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August 13, 2013

BY CERTIFIED AND ELECTRONIC MAIL

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1849 C Street, N.W.  
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Daniel M. Ashe, Director  
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1849 C Street, N.W.  
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Lieutenant General Thomas P. Bostick  
Chief of the U.S. Army Corps of Engineers  
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U.S. Army Corps of Engineers  
441 G Street, N.W.  
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**NOTICE OF VIOLATIONS OF THE ENDANGERED SPECIES  
ACT IN CONNECTION WITH U.S. ARMY CORPS OF ENGINEERS'  
AND U.S. FISH AND WILDLIFE SERVICE'S SECTION 7  
CONSULTATION CONCERNING THE EVERGLADES  
RESTORATION TRANSITION PLAN, PHASE 1, AND ITS  
IMPACT ON THE ENDANGERED CAPE SABLE SEASIDE SPARROW**

Dear Secretary Jewell, Director Ashe, and Lieutenant General Bostick:

On behalf of the Center for Biological Diversity, Dr. Stuart Pimm, and Mr. Oron L. Bass, Jr. (hereby collectively referred to as "CBD"), we hereby provide notice, pursuant to section 11(g) of the Endangered Species Act ("ESA" or "Act"), 16 U.S.C § 1540(g), that the U.S. Army Corps of Engineers ("Corps") and U.S. Fish and Wildlife Service ("FWS") are in violation of the



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ESA with regard to their consultation under section 7 of the Act concerning the Corps' implementation of the Everglades Restoration Transition Plan, Phase 1 ("ERTP-1") and continuation of the "Interim Operational Plan for the Protection of the Cape Sable seaside sparrow" ("IOP"). In particular, we provide notice that the Service's November 17, 2010 Biological Opinion ("2010 BiOp"), on which the Corps has relied in implementing ERTP-1, IOP, and related actions in the habitat of the Cape Sable seaside sparrow ("sparrow") violates section 7's prohibition on federal actions that jeopardize the continued existence of species, and otherwise contravenes the consultation obligations imposed by the ESA and implementing regulations.

Although this notice focuses primarily on the Cape Sable seaside sparrow, the goal of this letter and any subsequent litigation we may bring is to obtain certainty about when and how a more natural flow regime will be restored to the Everglades, which will not just benefit the sparrow, but also the Everglade snail kite, wood stork and many other wildlife species in the Everglades.

In order to avoid litigation over this matter, we request that you address the issues raised in this letter within sixty days. During that time, we would be happy to meet with representatives of the Service and Corps in an effort to arrive at a mutually acceptable approach to staving off the sparrow's extinction and bringing about its recovery.

## BACKGROUND

### A. **The Service's ESA Consultations With The Corps Concerning the Sparrow Leading Up To The 2010 BiOp**

As recognized in the 2010 BiOp, the sparrow is a highly endangered species and has been since its listing under the predecessor to the ESA in 1967. 2010 BiOp at 37. 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)).

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 the Corps' activities on the sparrow subpopulation west of Shark River Slough in Everglades National Park and in eastern Big Cypress – a subpopulation that has long been deemed by the Service to be "essential to the survival and recovery of the sparrow." *Biodiversity*

*Legal Foundation*, 285 F. Supp. 2d at 6 (citing FWS, 3/23/00 internal memorandum). This “subpopulation supported over 40 percent of the estimated population total 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’ water diversion and related activities. 2010 BiOp at 43, 44.

In particular, “[s]ubpopulation 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 (Pimm et al. 2002). This subpopulation has subsequently remained at a low level, less than 450 sparrows.” 2010 BiOp at 45. Not coincidentally, 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 (indicating that the overall population has declined from an estimated 6,576 sparrows in 1992 to 3,120 sparrows in 2009). As summarized in a recent 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 Annual Report* (December 2009).

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. The legal flaws in the 2010 BiOp must be understood within the context of this repeated willingness of the Service to sign off on Corps’ water delivery and routing actions that have continued for many years now to place subpopulation A – and hence the sparrow as a whole – in an extremely perilous state.

For example in 1995, the Service issued a BioOp concerning “Test Iteration 7 of the Experimental Program of Water Deliveries to Everglades National Park.” The purported purpose of “Test 7” was to “evaluate methods of restoring more natural hydroperiods to ecosystems within the Park,” which “would be achieved through a program of water deliveries to the Park through Shark River Slough and Taylor Slough.” FWS, 10/27/95 BiOp Concerning “Test Iteration 7 of the Experimental Program of Water Deliveries to Everglades National Park,” at 3-4.

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.

In adopting a Reasonable and Prudent Alternative (“RPA”) designed 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.” *Id.* In view of that 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.*” *Id.* (emphasis added). The Service’s Incidental Take Statement (“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:

[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 (emphasis added).

