintain “[a]t least 60 continuous days with water levels above ground surface at NP-205 from March 1 through July 15 in 8 out of every 10 years,” the review finds that these criteria have in fact proven to be incompatible with the breeding needs of the Sparrow, explaining that:

the Service agrees that the Corps operated within the constraints of the criteria for interim IOP, and ERTTP-1, and that nesting season habitat conditions did not exceed the reinitiation trigger including the two consecutive years criteria. *However, the Service has serious concerns based on the most recent years population estimates and other habitat data . . . [T]he sparrow, and specifically [Subpopulation A], does not appear to be recovering and in the case of [Subpopulation A] has experienced major declines in its estimated population (1992-1993, 2000-2001, and 2012-2014) . . . Observations from annual intensive on the ground [Sparrow] surveys have been instrumental in providing inferences into why sparrows have been performing so poorly. In some years it has been observed that breeding pairs do not begin actively nesting until well after the designated March 1 beginning of the breeding season, sometimes as late as 30 to 45 days. In these years, the late initiation of breeding may reduce the optimal breeding period to 15 to 30 years days based on the 60 day criteria, well short of the 40 day window needed to successfully breed and fledge one brood.*

2014 FWS Review at 36-37 (emphasis added)

41. Because “the sparrow, and specifically [Subpopulation A] does not appear to be recovering and in the case of [Subpopulation A] has experienced major declines in its estimated population,” 2014 FWS Review at 36, the review finds that the 60-day “metric” set forth in the BiOp must be reconsidered if the dire situation facing Subpopulation A, and hence the Sparrow as a whole, is to be reversed. The review explains that:

[i]ntensive ground suveys have documented a high rate of nest failure due to a variety of potential causes including flooding, nest predation, food availability, and competition with other species. *This may point to the need for breeding sparrows to be able to successfully fledge multiple broods each year, a goal the 60 day metric is not able to achieve. Again, field observations from ground researchers demonstrated that when a prolonged optimal breeding period occurs (100 to 120 days), sparrows can successfully fledge two and sometimes three broods during one breeding season . . .]T]he Service strongly recommends that the Corps, in consultation with the Service, take steps to modify and improve this metric for the future conservation and recovery of the [Sparrow]. As described above, recent experience shows that even when the 60 day metric is met sparrows cannot reproduce sufficiently for the population to recover. It appears that an extension of the consecutive dry period to 100 days at NP-205, at a rate of 8 out of 10 years, and avoiding consecutive suboptimal years is necessary to once again reestablish a healthy [Sparrow] subpopulation in this area.*

Id. at 37 (emphasis added).

42. Reinforcing the need for a fundamental reassessment of what is necessary to conserve Subpopulation A, the review further finds that the Corps has also failed to satisfy an “ecological target” that the Corps should “[s]trive to maintain a hydroperiod between 90 and 210 days (three to seven months) per year throughout sparrow habitat to maintain marl prairie vegetation.” 2014 FWS Review at 39. The review states that this failure is a significant setback for the species as a whole and, again, Subpopulation A in particular, explaining that:

[b]ased on the average conditions across all subpopulations . . . only [subpopulation F] met the ecological target in 2013. The same pattern is indicated for the years 2012 and 2014. Combined, this represents 3 consecutive years across essentially the entirety of sparrow habitat (except [Subpopulation F] which consistently only has 1-2 birds counted in population surveys), that has not experienced the desired hydroperiod favoring marl prairie habitat. Only in 2011 was the majority of [Sparrow] habitat within the desirable range, *and even then, the indication was that [Subpopulation A] was too wet. It should be mentioned that the discontinuous hydroperiod metric and the process of which it is an indication (i.e., the maintenance of optimal sparrow habitat) is almost certainly the most critical effect on sparrow survival and reproduction . . . [I]n only one or two years (of 22 total years since 1992), has the 90 to 210 day discontinuous hydroperiod ecological target been met [for Subpopulation A]. When this data is cross-referenced with previously discussed continuous dry nesting days [] and [Sparrow] population*

survey data [], the importance of this habitat maintenance metric becomes immediately evident.

Id. (emphasis added). The review explains that these data “further reinforce[] the need to reinitiate consultation on ERTTP-1” and also warrant that the Service “consider including this metric as a term and condition in the ITS of the 2016 ERTTP [BiOp].” *Id.*

43. By letter dated February 5, 2015, Plaintiffs provided Defendants with a supplemental formal Notice of Violations of the ESA in connection with the Corps’ and FWS’s section 7 consultation concerning the impacts of the Corps’ actions on the Sparrow. Plaintiffs’ supplemental notice explained that developments since the 2013 notice “have confirmed unequivocally the validity of [Plaintiffs’] earlier contentions that that the Corps and FWS are violating the ESA by” relying on a BiOp that “flouts the ESA’s prohibitions on jeopardizing the continued existence of endangered species.” Plaintiffs further explains that, “[i]n addition, in light of these developments, it is apparent that the Corps and FWS are now violating the ESA in ways that were unaddressed in the prior notice letter,” including that the Corps cannot lawfully continue to “take” the Sparrow in the absence of a valid BiOp/ITS from the FWS authorizing such take, and that the Corps’ continuation of actions that result in the flooding of the Sparrow’s marl prairie habitat during reinitiation of formal consultation violates the prohibition in section 7(d) of the Act on the “irreversible or irretrievable commitment of resources . . . which has the effect of foreclosing the formulation or implementation” of RPAs.

