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February 5, 2015

BY CERTIFIED AND ELECTRONIC MAIL

Sally Jewell, Secretary
U.S. Department of the Interior
1849 C Street, N.W.
Washington, D.C. 20240
sallyjewell@ios.doi.gov

Dan Ashe, Director
U.S. Fish & Wildlife Service
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Washington, D.C. 20240
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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
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Thomas.P.Bostick@usace.army.mil

**SUPPLEMENTAL NOTICE OF VIOLATIONS OF THE ENDANGERED
SPECIES ACT IN CONNECTION WITH THE 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 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 (hereby collectively referred to as "CBD"), we hereby supplement our August 13, 2013 Notice Letter ("2013 Notice"), send pursuant to section 11(g) of the Endangered Species Act ("ESA" or "Act"), 16 U.S.C § 1540(g), informing you that the U.S. Army Corps of Engineers ("Corps") and



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U.S. Fish and Wildlife Service (“FWS”) are in violation of the 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”). As explained below, developments since the 2013 Notice have confirmed unequivocally the validity of CBD’s earlier contentions that the Corps and FWS are violating the ESA by relying on a 2010 Biological Opinion (“2010 BiOp”) that flouts the ESA’s prohibition on jeopardizing the continued existence of endangered species. In 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.

THE AUGUST 2013 NOTICE LETTER

CBD’s 2013 Notice (which is incorporated by reference in its entirety) explained that, although the FWS has warned for decades that the Corps’ activities in sparrow habitat are jeopardizing the continued existence of the species, specifically through extensive discharges of water into the essential subpopulation of sparrows west of Shark River Slough (“subpopulation A”), the FWS has issued, and the Corps has relied on, a series of short-term BiOps that allow these extremely harmful activities to continue based on the Corps’ oft-repeated representations that at some distant time in the future the Corps will undertake unidentified remedial measures that will better protect subpopulation A and thereby stave off extinction and facilitate recovery. *See* 2013 Notice at 3-6.

CBD’s Notice explained that the 2010 BiOp followed this regrettable and unlawful pattern, finding once again that maintaining and restoring subpopulation A is indeed essential to conservation of the sparrow *and* that the Corps’ activities would continue to leave that subpopulation in a perilous state. Accordingly, the only way in which the 2010 BiOp could justify its “no jeopardy” conclusion was by artificially restricting its analysis to a five-year time frame and by finding that the Corps’ activities would allow for maintenance of a minimally adequate level of nesting in the subpopulation until additional, albeit unidentified, CERP projects could be “brought-on-line” that would purportedly improve the status of the subpopulation at some unspecified date in the future.

The 2013 Notice letter identified a number of interrelated ways in which the 2010 BiOp and the Corps’ reliance on it violates section 7(a)(2) of the ESA, which requires federal agencies, in consultation with the FWS and in view of the “best available” scientific data, to “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). In particular, CBD explained that (1) the FWS’s own explication, over the course of many years, of the best available data makes clear that the Corps’ actions are in fact jeopardizing the continued existence of the Sparrow by keeping subpopulation A in a continuously precarious status; (2) the FWS’s limitation of the 2010 BiOp to a five-year period of analysis precludes the Service from meaningfully analyzing the *actual* anticipated impact of the Corps’ activities on the species, in violation of the ESA’s implementing regulations and case law applying them; (3) the BiOp’s reliance on unspecified future CERP actions also contravenes the “best available” science as well

as court rulings explaining that future remedial measures may be taken into account in the jeopardy determination *only* if such measures are clearly delineated and binding on the action agency; and (4) the BiOp violates the ESA by failing independently to analyze the impact of the Corps' actions on the Sparrow's *recovery* prospects, in violation of 50 C.F.R. § 402.02 and judicial interpretations of that regulation. *See* 2013 Notice at 7-10.

Although, in response to CBD's letter, a number of discussions took place in an effort to determine whether CBD and the federal agencies could agree on a path forward, no such resolution was reached.