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). 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.* The Service stressed 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 decimate subpopulation A. *Id.* at 27 (“in 1998, the total number of birds west of Shark River Slough declined again to 192 birds”); *id.* at 70 (“Pimm (1997) predicts that without changes in current water management practices, the Cape Sable seaside sparrow will become extinct within two decades”).

Accordingly, 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.

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 the Interim Operational Plan (“IOP-Alt. 7R”) as a potential substitute RPA for the one adopted in the 1999 BiOp. See 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* (March 28, 2002). 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 it would “provid[e] as much protection to the sparrow” as the 1999 BiOp. *Id.* at 34, 35 (“compliance with either the February 19, 1999 biological opinion, or the water management actions outlined by IOP-Alt. 7R (in conjunction with the requirements of the original RPA) will provide the Service’s recommendations for compliance with the Endangered Species Act.”).

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* (Nov. 17, 2006), at 6. 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 (“Subpopulation 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. *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.”) (emphasis added).

But, while again conceding 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,” *id.* at 29-30, and that “[c]onsistent with past evaluations, maintaining and restoring sparrow Subpopulation A *is essential to maintaining the overall sparrow population,*” *id.* at 66 (emphasis added); *id.* (the “extirpation of Subpopulation A would represent a significant reduction in the distribution of the sparrow”), the 2006 BiOp *again* authorized the Corps’ maintenance of the admittedly and demonstrably inadequate status quo, which was “*not expected to improve the status of this subpopuulation.*” *Id.* (emphasis added). As in past BiOps, the Service confined its analysis to another short increment of time, finding that the “continued operation of 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. Thus, 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**

The 2010 BiOp – addressing the continuation of the IOP as well as the potential effects of proposed operations for the ERTTP-1, which represents a “transition between the IOP and implementation” of the Comprehensive Everglades Restoration Plan, 2010 BiOp at 13 – continues and aggravates this regrettable pattern of short-term opinions that endorse demonstrably and empirically inadequate approaches to preserving and restoring subpopulation A. Indeed, if anything, the 2010 BiOp indicates, alarmingly, that the Corps may be even less focused on sparrow conservation in particular than has previously been the case. *See* 2010 BiOp at 15 (“ERTTP-1 represents a paradigm shift from the previous operational plan, IOP. The IOP predominately consisted of scheduled closure periods on the S-12 structures . . . to manage primarily for a single endangered species found only in ENP, the [sparrow] . . . *In contrast ERTTP-1 incorporates operational flexibility and adaptive management to better manage WCA-3A northern ENP for the benefit of multiple species.*”) (emphasis added).

The notion that the Corps’ management of sparrow habitat, as authorized by the Service, will be even *less* accommodating of sparrow conservation than has previously been the case is confirmed by other statements in the 2010 BiOp. While the document states that the “overall project of ERTTP-1 is to utilize operational flexibilities in order to *improve* conditions for the Everglades snail kite” and “*enhance* wood stork and native habitats,” the Service flatly concedes that the transition plan’s goal will 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). Remarkably, the BiOp endorses this result 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)<sup>1</sup>; that the overwhelming majority of sparrows (79%) occurs within a single subpopulation (B); and that subpopulation A continues to be severely depleted. *Id.* Indeed, the data presented in the BiOp demonstrate 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.*

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<sup>1</sup> Subpopulation B was not surveyed in 2008 or 2009. If the estimate for the last year in which that subpopulation was surveyed is added to the more recent surveys for the other populations results in a total population that is even lower than the 2007 estimate. *See* 2010 BiOp at 44.

As in past BiOps, the Service stresses the *importance* of recovering subpopulation A. Indeed, the 2010 BiOp explains 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.”).

Nonetheless, 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 finds that the ERTP-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 ERTP-1, or the period when the IOP remains in place.”). Yet the Service concludes, anomalously, 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 have 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 justifies this result by asserting that the minimal “level of nesting” anticipated to occur under the IOP and ERTP-1 “is 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 makes no effort to delineate those “additional CERP projects” that will 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.

## DISCUSSION OF LEGAL VIOLATIONS

The 2010 BiOp, and the Corps’ reliance on that document to implement water management, control, and diversion activities in the Everglades violate the ESA and implementing regulations for a number of discrete, albeit interrelated, reasons.

