UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

CENTER FOR BIOLOGICAL DIVERSITY; TROPICAL AUDUBON SOCIETY; MIAMI PINE ROCKLANDS COALITION; and SOUTH FLORIDA WILDLANDS ASSOCIATION, *Plaintiffs,* v. RYAN ZINKE, in his official capacity as Secretary of the U.S. Department of Interior; U.S. DEPARTMENT OF THE INTERIOR; U.S. FISH AND WILDLIFE SERVICE; GREG SHEEHAN, in his official capacity as Principal Deputy Director of U.S. Fish and Wildlife Service; and JIM KURTH, in his official capacity as Deputy Director for Operations and Acting Director of U.S. Fish and Wildlife Service, *Defendants.*	CASE NO. 1:17cv2444

PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION, SUPPORTING MEMORANDUM OF LAW, AND REQUEST FOR HEARING

MOTION FOR TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTION

Plaintiffs Center for Biological Diversity, Tropical Audubon, Miami Pine Rocklands Coalition, and South Florida Wildlands Association move for an temporary restraining order and/or preliminary injunction (TRO/PI) immediately staying the U.S. Fish and Wildlife Service's (Service) incidental take permit (ITP) for the Coral Reef Commons (the Project). This temporary restraining order (TRO) is needed because the Developers accelerated their construction schedule with three bulldozers that starting clearing land and knocking down trees late yesterday afternoon, December 8, 2017. Ex. 21, Valadares Dec. Plaintiffs request an Order directing the Service to suspend the effectiveness of the ITP immediately until the Court may rule on Plaintiffs' motion.

The ITP will allow more than 80 acres of some of the last unique habitats in South Florida to be lost forever. These pine rockland forests are home to wildlife and plants like the endangered Bartram's scrub-hairstreak butterfly and deltoid spurge, which are found nowhere else. *See* Ex. 1, ITP at 1; Ex. 5, EA at 70; Ex. 3, BO at 32, 129; Ex. 6, Comments by Roger L. Hammer at 2. The Project will consume 50+ acres of upland habitat and 30+ acres of pine rocklands, Ex. 4, HCP at 9, 135, rendering what remains uninhabitable for species. Since these species have few places left, destroying this habitat jeopardizes their very existence. Without emergency injunctive relief, Plaintiffs and the environment suffer irreparable harm.

Plaintiffs are likely succeed on the merits of their claims, which allege that Defendants U.S. Fish and Wildlife Service (Service); Department of the Interior; Ryan Zinke, in his official capacity as Secretary of the Interior; Gregory Sheehan, in his official capacity as Principal Deputy Director of the Service; and Jim Kurth, in his official capacity as Deputy Director for Operations and Acting Director for the Service have issued an unlawful Endangered Species Act (ESA) ITP and "biological opinion" in violation of Administrative Procedure Act (APA) and National Environmental Policy Act (NEPA). The public interest favors a TRO/PI to protect endangered species and the natural environment and to maintain the status quo until the Court resolves this motion. The public's interest in preventing such irreparable harm outweighs any inconvenience to Defendants or the Developers in suspending the ITP. Finally, Plaintiffs should not be ordered to post a bond pursuant to Fed. R. Civ. Pro. 65(c) as courts typically waive bonds in litigation such as this.

Plaintiffs respectfully request a hearing on this motion as the Court's calendar allows.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION

Pine rockland forests, found only in South Florida and the Bahamas, are some of the most imperiled ecosystems in the world, and home to rare plants and animals found nowhere else. Ex. 5, EA at 6. The Richmond pine rockland tract is the largest of such landscapes outside Everglades National Park, Ex. 5, EA at 6, supporting 260 native plants and rare species like the Bartram's scrub-hairstreak butterfly, Florida bonneted bat, rim rock crowned snake, and deltoid spurge.[1]

The Richmond pine rockland tract is the site of an 88-acre mega-development called Coral Reef Commons, which would clear this rare forest and replace it with a commercial supercenter, chain restaurants, and apartments. Ex. 4, HCP at 9; Ex. 6, Comments by Alexander Robillard at 1. The Project is slated to add more than 17,000 cars daily to congested roads, permanently destroy more than 82 acres of habitat, and degrade and fragment even more habitat with pollution, killing, injuring, and harming ESA-protected species in the process. The Project will intensify the impacts of climate change on these species by eliminating higher-elevation refugia from sea-level rise and storm surges.

This destruction has been permitted through a flawed permit issued by the Service and backed by a convoluted "conservation plan" that violates several environmental laws.

FACTUAL BACKGROUND

On November 30, 2017, the Service issued a biological opinion (BO) for the Project, paving the way for its approval of the Coral Reef Commons Habitat Conservation Plan (HCP) and an incidental take permit (ITP) on December 5, 2017. Ex. 3, BO at 1; Ex. 1, ITP at 1. Plaintiffs were made aware of the ITP approval via an email from the Service's Public Affairs Officer at 3:13 p.m. on December 5, 2017. Ex. 7, Email from Ken Warren, entire. The BO covers rare and imperiled species like the Bartram's scrub hairstreak butterfly, eastern indigo snake, Florida bonneted bat, Florida leafwing butterfly, gopher tortoise, Miami tiger beetle, Rim Rock crowned snake, and white-crowned pigeon. Ex. 3, BO at v-vi. The BO also reviews impacts and conservation measures for 14 federal candidate, threatened, and endangered plant species, including the endangered tiny polygala and deltoid spurge. The HCP relies heavily on a "habitat valuation assessment."

[1] U.S. Fish and Wildlife Service, *Multi-Species Recovery Plan – Pine Rocklands*, 3-173 (July 23, 2014) https://www.fws.gov/verobeach/MSRPPDFs/Pinerock.pdf.

On December 4, 2017 the Service issued a statement of findings (SOF) on the HCP, ITP, and Environmental Assessment (EA) and decided to issue ITP. Ex. 2, SOF at 1. To date, the Service has not made publically available a "finding of no significant impact" (FONSI).

Plaintiffs promptly filed their complaint and the instant motion within 3 days of the Service announcing its decision, and within hours of learning that Permittees had commenced construction activities.

STANDARD AND SCOPE OF REVIEW

The Court should grant a TRO/PI because Plaintiffs show: (1) a substantial likelihood of success on the merits; (2) that they are suffering irreparable harm; (3) that this harm exceeds any harm suffered by the Service and Developers; and (4) that an injunction would serve the public interest. *Grizzle v. Kemp*, 634 F.3d 1314, 1320 (11th Cir. 2011); *Nat'l Wildlife Fed'n v. Marsh*, 721 F.2d 767, 770 (11th Cir. 1983); *S. Dade Land Corp. v. Sullivan*, 853 F. Supp. 404, 410 (S.D. Fla. 1993) (plaintiff seeking temporary injunctive relief must show "the elements required for issuance of a preliminary injunction"). The Court may issue a TRO without notice to the Service and Developers because: 1) "specific facts" set forth below "clearly show that immediate and irreparable injury, loss, or damage will result" before the Center can be heard in opposition; and 2) the Center's attorney has certified her efforts to give notice to Defendants Fed. R. Civ. P. 65(b)(1). The Court should also decline to enter an injunction bond. Fed. R. Civ. P. 65(c).

A TRO/PI will "preserve the status quo until the rights of the parties can be fairly and fully investigated and determined by strictly legal proof and according to the principles of equity." *Wash. Cnty., N.C. v. U.S. Dep't of the Navy*, 317 F. Supp. 2d 626, 631 (E.D.N.C. 2004) (quoting *Sinclair Refining Co. v. Midland Oil Co.*, 44 F.2d 42, 45 (4th Cir. 1932)); *Ne. Fla. Chapter of Ass'n of Gen. Contractors v. Jacksonville*, 896 F.2d 1283, 1284 (11th Cir. 1990). Such relief "is not a final adjudication of the rights of the parties" but simply temporarily reserves the parties' rights. *Wash. Cnty.*, 317 F. Supp. at 631 (internal citation omitted); *see also Levi Strauss & Co. v. Sunrise Int'l Trading Inc.,* 51 F.3d 982, 985 (11th Cir. 1995); *Complete Angler, LLC v. City of Clearwater, Fla.*, 607 F. Supp. 2d 1326, 1330 (M.D. Fla. 2009).[2]

[2] Given the exigency of this motion, Plaintiffs focus on specific claims which will allow the Court to enter preliminary injunctive relief until the case may be heard and after the Defendants produce an administrative record. Plaintiffs reserve their right to pursue all of the claims in their complaint at the summary judgment stage of the proceeding.

ARGUMENT

I. Plaintiffs will be irreparably harmed absent a temporary restraining order and preliminary injunction

Plaintiffs are irreparably harmed in the absence of a TRO/PI. Upon information and belief, after the Service notified the public that it had approved the ITP, the Permittee began clearing the pine rocklands and surrounding habitat on the Project site yesterday at about 3:30 in the afternoon.[3] Once the permittees' bulldozers destroy the unique pine rocklands landscape, it will likely be impossible to restore it to its original state, and the threatened and endangered species that depend on it for survival will be lost, possibly forever.

a. The Project will irreparably destroy and degrade rare pine rockland habitat and harm threatened and endangered species

For the Plaintiffs, "irreparable injury is likely in the absence of an injunction." *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 22 (2008). "An injury is irreparable if it cannot be undone through monetary remedies." *Scott v. Roberts*, 612 F.3d 1279, 1295 (11th Cir. 2010) (internal quotation marks omitted). This inquiry "does not focus on the significance of the injury," but rather on "whether the injury . . . is *irreparable*—that is, whether there is any adequate remedy at law . . . ." *Sierra Club v. Martin*, 71 F. Supp. 2d 1268, 1327 (N.D. Ga. 1996). Courts "readily find that an environmental injury is 'irreparable' because '[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable.'" *U.S. v. Jenkins*, 714 F. Supp. 2d 1213, 1221-22 (S.D. Ga. 2008) (quoting *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987)).

Destruction of rare pine rocklands and the threatened and endangered species that live at the Project site is per se irreparable. *See* Ex. 3, BO at 7. Many of these species are found only in small patches of some of their last remaining habitat, so bull-dozing the Project site may push these species beyond the point from which they can recover, or even survive, the threat of extinction. *See Alliance for the Wild Rockies*, 632 F.3d at 1135; *see also Nat'l Wildlife Fed'n v. Harvey*, 440 F. Supp. 2d 940, 958 (E.D. Ark. 2006) ("When an endangered species is allegedly jeopardized, the balance of hardships and public interest tip in favor of the protected species."); *Bensman v. U.S. Forest Serv.*, 984 F. Supp. 1242, 1249 (W.D. Mo. 1997) ("[D]eath is certainly an irreparable harm and the extinction of a species is 'incalculable.'").

[3] *See* Ex. 16, Jenny Staletovich, Federal wildlife managers clear way for Walmart in vanishing South Florida forest, Miami Herald (Dec. 2017), http://www.miamiherald.com/news/local/environment/article188236199.html.

Plaintiffs are also irreparably injured by the Service's violations of NEPA, as described below. An agency's failure "to comply with NEPA before reaching a determination" and prepare an EIS constitutes irreparable injury by "'add[ing] risk to the environment'" with decisions based on incomplete information. *Sierra Club v. Norton*, 207 F. Supp. 2d 1310, 1340-41 (S.D. Ala. 2002) (quoting *Sierra Club v. Marsh*, 872 F.2d 497, 500-01 (1st Cir. 1989)); *Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 404 F. Supp. 2d 1352, 1361-62 (S.D. Fla. 2005). This injury is irreparable in a NEPA challenge where preliminary relief is necessary to "maintain the status quo pending review." *San Luis Valley Ecosystem Council v. U.S. Fish and Wildlife Serv.*, 657 F. Supp. 2d 1233, 1240-42 (D. Colo. 2009).

b. Plaintiffs are suffering irreparable harm to their recreational and aesthetic interests

Plaintiffs are suffering harm to their recreational and aesthetic interests, Ex. 18, Clancy Dec.; Ex. 19, Sunshine Dec.; Ex. 20, Schwartz Dec.; Ex. 17, Greenwald Dec., which are well-established, legally cognizable injuries. *Fund for Wild Animals v. Lujan*, 962 F.2d 1391, 1397 (9th Cir. 1992) (citing *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)). The Service issued the ITP on December 5, 2017, authorizing the Developers to destroy and develop pine rocklands and other habitat on the Project site.[4] These activities are occurring now. Ex. 18, Clancy Dec. ¶ 26. Harm to an individual's aesthetic and recreational interests in enjoying wildlife is irreparable because it cannot be undone. Thus, irreparable harm to Plaintiffs, pine rocklands, and protected species is "real and immediate"—indeed, it is occurring now. *See S.D. v. St. Johns Cty. Sch. Dist.*, 632 F. Supp. 2d 1085, 1095 (M.D. Fla. 2009) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983)).[5]

II. Plaintiffs have standing to bring this case

Plaintiffs are non-profit environmental and conservation organizations representing concerned citizens of Miami-Dade County and south Florida. Plaintiffs' members have standing to bring these claims, as they live and recreate in the region. They use public and private lands nearby for hiking, birdwatching, wildlife viewing, quiet and spiritual contemplation, and nature photography. By its very nature, "environmental injury, . . . is often permanent or at least of long

[4] *See* Ex. 16, Jenny Staletovich, Federal wildlife managers clear way for Walmart in vanishing South Florida forest, Miami Herald (Dec. 2017), http://www.miamiherald.com/news/local/environment/article188236199.html.