RECENT DEVELOPMENTS

Developments since CBD sent the 2013 Notice Letter have borne out CBD's grave concerns with the FWS's and Corps' ongoing and unlawful practice of allowing the Sparrow to balance on the brink of extinction, particularly by maintaining subpopulation A in such an imperiled state that it faces a constant threat of extirpation. If possible, these recent developments make even clearer than before that the approach taken by the Corps and FWS is jeopardizing the continued existence of the Sparrow and violating the ESA in myriad ways.

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 (Attachment A); *see also* Jacksonville District Corps of Engineers, *Annual Assessment Report: Water Year 2014* (November 2014). In so doing, 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." Attachment A at 2.

However, the Corps, predictably, sought to shift responsibility from its own ongoing deleterious activities by asserting that "[t]here are several factors that influence populations 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.* Not surprisingly, therefore, the Corps committed to taking no concrete remedial action in the foreseeable future but, yet again, sought to kick the can down the road by promising "future restoration" under CERP that will somehow address the Sparrow's needs assuming that the species can hang on the meantime. *Id.*

In December 2014, the FWS evidently 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. *See* 12/12/14 Letter from FWS to Corps (Attachment B).¹ While agreeing that the Sparrow is “suffering from small population effects,” the Service did *not* accept the Corps’ suggestion that its 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 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* (Oct. 6, 2014) (“2014 FWS Review”).

The 2014 FWS review paints yet another bleak picture of the Sparrow’s plight and the Corps’ contribution to it. The 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,” i.e., even the unlawfully narrow objectives for the Sparrow established in the BiOp were not satisfied. 2014 FWS Review at 21 (explaining that the overall population estimate for 2014 was 2,720 birds, 195 birds below the baseline 2,915 birds specified in the reinitiation trigger).

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.* The review makes crystal-clear that, once again, 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, has not worked even to accomplish the minimal objectives of the 2010 BiOp. Rather, this approach is inexorably

¹ We say that FWS “evidently” agreed that formal consultation is necessary because, while the letter agrees with the Corps that the reinitiation triggers have been met, the Service’s letter does not state point-blank that formal consultation has in fact been reinitiated on the current iteration of the ERTTP, as is plainly required where, as here, incidental take thresholds in a BiOp have been exceeded. Rather, the letter expresses “appreciat[ion]” for the Corps’ decision to “discuss with the Service and other partners the problems and opportunities associated with the current ERTTP operations while also looking forward to the next iteration of the ERTTP.” Attachment B. For purposes of this letter we are assuming that the Corps and FWS have in fact reinitiated formal consultation on the 2010 BiOp and the ERTTP activities covered by that BiOp but if, for whatever reason, they have not done so – e.g., the “discuss[ions]” between the FWS and the Corps are focused solely on what should be done under the *next* iteration of the ERTTP rather than what must also be done to rectify the *present and ongoing* violations of the ESA – then you are also placed on notice that such a course of conduct constitutes a further violation of the ESA, in addition to the other violations set forth in this letter. *See* 50 C.F.R. § 402.16(a); 2010 BiOp at 185 (“[I]f annual population estimates fall below 2,915 sparrows . . . *reinitiation of consultation must occur*”) (emphasis added).

driving subpopulation A (and hence the species as a whole) ever closer to extinction.

The review explains 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 ERTTP-1 operations.” 2014 FWS Review at 21. However, “[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). As explained by the review:

The operations of ERTTP-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 ERTTP-1, or the period when the IOP remained in place. *However, the operation of the IOP and ERTTP-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).

The 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. Thus, 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:

[T]he 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 wind needed to successfully breed and fledge one brood.

Id. at 36-37 (emphasis added); *see also id.* at 36 (“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”) (emphasis added).

Consequently, 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:

[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).

