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By Certified Mail

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**Re: Notice Of Violations Of The Endangered Species Act In Connection With
The U.S. Fish And Wildlife Service's Legally Inadequate Biological Opinion
For The Scripps Briger DRI Project In Palm Beach County, Florida**

On behalf of the Palm Beach County Environmental Coalition; Sierra Club Florida, led by its Loxahatchee Group; South Florida Wildlands Association,; and the Green Party of Palm Beach County, we hereby provide notice, pursuant to section 11(g) of the Endangered Species Act, 16 U.S.C. § 1540(g), that the U.S. Fish and Wildlife Service ("Service") and the U.S. Army Corps of Engineers ("Corps") have violated and are continuing to contravene various provisions of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531-1544, and the Act's implementing regulations by issuing and relying on the Service's March 23, 2011 Biological Opinion for the Scripps Briger DRI Project in Palm Beach County, Florida.



BACKGROUND

A. Endangered Species Act

The ESA “represent[s] 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). Section 9 of the ESA prohibits any “person” from “taking” any member of an endangered or threatened species. 16 U.S.C. § 1538(a).¹ Where federal action is involved that is likely to take or otherwise impact listed species, the action agency must engage in consultation with the Service. *Id.* § 1536.

Specifically, the action agency must ensure that the action at issue “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.” *Id.* § 1536(a)(2). An action will cause jeopardy if it “reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02. An agency must evaluate the effect of a proposed project requiring a federal permit to determine the effect of the project on the species’ chances of survival and recovery. This evaluation must use “the best scientific and commercial data available.” 16 U.S.C. § 1536(a)(2).

At the end of the consultation process, the Service issues a biological opinion, which must analyze the effects of the proposal on listed species, determine whether the proposal is likely to jeopardize any listed species based on both survival and recovery risks, and determine any reasonable and prudent alternatives that might exist (if a jeopardy determination is made), or reasonable and prudent measures to minimize take (if a non-jeopardy determination is made). *Id.* § 1536(b). The Service must also provide an incidental take statement that must specify (1) the amount or extent of such incidental taking on the species; (2) the reasonable and prudent measures necessary to minimize such impacts; and (3) the terms and conditions that must be complied with to implement the reasonable and prudent measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1)(i). The incidental take statement must provide a meaningful trigger for

¹ The term “take” is defined broadly to include “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect.” *Id.* § 1532(19). FWS has further defined “harass” to include “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, including breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. In addition, “harm” is defined to “include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” *Id.*

reinitiation of consultation in the event that the level of take authorized by the biological opinion is reached or exceeded.

Without an adequate biological opinion in place, any activities likely to result in incidental takes of members of listed species are unlawful. Accordingly, anyone who undertakes such activities, or who authorizes such activities, 16 U.S.C. § 1538(g), may be subject to criminal and civil federal enforcement actions, as well as civil actions by citizens for declaratory and injunctive relief. *See id.* § 1540.

B. Eastern Indigo Snakes

The eastern indigo snake is one of the largest North American snake species, and its color is uniformly lustrous-black, dorsally and ventrally, except for a red or cream-colored suffusion of the chin, throat, and sometimes the cheeks. The eastern indigo snake was listed as threatened on January 31, 1978 (43 Fed. Reg. 4028), due to population declines caused by habitat loss, over-collecting for the domestic and international pet trade, and mortality caused by rattlesnake collectors who gas gopher tortoise burrows to collect snakes. Georgia and Florida currently support the only remaining endemic populations of the eastern indigo snake.

Eastern indigo snake breeding extends from June to January, egg laying occurs from April to July, and hatching occurs from mid-summer to early fall. Young hatch approximately three months after egg-laying and there is no evidence of parental care. Eastern indigo snakes are active and spend a great deal of time foraging and searching for mates. They are one of the few snake species that are active during the day and rest at night. The eastern indigo snake is a generalized predator and will eat any vertebrate small enough to be overpowered. Prey include fish, frogs, toads, snakes (venomous, as well as non-venomous), lizards, turtles, turtle eggs, small alligators, birds, and small mammals.