[5] Indeed, the terms "environmental" and "irreparable" are essentially interchangeable modifiers of "harm." *See Fla. Key Deer v. Brown*, 386 F. Supp. 2d 1281, 1286 (S.D. Fla. 2005), *aff'd sub nom. Fla. Key Deer v. Paulison*, 522 F.2d at 1133 (11th Cir. 2008).

duration, *i.e.*, irreparable." *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011) (citation omitted); *see also Central Or. Landwatch v. Connaughton*, 905 F. Supp. 2d 1192, 1197 (D. Or. 2012). Plaintiffs' members' interests are harmed by the Service's approval of the ITP and those harms would be redressed by a Court order requiring the agency to reevaluate and further review it. The interests Plaintiffs seek to protect are germane to their organizational purposes, and this case does not require their individual members to participate.

III. Plaintiffs are substantially likely to prevail on the merits of their claims

Plaintiffs have enough evidence to establish a "substantial likelihood of success on the merits," and hence the Court "need not find that the evidence positively guarantees a final verdict in plaintiff's favor." *Levi Strauss*, 51 F.3d at 985. Here, Plaintiffs present evidence that Defendants are likely violating NEPA and the APA. 5 U.S.C. § 706; *Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1216 (11th Cir. 2002). Thus the Court should enjoin the effectiveness of the ITP as it was approved following a process and analyses that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2).

a. The Service violated the APA.

i. The Service arbitrarily and capriciously relied on an unprecedented and scientifically unsupported "habitat functional assessment" to measure species impacts and associated mitigation in approving the BO.

To survive review, the Service must "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Veh. Mfrs. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983). It also must base its conclusions on the best available science "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). Yet here the Service approved an HCP entirely based on a novel "habitat functional assessment" that has no link to the affected species and ignores the best available science. Thus, the Service failed to consider the best scientific information relevant to each species' conservation needs and failed to draw a rational connection between the facts found and the findings made in its habitat value assessment. The Service erred in the following four ways.

First, rather than consider the individual habitat needs of each listed species when determining the effects of the action and potential mitigation, the Service created a haphazard "habitat functional assessment" that purportedly measured the habitat value for all species based

on six generic factors. Ex. 4, HCP at 82.[6] This one-size-fits-all approach was arbitrary and capricious because it fails to account for the listed species' specific habitat needs. Approving a conservation plan that is predicated on a habitat functional assessment and biological opinion that fail to accurately account for and mitigate impacts to species is arbitrary and capricious. It renders conservation goals unattainable. *Home Builders Ass'n v. U.S. Fish & Wildlife Serv.*, No. Civ. S-05-0629 WBS-GGH, 2006 U.S. Dist. LEXIS 80255, at *58-59 (E.D. Cal. Nov. 1, 2006). Because habitat characteristics can be fundamental to one species but not another, the Service must assess *each* species' precise needs. By relying on a vague habitat value assessment that conflates the needs of all affected species, the Service failed to evaluate the impacts to each species or ensure that these impacts will be adequately mitigated in the HCP.

Second, neither the BO nor the HCP contain any explanation of how the Developers delineated or scored the polygons that were applied to assess habitat values at the Project site, leading to apparently arbitrary assessments. For instance, it is unclear how the permittee concluded that polygons that will in fact become *more* isolated and fragmented after development will experience an *increase* in the valuation score for "habitat connectivity." *See, e.g.*, Ex. 4, HCP at 74.

Third, the habitat value assessment and the HCP rely on the wholly speculative assumption that prescribed fire will be possible, despite the weight of science indicating construction of the Project will *inhibit* prescribed burns. *See* Ex. 6, Comments by Roger L. Hammer at 2-3; Ex. 6, Comments by Julie Milstid at 2-3; Ex. 6, Comments by Jennifer Possley at 4. The best available scientific evidence dictates that "as residential and commercial developments have expanded" around the Project site, "the fire regimen has been reduced or eliminated" and indeed, after Coral Reef Commons project is constructed, "further restrictions will be placed upon the fire programs." Ex. 4, HCP App B. Given the construction of 900 residential units, retail, and a school in such a small area, it is extraordinarily optimistic to assume that prescribed burns would be possible without threatening property. It also defies past agency practice, *see* Ex. 4, HCP App. B, to assume that prescribed burning will be a viable land management tool once construction of the Project is complete.

[6] These factors include: open canopy, native herbaceous plants, exposed limestone substrate, fire frequency, low-levels of invasive plants, and habitat connectivity. Ex. 4, HCP at 82.

Finally, the habitat value assessment allows "double accrediting" for removal of exotic vegetation, which is often directly related to the percent native vegetation cover, and *vice versa*, so that polygons that score high for percent native vegetation cover also score high for removal of non-native vegetation, making the distinction between the two meaningless except to artificially inflate the value of some polygons. Ex. 4, HCP at 82. Further tipping the scale are the non-native vegetation and the native vegetation values that have the greatest weighted values. Ex. 4, HCP at 82.

ii. The Service arbitrarily and capriciously relied on the off-site mitigation area, which is owned by a third party and subject to land-use restrictions.

The Service had to find that the Developers "will, to the maximum extent practicable, minimize and mitigate the impacts" of taking threatened or endangered species for the Project. 50 C.F.R. §§ 17.22(b)(2)(i)(B), 17.32(b)(2)(i)(B). Yet the Service arbitrarily relied on conservation activities proposed at an off-site mitigation area that is: 1) owned and controlled by a third party that is not bound by the ITP's terms; and 2) subject to protections already. This undermines any claim of their conservation value. In addition, the Service ignored any analysis of off-site mitigation area on a species-by-species basis that would even have allowed it to draw a connection between impacts and how they might be offset, let alone a rational connection.

The HCP is intended to cover incidental take associated with "the construction of mixed-use development within 86.49 acres and all activities associated with such development." Ex. 4, HCP at 79. The 86.49 acres—and associated development activities—are under the control of the primary Developer: Ram Coral Reef. Ex. 4, HCP at 1, 5-6. The HCP relies on an off-site mitigation area to offset species impacts from the Project. Ex. 4, HCP at 79, 119-21. This property is part of the University of Miami Richmond campus and owned by the University of Miami (UM), Ex. 4, HCP at 5, 119, which is wholly unassociated with the Project. UM is termed "Applicant" in the HCP, but without an interest in mitigation, UM is not bound to follow the HCP or ITP. Thus, while termed an "Applicant," UM is simply a third party without an interest in the covered action. 50 C.F.R. § 402.02 (defining "applicant" as someone "who requires formal approval or authorization from a Federal agency as a prerequisite to conducting the action").

An applicant for an HCP cannot receive mitigation credit for mitigation performed by a third party. 16 U.S.C. § 1539(a)(2)(B)(ii) (requiring the Service to find "*the applicant* will . . . minimize and mitigate the impacts of [species take]" (emphasis added)); *see Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin.*, 99 F. Supp. 3d 1033, 1050 (N.D. Cal.

2015); *Sierra Club v. Babbitt*, 15 F. Supp. 2d 1274, 1282 (S.D. Ala. 1998). Because UM is not an applicant for the purposes of the HCP, the Service acted arbitrarily and capriciously in approving mitigation to be provided by a non-party to mitigate Ram Coral Reef's activities.

Even if the "off-site mitigation area" were not owned by an uninterested third party, it is already subject to land-use restrictions and thus cannot be considered new or additional commitment of resources to mitigate the Project impacts of take permitted under the ITP. This is double-dipping that contravenes Section 10's mandate that the Service find that the *applicant* "will, to the maximum extent practicable, minimize and mitigate the impacts of taking," 16 U.S.C. § 1539(a)(2)(B)(ii) (emphasis added), resulting in an added conservation benefit. *See Pacificans for a Scenic Coast v. Cal. DOT*, 204 F. Supp. 3d 1075, 1088 (N.D. Cal. 2016) (holding the approval of a transit project invalid where the Service accepted as mitigation for species impacts a proposal to preserve a 5.14-acre site that had already been preserved); *see also Gerber v. Norton*, 294 F.3d 173, 183 (D.C. Cir. 2002) (discussing the "problem" that "an open-space covenant already existed on the mitigation site, thus drawing into question whether placing a conservation easement on the site added anything to existing protections"). Here, 39.64 acres of pine rockland Natural Forest Community and 3.72 acres of hardwood hammock Natural Forest Community must already be "preserved in natural condition" with g controlled burns and exotic plant removal, pursuant to a covenant that runs with the land. HCP App. B. UM and the Developers cannot then also count those acres toward mitigation of the Project's impacts.

Last, Mitigation must be "rationally related to the level of take [authorized] under the plan." *Nat'l Wildlife Fed'n v. Norton*, 306 F. Supp. 2d 920, 928-29 (E.D. Cal. 2004). Yet there are no surveys for the property, and thus no basis for the Service's conclusion that the off-site mitigation area will, in fact, offset impacts to the listed species from the Project. As the HCP lacks a species-specific, rational connection between the off-site mitigation and the authorized impacts, the Service's approval of the proposed off-site mitigation was arbitrary and capricious.

iii. The Service failed to ensure adequate funding for the conservation plan.

The Service had to find that the Developers will adequately fund the conservation fund. 50 C.F.R. §§ 17.22(b)(2)(i)(C), 17.32(b)(2)(i)(C); *Sw. Ctr. for Biological Diversity v. Bartel*, 457 F. Supp. 2d 1070, 1105 (S.D. Cal. 2006) (citing *Sierra Club v. Babbitt*, 15 F. Supp. 2d 1274, 1281-82 (S.D. Ala. 1998)) ("applicant cannot rely on speculative future actions of others"). Yet

the Service relied on speculative funding sources based on the actions of third parties not bound by the ITP, rendering its conclusion that the HCP is adequately funded arbitrary and capricious.

The Developers claimed that perpetual maintenance costs will be funded through a Coral Reef Commons Master Property Owners Association (Association), to be established for the Project,[7] which will raise funds for maintenance. Ex. 4, HCP at 144-45, Appendix M. As a contingent assurance, the Developer claimed a dormant "Special Taxing District" "will be recorded"[8] and may be re-activated to raise funds should the Association dissolve; re-activation condition precedent aside, the Special Taxing District can be easily dissolved through a petition to Miami-Dade County that the Board of County Commissioners approves. Ex. 4, HCP at 145-46.

The Service's reliance on Developers' "financial assurances" is arbitrary and capricious. Funding is wholly dependent on the construction and success of the mixed-use residential development at the Project, and hence there will be no funding if the development fails. Likewise, the financial responsibility for maintaining the mitigation areas falls on the Association, which is not a party to the ITP, meaning the Service has no way to enforce the Developers' funding commitments. Any assurance found in the Special Taxing District is unreliable because Miami-Dade County can simply dissolve based on a petition, even if the Service objects. Because the Developers' funding commitments are speculative, contingent on third-party actors, and unenforceable by the Service, the Service arbitrarily and capriciously found that there is "adequate funding" for the HCP. *See Sw. Ctr. for Biological Diversity*, 457 F. Supp. 2d at 1105-06 (reliance on speculative future actions by unnamed parties for the majority of money needed to implement a conservation plan was arbitrary and capricious); *Nat'l Wildlife Fed'n v. Babbitt*, 128 F. Supp. 2d 1274, 1295 (E.D. Cal. 2000) (a cost-shifting mechanism under which funding depends on the participation of a third party requires the Applicant's guarantee to "ensure" funding).

iv. The Service failed to specify take and unlawfully used a surrogate measure in the biological opinion.

When the Service anticipates take of listed species, it must issue an "incidental take statement" (ITS) that specifies "the amount or extent of . . . incidental taking of a listed species."

[7] The HCP states that "the Master Association established for the CRC Property" is described in "Section 11.5.2 of the HCP," Ex. 4, HCP at 144, but such section does not exist.
[8] The Special Taxing District and CRC Master Association are conditions of the ITP. Ex. 4, HCP at 145-146.

50 C.F.R. § 402.14(i)(l)(i). An ITS may lawfully allow take of a listed species "as long as the statement sets a 'trigger' for further consultation" when "allowed incidental take is exceeded, a point at which there is a risk of jeopardizing the species." *Miccosukee Tribe of Indians v. U.S.*, 566 F.3d 1257, 1271-72 (11th Cir. 2009). This trigger "alert[s] the agency when the allowed incidental take has been exceeded" and hence can avert jeopardy to the species. *Id.* at 1272.