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. *Id.* at 39. Specifically, the review explains that this is a significant setback for the species as a whole and, again, subpopulation A in particular:

[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.*

DISCUSSION OF LEGAL VIOLATIONS

Developments occurring since CBD’s 2013 Notice Letter only serve to reinforce all of the reasons set forth in that letter as to how the BiOp, and the Corps’ reliance on it, are unlawfully jeopardizing the continued existence of the Sparrow, particularly by allowing Corps activities to continue that are keeping subpopulation A in a decimated state that cannot help avoid extinction, or contribute to recovery, of the species as a whole. The best available science demonstrates that the Sparrow population as a whole is continuing to decline and that the Corps’ activities are continuing to inhibit breeding in subpopulation A in particular in a manner that precludes recovery of that subpopulation, leaves it at grave risk of extirpation, and therefore jeopardizes the continued the existence of the Sparrow overall because the species’ survival and recovery is dependent on preservation of that subpopulation.

In addition to corroborating all of the legal violations we previously identified, the recent developments point to several additional ways in which the Corps and FWS are in violation of the ESA.

First, since the Corps has concededly exceeded the incidental take thresholds set forth in the 2010 BiOp, the Corps will violate the “take” prohibition in section 9 of the ESA, 16 U.S.C. § 1538, should it proceed to engage in *any* water management or other activities that have the effect of allowing subpopulation A to be flooded and otherwise impaired in a manner that disrupts Sparrow breeding and other essential behaviors in the subpopulation, before the FWS has issued a legally valid Incidental Take Statement covering the Corps’ activities. *See, e.g., Center for Biological Diversity v. U.S. Bureau of Land Management*, 698 F.3d 1101, 1108 (9th Cir. 2012) (“If the amount or extent of incidental taking is exceeded, the action agency must immediately reinitiate consultation with the FWS . . . When reinitiation of consultation is required, the original biological opinion loses its validity, *as does its accompanying incidental take statement, which then no longer shields the action agency from penalties for taking.*”) (emphasis added); *see also Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1249 (9th Cir. 2001) (“Incidental Take Statements set forth a ‘trigger’ that, when reached, results in an unacceptable level of incidental take, *invalidating the safe harbor provision*”)

(emphasis added).²

Second, should the Corps proceed with activities that the FWS has now found to be impairing sparrow breeding in subpopulation A – such as maintenance of the 60-day metric for maintaining dry breeding habitat – the Corps will be in violation of section 7(a)(2)’s prohibition on jeopardizing the continued existence of endangered species for that reason, as well as those set forth in CBD’s 2013 Notice Letter. Indeed, because the FWS has now left little doubt that the 2010 BiOp’s no-jeopardy conclusion was predicated on erroneous assumptions concerning the kinds of conditions that would even permit the subpopulation to persist for a limited time frame – which was an unlawfully low bar in the first instance – at least until the FWS issues a new BiOp that complies with the ESA, the Corps *cannot* insist on merely continuing with business as usual without flagrantly violating section 7(a)(2). As the Supreme Court has held, section 7(a)(2) was enacted for the precise purpose of ensuring that “agencies of Government can no longer plead that they can do nothing about [the effects of their actions on imperiled species] . . . *They can, and they must. The law is clear.*” *TVA v. Hill*, 437 U.S. 153, 184 (1978) (internal quotation omitted); *see also Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987) (holding that the Corps violated section 7(a)(2)’s substantive prohibition by allowing destruction “of any part of the [listed] birds’ habitat” in the absence of compliance with a valid BiOp); *id.* (“Congress clearly intended that the [Corps] give ‘the highest of priorities’ and the ‘benefit of the doubt’ to preserving endangered species such as the tern and the rail.”) (quoting *TVA v. Hill*, 437 U.S. at 174)).

Third, should the Corps proceed with activities that will, once again, destroy or degrade the Sparrow’s marl prairie habitat or in any way foreclose the FWS from requiring more protective measures, including *during 2015*, the Corps will also be in violation of section 7(d) of the Act. *See* 16 U.S.C. § 1536(d). That provision requires that, following the “initiation of consultation required under subsection (a)(2) of this section, the Federal 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 violate subsection (a)(2) of this section.*” *Id.* (emphasis added).