Eastern indigo snakes use a mosaic of habitats. Eastern indigo snakes shelter in gopher tortoise burrows, hollowed root channels, hollow logs, or the burrows of rodents, armadillos, or land crabs. Over most of its range in Florida, the eastern indigo snake frequents diverse habitats such as pine flatwoods, scrubby flatwoods, floodplain edges, sand ridges, dry glades, tropical hammocks, edges of freshwater marshes, muckland fields, coastal dunes, and xeric sandhill communities. Eastern indigo snakes also use agricultural lands and various types of wetlands, with higher population concentrations occurring in the sandhill and pineland regions of northern and central Florida. Adult males have larger home ranges than adult females and juveniles; their ranges average 554 acres, decreasing to 390 acres in the summer. In contrast, a gravid female may use from 3.5 to 106 acres. In Florida, home ranges for females and males range from 5 to 371 acres and 4 to 805 acres, respectively.

Because of its relatively large home range, scientific studies have shown that the eastern indigo snake is particularly vulnerable to habitat loss, degradation, and fragmentation. According to biologists, the primary threat to the eastern indigo snake is habitat loss due to

development and fragmentation. As the Service has stated, “[i]n the interface areas between urban and native habitats, residential housing is also a threat because it increases the likelihood of snakes being killed by property owners and domestic pets.” March 23, 2011 Biological Opinion (Exhibit A) at 5. “Extensive tracts of undeveloped land are important for maintaining eastern indigo snakes.” *Id.*

C. Scripps Briger DRI Project

The Scripps Briger DRI project is a large biotechnology facility and mixed use residential development that is planned for construction and long-term operation on a 681.89-acre site in Palm Beach County, Florida. The project site consists of two parcels separated by Interstate 95. The western parcel (195 acres) is bound on the north by the confluence of I-95 and the Florida Turnpike, on the west by the Florida Turnpike, on the east by I-95, and on the south by Hood Road. The eastern parcel (496 acres) is bound on the north by Donald Ross Road, on the west by I-95, on the south by Hood Road, and on the east by single-family residences and a school. The project site contains 83.21 acres of wetlands, the majority of which are exotic wetland hardwoods. According to the Service, there is a small 2.76-acre ditch on site that does not appear to connect off site. The remaining 595.72 acres of uplands on site are predominantly dense pine flatwoods.

As proposed by the applicant, the Corps and the Service determined that the project will impact 2.76 acres of ditch, 75.71 acres of wetlands, and 535.05 acres of uplands. Because wetlands will be permanently impacted as a result of the project, the applicant was required to obtain a section 404 Clean Water Act permit from the Corps. According to the Service, “[a]s part of the project, the applicant has proposed to preserve a 7.50-ac freshwater marsh located in the southern portion of the eastern parcel as well as 60.67 ac of upland preserve dispersed throughout the site. . . . [which] are located in the western parcel.” March 23, 2011 Biological Opinion at 2-3.

The 682-acre project site – which is mostly forested – is bounded on all sides by heavy residential and commercial development, and serves as the only local refugia for many species of wild animals that rely on contiguous, unfragmented habitat. Thus, the project site serves as an important refuge for local populations of various species, including the eastern indigo snake, gopher tortoise, and eastern diamondback snake.

D. Interagency Consultation and March 23, 2011 Biological Opinion

On October 9, 2009, the Corps initiated formal consultation with the Service concerning the effects of the Scripps Briger DRI project (Corps Permit SAJ-2009-1720) on the eastern indigo snake, after the Corps determined that the project “may affect the eastern indigo snake,” based on eastern indigo snake use generally in the geographic area and based on the habitat mosaic present on the project site which is suitable to eastern indigo snake use.

During a site visit by ESI Consultants, no eastern indigo snakes were found, but ESI observed an eastern diamondback rattlesnake, which is the primary prey of eastern indigo snakes. In February 2010, at the request of the Service, the applicant allowed a biologist to access the project site to conduct an experimental survey using a trained indigo snake detection dog and handler team. According to the Service, “[w]hile on site, the dog signaled the possible presence of a snake in a gopher tortoise burrow; however, the burrow was not scoped to confirm presence.” March 23, 2011 Biological Opinion at 7.