**First**, the BiOp and the Corps’ reliance on it violate the overarching mandate of section 7(a)(2) that federal agencies must “insure that any action authorized, funded, or carried out” by them “is not likely to jeopardize the continued existence of any endangered species . . . .” 16

U.S.C. § 1536(a)(2). Indeed, the Service's *own* explication of the "best scientific . . . data available," *id.* – which is required to inform all section 7 consultations, *id.* – compels the conclusion that *continuing* to maintain Subpopulation A in a highly depleted, vulnerable status teetering on extirpation constitutes jeopardy to the sparrow. As described previously, over the past two decades, the Service has repeatedly found that the best available science dictates two conclusions: (1) the sparrow is highly vulnerable to extinction from fire, climactic conditions, and other stochastic factors if (as has been the case for years now) the vast majority of the remaining sparrows are concentrated in one subpopulation in one geographical area; and (2) restoration of Subpopulation A in particular is therefore essential to mitigating the risk of extinction.

In contravention of those scientific findings, the 2010 BiOp concludes that Corps management actions that concededly will *not* restore subpopulation A but, rather, will, *at best*, maintain that essential subpopulation in its perilous, highly vulnerable state of fewer than 10% of the sparrows that existed as recently as 1992 does not constitute a jeopardy situation. That conclusion is impossible to reconcile with the best available science standard, as the Service itself has described the pertinent science, and contravenes the Service's and Corps' fundamental obligations not only to employ the consultation process so as to avoid placing a species in jeopardy of extinction, but to "articulate[] a rational connection between the facts found [in a BiOp] and the conclusions reached." *Pac. Coast Fed'n of Fishermen's Ass'ns v. Bureau of Reclamation*, 426 F.3d 1082, 1090 (9th Cir. 2005).

**Second**, and related to the prior point, the only way in which the Service could reach its baseless conclusion in the 2010 BiOp that allowing Subpopulation A to remain in a highly depleted state is consistent with the obligation to avoid jeopardy is by doing what the Service has repeatedly done over the past two decades: artificially segmenting the Corps' harmful water management activities into short increments of time and finding that the Corps' deleterious management activities during those brief time intervals will not jeopardize the species. But this is precisely what courts have ruled the Service may *not* do in order to avoid making a jeopardy finding. *See Wild Fish Conservancy v. Salazar*, 628 F.3d 513, 522 (9th Cir. 2010).

For example, in *Wild Fish Conservancy*, the Ninth Circuit held that the Service's "framing [of] the operation of an ongoing project as a short-term action" in order to avoid evaluating the full effects of the project violated the Services obligation to "analyze the effect of the *entire* agency action." 628 F.3d at 522 (quoting *Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988)). In *Wild Fish Conservancy*, the project at issue – which was adversely affecting an endangered fish species – had been "operating for seventy years and [was] expected to continue operating into the future"; nonetheless, the action agency "simply made a decision, endorsed by the Service, to define the action as a five-year term of operations, when it might as easily have chosen" a different term. 628 F.3d at 523. The court squarely rejected that approach to ESA consultation, explaining that the "artificial division of a continuing operation into short terms can undermine the consulting agency's ability to determine accurately the species' likelihood of survival and recovery." *Id.*

The court further explained that, while the assessment of an ongoing action (or series of



actions) over a longer term might yield the conclusion that the action is indeed contributing to the extinction of a species – e.g., as here, by causing the “loss of [a] local population” whose loss “might be significant enough to ‘reduce appreciably the likelihood of both the survival and recovery’” of the species as a whole – a series of “short-term analyses, on the other hand, could mask the long-term impact” of adverse actions by steadily eroding the “baseline” status of the species and thereby circumventing jeopardy determinations that would otherwise be made. *Id.* at 523 (quoting 50 C.F.R. § 402.02). Consequently, “[u]nder this approach, a listed species could be gradually destroyed, so long as each step on the path to destruction is sufficiently modest. This type of slow slide into oblivion is one of the very ills the ESA seeks to prevent.” *Id.* (quoting *Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008)).

For essentially identical reasons, the Service’s decision to limit the 2010 BiOp “to a five-year-term of operations and management was therefore arbitrary and capricious,” and flies in the face of the “ESA exhortation that agencies ensure that their actions are ‘not likely to jeopardize the continued existence of any endangered species . . . .’” 628 F.3d at 525 (quoting 16 U.S.C. § 1536(a)(2)). If anything, the situation is even more egregious than that in *Wild Fish Conservancy*. As explained previously, for literally *decades* the Service’s own BiOps have been urgently opining on the need to restore Subpopulation A in order to mitigate the severe risk to the species as a whole; accordingly, the only way in which the agency has been able to avoid the obvious conclusion that the Corps’ ongoing water management and control activities are *not* placing this severely depleted Subpopulation (and hence the species as a whole) in a jeopardy posture is by, yet again, artificially and unlawfully confining the Service’s analysis of the Corps’ deleterious management actions to a short-term interval. *See also Am. Rivers v. U.S. Army Corps of Engineers*, 271 F. Supp. 2d 230, 237-38 (D.D.C. 2003) (invalidating a BiOp that “improperly segments its analysis and narrowly focuses on harms to the species” during a finite period “instead of considering all present and future effects on the three imperiled species”).<sup>2</sup>