Here, the FWS’s 2014 review indicates that as part of the reinitiated formal consultation the Service may well conclude that the Corps’ activities are jeopardizing the Sparrow in the absence of far better protections for the Sparrow and its habitat, especially in subpopulation A.

² There can be no legitimate dispute that the Corps’ activities result in “take” of the Sparrow, as defined in the ESA implementing regulations. *See* 50 C.F.R. § 17.3 (defining take through “harassment” to mean an “intentional or negligent act or omission which creates the likelihood of injury or wildlife by annoying it to such an extent significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering”); *id.* (defining take through “harm” to “include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering”).

If so, the Service would be obligated to set forth “those reasonable and prudent alternatives [“RPAs”] which [it] believes would not violate” the jeopardy prohibition and “can be taken by the [Corps] . . . in implementing the agency action.” 16 U.S.C. § 1536(b)(3)(A). Accordingly, should the Corps proceed with business as usual *before* a new BiOp is issued, thus as a practical matter “foreclosing the formulation or implementation” of RPAs that the Service may devise, that would be a clearcut violation of section 7(d) as well as section 7(a)(2). *See, e.g., Native Ecosystems Council v. Kreuger*, 946 F. Supp. 2d 1060, 1076 (D. Mont. 2013) (issuing injunctive relief based on a section 7(d) violation, where planned timber sales could foreclose changes to a Forest Plan that the FWS might devise in section 7 consultation to protect grizzly bears).

Fourth, the FWS’s 2014 review also establishes that the Corps is in violation of section 7(a)(1) of the ESA, which imposes a distinct obligation on all federal agencies to consult with the FWS for the purpose “carrying out programs for the conservation” of endangered species. 16 U.S.C. § 1536(a)(1) (“Federal agencies shall, in consultation with and with the assistance of the [FWS], utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species”); *see also id.* at § 1532 (defining “conservation” to mean “to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary”).

Here, the 2014 FWS review makes clear 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* the Service’s recommendations for improving the status of the Sparrow. The review explains that while the “Corps has been diligent in hosting frequent periodic scientific calls (PSC), providing detailed information relating to water management operations and receiving recommendations from call participants,” there is little evidence that the Corps has followed, or even seriously considered, a “multitude of recommendations” made by the FWS for actions that should be taken to improve the status of the Sparrow in light of the evidence produced by the Corps. The review explains that:

it is difficult to discern in the table provided by the Corps how [the Corps] utilized the recommendations to formulate actions as a result of the PSC input. *For example, despite a multitude of recommendations relating to the Cape Sable seaside sparrow over four months of operations, no mention is made of these or the resultant actions taken by the Corps appear in the table.*

2014 FWS Review at 11 (emphasis added).

Plainly, the Corps cannot be said to be meaningfully consulting with the FWS on “programs for the conservation” of the Sparrow where, as here, the Corps appears to be systematically ignoring the Service’s conservation recommendations or, at the very least, failing to document and explicate how it is responding to them. Accordingly, the Corps is in default of its section 7(a)(1) duties as well as those under section 7(a)(2). *See Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1147 (11th Cir. 2008) (explaining that under section 7(a)(1) each federal agency

“must in fact carry out a program to conserve” listed species affected by the agency’s actions); *Sierra Club v. Glickman*, 156 F.3d 606, 616 (5th Cir. 1998) (“Given the plain language of the statute and its legislative history, we conclude that Congress intended to impose an affirmative duty on each federal agency to conserve each of the species” on the list).

CONCLUSION

For the foregoing reasons, as well as those set forth in the 2013 Notice, the Corps and FWS are in ongoing violation of the ESA.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric R. Glitzenstein". The signature is stylized with a large, sweeping "E" and a long, horizontal stroke.