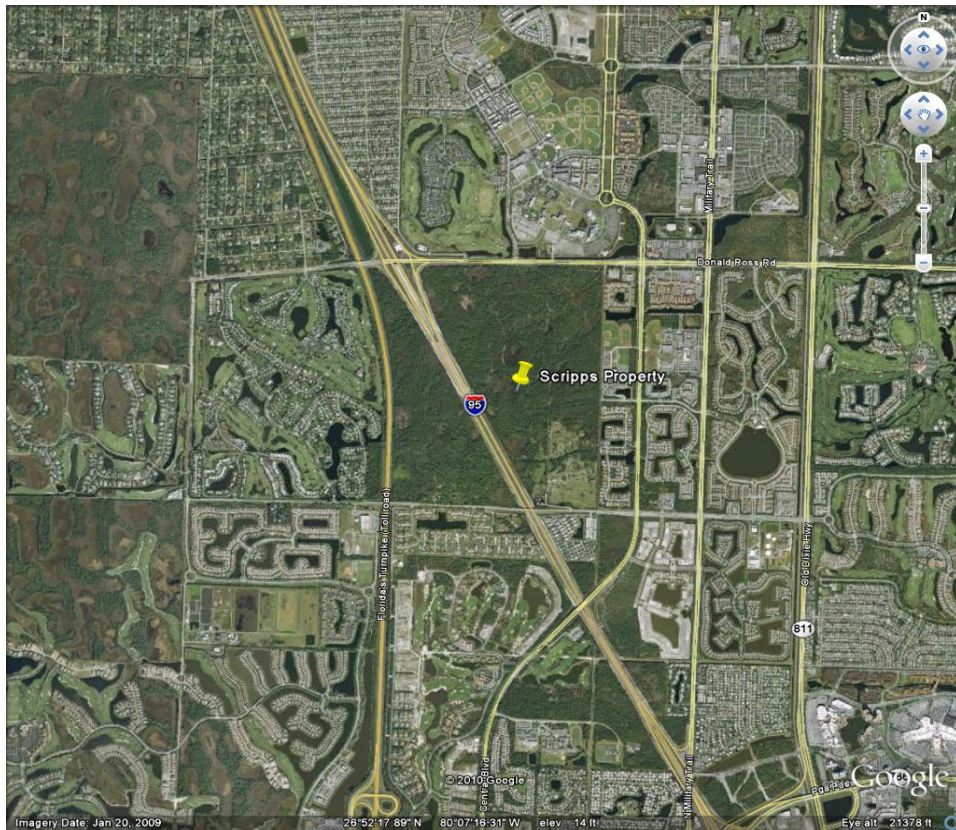
Based on the best available scientific evidence, the Service concluded that there are approximately six eastern indigo snakes present on the project site, and assumed they consisted of three males and three females. *Id.* at 8. Despite the lack of site-specific data collected at the site, the Service based its conclusion that approximately six eastern indigo snakes (two snakes in the western portion and four snakes in the eastern portion) are present on the site on various factors, including:

- A trained eastern indigo snake detection dog signaled the presence of a snake in a gopher tortoise burrow, which is the primary habitat of eastern indigo snakes, March 23, 2011 Biological Opinion at 7;
- Eastern indigo snakes “have been documented using habitats similar to those impacted by the proposed action within 10 mi of the action area,” *id.* at 6-7;
- ESI observed an eastern diamondback rattlesnake – the primary prey species of the eastern indigo snake – on the project site, and the Service noted that “[e]astern indigo snakes are known to eat rattlesnakes as well as occupy the same habitat,” *id.* at 7;
- “[M]oderately suitable habitat [for the snake] remains on the project site,” *id.* at 7;
- The “forested portions of the site provide ample cover for both eastern indigo snakes and their prey,” *id.* at 8.

While the Service suggested that its conclusion was the result of a “conservative approach,” *id.* at 7-8, the fact that the Service adopted its conclusion based on a comparison to the study with the least optimal eastern indigo snake habitat – *i.e.*, sugarcane fields – means that, in reality, it is likely that there are more than six snakes on the project site here because the partially forested habitat cover on this project site is “[m]oderately suitable” for snakes rather than the “suboptimal” nature of sugarcane fields for harboring snakes. *Id.* at 7-8.

In any event, this project site is especially important in the local ecosystem for eastern Indigo snakes (and other species), because “the Scripps Briger DRI site is fragmented from other areas potentially inhabited by eastern indigo snakes.” *Id.* at 6. Thus, while the “most likely

route for [snake] immigration and emigration would be via the residential areas to the east and south,” “the natural areas are very sparse within these developments.” *Id.* Moreover, the Service concluded that “[i]t is unlikely snakes would survive attempting to cross I-95, the Florida Turnpike, or Donald Ross Road.” *Id.* As a result, the Service concluded that “[d]ue to these physical barriers in the landscape, it is the Service’s opinion that indigo snakes are very unlikely to disperse to or from the project site.” *Id.* The following figure illustrates the vital importance of this forested parcel to snakes and other animals seeking refuge from the heavy development on all sides of the project site:



The Service biologist assigned to review this project commented on this isolated refugia phenomenon in January 2010 as part of formal consultation with the Corps, explaining that “this 700 acre site has likely acted as a sink for indigos while all the other development has occurred around it.” *See* January 19, 2010 Email from Kristi Yanchis to Eric Reusch (Exhibit B). Due to the Service’s assumption of eastern indigo snake presence on the project site, the Service biologist explained that section 7 of the ESA would ultimately require certain eastern indigo snake “conservation measures” aimed at minimizing the on-site effects to the snake. *Id.* (“Basically, I’m going to have to ask for some kind of indigo snake conservation measures. I will try to have several options for the applicant to choose from.”).