Thus Service must: (1) set a numerical "cap" or, in some circumstances, a rational surrogate on take; and (2) specify monitoring provisions to assess actual take and effectuate the trigger. *Id.* at 1275. Congress has declared a preference for a numerical expression of take, *Miccosukee Tribe of Indians*, 566 F.3d at 1274, though the Service may use a surrogate *if* the BO: (1) "explains why it is not practical to express the amount or extent of anticipated take . . . in terms of individuals"; (2) "[d]escribes the causal link between the surrogate and take of the listed species"; and (3) "sets a clear standard for determining when . . . take has been exceeded." 50 C.F.R. § 402.14(i)(1)(i). The Service has not met any of these requirements here.

The BO contains no "incidental take statement," but instead references the HCP. Ex. 3, BO at 172-173.[9] Thus, the Service does not set take numerically for *any* of the affected species. Likewise, although the Service observes that a habitat surrogate can be applied "[to] situations where it is impractical to detect or monitor take of individual species," Ex. 4, HCP at 81, it does not explain why it is impracticable to express take numerically for affected species here.[10]

b. The Service is violating NEPA

NEPA is the Nation's charter for protection of the environment. 40 C.F.R. § 1500.1(a). Congress designed NEPA to "insure that environmental information is available to public officials and citizens *before* decisions are made and actions are taken" and to "help public officials make decisions that are based on understanding of environmental consequences." *Id.* § 1500.1(b)-(c) (emphasis added).

i. The Service has not made its FONSI available for public review for 30 days

In May 2015, RAM Coral Reef and UM applied to the Service for a 30-year ITP to develop Coral Reef Commons, thereby causing incidental take of listed species. With irreversible destruction of some of the last pine rocklands, the ITP would permit take of these species. On

[9] "The amount or extent of incidental take anticipated under the proposed CRC HCP, associated reporting requirements, and provisions for disposition of dead or injured animals are as described in the HCP and its accompanying section 10(a)(1)(B) permit(s)." Ex. 3, BO at 172-173.

[10] This is true even though several of the species are capable of detection and have received numeric take limits for other federal projects.

March 23, 2017, the Service announced the proposed HCP and a draft EA for public review and comment. More than 3,000 people, including experts in the species and habitats at issue, submitted comments in opposition to the proposal. Ex. 2, SOF at 7. Most of these comments opposed the Project and favored science-based species protection.

The EA determines whether the proposed action is a "major Federal action significantly affecting the quality of the human environment" and if so, an EIS is required. If not, a FONSI must be prepared and signed. 550 FW 3 Documenting and Implementing Decisions 3.3(B)(1). Service policy also "dictates that the FONSI must be made available to the affected public." 550 FW 3 Documenting and Implementing Decisions 3.3(B)(4)(a). Moreover, the Service must make the FONSI available for a 30-day public review, in accordance with 40 C.F.R. 1501.4(e)(2), if:

> (i) The proposal is a borderline case (i.e., there is a reasonable argument for preparation of an EIS).
>
> (ii) The proposal is an unusual case, a new kind of action, or a precedent-setting case.
>
> (iii) There is either scientific or public controversy over the proposal.
>
> (iv) When the FONSI involves a proposal which is or is closely similar to one which normally requires preparation of an EIS.

550 FW 3 Documenting and Implementing Decisions 3.3(B)(4)(c)(i)-(iv); 40 C.F.R. 1501.4(e)(2), 1508.27.

On December 5, 2017, the Service announced it had approved the HCP and issued an ITP for the Project. The Service did not apparently publish or otherwise make available to the public a FONSI for its decision to issue the ITP. Thus, it has failed to give the public 30 days to review its determination that the project will not significantly impact the human environment.

ii. The Service did not consider a reasonable range of alternatives in the EA and HCP

NEPA requires a "detailed statement" of "alternatives to the proposed action." 42 U.S.C. § 4332(2)(c). The statement must compare impacts of the proposal and the alternatives, "sharply defining the issues and providing a clear basis for the choice among options by the decisionmaker and the public." 40 C.F.R. §§ 1502.14, 1508.9(b) (providing an EA "[s]hall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted."). It must therefore "rigorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a). To that end, courts have insisted that

agencies "consider such alternatives to the proposed action as may partially or completely meet the proposal's goal." *Nat. Res. Def. Council, Inc. v. Callaway*, 524 F 2d 79, 93 (2d Cir. 1975). Failure to examine a viable alternative renders an EIS or EA inadequate. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999).

The EA lacks a range of reasonable alternatives here. Aside from the no-action alternative (Alternative 1), there is just: a "redevelopment option" of 25.4 developed acres (Alternative 2); three alternatives consisting of 92-100 developed acres (Alternatives 3-5); and a preferred alternative of more than 86 developed acres (Alternative 6). Ex. 5, EA at 41. The Service rejected the "redevelopment alternative" for not being an "environmentally conscious" or "economically viable" development. Ex. 4, HCP at 69. Yet because the redevelopment alternative included mixed-use development and impacted significantly fewer acres of rare pine rocklands, the issue appears to be economic viability; even so, the EA lacks any financial analysis to support the Developers' claim that it is not economically viable. *See* Ex. 5, EA at 42; Ex. 4, HCP at 69.

The Service simply cannot blindly adopt an applicant's hollow economic rationale as determinative. *Sw. Ctr. for Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1158 (S.D. Cal. 2006); *see also* CEQ, Forty Most Asked Questions Guidelines Concerning CEQ's NEPA Regulations, Question 2a (Mar. 23, 1981). Such a "cursory dismissal . . . , unsupported by agency analysis" simply cannot satisfy the Service's "duty" to consider a range of alternatives. *Envt'l Prot. Info. Ctr. v. U.S. Forest Serv.*, 234 Fed. Appx. 440, 443, 2007 WL 1417163 (9th Cir. 2007). Also, NEPA does not allow an agency to eliminate "whole range of alternatives" because "they would achieve only some" of the project's purposes. *Town of Matthews v. U.S. Dep't of Transp.*, 527 F. Supp. 1055 (W.D. N.C. 1981).[11]

Indeed, Alternatives 3, 4, and 5 are essentially the same alternative, differing only by a few acres. All three involve the same amount of commercial development, and Alternatives 4 and 5 have the same amount of residential units. Ex. 5, EA at 41. By summarily rejecting the redevelopment alternative and presenting three substantially identical "alternatives," the Applicant has not provided "a clear basis for choice among options by the decisionmaker and the

[11] *See also N. Buckhead Civic Assoc. v. Skinner*, 903 F.2d 1533, 1542 (11th Cir. 1990) (explaining "a discussion of alternatives that would only partly meet the goals of the project may allow the decision maker to conclude that meeting part of the goal with less environmental impact may be worth the tradeoff with a preferred alternative that has greater environmental impact").

public" as NEPA requires. 40 C.F.R. § 1502.14; *see also Muckleshoot Indian Tribe*, 177 F.3d at 813 (rejecting environmental impact statement that failed to provide a true range of alternatives); *Curry v. U.S. Forest Serv.*, 988 F. Supp. 541 (W.D. Penn 1997) (same).[12]

iii. The Service failed to Prepare an Environmental Impact Statement

NEPA requires agencies to complete an Environmental Impact Statement (EIS) for proposed actions that may significantly affect the quality of the environment. 42 U.S.C. 4332(C). While an EA, as completed here, should "briefly provide[] sufficient evidence and analysis for determining whether to prepare an EIS" and "facilitate[] preparation of an EIS when one is necessary," CEQ, Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, at 36a (Mar. 23, 1981), an EIS should provide "all the information on environmental impacts and alternatives that the decisionmaker and the public need . . . to . . . . deci[de]" and "to ascertain . . . every significant factor . . . ." *Id.* at 25a; *Sierra Club v. U.S. Army Corps of Eng'rs*, 295 F.3d 1209, 1215 (11th Cir. 2002); 40 C.F.R. §§ 1502.1, 1508.9, 1508.11.

To determine whether a project's effects are significant, and thus whether a detailed EIS is required, an agency must consider both context and intensity. 40 C.F.R. § 1508.27. For a site-specific action, "context" means "the effects in the locale" (not the world as a whole) and "[b]oth short- and long-term effects are relevant." *Id.* § 1508.27(a). Intensity means "the severity of the impact" and requires consideration of numerous factors at play here. *Id.* § 1508.27(b). Public controversy surrounding the potential impacts of a federal action on the human environment strongly suggests that an EIS is required. *Id.* § 1508.27(b)(4), (5). The presence of just one intensity factor can require an EIS. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 361 F.3d 1108, 1125 (9th Cir. 2004).

The Service was required to prepare an EIS for the Project because the action is "significant" in several ways. Locally, it will destroy approximately 86.5 acres in the Richmond pine rockland, an exceptionally rare habitat inhabited by many protected species that cannot live anywhere else. *See* Ex. 5, EA at 1, 7, 21-26. Regionally, it will destroy even more of a unique habitat that has already been reduced by 98 percent outside of Everglades National Park. *See* Ex. 5, EA at 5-6. For many species, the Project site is the last of very few places left where they *can* survive. *See, e.g.*, Ex. 4, HCP at 43-44, 51, 55-56. *See* Ex. 6, Comments by Jennifer Possley at 2-

[12] It is unclear whether any other less damaging alternatives were considered. The draft HCP simply states, "other alternatives were considered and rejected earlier in the process, and therefore, not brought forward for in-depth consideration." Ex. 4, HCP at 68.

4. The Project will have permanent consequences for habitat and perhaps the very existence of these species. The Project satisfies several intensity factors; it would put human development in direct proximity to areas planned for prescribed burns, Ex. 4, HCP at 128-129, affecting air quality and public safety. Ex. 4, HCP App. J at 4.[13]

In light of all of the above, it cannot be disputed that the Project will be "significant," particularly when one considers the loss of 86.49 acres and fragmentation of some of the last remaining habitat of its kind, and the killing, injuring, and harming eight protected wildlife species and 14 protected plants. Ex. 4, HCP at 7-9. Even assuming it would benefit the environment, which Plaintiffs would not stipulate, it is significant. *See* 40 C.F.R. § 1508.27(b)(1).

Likewise, the Project is located in an ecologically critical area. Most of the habitat within the Project area is pine rocklands, Ex. 5, EA at 1, a rare, declining habitat characterized by limestone substrate and South Florida slash pine that has diminished from approximately 185,000 acres to just 22,790 acres (an 88 percent loss) in Miami-Dade County alone. *Compare* Ex. 5, EA at 6 *with* Ex. 4, HCP at 2. Miami-Dade County has designated and protected 39.64 acres of the property as a pine rockland Natural Forest Community (NFC) and 3.72 acres of hardwood hammock NFC. Ex. 4, HCP at 16. The Project's effects on protected species and their habitat could involve devastating consequences; namely because: 1) siting development so close to conservation land is incompatible and will lead to either public safety risks or failure to implement prescribed burns; and 2) the unprecedented use of the "habitat functional assessment" (which conflates the analysis of the affected species) and "habitat value units" will not mitigate harm to listed species.[14]

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[13] The school—which is hardly mentioned at all in any of the Service's or Permittees' documents—falls within a "no school zone" due to other "health and safety concerns," i.e., from building schools in close proximity to airports. Ex. 5, EA at 17.

[14] The unprecedented use of a habitat functional assessment and system of habitat value units to "mitigate" the Project's impacts on many federally listed species with unique recovery needs, Ex. 4, HCP at 81-88, is likely establish a precedent for future actions with similar effects on rare habitat where it cannot be conserved acre-for-acre in a least 2:1 ratio. Specifically, it could set a precedent for a related action directly adjacent called Miami Wilds, leading to cumulatively significant impacts to species and habitat both locally and universally. *See, e.g.*, Ex. 9, Camila Cepero, Miami Wilds theme park zoo lease talks continue (Dec. 20, 2016), http://www.miamitodaynews.com/2016/12/20/miami-wilds-theme-park-zoo-lease-talks-continue; Ex. 10, Jenny Staletovich, Tiger beetle could be next challenger to Miami Wilds and Walmart, Miami Herald (Dec. 18, 2015), http://www.miamiherald.com/news/local/environment/article50558240.html.

This Project and all of its impacts are also highly controversial, as documented by the more than 3,000 public comments and extensive media coverage.[15] Ex. 2, SOF at 7. Indeed, the Service conceded that "the proposed Project has generated controversy in the County community." Ex. 2, SOF at 34. *See NRDC v. Nat'l Park Serv.*, No. 2:16-cv-585-FtM-99CM, 2017 U.S. Dist. LEXIS 61428, at *68-69 (M.D. Fla. Apr. 24, 2017); *Ctr. for Biological Diversity v. Animal & Plant Health Inspection Serv.*, No. 10-14175-CIV, 2011 U.S. Dist. LEXIS 115905, at *17 (S.D. Fla. Oct. 6, 2011); *Fla. Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 404 F. Supp. 2d 1352, 1358 (S.D. Fla. 2005).