Eric R. Glitzenstein



DEPARTMENT OF THE ARMY
JACKSONVILLE DISTRICT CORPS OF ENGINEERS
P.O. BOX 4970
JACKSONVILLE, FLORIDA 32232-0019

REPLY TO
ATTENTION OF

Planning and Policy Division
Environmental Branch

NOV 17 2014

Mr. Larry Williams, State Supervisor
South Florida Ecological Services Field Office
U.S. Fish and Wildlife Service
1339 20th Street
Vero Beach, Florida 32960-3559

Dear Mr. Williams,

In accordance with the November 17, 2010 U.S. Fish and Wildlife Service (Service) Biological Opinion on the Everglades Restoration Transition Plan (ERTP), the U.S. Army Corps of Engineers (Corps) prepared the enclosed annual assessment for Water Year 2014. The assessment documents water management operations and includes an analysis of Incidental Take and ERTTP Performance Measures. Based upon preliminary data collected by Everglades National Park (ENP) as part of the 2014 Cape Sable seaside sparrow (CSSS) range-wide survey, it appears that the annual population estimate of CSSS has fallen below the reinitiation trigger defined within the November 17, 2010 ERTTP Biological Opinion. Therefore, pursuant to requirements of the Biological Opinion, the Corps is requesting reinitiation of consultation.

The Corps also completed a retrospective review of ERTTP operations during the 2013 nesting season, as operations during this time period would have the potential for the greatest impact on population estimates for the 2014 nesting season. Based upon this retrospective review, the Corps concludes that all water management operations were in accordance with 2012 ERTTP. In addition, the S-12C structure which does not have any mandated closure period for protection of this subspecies, was closed for much of the 2013 nesting season in accordance with the Water Conservation Area 3A Rainfall-Based Management Plan. Closure of the S-12C structure further restricts flow into ENP and western Shark Slough where CSSS, subpopulation A, resides. Therefore, the Corps concludes that water management operations did not contribute to the transition from groundwater to surface water at Gauge NP-205 during Water Year 2013 or Water Year 2014. The Corps has also initiated the Modified Water Deliveries to ENP Project Increment 1 Field Test, in which the Gauge 3273 constraint will be relaxed to allow additional flow into ENP's Northeast Shark River Slough. This effort will further restrict water flow within western ENP.

During the Endangered Species Act consultation for the Central Everglades Planning Project, a number of items were discussed that could facilitate CSSS recovery. During this consultation, the Service noted the need for a better survey methodology and population estimator to more accurately assess CSSS population size. Recently, ENP personnel reported that there were apparent anomalies with CSSS range-wide survey data and in particular, with negative data. Anomalies with the negative data center around the concern that the database does not discern between sites apparently surveyed in which birds were not encountered versus sites that were never surveyed. This anomaly (among others) would affect the accuracy of data reported, thus calling into question the information that was used to establish the Incidental Take trigger within the 2010 ERTTP Biological Opinion. ENP further indicated that they are in the process of performing a quality assessment/quality control review of the entire database to ensure accuracy. This effort will assist to provide a more accurate accounting of survey data.

As shown in Table 7 in the enclosed assessment, CSSS, subpopulation A, has not recovered under the 1998/1999 Emergency Deviations, 2000-2002 Interim Structural and Operational Plan, 2002-2006 Interim Operational Plan for Protection of the CSSS or 2012-2014 ERTTP operations. There are several factors that influence population size including competition, predation and prey availability. Recent research suggests that sparrow populations are slow to recover, or cannot recover, once they reach very small population sizes due to low adult and juvenile recruitment, many unmated males, biased sex ratios, lower hatch rates and other adverse effects associated with small population size (Boulton et al. 2009; Virzi et al. 2009). In addition, ENP has been identified as a hotspot for methylmercury, which has been shown to have sub-lethal effects on songbirds resulting in reduced reproductive success (Jackson et al. 2011).