As formal consultation proceeded, however, the Service apparently jettisoned the eastern indigo snake conservation measures it had previously contemplated, and instead determined that “we would like to see some sort of compensation for impacts to the indigo snake,” which the Service stated could be accomplished by allowing the experimental survey method to occur on the project site using trained dogs. *See* February 8, 2010 Email from Kristi Yanchis to Eric Reusch (Exhibit C). The lead Service biologist recognized that the compensatory measures would not obviate the legal requirement for a biological opinion, but committed to getting “it out quickly if the applicant agrees to help with this effort.” *Id.* Moreover, the biologist stated that, “[i]n fact, in the terms and conditions of the [biological opinion], I will say the applicant aided our research and therefore has compensated for impacts the best way possible.” *Id.*

In February 2011, the Service internally circulated a draft of the biological opinion. In that draft, the Service concluded that up to two of the snakes on the project site “may be harmed (injury or mortality) incidental to project construction.” February 15, 2011 Draft Biological Opinion at 14 (Exhibit D). However, in that draft, the Service anticipated that “[a]fter site clearing and development, we anticipate that the project site could continue to support a few eastern indigo snakes within the green spaces of the Scripps biotech development.” *Id.* Based on human disturbances and maintenance, the draft biological opinion concluded that “any eastern indigo snakes remaining at the Scripps site could be incidentally taken through harassment for the life of the project.” *Id.*

On March, 23, 2011, the Service issued its final biological opinion for the Scripps Briger DRI project. In the final biological opinion, the Service explained that “[t]here will be approximately 90 ac of uplands and wetlands preserved on site which may provide potential [snake] habitat; however, these parcels are fragmented and scattered throughout the site.” March 23, 2011 Biological Opinion at 9. As to the effects of the project on snakes, the Service explained that:

Construction, operation, and maintenance of the project may result in actions that could kill or injure individual eastern indigo snakes, destroy nests, and destroy or degrade habitat and foraging areas. Clearing, burning, earthmoving, construction, operation, and maintenance activities may also disturb eastern indigo snakes by causing them to try to leave the area, and possibly miss foraging and mating opportunities. Individual eastern indigo snakes attempting to flee the area are likely to be unsuccessful due to surrounding major roadways, and any who manage to successfully disperse may be more vulnerable to predation and intraspecific aggression.

Id. at 11. The Service concluded that the project as proposed is not likely to jeopardize the continued existence of the eastern indigo snake as a whole. *Id.* at 12. However, the Service also concluded that “the eastern indigo snakes (3 males, 3 females, 3 nests) will over time be extirpated from the site as there will be limited cover available to hide and support sufficient

forage” because “[t]he habitat that will remain on site in the form of mitigation areas is neither contiguous nor large enough to support snakes indefinitely.” *Id.*

The Service prepared an incidental take statement authorizing various forms of take of eastern indigo snakes, ultimately resulting in complete extirpation of the species at this site. *See id.* at 13. In contrast to the February 2011 draft biological opinion, the Service’s final incidental take statement stated that “[t]he green spaces of the proposed Scripps biotech development are not contiguous with other undeveloped land and are too small to support a snake indefinitely.” *Id.* As a result, the Service concluded that “[a]fter site clearing and development, we anticipate that the project site will not continue to support eastern indigo snakes.” *Id.*

Despite the expected extirpation of the species at this project site, the Service only implemented one reasonable and prudent measure to purportedly minimize take of the snake – adherence by the Corps and the applicant to the Service’s Standard Protection Measures for the Eastern Indigo Snake, *id.* at 14, which is a half-page memorandum simply requiring that any construction contractors on the site have available to them an eastern indigo snake educational brochure. *See* Standard Protection Measures for the Eastern Indigo Snake, available at http://www.fws.gov/northflorida/IndigoSnakes/20040212_gd_EIS_Standard_Protection_Measures.pdf. The Service stated that, despite the species’ complete extirpation from the project site, the single reasonable and prudent measure considered – which does not at all seek to prevent extirpation and thus does not minimize take at all – is “critical in minimizing take associated with the proposed action.” March 23, 2011 Biological Opinion at 14.