Thus the Service seems to acknowledge there are significant impacts, but rather than prepare an EIS, the Service blithely claims that "[w]e have no regulatory control over the effects of the Project except to the extent they are causally related to the take of species." Ex. 2, SOF at 34. Likewise, in direct contrast to its finding in the BO that the Project would result in the permanent loss of habitat, Ex. 3, BO at 7; in the EA, the Service made the spurious claim that the ITP "would [somehow] *not* result in permanent and irreversible changes to the current state of the physical and biological environment, infrastructure, societal issues, economics, aesthetics, or public health and safety to the human environment." Ex. 2, SOF at 37 (emphasis added).

Consequently, the Project development meets several of the intensity factors and is significant in both local and more global contexts and requires an EIS. The Service's failure to prepare an EIS is arbitrary and capricious and violates NEPA.

[15] *See, e.g.*, Ex. 11, Jenny Staletovich, Feds ask developer to stop work on Walmart in rare Miami-Dade forest, Miami Herald (July 17, 2014), http://www.miamiherald.com/news/local/community/miami-dade/article1975937.html; Ex. 12, Trevor Bach, Thousands Sign Petition Against Walmart Development on Endangered Pine Rockland, Miami New Times (July 29, 2014), http://www.miaminewtimes.com/news/thousands-sign-petitions-against-walmart-development-on-endangered-pine-rockland-6553826; Ex. 13, Grant Stern, Outraged Miami Residents Confront Walmart Developer in Kendall, HuffPost (Sept. 12, 2014), http://www.huffingtonpost.com/grant-stern/outraged-miami-residents-_b_5808574.html; Ex. 14, Trevor Bach, Environmentalists Plan Protest Against Walmart, Theme Park Threatening Endangered Pine Rocklands, Miami New Times (Jan. 16, 2015), http://www.miaminewtimes.com/news/environmentalists-plan-protest-against-walmart-theme-park-threatening-endangered-pine-rocklands-6560653; Ex. 15, Kate Stein, Environmentalists Ask for Intervention to Preserve Rare Pine Rockland Forest in Southern Miami-Dade, WLRN (May 19, 2017), http://wlrn.org/post/environmentalists-ask-intervention-preserve-rare-pine-rockland-forest-southern-miami-dade.

iv. The Service thwarted meaningful public participation in the environmental analysis and approval of the Project

Agencies must make high quality information available to officials and citizens before decisions are made so "public officials make decisions that are based on understanding of environmental consequences." 50 C.F.R. § 1500.1(a)-(c). Agencies must "use all practicable means" to assure a safe, healthy environment and preserve the nation's natural heritage. *Id.* § 1502.2(d); 42 U.S.C. § 4331(b). "'[C]itizen participation is a vital ingredient in the success of NEPA'" and the "'opportunity for local citizens or other interested parties to participate in the preparation of the environmental analysis is *mandatory*.'" *Town of Golden Beach v. U.S. Army Corps of Eng'rs*, No. 94-1816 CIV, 1994 U.S. Dist. LEXIS 15832, *18-19 (S.D. Fla. Sept. 22, 1994) (citation omitted) (emphasis in original); 40 C.F.R. § 1500.1(b).

Here, the Service thwarted meaningful public participation by failing to make high quality information available. For example, the Service summarily rejected the "redevelopment alternative" purportedly because it is not an "environmentally conscious, economically viable, mixed-use development"; but the EA has no analysis to support the Developers' assertions that it would not be commercially viable. *See* Ex. 5, EA at 42; Ex. 4, HCP at 69. The Service also failed to provide and explain the factors and assumptions underlying its habitat functional assessment, which underpins all environmental and species impact analyses in the EA and HCP. Ex. 4, HCP at 81-88; Ex. 5, EA at 58-72. For example, the Service failed to link its habitat functional assessment to species' specific habitat needs, making it unclear whether the conservation plan will result in a conservation benefit for each species. The Service also failed to explain how certain parcels could receive functional lift in habitat value for "habitat connectivity" post-construction, at which point the Project would fragment habitat. *See, e.g.*, Ex. 4, HCP at 74. The Service also failed to resolve apparent defects in the habitat functional assessment, such as the apparent double conservation accreditation given to the Applicant for "native plant cover" and "low presence of invasive species," Ex. 4, HCP at 82, which are inversely related habitat qualities. By failing to provide all necessary information to assess whether the HCP and EA are rational and based on the best available science, the Service deprived the public of a meaningful opportunity to engage in the NEPA process, as required by the statute itself.

IV. The balance of the harms favors issuance of a temporary restraining order and preliminary injunction

Plaintiffs have demonstrated above that severe, irreparable harm to endangered species and the environment is likely if the Service's approval of the Project is not enjoined. By contrast, the Service will not suffer any harm from having its approval stayed pending the resolution of this case. *See Sierra Club v. U.S. Army Corps of Eng'rs*, 399 F. Supp. 2d 1335, 1348 (M.D. Fla. 2005), *vacated on other grounds*, 464 F. Supp. 2d 1171 (M.D. Fla. 2006); *Sierra Club v. Norton*, 207 F. Supp. 2d 1310, 1341 (S.D. Ala. 2002).

Likewise, harm to the Applicant, if any, would be minimal and would not outweigh the irreparable harm to Plaintiffs that will occur absent a preliminary injunction. Also, costs the Applicant has incurred for permitting, or from permitting-related delays, should not be considered because they are "sunk" costs and are not "directly affected by the agency's challenged action or by the court's order." *Norton*, 207 F. Supp. 2d at 1341.

V. Public interest favors a temporary restraining order and preliminary injunction to preserve the status quo

Moreover, any conflict with economic interests "is outweighed by the public interest in preserving vital aspects of the environment." *Martin*, 71 F. Supp. 2d at 1329; *see also Sierra Club*, 645 F.3d at 997-98. The public interest in preserving the status quo—this unique parcel of South Florida's remaining pine rocklands and, possibly, the very existence of threatened and endangered species—is overwhelming. The public interest in "informed agency decision-making," *Norton*, 207 F. Supp. 2d at 1342, "requires careful consideration of environmental impacts before major federal projects may go forward," *S. Fork Band Council of W. Shoshone v. U.S. Dep't of Interior*, 588 F.3d 718, 728 (9th Cir. 2009); *id*. A TRO/PI "is necessary to defend this court's ability to enter meaningful and effective relief." *Norton*, 207 F. Supp. 2d at 1340.; *Nat'l Wildlife Fed'n*, 721 F.2d at 786.

VI. The Court should grant the TRO/PI without notice to the Service or its attorney

The Court may issue the TRO/PI without written or oral notice to the Service or its attorney when: "specific facts in an affidavit or verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition"; and 2) "the movant's attorney certifies in writing any efforts to give notice and the reasons why it should not be required." Fed. R. Civ. P. 65(b)(1). These factors are met here.

The Service issued the ITP on December 5, 2017, and the Developers began the first phase of construction on December 7, 2017. Witnessing this devastation, Plaintiffs are suffering immediate and irreparable injury to their recreational, aesthetic, scientific, spiritual, and economic interests from habitat destruction and knowing of the resulting species harm. Ex. 18, Clancy Dec.; Ex. 17, Greenwald Dec.; Ex. 20, Schwartz Dec.; Ex. 19, Sunshine Dec. This harm will continue before the Service or Developers can be heard in opposition.[16]

VII. The Court should not require Plaintiffs to post a bond

Plaintiffs respectfully request that the Court decline to require a bond to grant this motion, or a nominal bond. It is well within the Court's discretion not to require a bond, *see BellSouth Telecomm., Inc. v. MCIMetro Access Transmission Servs., LLC*, 425 F.3d 964, 971 (11th Cir. 2005), Defendants will not suffer substantial losses if the TRO/PI is granted, as there is no "reason to believe that defendants will incur costs and damages . . . ." *GOS Operator, LLC v. Sebelius*, No. 12-0035-WS-N, 2012 WL 175056, at *6 (S.D. Ala. Jan. 20, 2012); *see Hospice Savannah, Inc. v. Burwell*, No. 4:15-cv-00253-JRH-GRS, 2015 WL 8488432, at *2 (S.D. Ga. Sept. 21, 2015) (waiving bond where defendants "will not suffer any harm"). Plaintiffs have shown a likelihood of success on the merits, which also weighs in favor of waiving any bond, *TracFone Wireless, Inc. v. Washington*, 978 F. Supp. 2d 1225, 1235 (M.D. Fla. 2013), and "it is customary to waive bonds in public interest litigation such as this," where Plaintiffs have no financial interest at stake. *Sierra Club*, 2011 WL 2887956, at *2 (requiring no bond); *Cal. ex rel. Van de Kamp v. Tahoe Reg'l Planning Agency*, 766 F.2d 1319, 1325-26 (9th Cir. 1985) (setting no bond for an environmental non-profit "to ensure access to the courts . . . where Congress has provided for private enforcement of a statute"); *Kentuckians for the Commonwealth v. U.S. Army Corps of Eng'rs*, No. 3:12-CV-00682-TBR, 2013 WL 5278236, at *5 (W.D. Ky. Sept. 18, 2013) (imposing no bond because "Plaintiffs seek to vindicate the public interest served by NEPA"). For all of these reasons, the Court should not require an injunction bond here.[17]

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[16] **C**ounsel for Plaintiffs has met its obligations under Rule 65. *See* Ex. 22, Atwood Dec; Ex. 23, Attachment to Atwood Dec.

[17] If the Court does require a bond, a nominal bond is appropriate because a TRO/PI is in the public interest and a substantial bond requirement could chill non-profit entities "from obtaining meaningful judicial review or appropriate relief." *Sierra Club v. Norton*, 207 F. Supp. 2d 1342, 1343 (S.D. Ala. 2002); *Davis v. Mineta*, 302 F.3d 1104, 1126 (10th Cir. 2002) ("Ordinarily, where a party is seeking to vindicate the public interest served by NEPA, a minimal bond amount should be considered."); *Ala. ex rel. Baxley v. Corps of Eng'rs*, 411 F. Supp. 1261, 1276 (N.D. Ala. 1976) (setting nominal bond of $1.00 for non-profit environmental plaintiffs); *Nat.*

REQUEST FOR HEARING AND CONCLUSION

For all of the foregoing reasons set forth herein, Plaintiffs respectfully request this Court grant the requested TRO/PI, order the Service to suspend the effectiveness of the ITP for the Coral Reef Commons Project, and enjoin the Service from authorizing any further ground-clearing activities at the Project site pending adjudication of the merits of this motion. A proposed order is attached.

Plaintiffs respectfully request a hearing on this Motion, and estimate that a hearing would last 1 hour, with 30 minutes for each side's arguments.

DATED this 8th day of December, 2017.

Respectfully submitted,

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Res. Def. Council v. Morton, 337 F. Supp. 167, 169 (D.D.C. 1971) (concluding that a substantial bond would "stifle the intent" of NEPA by precluding citizen enforcement, and setting bond at $100).

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2017, I electronically filed the foregoing Form A Notice of Conventional Filing with the Clerk of the Court by using the CM/ECF system, which served all counsel of record registered with CM/ECF system for this case.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Miami Division

CENTER FOR BIOLOGICAL DIVERSITY; TROPICAL AUDUBON SOCIETY; MIAMI PINE ROCKLANDS COALITION; and SOUTH FLORIDA WILDLANDS ASSOCIATION, *Plaintiffs,* v. RYAN ZINKE, in his official capacity as Secretary of the U.S. Department of Interior; U.S. DEPARTMENT OF THE INTERIOR; U.S. FISH AND WILDLIFE SERVICE; GREG SHEEHAN, in his official capacity as Principal Deputy Director of the U.S. Fish and Wildlife Service; and JIM KURTH, in his official capacity as Deputy Director for Operations and Acting Director of U.S. Fish and Wildlife Service, *Defendants*.	Case No. 1:17cv2444

PLAINTIFFS' COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. INTRODUCTION

1. The Center for Biological Diversity, Tropical Audubon Society, Miami Pine Rocklands Coalition, and South Florida Wildlands Association (collectively, Plaintiffs) challenge the U.S. Fish and Wildlife Service's (Service or Defendant) decision to permit a shopping center and apartment complex called Coral Reef Commons (the Project), which will result in the destruction of some of the last pine rocklands in Florida, literally paving paradise to put up a parking lot.

2. Highly distinctive and once wide-ranging, pine rocklands are landscapes comprised of limestone outcrops with canopies dominated by slash pine and inhabited by many endemic yet imperiled plants and animals. These unique ecosystems have been severely reduced from development and may be found only in small fragments in south Florida.