The Jacksonville District suggests that species recovery focus on identifying vital rates that would have the greatest effect on enhancing CSSS populations in order to increase resiliency of the subspecies for future restoration under the Comprehensive Everglades Restoration Plan (CERP) and other efforts focused upon increased water deliveries within ENP to restore historic ridge and slough habitats. Subsequent refinements to 2012 ERTTP that result in further restrictions of water deliveries to ENP for protection of CSSS are contrary to CERP restoration goals and would further result in adverse effects to other species as documented within the 2014 RECOVER System Status Report.

Despite the lack of apparent connection between water management operations and preliminary CSSS population data results, in accordance with the 2010 ERTTP Biological Opinion, please view this correspondence as reinitiation of formal consultation under the Endangered Species Act of 1973, as amended.

The Corps requests that the Service review and consider information within the enclosed assessment in its reinitiation process and respectfully requests that any subsequent opinion incorporate 1) incidental take trigger amendments to reflect consideration of new information provided; and 2) ENP quality assessment/quality control review of the CSSS range-wide survey data. Your point of contact for this effort is Dr. Gina Ralph at 904-232-2336. We look forward to continued cooperative efforts on this important matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Eric P. Summa", with a long horizontal flourish extending to the right.

Eric P. Summa
Chief, Environmental Branch

Enclosure



United States Department of the Interior

FISH AND WILDLIFE SERVICE

1875 Century Boulevard
Atlanta, Georgia 30345

In Reply Refer To:
FWS/R4/ES

December 12, 2014

Colonel Alan M. Dodd
District Commander
U.S. Army Corps of Engineers
701 San Marco Boulevard, Room 372
Jacksonville, Florida 32207-8175

Service Consultation Code: 41420-2011-F-0024

Project: Everglades Restoration Transition
Plan, Phase 1

Counties: Broward, Miami-Dade, and Monroe

Dear Colonel Dodd:

The U.S. Fish and Wildlife Service (Service) has reviewed your letter dated November 17, 2014, in which you provide your Annual Assessment Report: Water Year 2014, for the Everglades Restoration Transition Plan and request reinitiation of formal consultation under the Endangered Species Act of 1973, as amended, due to exceedance of triggers identified in the November 17, 2010 ERTTP Biological Opinion. We agree with and appreciate the Corps' decision to discuss with the Service and other partners the problems and opportunities associated with current ERTTP operations while also looking forward to the next iteration of ERTTP.

While the Service generally agrees with the conclusions in your report, and concur that naturally occurring weather events were the primary cause for not meeting some of the hydrologic thresholds and that Cape Sable seaside sparrows are suffering from small population effects, it has become apparent to the Service that further modifications to the current water management regime are needed to conserve and recover sparrows. We look forward to discussing new and improved operational flexibility with the goal of improving sparrow habitat and population numbers so that this and other threatened and endangered species can better handle the transition into full Everglades restoration.

We are attaching our report pertaining to the matter entitled, *Review of U.S. Army Corps of Engineers Everglades Restoration Transition Plan Annual Assessment Report: Water Year 2013, Initial Analysis of Water Year 2014*. Please review this document as it contains some important information that should be included in future Annual Assessment Reports and also includes our analyses of triggers exceeded in 2013-2014. This report will be used as the basis for discussions regarding ERTTP-2 for which a new Biological Opinion must be prepared by January 2016.

Thank you for your cooperation and effort in protecting fish and wildlife resources. The Service is committed to working with the Corps, and other cooperating agencies to protect wildlife resources including threatened and endangered species in the Everglades and we look forward to discussing these issues further during our meeting on December 18, 2014. If you have any questions regarding this letter or the accompanying report, please contact Kevin Palmer at 772-469-4280, or via email at Kevin_Palmer@fws.gov.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Leopoldo Miranda', written over a horizontal line.

Leopoldo Miranda
Assistant Regional Director
Ecological Services