In its Terms and Conditions section of the incidental take statement, the Service did not require any conditions – such as the creation of additional mitigation acres or green spaces to accommodate continued eastern indigo snake use of the project site, or translocation of snakes to another location containing suitable snake habitat – that would actually minimize the anticipated take (*i.e.*, the total extirpation of this eastern indigo snake population at this project site). The Service merely required that the applicant notify the Service if a dead snake is observed and submit a post-construction report of snake sightings. *Id.* at 14. The Service included its standard notice concerning reinitiation of consultation, citing to its regulations indicating that reinitiation is required when the amount of authorized take is exceeded.

DISCUSSION

A. The Service’s Failure to Minimize Take Violates Section 7 and the ESA’s Implementing Regulations.

Section 7(b)(4)(C) of the ESA requires that in rendering a biological opinion where the Service has determined that an action will not jeopardize the continued existence of the listed species at issue, the Service must “specif[y] those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact” and “set[] forth the terms

and conditions . . . that must be complied with by the Federal agency or applicant . . . to implement the measures specified” to minimize take of listed species. 16 U.S.C. §§ 1536(b)(4)(C)(ii), (iv); *see also* 50 C.F.R. § 402.14(i). Therefore, in a non-jeopardy context, the Service has a non-discretionary statutory obligation under the ESA to “minimize” takes to listed species, and to craft reasonable and prudent measures, along with terms and conditions to implement the measures, to achieve such minimization. In practice, this means that the Service is required to explore measures that will reasonably minimize take on a given project site – *i.e.*, result in less than 100% of the anticipated effects to the members of the listed species present on that site – unless the Service makes an explicit finding that otherwise effective minimization measures are not “necessary or appropriate to minimize such impact” because they are financially or otherwise impracticable. 16 U.S.C. § 1536(b)(4)(C)(ii).

Here, the Service’s March 23, 2011 Biological Opinion fails to even consider whether there are any “reasonable and prudent measures . . . necessary or appropriate to *minimize*” impacts to the six (or more) eastern indigo snakes using the project site. *Id.* (emphasis added). Rather, the only reasonable and prudent measure implemented by the Service – adherence by the applicant to the Service’s Standard Protection Measures for the Eastern Indigo Snake by providing contractors with a snake educational brochure – does *nothing* to address the virtually certain extirpation, *i.e.*, death of *all* snakes on this site with no prospect of future repopulation of snakes at this site. At most, the measure simply avoids lethal forms of take to snakes in the short term, while the six (or more) snakes present on the site are subject to death via other forms of construction and human disturbance over time. This can hardly be squared with the dictionary definition of “minimize.” *See* Merriam-Webster Online Dictionary (2013) (defining “minimize” as “to make (something bad or not wanted) as small as possible”).

Indeed, the Biological Opinion acknowledges that the Service took no steps to prevent the snake’s total and permanent extirpation from the project site, explaining that “the eastern indigo snakes (3 males, 3 females, 3 nests) will over time be *extirpated*,” and that “[a]fter site clearing and development, we anticipate that the project site will *not* continue to support eastern indigo snakes.” March 23, 2011 Biological Opinion at 12-13 (emphases added). Nor does the Biological Opinion evidence *any* attempt by the Service to consider various alternatives to the proposed action that would have minimized take of eastern indigo snakes consistent with the ESA.

For example, the Service could have considered requiring the Corps and the applicant to tailor the project design in a manner that would provide adequate contiguous green space on the site suitable for continued use by some eastern indigo snakes. To the contrary, the Service simply accepted the applicant’s project design without question, and stated that “[t]he green spaces of the proposed Scripps biotech development are not contiguous with other undeveloped land and are too small to support a snake indefinitely.” *Id.* at 13. But an alternative design layout – with a set-aside for green spaces sufficient to facilitate continued eastern indigo snake presence and foraging – was never even considered by the Service. Similarly, although it would have resulted in a permanent loss of habitat for the species at this site, the Service does not

appear to have considered the option of requiring the permit applicant to conserve off-site snake habitat and translocate the six (or more) eastern indigo snakes to such off-site suitable snake habitat before on-site construction activities begin, which would have at least avoided or minimized lethal injury to these snakes – and therefore would be far more consistent with section 7. These are only two potentially viable options that the Service could have considered, but failed to do so in rendering its March 23, 2011 Biological Opinion in violation of the ESA.