**Third**, the 2010 BiOp further compounds these legal violations by expressly relying on unspecified future CERP activities that will, in some undefined, unanalyzed, and unenforceable manner, restore “shift flows to the east away from Subpopulation A.” 2010 BiOp at 181. The Supreme Court has explained that the “obvious purpose of the requirement that each agency ‘use the best scientific and commercial data available’ is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise.” *Bennett v. Spear*, 520 U.S. 154, 176 (1997). Consistent with that understanding, courts have repeatedly held that the Service may not base a no jeopardy determination on an action agency’s “empty promises” that it will improve the situation in some unspecified fashion at some future time. *Oregon Natural Desert Ass’n v. Tidwell*, 716 F. Supp. 2d 982, 1004 (D. Or. 2010). Rather, future mitigation measures must be both clearly explicated and “binding under the ESA” if they are to factor in any manner into the

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<sup>2</sup> In *Wild Fish Conservancy*, the Service “might also have found that even if the [local population at issue] were extirpated, its loss would not jeopardize the survival or recovery” of the species as a whole, “[b]ut [the Service] did not make that finding, and it is far from obvious that the extirpation of the [local] population would be harmless.” 628 F.3d at 529. Here, on the other hand, the Service has made it abundantly clear that the loss of Subpopulation A would be devastating to the sparrow’s long-term prospects for survival and recovery.

Service's no jeopardy conclusion. *Center for Biological Diversity v. U.S. Bureau of Reclamation*, 698 F.3d 1101, 1110 (9th Cir. 2012); *see also Nat'l Wildlife Fed'n*, 524 F.3d at 934 ("even a sincere general commitment to future improvements" may not be relied on as the basis for a no jeopardy conclusion "absent specific and binding plans"); *Center for Biological Diversity v. Bureau of Land Management*, 422 F. Supp. 2d 1115, 1120 (N.D. Cal. 2006) (where Service's BiOp acknowledged significant declines in species populations before any new mitigation measures would be instituted, and failed to identify any specific mitigating measures that would be taken to address ongoing threats, the no jeopardy conclusion was arbitrary and capricious); *Nw. Env't'l Advocates v. U.S. EPA*, 268 F. Supp. 2d 1255, 1273 (D. Or. 2003) (the Service's reliance on "[u]enforceable promises" of future action render a no jeopardy conclusion "unwarranted and unsupported by the evidence").

**Fourth**, the 2010 BiOp is also unlawful because it fails to independently analyze the impact of the Corps' actions on either short-term or long-term *recovery* prospects of the sparrow. The ESA implementing regulations define the phrase "jeopardize the continued existence" of a species to mean 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." 50 C.F.R. § 402.02 (emphasis added). Consequently, the "jeopardy regulation requires [the Service] to consider *both* recovery and survival impacts," *Nat'l Wildlife Federation*, 524 F.3d at 931, because "even before a population is extinguished, it may reach a point at which it is no longer recoverable: 'a species can cling to survival even when recovery is far out of reach.'" *Wild Fish Conservancy*, 628 F.3d at 527 (internal quotation omitted).

In violation of that requirement, however, the 2010 BiOp utterly fails to analyze whether, and the extent to which, continuing to manage Subpopulation A (and hence the sparrow as a whole) in a severely depleted state will impair the species' prospects for recovery. That omission is particularly glaring in view of the BiOp's admission that the Corps' activities "for the next 5 years" are "*not expected to improve the status of this subpopulation.*" 2010 BiOp at 145 (emphasis added). Even if that finding could be reconciled with the Service's and Corps' obligation to avoid jeopardy – which it cannot – it certainly calls into question whether the ongoing management of the species' habitat is, at most, allowing the species to barely "cling to survival" which rendering any semblance of biological recovery further and further "out of reach." *Wild Fish Conservancy*, 628 F.3d at 527. Accordingly, the 2010 BiOp is patently unlawful, and arbitrary and capricious, for failing to address that issue as well.

## CONCLUSION

For the foregoing reasons, the Service's 2010 BiOp, and the Corps' reliance on that document to conduct water management and diversion activities in sparrow habitat, clearly violate section 7 of the ESA and that Act's implementing regulations. To avoid litigation over this matter, we request an opportunity to meet with you and/or your staffs as expeditiously as possible so that we can evaluate whether there is a mutually agreeable basis on which litigation can be avoided.

Sincerely,

A handwritten signature in black ink, appearing to read 'Eric R. Glitzenstein', with a stylized flourish at the end.

Eric R. Glitzenstein