3. Coral Reef Commons will further destroy and fragment this disappearing landscape, including habitat for several of Florida's most iconic yet endangered native species like the Florida bonneted bat, Florida leafwing butterfly, Bartram's scrub-hairstreak butterfly, Miami tiger beetle, eastern indigo snake, Rim Rock crowned snake, gopher tortoise, white-crowned pigeon, Everglades bully, Florida brickell-bush, Carter's small-flowered flax, deltoid spurge, and tiny polygala, as well as the Dade County pine (*Pinus elliottii* var. *densa*), a slash pine that is included in the International Union for the Conservation of Nature and Natural Resources' (IUCN) Red List of Threatened Species, which is regarded as the most objective approach for evaluating the conservation status of plants and animals. The Richmond tract of pine rocklands in Miami-Dade County, where Coral Reef Commons is planned, contains 260 taxa of native plants. According to the Service's own analysis, the Project will result in the loss of more than 80 acres of habitat, including critical habitat for several species, and further fragment remaining habitat in the Richmond Area.

4. Coral Reef Commons would destroy the connectivity and dispersal of species across the Project site, and create negative impacts from pesticides, noise, lighting, and traffic. Additional loss of habitat and stressors could push some of these species to the brink of extinction, especially in light of population growth, cumulative development, and the impacts of climate change.

5. Plaintiffs contend the Service's approval of the Coral Reef Commons Habitat Conservation Plan (HCP), Incidental Take Permit (ITP), Biological Opinion (BO), and Environmental Assessment (EA) associated with Permit Number TE15009C-0 is in violation of the National Environmental Policy Act (NEPA) and the Administrative Procedure Act (APA).

6. Thus, for the reasons described below, Plaintiffs request that the Court: (1) declare that the Service's approval of Coral Reef Commons is in violation of NEPA and the APA; (2) set aside the Service's BO and Permit Number TE15009C-0; and (3) enjoin the Service from authorizing any further agency action under Permit Number TE15009C-0 until it lawfully complies with the statutory and regulatory demands of NEPA and the APA.

II. PARTIES

7. Plaintiff Center for Biological Diversity (Center) is a non-profit 501(c)(3) organization with more than 61,000 active members across the country, including in Miami-Dade County. The Center's mission is to protect and conserve endangered species and their habitats.

8. Plaintiff Tropical Audubon Society (Tropical Audubon) is a non-profit 501(c)(3) organization with approximately 1,500 members in south Florida, including in Miami-Dade County. Tropical Audubon's mission is to conserve and restore South Florida ecosystems, focusing on birds, other wildlife, and their habitat.

9. Plaintiff Miami Pine Rocklands Coalition, Inc. is a Florida-registered non-profit corporation established to educate, coordinate and initiate for the preservation and restoration of the remaining two percent of America's pine rocklands found only in south Florida.

10. Plaintiff South Florida Wildlands Association is a not-for-profit organization committed to aggressively defending what remains of one of our planets most unique natural areas, the greater Everglades.

11. Plaintiffs and their members are interested in the conservation of imperiled species that would be destroyed by the Project, including but not limited to the Florida bonneted bat, Florida leafwing butterfly, Bartram's scrub-hairstreak butterfly, Florida brickell-bush, Carter's small-flowered flax, deltoid spurge, and tiny polygala, and the effective implementation of the environmental laws that protect them.

12. Plaintiffs have members who have visited areas where these species are known to occur. Plaintiffs' members use these areas for observation of these species and other

wildlife, research, nature photography, aesthetic enjoyment, recreation, education, and other activities. Plaintiffs' members derive professional, aesthetic, spiritual, recreational, economic, informational, and educational benefits from these species and their habitat. These members have concrete plans to continue visiting and recreating in areas where they can observe these species and their habitat.

13. Plaintiffs and their members' interests are adversely affected by the Service's failure to comply with the APA and NEPA. The Service's inactions are likely harming the prospects of recovery for these imperiled species and may be jeopardizing their ability to survive.

14. The Plaintiffs and their members also have a procedural interest in seeing the Service comply with its legal obligations, and they suffer procedural injury from the Service's failure to do so.

15. The injuries described above are actual, concrete injuries presently suffered by the Plaintiffs and their members, and the injuries will continue to occur unless this Court grants the requested relief.

16. Defendant Ryan Zinke is the Secretary of the Interior. As Secretary of the Interior, Defendant Zinke has the ultimate responsibility to enforce and implement the provisions of the ESA. Defendant Zinke is sued in his official capacity.

17. Defendant U.S. Department of Interior is an agency of the United States charged with administering the ESA for non-marine species.

18. Defendant U.S. Fish and Wildlife Service is a federal agency within the Department of the Interior charged with implementing and ensuring compliance with the ESA through the APA and other federal laws.

19. Defendant Greg Sheehan is the Principal Deputy Director of the U.S. Fish and Wildlife Service. As Principal Deputy Director, Defendant Sheehan is a federal official vested with responsibility for enforcing the ESA and its joint regulations. Defendant Sheehan is sued in his official capacity.

20. Defendant Jim Kurth is the Acting Director of the U.S. Fish and Wildlife Service. As Acting Director, Defendant Kurth is a federal official vested with responsibility for

enforcing the ESA and its joint regulations. Defendant Kurth is sued in his official capacity.

21. Defendants Ryan Zinke, in his official as Secretary of the Interior; Department of the Interior; U.S. Fish and Wildlife Service; Greg Sheehan, in his official capacity; and Jim Kurth, in his official capacity as Acting Director of the U.S. Fish and Wildlife Service, have waived sovereign immunity pursuant to 5 U.S.C. § 702.

22. The Service is an agency of the federal government, which may be named as a defendant and against which a writ in the nature of mandamus, a declaratory judgment, and injunctive relief may be entered pursuant to 28 U.S.C. §§ 1361, 2201 and 2202, and Federal Rules of Civil Procedure 57 and 65(a). The Service is a federal agency that may be sued under NEPA and the APA.

III. JURISDICTION AND VENUE

23. Plaintiffs bring this action under NEPA, 42 U.S.C. §§ 4321-4370e, and the APA, 5 U.S.C. §§ 701-706.

24. This Court has subject matter jurisdiction pursuant to 5 U.S.C. §§ 701-706 (APA judicial review provisions); 28 U.S.C. § 2201 (Declaratory Judgment Act); 28 U.S.C. § 1361 (action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the Plaintiffs). The relief requested is authorized by 28 U.S.C. § 2201 (declaratory relief); 28 U.S.C. § 2202 (injunctive relief); and 5 U.S.C. §§ 701-706.

25. This Court also has jurisdiction pursuant to 28 U.S.C. § 1331, which grants federal district courts "original jurisdiction of all civil actions arising under the . . . laws . . . of the United States."

26. Plaintiffs have exhausted all available administrative remedies, the agency's actions are final and ripe for review, and Plaintiffs have standing to bring these claims.

27. Venue in this Court is proper pursuant to 28 U.S.C. § 1391(e) because the Service, an agency of the United States, has committed the unlawful conduct alleged herein from its Vero Beach office which is in Indian River County, Florida. The affected area is in Miami-Dade County, Florida.

28. The federal government has waived sovereign immunity in this action pursuant to 5 U.S.C. § 702.

IV. STATUTORY AND REGULATORY FRAMEWORKS

A. NATIONAL ENVIRONMENTAL POLICY ACT

29. NEPA is the Nation's charter for protection of the environment. 40 C.F.R. § 1500.1(a). Its central goals are "[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation . . . ." 42 U.S.C. § 4321. The president, federal agencies, and courts share responsibility for enforcing NEPA and guaranteeing that high quality information is available to the public and analyzed by the federal agencies before the agencies make decisions and take actions. 40 C.F.R. § 1500.1(a).

30. Congress designed NEPA to "insure that environmental information is available to public officials and citizens *before* decisions are made and actions are taken" and to "help public officials make decisions that are based on understanding of environmental consequences." *Id.* § 1500.1(b)-(c) (emphasis added).

31. Pursuant to 42 U.S.C. § 4342, Congress created the Council on Environmental Quality (CEQ) to promulgate regulations applicable to all federal agencies consistent with the intent and purposes of NEPA. *See* 40 C.F.R. § 1500 *et seq.*

32. Federal agencies must engage in NEPA review for any major federal agency action. "Major Federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility." *Id.* § 1508.18 (internal quotation marks omitted).

33. To start the NEPA process, federal agencies are required either to prepare an Environmental Impact Statement (EIS) if it is apparent that the action will "significantly" affect the human environment, or if the action's effects are unclear, agencies may first prepare an Environmental Assessment (EA). EAs assess the action's environmental

impacts and determine whether they are significant to establish if a more extensive EIS analysis is required. Thus, while the purpose of an EA is generally to determine whether an EIS is required, preparation of an EA is not a necessary predicate to preparation of an EIS. *Id.* §§ 1501.4; 1508.9.

34. If, after completing an EA, the agency concludes that an EIS is not required, it must issue a "finding of no significant impact" (FONSI). *Id.* §§ 1501.4(e), 1508.9(a)(1), 1508.13; 33 C.F.R. pt. 325, app. B, § 7. However, if an EA results in a finding that an action will likely significantly affect the human environment, then the agency must prepare an EIS. 40 C.F.R. § 1501.4.

35. The "human environment" means "the natural and physical environment and the relationship of people with that environment." *Id.* § 1508.14. "Significantly," as used in NEPA, "requires considerations of both context and intensity." *Id.* § 1508.27. In the case of a site-specific action, "context" means "the effects in the locale rather than in the world as a whole" and "[b]oth short- and long-term effects are relevant." *Id.* § 1508.27(a). "Intensity" refers to "the severity of impact." *Id.* § 1508.27(b).

36. Public controversy or uncertainty about the impacts of a federal action suggests that an action is significant and requires preparation of an EIS. *Id.* § 1508.27(b)(4), (5).

37. Other factors an agency must consider in determining whether a project will have a significant impact include: the degree to which the proposed action affects public health or safety; the unique characteristics of the geographic area such as proximity to park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas; whether the action is related to other actions with individually insignificant but cumulatively significant impacts; and the degree to which the action may adversely affect an endangered or threatened species or its critical habitat. *Id.*

38. Likewise, agencies must include discussions of "indirect effects" and their significance in an EIS. *Id.* § 1502.16(b). Indirect effects are:

> caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern

> of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Id. § 1508.8(b).

39. Possible impacts also include "ecological" effects, such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems, as well as aesthetic, historic, cultural, economic, social, or health" impacts. *Id.* § 1508.8.

40. The term "cumulative impacts" means the "incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time." *Id*. § 1508.7. Cumulative impact analyses include private, state, and federal actions. *Id.* §§ 1508.7; 1508.25(a), (c).

41. Neither NEPA nor its implementing regulations allow federal agencies to analyze effects of their actions in isolation. Rather, NEPA directs federal agencies to analyze the effects of proposed actions to the extent they are reasonably foreseeable consequences of the proposed action, regardless of where those impacts might occur. Agencies must analyze indirect effects, "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." *Id.* § 1508.8(b).

42. Furthermore, NEPA's implementing regulations require that the Service hold a public hearing "whenever appropriate" taking into account factors such as "substantial environmental controversy concerning the proposed action or substantial interest in holding hearing. *Id.* § 1506.6(c)(1).

43. NEPA requires agencies to take a "hard look" at the environmental consequences of their actions. To meet NEPA's "hard look" requirement, "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citing *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). This includes requiring that environmental effects are "discussed in sufficient detail to ensure that environmental

consequences have been fairly evaluated." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 352 (1989).

44. Therefore, "[t]he EA serves as the basis for determining whether implementation of the proposed action would constitute a major Federal action significantly affecting the quality of the human environment. If a positive finding is made, an EIS is required. If a negative finding is made, a FONSI is prepared and signed." 550 FW 3 Documenting and Implementing Decisions 3.3(B)(1).

45. The FONSI must be made available to the affected public." 550 FW 3 Documenting and Implementing Decisions 3.3(B)(4)(a).

46. The Service must make the FONSI available for public review, in accordance with 40 C.F.R. 1501.4(e)(2), if

> (i) The proposal is a borderline case (i.e., there is a reasonable argument for preparation of an EIS).
>
> (ii) The proposal is an unusual case, a new kind of action, or a precedent-setting case.
>
> (iii) There is either scientific or public controversy over the proposal.
>
> (iv) When the FONSI involves a proposal which is or is closely similar to one which normally requires preparation of an EIS.

550 FW 3 Documenting and Implementing Decisions 3.3(B)(4)(c)(i)-(iv); 40 C.F.R. 1501.4(e)(2), 1508.27.

47. In summary, the purposes of NEPA are: to lead to better outcomes; to facilitate meaningful public engagement; to provide transparent, accountable, and informed government decisionmaking; to allow for consideration of reasonable alternatives that may not otherwise be identified; to identify mitigation alternatives and measures; and to encourage collaboration with interested parties.

B. ADMINISTRATIVE PROCEDURE ACT

48. Pursuant to the APA, any person who has suffered legal wrong because of agency action or who is adversely affected or aggrieved by agency action within the meaning of a relevant statute is entitled to judicial review thereof. 5 U.S.C. § 702.