As courts reviewing similar facts have found, the statutory language plainly imposes an unequivocal duty on the Service to determine what reasonable and prudent measures are “necessary or appropriate to minimize” an action’s impact on listed species, and to minimize take to the extent possible, meaning that the Service must select an alternative that minimizes take of less than all individuals on a project site so long as the alternative is consistent with the project’s purpose and need. For example, in one case, a court reviewed a challenge to the Service’s biological opinion authorizing the Bureau of Land Management’s management of off-road vehicles, which did not include a “Term and Condition that specifically addresses minimizing the impact of OHV use.” *See Ctr. for Biological Diversity v. BLM*, 422 F. Supp. 2d 1115, 1140-41 (N.D. Cal. 2006). Although there were only a “few desert tortoises” in the project area and the Service asserted that the “anticipated impacts to desert tortoise from recreational use are minor, and may not even be measurable,” the court nevertheless found that the Service’s failure to craft any measures that would minimize take of desert tortoises “violates the plain language of the ESA.” *Id.* at 1141. The court explained that the relatively minor impacts to individual tortoises, the few tortoises impacted by the action at issue, and the fact that the Service determined that the action would not jeopardize the species as a whole “does not absolve the Service of its responsibility to delineate terms and conditions to minimize the potential of incidental take of desert tortoises during recreational use.” *Id.*

By the same token, the Service’s complete failure here to consider – much less adopt – reasonable measures that are necessary or appropriate to minimize the projected take of *all* six (or more) eastern indigo snakes using the project site cannot be squared with the ESA. Indeed, the Service’s failure to consider options that would avoid the death of six (or more) snakes and the complete extirpation on the project site here is far more egregious than the non-lethal take to desert tortoises which the court nevertheless found *must* be minimized by the Service pursuant to the plain language of section 7.

Accordingly, because the Service’s incidental take statement fails to minimize take *at all* – instead allowing total extirpation of the eastern indigo snake population at this project site – the Biological Opinion is invalid, and cannot be sustained under the ESA and its implementing regulations.

B. The Service's Failure to Provide a Meaningful Trigger for Reinitiation of Consultation Violates the ESA and its Implementing Regulations.

Pursuant to section 7(b)(4) of the ESA, the Service is required to issue an incidental take statement with each biological opinion clearly specifying the amount and extent of incidental take authorized to the action agency. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.12(i)(1). The impact of incidental takings should be expressed as a specific number whenever possible. *See Ore. Natural Res. Council v. Allen*, 476 F.3d 1031, 1037 (9th Cir. 2006). The purpose of developing a specific level of take is to establish a “trigger” number of takings that, when reached, “results in an unacceptable level of incidental take . . . requiring the parties to re-initiate consultation.” *Id.* at 1038. Courts have rejected the Service’s failure to provide a meaningful trigger for reinitiation of consultation, particularly where there is “no number of dead” animals in the project area that “will trigger re-consultation.” *Miccosukee Tribe of Indians v. United States*, 566 F.3d 1257, 1271-75 (11th Cir. 2009).

Here, there are several problems with the Service’s incidental take statement. As a threshold matter, it is not clear what level of take the Service’s Biological Opinion has authorized because the Service’s incidental take statement is virtually incomprehensible. Although the Service recognized that at least six snakes were likely using the project site, the Service only authorized that “[u]p to two eastern indigo snakes may be harmed (injury or mortality) incidental to project Construction” and “[t]he productivity associated with up to three eastern indigo snake nests may also be lost through direct mortality incidental to project construction.” March 23, 2011 Biological Opinion at 13. While not directly providing authorization for their deaths, the Service further explained “that all eastern indigo snakes at the Scripps project site could be incidentally taken through harassment for the life of the project.” *Id.* However, the Service makes clear elsewhere in the Biological Opinion that this project – whether through construction or long-term operation – will, in fact, *kill* every single snake on the project site and prevent any snakes from reestablishing residence there. *See* March 23, 2011 Biological Opinion at 12-13 (concluding that “the eastern indigo snakes (3 males, 3 females, 3 nests) will over time be *extirpated*,” and that “[a]fter site clearing and development, we anticipate that the project site will *not* continue to support eastern indigo snakes”) (emphases added).