44. To date, neither the Corps nor the FWS has committed to take any action to remedy the violations set forth in Plaintiffs’ supplemental Notice of Violations. On April 1, 2015, the Corps and FWS sent a letter to Plaintiffs’ counsel confirming that the agencies reinitiated formal consultation and stating that the “consultation will conclude with the Service’s

completion of a new Biological Opinion, which will be completed before the 2010 Biological Opinion expires on January 1, 2016.” The letter contains no commitment to improve conditions for the Sparrow prior to expiration of the 2010 BiOp, nor does it make any specific commitments with regard to addressing the violations enumerated by Plaintiffs in any new BiOp that may be issued.

CLAIMS FOR RELIEF

CLAIM ONE (AGAINST THE CORPS)

45. As detailed in the FWS’s 2014 Review, the Corps management actions – including but not limited to maintenance of the 60-day metric for maintaining dry breeding habitat – are jeopardizing the continued existence of the Sparrow in violation of both the substantive and procedural mandates of section 7(a)(2) of the ESA. The Corps is not only violating the substantive obligation imposed by section 7(a)(2) to avoid jeopardizing the Sparrow, but the Corps is presently operating in the absence of any valid BiOp authorizing actions that the FWS has found to place Subpopulation A, and hence the Sparrow as a whole, at risk of extinction.

46. The Corps is violating the “take” prohibition in section 9 of the ESA by undertaking water management and related activities that have the effect off allowing Subpopulation A to be flooded and otherwise impaired in a manner that disrupts Sparrow breeding and other essential behaviors in the subpopulation. As set forth in the FWS’s BiOps, including the 2010 BiOp, the Corps’ activities cause “take” of the Sparrow within the meaning of the ESA and implementing regulations, including by causing “significant habitat degradation” that “actually kills or injures [Sparrows] by significantly impairing essential behavioral patterns,

including breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. Because the Corps has violated the ITS in the 2010 BiOp and is presently operating in the absence of any valid BiOp/ITS authorizing its activities, the agency has no legal shield from section 9 liability and is therefore in ongoing violation of that provision of the Act.

47. By proceeding with activities that will, once again, destroy or degrade the Sparrow’s marl prairie habitat and that otherwise foreclose the FWS from requiring more protective measures in reinitiated formal consultation – including but not limited to the measures suggested in the 2014 FWS Review – the Corps is violating the prohibition in section 7(d) of the ESA on “any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulating or implementation of any [RPAs] which would not violate” the jeopardy prohibition in section 7(a)(2).

48. The Corps is in violation of its obligations under section 7(a)(1) of the ESA to “carry[] out programs for the conservation” of the Sparrow. The 2014 FWS Review establishes that not only are the Corps’ actions frustrating rather than facilitating the conservation – i.e., recovery – of the Sparrow, but that the Corps is systematically ignoring and/or failing to explain how it has responded to a “multitude of recommendations” made by the Service for actions that should be taken to improve the status of the Sparrow in light of the evidence produced by the Corps.

CLAIM TWO (AGAINST THE FWS)

49. The 2010 BiOp issued by the FWS contravenes section 7(a)(2)’s prohibition on agency actions that jeopardize the continued existence of endangered species. The BiOp’s no jeopardy conclusion is not based on the best available science, as mandated by section 7(a)(2)

and as repeatedly explicated by the Service itself, and the BiOp is otherwise arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2) (“APA”). The BiOp unlawfully authorized the Corps to maintain the Sparrow in a perilous, highly vulnerable state based on (1) an illegally segmented and truncated five-year time frame for analyzing impacts of the Corps’ activities, as well as (2) unenforceable, speculative promises of unspecified future activities that may or may not ever occur and (if they do) may or may not have any benefits for the Sparrow. This authorization embodies the polar opposite of the “institutionalization of [] caution” mandated by the ESA, *TVA v. Hill*, 437 U.S. 153, 178 (1978) (internal quotation omitted), and ignores the best available science as repeatedly acknowledged by the Service itself concerning the critical importance of conserving Subpopulation A in order to stave off the extinction of the species as a whole. The BiOp also violated the ESA and implementing regulations by failing to address at all the impact of the Corps’ actions on the Sparrow’s long-term prospects for recovery. Especially in view of the Service’s past experience with the extinction of the closely related Dusky seaside sparrow, it is the essence of arbitrary and capricious action for the FWs to have knowingly authorized conduct that keeps Subpopulation A, and hence the species as a whole, in a condition where its recovery is foreclosed and where it can easily and rapidly be extirpated through fire, climactic changes, and other stochastic events.

50. The 2010 BiOp embodied a longstanding FWS policy and practice of issuing BiOps to the Corps that unlawfully circumvent a comprehensive jeopardy analysis based on the best available science, by limiting the Service’s review to narrow time frames and by relying on the Corps’ unenforceable assertions that at some unspecified time in the future undefined actions

will be taken that will alleviate the Sparrow's predicament. This longstanding policy and practice violates the ESA's prohibition on jeopardizing the continued existence of the Sparrow and its mandate to consider the best available science in section 7 consultations, and is otherwise arbitrary, capricious, an abuse of discretion, and not in accordance with law, in violation of the APA.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

- (1) Declare that the FWS and Corps have violated the ESA and APA;
 - (2) Order the FWS and Corps to engage in formal section 7 consultation that fully complies with the ESA and implementing regulations;
 - (3) Enjoin the Corps from continuing to jeopardize the continued existence of the Sparrow and/or to "take" members of the species before the Corps and FWS have completed a legally valid section 7 consultation and the Corps has received a legally valid BiOp/ITS from the Service;
 - (4) Award Plaintiffs their reasonable attorneys' fees and litigation costs in this action;
- and
- (5) Grant Plaintiffs such other and further relief that the Court may deem is just and proper.

Respectfully submitted,

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