49. Under 5 U.S.C. § 706, "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." The APA also requires a reviewing court to:

> (1) compel agency action unlawfully withheld or unreasonably delayed; and
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> > (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or]
> > . . .
> > (D) without observance of procedure required by law . . . .

Id. § 706(1)-(2).

50. Judicial review of claims arising under the APA is generally based "the whole record or those parts of it cited by a party . . . ." *Id.* § 706.

51. The Service's EA, FONSI, and decision not to prepare an EIS under NEPA are final agency actions reviewable under the APA. *See id.* § 704.

52. The Service's issuance of an ITP is a final agency action reviewable under the APA. *See id.* § 704.

53. The Service's issuance of a BO is a final agency action reviewable under the APA. *See id.*

C. ENDANGERED SPECIES ACT

54. The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). To that end, the ESA's purpose is to "provide a program for the conservation of . . . endangered species and threatened species" and "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved." 16 U.S.C. § 1531(b). The ESA requires that "all Federal departments and agencies . . . seek to conserve endangered species and threatened species and . . . utilize

their authorities in furtherance of the purposes" of the ESA. *Id*. §1531(c)(1). The Supreme Court has found through examination of the language, history, and structure of the ESA that "Congress intended endangered species to be afforded the highest of priorities." *Tenn. Valley Auth.*, 437 at 174.

55. Listed species are entitled to significant protections under the ESA, including a number of congressionally mandated measures designed to protect and restore their persistence in the wild. For example, under the ESA and its implementing regulations it is illegal for anyone to "take" an endangered or threatened animal. 16 U.S.C. § 1538(a)(1); 50 C.F.R. §§ 17.21, 17.31.

56. To "take" an endangered or threatened animal means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect" it, or "to attempt to engage in any such conduct." 16 U.S.C. § 1532(19). "Harm" includes significant habitat modification or degradation that results in death or injury to listed species "by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3. "Harass" is defined as intentional or negligent actions that create a likelihood of injury to listed species "to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering." *Id.* Congress intended the term "take" to be defined in the "broadest possible manner to include every conceivable way" a person could harm or kill fish or wildlife. *See* S. Rep. No. 93-307, at 7 (1973), *as reprinted in* 1973 U.S.C.C.A.N. 2989, 2995.

57. "Incidental take" is defined as take that is "incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 50 C.F.R. § 17.3.

58. Section 10 of the ESA provides an exception to the take prohibition by permitting the "incidental take" of a listed species where "such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." An incidental take permit (ITP) may not be granted unless the applicant submits a conservation plan to the Service, which must then determine that the "impact which will likely result from such taking," together with the "steps the applicant will take to minimize and mitigate such impacts," "will not appreciably reduce the likelihood of the survival and recovery of the species in

the wild." 16 U.S.C. § 1539(a)(2)(A)(i–iv). Before issuing an ITP, the Service must find that the conservation plan specifies that:

a) The taking will be incidental;

b) The applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking;

c) The applicant will ensure that adequate funding for the conservation plan and procedures to deal with unforeseen circumstances will be provided; [and]

d) The taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild . . . .

50 C.F.R. §§ 17.22(b)(2)(i)(A)-(D), 17.32(b)(2)(i)(A)-(D).

59. Prior to issuing an ITP, the Service must also undergo "consultation" pursuant to Section 7 of the ESA and its implementing regulations, 50 C.F.R. Part 400, to ensure that granting the permit "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536(a)(2). To jeopardize the continued existence of the species is to engage in an activity that either, "directly or indirectly . . . reduces 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(d).

60. Consultation under Section 7 of the ESA also considers the impacts of the federal action to plants because Section 7 prohibits any action that jeopardizes any listed species, including plants. 16 U.S.C. § 1536(a)(2); *see also* 16 U.S.C. § 1532(16) ("The term 'species' includes an subspecies of fish or wildlife or plants . . . .").

61. The ESA's implementing regulations broadly define an "action" to mean "actions directly or indirectly causing modifications to the land, water, or air." 50 C.F.R. § 402.02(d). ESA regulations further provide that "any request for formal consultation may encompass . . . a number of similar individual actions within a given geographical area" or "a segment of a comprehensive plan." *Id*. § 402.14(c).

62. During consultation, the Service must analyze the effects of the proposed action on listed species and habitat, which includes the direct and indirect effects, "together with effects of other activities that are interrelated or interdependent with that action, [which] will be added to the environmental baseline." *Id.* § 402.02.

63. The "environmental baseline" includes "the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early Section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process." *Id.*

64. Indirect effects are "caused by the proposed action and [occur] later in time, but still are reasonably certain to occur." *Id.*

65. Interrelated actions "are part of a larger action and depend on the larger action for their justification." *Id.*

66. Interdependent actions "have no independent utility apart from the action under consideration." *Id.*

67. The Service must also analyze the cumulative effects of "future State or private activities, not involving Federal activities that are reasonably certain to occur within the action area." *Id.*

68. The Service's evaluation during consultation must be based on the "best scientific and commercial data available." 16 U.S.C. § 1536(a)(2).

69. At the conclusion of the consultation process, the Service issues a "biological opinion" which "detail[s] how the agency action affects the species," *id.* § 1536(b)(3)(A), and sets forth the Service's opinion as to whether the action is "likely to jeopardize" the continued existence of a listed species. 50 C.F.R. § 402.14(h)(1)-(3).

70. If the Service determines the project is not likely to cause jeopardy to the species or to destroy or adversely modify its habitat, the agency must provide a statement specifying the impact of the incidental take on the listed species, outlining "reasonable and prudent measures" (RPMs) that are necessary or appropriate to minimize the impact from incidental take, and setting forth any conditions the agency and applicant must

follow in accordance with the ITP. 16 U.S.C. § 1536(b)(4)(A)-(C); 50 C.F.R. § 402.14(i)(1)(ii).

71. If the Service determines that the agency action is likely to jeopardize the continued existence of a listed species or result in adverse modification of critical habitat, the biological opinion must suggest "reasonable and prudent alternatives" (RPAs) that would reduce action-related impacts such that the agency action may avoid jeopardizing listed species. 16 U.S.C. § 1536(b)(3)(A).

72. If the agency action is expected to cause "take," the Service must also include an incidental take statement (ITS) in its biological opinion. 50 C.F.R. § 402.14(i). The ITS must, wherever practicable, quantify the amount of take allowed for each species, thereby creating a meaningful "trigger" to reinitiate consultation when an allowable level of take is exceeded. *Id.* § 402.14(i)(1)(i). The Service may use a reasonable surrogate, or proxy, for take in the ITS only where it: (1) demonstrates that it cannot express anticipated take in numerical form; (2) articulates a causal connection between the surrogate and the anticipated take; and (3) "sets a clear standard for determining when authorized take has been exceeded." *Id.*

73. Compliance with a biological opinion and its ITS protects federal agencies, and others acting under or consistent with the biological opinion, from enforcement action under Section 9's prohibition against take. 16 U.S.C. §§ 1536(o)(2), 1538(a); 50 C.F.R. § 17.31(a). However, take that is not in compliance with a biological opinion or absent a valid ITS or ITP violates Section 9 of the ESA.

74. Under the terms of Section 7(b)(4) and Section 7(o)(2), take that is incidental to and not intended as part of an agency action, may be permitted only if such taking complies with the terms and conditions of an ITS issued as part of a biological opinion. 16 U.S.C. § 1536(b)(4), (o)(2).

75. Even after the Service issues a biological opinion, the ultimate duty to ensure that the action will not jeopardize a listed species lies with the action agency, here, also the Service. 50 C.F.R. § 402.15. An agency cannot rely on an inadequate, incomplete, or flawed biological opinion to satisfy its duty to avoid jeopardy.

76. An agency must reinitiate consultation with the Service if any of the following circumstances occur:

(a) If the amount or extent of take specified in the ITS is exceeded;

(b) If new information reveals effects of the action that may affect a listed species in a manner or to an extent not previously considered;

(c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that not considered in the biological opinion; or

(d) If a new species is listed or critical habitat designated that may be affected by the identified action.

Id. § 402.16(a)-(d).

V. FACTUAL AND PROCEDURAL BACKGROUND

77. The Richmond pine rocklands are characterized by limestone outcrops, a canopy composed solely of Florida slash pine, and a diverse understory of scrubs and herbs. They are also the site of the proposed Coral Reef Commons, a mixed-use development proposal with 900 apartments, a commercial supercenter (like Walmart), and additional retail.

78. On July 15, 2014, the Service notified the developer of Coral Reef Commons that such a project could result in the "take" of numerous endangered and threatened species that are protected under the ESA, and thus, that the developer could be liable for violating federal law.

79. In November 2014, the developer announced it would submit a Section 10 ITP and HCP application to the Vero Beach office of the Service to authorize the take of ESA-listed species, potentially including the Florida bonneted bat (*Eumops floridanus*), Florida leafwing butterfly (*Anaea troglodyta*), Bartram's scrub-hairstreak butterfly (*Strymon acis bartrami*), Florida brickell-bush (*Brickellia mosieri*), Carter's small-flowered flax (*Linum carteri var. carteri*), deltoid spurge (*Chamaesyce deltoidea ssp. deltoidea*), and tiny polygala (*Polygala smallii*) associated with the destruction of irreplaceable and endangered pine rockland habitat.

80. In May 2015, Coral Reef Retail LLC, Coral Reef Resi PH I LLC, and Ramdev LLC (collectively "RAM Coral Reef"), and the University of Miami (collectively "Permittees") applied to the Service for an ITP for 30 years to develop and operate Coral Reef Commons while causing incidental take of the seven ESA-listed species, as well as the Miami tiger beetle, eastern indigo snake, rim rock crowned snake, gopher tortoise, and white-crowned pigeon.

81. According to the May 2015 application, the Project would include 137.90 acres of mitigation, including 55.29 acres of on-site mitigation and 50.96 acres of off-site mitigation. The on-site mitigation or "conservation areas" would be owned by RAM Coral Reef and include 23.92 acres in what is being called the "west preserve," 21.61 acres in the "east preserve," 2.16 acres in the "southern corridor," 3.72 acres of rockland hammock, and 3.88 acres of "stepping stones."

82. RAM Coral Reef intends to destroy 82.61 acres of endangered and threatened species habitat in connection with the Project.

83. On March 23, 2017, the Service announced the availability of the proposed HCP and a draft EA for public review and comment.

84. More than 3,000 people, including experts in the species and habitats at issue, submitted comments on the proposal. An overwhelming majority of these comments were in opposition to the Project and in favor of science-based species protections.

85. On December 5, 2017, the Service announced via a press release that it had approved the Coral Reef Commons Habitat Conservation Plan and issued an ITP for the Project.

86. The Service does not appear to have published or made available to the public a FONSI explaining its decision to issue the ITP.

A. PINEROCKLANDS AND PROTECTED PLANTS AND ANIMALS

87. The pine rockland community is one of the most endangered habitats in North America. Pine rocklands provide critical foraging and nesting habitat for a diverse array of wildlife, including many federally listed species. They also provide cover and roosting sites to a variety of wildlife species. Pine rockland ecosystems contain a rich herbaceous

flora with many plants and animals found nowhere else. These once-extensive communities have been plagued by development in the region and are now greatly reduced and divided into many smaller fragments.

88. Pine rocklands are found in three areas of southern Florida: the Miami Rock Ridge of southeastern peninsular Florida, the Lower Florida Keys, and the southern Big Cypress pinelands. The Miami Rock Ridge is characterized by a very diverse shrub layer dominated by hardwoods, and an equally diverse herbaceous layer containing 35 taxa endemic to southern Florida, including several species listed by the federal government as threatened or endangered. Like pine rocklands throughout Florida, habitat on the Miami Rock Ridge has been fragmented and degraded by past land use practices.

89. The north-south distribution of pine rocklands along the Miami Rock Ridge has already been reduced by over 12 miles. The Service's ultimate goal for this area is to restore the pine rocklands by maintaining the function, structure, and ecological processes of pine rocklands, and preventing any further loss, degradation, or fragmentation, of this imperiled South Florida community.

90. In Miami-Dade County, the remaining pine rockland habitat is highly fragmented, with the majority of fragments being less than 50 ha in size and embedded in an urban landscape.

91. The Richmond tract of pine rocklands in Miami-Dade County, where Coral Reef Commons is proposed, is protected by Miami-Dade County ordinances through its Natural Forest Community (NFC) designations. NFC designations are intended to protect forests that meet certain criteria for inclusion, and forests that become degraded may lose NFC designation. Once designated, NFCs are subject to development limits and permitting for any impacts to trees, shrubs, or groundcover plans to minimize impacts and ensure that remaining NFC areas are preserved and managed. On the Coral Reef Commons property, 44.94 acres of pine rocklands and 3.72 acres of rockland hammock were designated as NFCs.

92. The Richmond tract of pine rocklands contains 260 taxa of native plants, many of which are endangered or threatened. The Service identifies acquiring lands that are

threatened with development, such as the pine rocklands at the proposed Coral Reef Commons site, as the main tool in preventing further destruction or degradation of those lands.