Yet, while acknowledging that the snake population will be completely extirpated as a result of the proposed action and authorizing the action to proceed, the Service never formally authorized mortality of all six (or more) snakes that currently inhabit the project site, because the only mortality purportedly authorized by the Biological Opinion consists of two snakes that can be killed incidental to project construction. *See id.* at 13. Therefore, because it is unclear whether the Service has in fact authorized (1) only two snake deaths resulting from this project, (2) only six snake deaths resulting from this project (based on the assumption of six snakes using the project area), or (3) all snakes using the site which could be more than six snakes, the Service’s Biological Opinion as written is completely unclear and fails to meet the rigor of the

ESA in specifying the amount of take authorized and providing specific limits which when exceeded would trigger reinitiation of consultation.

Likewise, because it is entirely unclear whether the Service has authorized the death of two snakes, six snakes, or all snakes on the project site (which could be far greater than six), it is impossible to determine whether there is a meaningful trigger for reinitiation of consultation as required by the ESA. While citing the general statement concerning reinitiation of consultation, *id.* at 15, there is no legal or logical way that reinitiation of consultation could ever be triggered if, in fact, the Service has authorized total extirpation of the entire snake population in the project area, whatever its size, despite the fact that under that scenario there could actually be far more than six snakes using the site, and thus more than six snakes that would die. That would be problematic because the Service's effects analysis in the Biological Opinion *never* analyzed the effects of the action on survival and recovery under the assumption that more than six snakes would be killed.

Thus, because the Service's lack of clarity in authorizing incidental take here appears to have provided blanket authorization to kill some undetermined number of snakes *greater* than the number analyzed by the Service in its effects analysis, there is no meaningful check on the agency's no-jeopardy determination because there is no trigger for reinitiation of consultation, and the incidental take statement is unlawful, in violation of the ESA and its regulations. *See, e.g., Allen*, 476 F.3d at 1041 (holding that limitations on take in the incidental take statement must not "be so indeterminate as to prevent the Take Statement from contributing to the monitoring of incidental take by eliminating its trigger function"); *Ctr. for Biological Diversity v. Provencio*, No. CV 10-330, 2012 WL 966031, at *15-16 (D. Ariz. Jan 23, 2012) (finding that where "[c]onsultation would only be revived in the event that all leopard frogs are extirpated from the only site they occupy on the Allotment, which amounts to a trigger based on extirpation of leopard frogs from the entire Allotment," "the trigger would be toothless" and therefore violates the ESA).

C. The Service's Failure to Analyze the Effects of the Action on the Recovery of the Eastern Indigo Snake Violates the ESA and its Regulations.

In undertaking its jeopardy analysis, the Service is required by regulation to assess not only the impacts of the Service's action on the *survival* of a listed species, but also on its *recovery*. *See* 50 C.F.R. § 402.02 (an agency action "jeopardize[s] the continued existence" of a species if it "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species"). The reason that the Service must independently analyze recovery is that otherwise "a listed species could be gradually destroyed, so long as each step on the path to destruction is sufficiently modest," which is the "type of slow slide into oblivion" that is "one of the very ills the ESA seeks to prevent." *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 930 (9th Cir. 2008).

As courts have explained, in this context “[r]ecover means more than just improved status; it means improvements to the point where the species may be delisted.” *Provencio*, 2012 WL 966031 at *12. Where, as here, the Service cannot demonstrate in a biological opinion that the agency expressly considered the effects of the proposed action on the listed species’ chances of recovery – as opposed to its survival – the biological opinion violates the ESA. *Id.*; *see also Nat’l Wildlife Fed’n*, 524 F.3d at 933 (holding that, “as part of the consultation process, [the Service] must conduct a full analysis of [recovery] risks and their impacts on the listed species’ continued existence,” and explaining that “[a]lthough recovery impacts alone may not often prompt a jeopardy finding, [the Service’s] analytical omission here may not be dismissed as harmless”).

Here, the Service never even attempted to analyze the effect of the proposed action – which will kill six (or more) eastern indigo snakes and permanently foreclose snake use of this 682-acre forested parcel that has long served as a vital refuge for eastern indigo snakes – on the *recovery* of the species. Rather, the Service’s jeopardy determination generally emphasized that the loss of this snake population would not jeopardize the continued *survival* of the species, noting that “[t]he potential loss of eastern indigo snakes present at the Scripps site will not significantly reduce the numbers, distribution, and reproduction of indigo snakes in south Florida.” March 23, 2011 Biological Opinion at 12; *see also id.* (“This is less than 0.5 percent of the habitat for eastern indigo snakes available on public and agricultural lands in Palm Beach County alone.”).

However, whether the snake species as a whole will go extinct (or reduce its population size) as a result of this one action (*i.e.*, survival) is a *far different* inquiry from whether the permanent loss of this 682-acre parcel with suitable snake habitat – in conjunction with the rapid development and consequent loss of many thousands of acres of suitable habitat throughout the snake’s range – will have a negative impact on the species’ *recovery* efforts in general and in South Florida specifically. By authorizing this project without analyzing at all the effects of the action on the snake’s recovery efforts and its chances of achieving its recovery goals to the point of being delisted, the Service has taken a piecemeal approach to the ESA that is flatly inconsistent with the plain language of the Act and its regulations.

D. The Service Has Not Adequately Considered the Cumulative Effects of the Action in Conjunction with Private Development in the Vicinity of the Project Area.

The Service’s regulations require the agency to “[e]valuate the effects of the action and cumulative effects on the listed species” of the action under review. 50 C.F.R. § 402.14(g). Cumulative effects are defined as “those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation.” *Id.* § 402.02.

Here, despite the Service’s acknowledgement that “[t]he primary threat today to the eastern indigo snake is habitat loss and fragmentation due to development,” March 23, 2011

Biological Opinion at 12, the Service's cursory cumulative effects analysis declines to analyze the effects of this project on the snake *in conjunction* with existing and future private development in the action area. Rather, the Service stated that "the Service does not anticipate any appreciable cumulative effects to the eastern indigo snake . . . [g]iven that the surrounding area is already heavily developed, there is little potential for future development." *Id.*

The Service's conclusion cannot be squared with the rest of its effects analysis. For example, the Service downplays the importance of the project area for eastern indigo snakes by myopically noting that "[t]his is less than 0.5 percent of the habitat for eastern indigo snakes available on public and agricultural lands in Palm Beach County alone." *Id.* Yet, if the Service is correct that the surrounding area is so heavily developed that there is little potential for future development, *see id.*, that reinforces why this particular 682-acre forested parcel is so critical from a local ecological standpoint precisely because it provides a refuge for animals such as the eastern indigo snake forced out of nearby parcels by surrounding development. Therefore, what the Service has done in the Biological Opinion is to characterize a parcel that serves as a key snake refugia amidst a sea of development as insignificant based on its size proportional to some larger habitat acreage – which has no bearing on whether it is *biologically significant* from a local ecosystem standpoint – while at the same time refusing to analyze, as cumulative effects, the very development that has caused rapid habitat loss and led to this parcel becoming the important snake refuge it is today and that the Service concedes over time will not only extirpate this population but also permanently eliminate the last remaining 682 acres of viable snake habitat in the vicinity of this project. This type of piecemeal authorization of incremental loss of snake habitat is slowly causing the species' slide into oblivion which is "one of the very ills the ESA seeks to prevent." *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 930 (9th Cir. 2008). This approach is not supported by the ESA and its regulations, and as a result the cumulative effects analysis violates the ESA for failing to address the effects of private development on the snake in the vicinity of the project area.

E. Because of Various Legal Deficiencies with the Service's Biological Opinion, the Corps and the Applicant May Not Lawfully Proceed with Construction Activities.

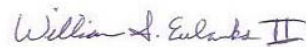
The Service's March 23, 2011 Biological Opinion violates various provisions of the ESA and its implementing regulations, and is arbitrary and capricious for the reasons explained above. Accordingly, since the Biological Opinion is legally impermissible, the Corps and the applicant may not lawfully rely on that Opinion; hence, none of the activities purportedly authorized by Corps permit SAJ-2009-1720 can be implemented by the Corps or the applicant without violating the ESA. Indeed, by proceeding with such activities, the Corps and/or the applicant would not only violate section 9 by initiating conduct reasonably certain to lethally take snakes without lawful authorization from the Service to do so, 16 U.S.C. § 1538(a)(1)(B), but in the process the Corps and/or the applicant would also violate section 7(d) of the Act by committing irretrievable commitments of resources that would severely circumscribe alternatives to the proposed action. *Id.* § 1536(d).

CONCLUSION

As described above, the March 23, 2011 Biological Opinion cannot pass the statutory and regulatory muster of the ESA, and thus cannot be relied upon by the Corps or the applicant in its current form. Therefore, we urge the Service to retract the Biological Opinion and to conduct a legally permissible analysis of the effects of the action on listed species; in the interim, the Corps and the applicant should not commit any resources to implementing the proposed action.

Please do not hesitate to contact us if you wish to discuss this matter or have any questions concerning this letter. If we do not hear from you, we will assume that no changes will be made and will consider all available avenues, including litigation, to conserve the highly imperiled eastern indigo snake in accordance with the requirements of the ESA.

Sincerely,



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