93. Coral Reef Commons will impact eight imperiled animals, including five federally listed species (Bartram's scrub-hairstreak butterfly, Florida leafwing butterfly, Florida bonneted bat, eastern indigo snake, and Miami tiger beetle); one candidate species (gopher tortoise); and two state-listed threatened species (Rim Rock crowned snake[1] and white-crowned pigeon). It also purports to provide conservation measures for 14 plant species, including 13 federally listed species (tiny polygala, deltoid spurge, crenulate lead-plant, Florida brickell-bush, Garber's spurge, Small's milkpea, sand flax, Carter's small-flowered flax, Blodgett's silver bush, Florida bristle fern, Everglades bully, Florida pineland crabgrass, and Florida prairie clover; and one state-listed endangered species (clamshell orchid). Neither the HCP nor the EA address impacts to, nor did the Permittees seek incidental take authorization for, the federally threatened pineland sandmat.[2]

94. No species-specific surveys were conducted on or off-site for several of the listed species, including the federally listed pineland sandmat (*Chamaesyce deltoidea, ssp. pinetorum*), even though the site is wholly within the species current range, and despite the Service's finding that the pineland sandmat may occur within the Richmond Area.

Bartram's scrub-hairstreak butterfly & Florida leafwing butterfly

95. Bartram's scrub-hairstreak butterfly (Bartram's) and Florida leafwing butterfly are entirely dependent on pine rockland habitat. In 2014, the Service listed and designated critical habitat for these species due to loss of pineland habitat, mismanagement of existing habitat, and pesticides. Bartram's have been observed on the

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[1] The Rim Rock crowned snake is also under consideration for federal ESA protections.

[2] The Service listed the Everglades bully, Florida pineland crabgrass, and pineland sandmat as threatened and the Florida prairie clover as endangered on October 5, 2017. 82 Fed. Reg. 46691 (Oct. 5, 2017). The Florida prairie clover, pinelands sandmat, and Everglades bully have been candidates for federal protection for more than a decade.

Project site, and the site contains 90.2 acres (nearly a quarter) of the 359 acres of Florida leafwing critical habitat.

96. Bartram's and Florida leafwing critical habitat overlaps entirely within the proposed 90.2 acres of the Project site. The Project would result in the loss of 39.47 acres of critical habitat for the butterflies. Of the 86.49 acres development footprint, 33 acres support pineland croton—Bartram's and leafwing's host plant—and potentially immature and adult Bartram's. This loss of habitat has the potential to kill or injure any immature butterflies that occur within the 33 acres. The Project would also destroy an additional 53 acres that support adult Bartram's by providing nectaring plants.

97. Every acre of upland critical habitat is vital to these butterflies, whose lower elevation sites are imminently threatened with sea-level rise.

Miami tiger beetle

98. The Miami tiger beetle is found only in pine rockland habitat along the Miami Rock Ridge and Richmond Area. The Service listed the Miami tiger beetle as endangered in October 2016, and while it has not been documented on the Project site, the Project site includes suitable habitat for the beetle and the species has been documented on properties north, east, and south of the proposed development. Neither the Service nor Permittees have conducted comprehensive studies or surveys for Miami tiger beetles on the Project site; however, the Project site contains suitable habitat for the species and it is expected to occur there.

99. Coral Reef Commons would develop 86.49 acres of habitat suitable to the Miami tiger beetle, including 32.91 acres of pine rockland habitat and 53.58 acres[3] of disturbed land. This habitat loss has the potential to injure or kill adults and larvae during construction and lead to further loss through the increased chance for collection. Already

[3] The EA states that 53.58 acres of disturbed land will be developed, while the HCP states that 53.62 acres of disturbed land will be developed. *Compare* EA at 96 *with* HCP at 10. There is no apparent explanation for the discrepancy between the EA and HCP.

there have been multiple instances of the Miami tiger beetle ending up in trade and given that it will use human-made pathways, further exposing them to overexploitation.

Florida bonneted bat

100. The Florida bonneted bat has been detected on the Project site, with acoustic equipment detecting clutter, commute, and feeding calls at all 25 stations within the Project site. The Service listed the Florida bonneted bat as an endangered species under the ESA in 2013. It is found in longleaf pine trees and is dependent on forested areas for roosting; however, the species has also been found roosting in palm trees. The greatest threats to the survival of the bonneted bat are mainly human-caused, such as habitat destruction, fragmentation, and degradation closely linked to various types of development and agriculture. It is anticipated that climate change and sea level rise will further negatively impact the species, which is already suffering from limited suitable habitat.

101. The Project would permanently destroy 86.35 acres of land that is likely used by the bat, including 73.84 acres of habitat that could be used for bat roosting and foraging. The EA expressly provides for the demolition of bat roost sites and that the removal of a roost site would be harassment and harm. Likewise, the EA concedes that no research has been done on the effect of fire management on bats. The Service also failed to explain how the loss of habitat for the bat will not appreciably reduce the survival or recover of the species, especially given the importance of upland habitat.

Eastern indigo snake

102. Historically, the eastern indigo snake was found throughout Florida, Georgia, Alabama, and portions of Mississippi; however, the species is now only found within Georgia and Florida. Eastern indigo snakes are more often found in pinelands, tropical hardwood hammocks, and mangrove forests, as they are more inclined to upland habitats and ecosystems. The indigo snake most frequently inhabits pine flatwoods, scrubby flatwoods, dry prairie, tropical hardwood hammocks, edges of freshwater marshes, agricultural fields, coastal dunes, and human-altered habitat; however, the species needs a

variety of these habitats to complete its life cycle. The snake has not been found on the Project site, but the site provides suitable habitat.

103. The Service listed the eastern indigo snake as threatened under the ESA in 1978 as the result of several threats including habitat destruction and fragmentation, over-collecting for the pet trade, and mortality from gassing gopher tortoise burrows to collect rattlesnakes. The species remains vulnerable to habitat destruction and fragmentation associated with residential and commercial construction, agriculture, and timbering.

104. On July 18, 2016, Krysko et al. published a peer-reviewed article identifying a new, previously undocumented species of indigo snake in the United States, the Gulf Coast indigo snake (*Drymarchon kolpobasileus*). The study distinguishes the new species from the federally threatened eastern indigo snake (*Drymarchon couperi*) using morphological and molecular analyses, and it identifies new distributions for each discrete species based on observed morphological and genetic differences. This study has several implications for the conservation of the species: it takes an already rare and imperiled species of snake and effectively splits it into two separate species that each inhabit even smaller ranges.

Gopher tortoise

105. The gopher tortoise is federally listed as threatened throughout its range, except in Florida where the Service considers it a "candidate" for listing under the ESA.[4] The gopher tortoise is a highly valuable "keystone species" that benefits and ensures the survival of other species in its ecosystem. This tortoise is known to benefit more than 350 different species, including eastern indigo snakes, foxes, skunks, and lizards, which use gopher tortoise burrows for shelter and for various parts of their lifecycles. The gopher tortoise is generally found in longleaf pine or oak sandhill ecosystems but may also be

4 Candidate species are species that he Service has sufficient information on biological vulnerability and threats to support listing, but listing is precluded by other listing actions.

found in other dry, upland habitats within its historic range. The gopher tortoise has not been documented on site or on the off-site area but is present within the Richmond Area.

106. The greatest threat to the gopher tortoise is habitat destruction, including habitat fragmentation and degradation, caused by urban development, agricultural conversion, forestry, and mining. Habitat fragmentation can lead to reproductive isolation, increased predation due to exposed habitat edges, and mortality resulting from vehicular collisions.

Florida brickell-bush & Carter's small-flowered flax

107. The Service listed the Florida brickell-bush and Carter's small-flowered flax as endangered in 2014 and designated 104.06 acres of critical habitat that overlaps entirely within the proposed Coral Reef Commons. The plants are only found in Miami-Dade pine rocklands in open, well-lit subcanopy with exposed limestone and minimal organic material. It is estimated only 1,550 Florida brickell-bush plants remain. The Project would result in the loss of 52.85 acres of critical habitat.

Tiny polygala & deltoid spurge

108. The Service listed the tiny polygala and deltoid spurge as endangered in 1985 but has never designated critical habitat for these two plants. Surveys conducted by the Permittees report two populations of tiny polygala, including one population of nine plants within pine rockland slated to be developed. Surveys detected deltoid spurge at three NFC parcels on the Coral Reef Commons site. Surveys have not been done at the off-site mitigation area, but the deed restrictions for the off-site mitigation area indicate that deltoid spurge have been observed there. HCP at 61.

Pineland sandmat, Everglades bully, Florida pineland crabgrass, and Florida prairie-clover

109. The Service listed the pineland sandmat, Everglades bully, and Florida pineland crabgrass as threated, and the Florida prairie-clover as endangered, on November 6, 2017, but has yet to designate critical habitat for these plants. Historical declines for each of these plants are partially attributed to fire suppression, inadequate fire management and resulting habitat loss. Indeed, the Service noted in its final listing rule for the plants that threats from urban development and lack of adequate fire management warranted listing,

specifically citing the Permittees' plans to develop the Richmond Pine Rocklands with a shopping center and residential construction, as well as the Zoo Miami amusement park expansion. The Service's position is that these development projects may preclude future recovery options for the four plants (for example, by compromising the land managers' ability to burn within Richmond Pine Rocklands).

110. Sea level rise compounds the habitat loss threat to these plants because the majority of these plant populations occur below two meters of sea level and are thus susceptible to inundation. Decades prior to sustained inundation, upland forest habitats will begin the transition to saline wetland habitats through irreversible changes in vegetation composition. These saline habitats are unsuitable for the pineland sandmat, Everglades bully, Florida pineland crabgrass and Florida prairie-clover, making the loss of one of the few remaining higher elevation pine rockland habitats that much more preclusive of future recovery options.

B. HABITAT CONSERVATION PLAN & ENVIRONMENTAL ASSESSMENT

111. The Permittees submitted a draft EA for the HCP and ITP that purports to provide a net benefit to the listed species in the area.

112. The draft HCP identified six alternatives. These alternatives include:

Alternative 1- No Action Alternative;

Alternative 2- Redevelopment Only/No Restoration;

Alternative 3- Maximum Build-out;

Alternative 4- County Approved Zoning in 2013;

Alternative 5- County Approved Zoning/Stepping Stones and Southern Corridor; and

Alternative 6- Reduced Commercial/Increased Preserve (Preferred Alternative).

113. Aside from the "no-action" alternative, there is a redevelopment option of 25.4 developed acres, three alternatives consisting of 92-100 developed acres, and a preferred alternative of more than 86 developed acres.

114. The Permittees summarily rejected the redevelopment alternative, stating that it is not "an environmentally conscious, economically viable, mixed-use development." As

the redevelopment alternative would permit mixed uses and impact significantly fewer acres of pine rockland habitat than the preferred alternative, the developers' resistance to adopt the redevelopment alternative actually appears to be one of economic viability. The Permittees claim the Project would not be commercially viable because there is not room for a large anchor tenant, but there is no financial analysis apparent in the HCP that would support this claim.

115. Alternatives 3, 4, and 5 have the same amount of commercial development. Alternatives 4 and 5 also have the same number of residential units. All three alternatives differ only by a matter of a few acres in the total amount of developed property and are essentially all maximum build out or near-build out scenarios.

116. The draft HCP includes no consideration of alternatives that fall between the 25.4-acre redevelopment only alternative and the more than 86-acre preferred alternative.

117. The Permittees' characterization that no restoration will occur under the no-action alternative ignores the existing obligations the Permittees are already under, and likely in violation of, to properly manage the land as an NFC.

118. Much of the HCP is based on a "habitat functional assessment" developed by the Permittees in consultation with the Service. According to the HCP, this assessment was used to classify the quality of habitats on site, assist in the minimization of impacts, and quantify impacts and mitigation requirements.

119. The habitat functional assessment is not based on a standardized methodology. It will lead to varying degrees of impacts and mitigation and regulatory uncertainty with no safeguards in place to ensure this Project or future actions will not jeopardize a species.

120. The HCP's assessment does not link various land cover types to the specific species and their needs, nor is there any indication that this valuation system has been peer reviewed. There is no base ratio that provides for the protection of a sufficient acreage of habitat for a particular species. It does not take into account how much habitat has been preserved, nor does it take into account its quality, function, or location, nor how much more habitat needs to be protected and how much is available It does not take into account the rate of yearly loss of habitat (from development) across a broad

geographic region, nor does it identify the location of developed habitat. There is no analysis of what is necessary to offset impacts to individual species populations, and no consideration of the ratio of conservation lands to impacted lands necessary to support each species or the amount of acreage needed to support a particular population.

121. The HCP relies on the assumption that one characteristic, for example fire, is going to be used to improve other characteristics, like removing invasive plants, restoring ground cover, and improving soil conditions. This assumption leads to high conservation value rankings for lands proposed for preservation and enhancement.

122. However, given the construction of 900 apartment units, retail, and a school, it seems extraordinarily optimistic, and in fact flies in the face of common sense and past practice that prescribed burning will be a viable land management tool.

123. Nearly all of the proposed restoration that serves as mitigation for the Project depends on fire management. It appears the property has not been fire managed in the past. Fire management will become even more difficult and perhaps pose human health risks with the addition of 900 residential units, retail, and a school.

124. There appears to be a double accrediting of the removal of exotics which is often times directly related to percent native vegetation cover, and *vice versa*. Because Coral Reef Commons receives conservation credit for the removal of exotics and the percent native vegetation cover, which reflect the same purported ecosystem benefits, it is essentially double dipping on only one purported ecosystem benefit. Both the non-native vegetation and the native vegetation values enjoy the highest weighted value of 0.20.

125. The post-construction valuation for removal of invasive exotic plants, native cover, and pine rockland herbaceous cover are all were awarded the aspirational, and likely overly optimistic value of 1.0.

126. The HCP contains no explanation of how the Permittees delineated the polygons they used to measure ecosystem value in their habitat functional assessment.

127. The Permittees state that the operation of the residential and commercial units will fund the conservation elements of the HCP. At the same time, the Permittees provide no

effective financial assurances should the operation of the residential and commercial unites fail to yield the financial resources necessary to fund such conservation.

128. Appendix L is merely a form of letter of credit with no details and no amounts, and Appendix N (the Draft Conservation Encumbrance – On Site CRC) is missing the essential details.

129. A transportation analysis conducted by Permittees estimates an additional 17,774 daily external trips will be generated once development is complete. The closest Florida Department of Transportation two-way portable traffic monitoring site, located on Coral Reef Drive .35 miles west of 117th Ave., saw average daily traffic of 60,500 for the year 2016. Neither the HCP nor the EA address the impacts that an increase in traffic by nearly a third will have on species either on or off-site, or on the surrounding human environment.

130. The transportation analysis conducted by the Permittees does not account for the increase in traffic that would result from the development of the adjacent property planned for the Zoo Miami complex expansion known as Miami Wilds. Neither the HCP nor the EA address the cumulative impacts brought by this Project, nor the cumulative impacts of the increase in traffic from both Coral Reef Commons and Miami Wilds.

131. As evidenced by the thousands of letters and comments in opposition to this Project, the Project is highly controversial.

132. The use of a habitat functional assessment, particularly the one developed here, may establish a precedent for future actions, especially considering the proposed Miami Wilds project that will be on adjacent, similar habitat.

133. The Permittees state that they conducted 16 surveys from Sept. 2014 through Jan. 2015, describing the conditions as mostly cloudy, with one exception of "light rain to mostly cloudy." Some of the surveys were for specific species, others were not. According to the Permittees, the general species surveys were conducted "in conjunction with other surveying efforts and included qualitatively recording observed flora and fauna."

134. No species-specific surveys for eastern indigo snake were conducted on or off-site, despite the fact that it "would likely have historically been found in the Richmond Area." Likewise no species-specific surveys for rim rock crowned snake were conducted on or off-site, despite the fact that it was documented in 2009 within the Zoo Miami area.

135. Bartram's was surveyed using pineland croton as a proxy on Sept. 12, 22, 24, 26, Oct. 3, 6, and 7 2014, but the HCP does not state whether the entire Coral Reef Commons Project site or off-site preservation were surveyed for Bartram's.

136. Florida bonneted bat surveys were conducted in September 2014 at 25 sites in forested areas of the Coral Reef Commons site. It is not clear from the HCP why the western and southwestern portions of the Project were not surveyed.

137. The off-site mitigation area appears to not have been surveyed for any of the species at all.

D. THE BIOLOGICAL OPINION

138. On November 30, 2017, the Service issued a biological opinion and conference opinion (BO) for Incidental Take Permit Number TE15009C-0 purporting to review 22 affected species' statuses, baseline conditions, effects of the action, and cumulative effects.

139. The BO concludes that the Project is not likely to jeopardize the species' continued existence or destroy or adversely modify their critical habitat.

140. The BO authorizes take of the Bartram's scrub-hairstreak butterfly, eastern indigo snake, Florida bonneted bat, Florida leafwing butterfly, and Miami tiger beetle.

141. The BO also evaluates the effects of the action on 14 plant species.

142. The conference opinion addresses the gopher tortoise and rim rock crowned snake.

143. The BO evaluates "conservation measures" that are intended to reduce the impacts of construction, including preconstruction surveys, construction worker education, best management practices, and building and landscaping design elements.

144. The BO evaluates other measures intended to reduce the impacts of operation of the Project, including community practices, measures to facilitate prescribed burning, and pest control management practices.

145. The BO acknowledges that most of the species considered in the BO are associated primarily or exclusively with pine rockland habitats and that only about one percent of the Miami Rock Ridge pine rocklands remain outside of Everglades National Park.

146. It also acknowledges that "[t]he challenges of managing smoke and ensuring public safety that are associated with prescribed fire severely constrain its application in urban environments."

147. The BO finds that Project construction would eliminate Bartram's from the development footprint (over 50 acres) and that it would reduce the habitat available to Bartram's and the Florida leafwing, yet it found that the Project is not likely to destroy or adversely modify designated critical habitat for the Bartram's or Florida leafwing.

148. The BO acknowledges the site has not been surveyed for Miami tiger beetles, that four contiguous properties support small populations of Miami tiger beetles. And that the tiger beetle is especially vulnerable to extinction.

149. The BO estimates the permanent loss of more than 20 acres of habitat for the tiger beetle, and may harm two or three eastern indigo snakes.

150. The BO found that the Project would convert 67 acres of vegetating foraging habitat into impervious surface, decreasing prey abundance.

151. The ITS refers back to the HCP and ITP with no further explanation or attempt to quantify or express by proxy the amount of take anticipated.

152. The HCP itself also does not express take numerically for listed species, nor does it explain why it is impracticable to do so or attempt to express take by proxy.

VI. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

(The Service's Violations of the National Environmental Policy Act and the Administrative Procedure Act)

153. Plaintiffs re-allege and incorporate by reference all the allegations set forth in this Complaint, as though fully set forth below.

154. The Service performed a major federal action for the purpose of NEPA by issuing Permit Number TE15009C-0. This action was a final agency action under the APA, 5 U.S.C. § 704.

155. The Service violated NEPA and its implementing regulations, abused its discretion, and acted arbitrarily and capriciously in violation of the APA, 5 U.S.C. § 706(2), in its actions as they relate to the Coral Reef Commons EA and decision to not produce an EIS.

156. Specifically, the Service failed to adequately addresses serious environmental issues raised by the Service's decisions to issue the ITP for listed species, including by:

(a) Failing to take a hard look at the significant direct, indirect, and cumulative environmental effects of its actions in permitting Coral Reef Commons, including by failing to meaningfully assess the environmental impacts of its action as it relates to other permit applications, both pending and reasonably foreseeable, including the Zoo Miami complex expansion known as Miami Wilds, and failing to meaningfully assess the environmental impacts of its action as it relates to ongoing and reasonably foreseeable activities in Miami-Dade County;

(b) Failing to properly identify and assess the basic and overall purpose and need for the Project;

(c) Improperly narrowing the analyses performed through the EA;

(d) Failing to properly identify and assess reasonable alternatives to the action, and avoid, minimize, or mitigate the adverse effects of these actions on the quality of the human environment;

(e) Failing to take a hard look at the significant harm to threatened and endangered species and their critical habitat from the action, including by failing to conduct any meaningful analysis of the substantial adverse impacts that will result from the activity through reduced opportunities for viewing wildlife;

(f) Relying on an arbitrary and capricious "habitat functional assessment" when considering the environmental impacts of and purported mitigation associated with the Project.

(g) Failing to conduct any NEPA review on the action's impacts to the federally threatened pineland sandmat;

(h) Failing to prepare an environmental impact statement for the Coral Reef Commons ITP;

(i) Failing to encourage and facilitate public involvement in these decisions, which are of substantial environmental controversy, including, but not limited to, by failing to adequately respond to requests that the agency hold public hearings, as requested by several interested parties—including Plaintiffs, and failing to hold such hearings;

(j) Failing to assess the impact of the addition of 17,000 vehicle trips daily; and

(k) Otherwise disregarding the requirements of NEPA and its implementing regulations, including, but not limited to, failing to follow procedural requirements related to its FONSI decision.

157. As a result of these errors, the Service failed to promote efforts that will prevent or eliminate damage to the environment; failed to use all practicable means to foster and promote the general welfare; failed to avoid preventable risk to the public health and safety; and failed to create and maintain conditions under which humans and nature can exist in productive harmony.

158. The Service also failed to make its FONSI available to the public for 30 days prior to taking any action.

159. The NEPA review conducted by the Service in connection with its decision to issue Permit Number TE15009C-0 is inadequate and flawed, and the Service's reliance on it was and is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with the law.

SECOND CLAIM FOR RELIEF

(The Service's Violations of the Administrative Procedure Act)

160. Plaintiffs re-allege and incorporate by reference all the allegations set forth in this Complaint, as though fully set forth below.

161. The Service's biological opinion is arbitrary and capricious, and contrary to its administrative consultation requirements of ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2), 50 C.F.R. § 402.14, and is thus violation of the APA, 5 U.S.C. § 706(2)(A).

162. Specifically, the Service failed to: (1) review all relevant information; (2) properly consider the direct and indirect effects of the action; (3) adequately assess the cumulative effects on the listed species; and (4) specify the level of take that may occur with a meaningful trigger to reinitiate consultation.

163. The Service's biological opinion is contrary to the consultation requirements of Section 7(a)(2) of the ESA and therefore violates the APA because it:

(a) Improperly restricts the action area and inaccurately describes the environmental baseline;

(b) Improperly limits the scope of the agency action and subsequent analysis of the effects of the agency action to develop the pine rocklands;

(c) Fails to consider all relevant information or information otherwise available;

(d) Fails to analyze the cumulative impacts on listed species in the action area;

(e) Fails to specify the level of take that may occur and provide an adequate trigger for re-initiation of consultation;

(f) Relies on an arbitrary and capricious "habitat functional assessment" when considering species and habitat impacts associated with the Project; and

(f) Relies on insufficient, unspecified, and unproven mitigation measures.

164. The Service's proffered Reasonable and Prudent Measures are also inadequate to minimize the incidental take of species at the Project site.

165. The biological opinion's Reasonable and Prudent Measures do not contain mitigation measures with specific defined conservation goals, action measures, or an implementation schedule to ensure that species conservation measures are met.

166. The Service failed to specify the amount or extent of take that will occur or provide a surrogate ecological condition that has some connection to the taking of the species, as the ESA requires.

167. The Service failed to provide a meaningful trigger for the reinitiation of consultation.

168. The Service failed to acknowledge that the eastern indigo snake is actually two genetically distinct species, and that the species located in the action area is the Gulf coast indigo snake (*Drymarchon kolpobasileus*).

169. The Service failed to initiate consultation regarding potential effects to the pineland sandmat.

170. The Service's failure to "meaningfully analyze" the risks to these species is arbitrary and capricious.

171. The Service violated the APA, 5 U.S.C. § 706(2)(A), in finding that Coral Reef Commons is not likely to adversely affect the species.

172.

VII. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request that the Court enter Judgment for Plaintiffs and provide the following relief:

(1) Declare that the Service's decisions to issue an incidental take permit for Coral Reef Commons, Permit Number TE15009C-0, violated NEPA and the APA;

(2) Declare that the Service's biological opinion is arbitrary, capricious, and contrary to ESA section 7(a)(2), 16 U.S.C. § 1536(a)(2), 50 C.F.R. § 402.14, and therefore are in violation of the APA, 5 U.S.C. § 706(2)(A);

(3) Declare that the Service's reliance on its biological opinion is arbitrary and capricious and violates section 7(a)(2) of the ESA;

(4) Declare that the NEPA review conducted by the Service in approving Permit Number TE15009C-0 is arbitrary, capricious, and in violation of the law;

(5) Order the Service to rescind Permit Number TE15009C-0;

(6) Order the Service to withdraw the biological opinion, rescind its incidental take statement, and prepare a biological opinion that complies with the mandates of the ESA;

(7) Preliminarily and permanently enjoin the Service from authorizing any further action under Permit Number TE15009C-0 until it fully complies with the requirements of NEPA and the APA, including providing an opportunity for public hearing;

(8) Award plaintiffs their costs and reasonable attorneys' fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412, and Fed. R. Civ. P. 54(d); and

(9) Award plaintiffs any other relief that is just and proper.

DATED: December 8, 2017

Respectfully submitted,

/s/ Jaclyn Lopez

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CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2017, I electronically filed the foregoing Form A Notice of Conventional Filing with the Clerk of the Court by using the CM/ECF system, which served all counsel of record registered with CM/ECF system for this case.

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