

In Reply Refer To:
FWS/R4/ES

Memorandum

To: Deputy Regional Director, Southeast Region

From: Assistant Regional Director - Ecological Services, Southeast Region

Subject: Set of Findings: Habitat Conservation Plan and NEPA findings for Charlotte County Board of County Commissioners, for the incidental take of Florida Scrub-jay and Eastern Indigo Snake, TE09117B-0

I. DESCRIPTION OF PROPOSAL

The Charlotte County Board of County Commissioners (Applicant) has submitted an HCP and application to the U. S. Fish and Wildlife Service's (Service) South Florida Field Office for a programmatic incidental take permit (ITP) for the threatened Florida scrub-jay (*Aphelocoma coerulescens*) and eastern indigo snake (*Drymarchon coureais cooperii*) under the authority of section 10(a)(1)(B) of the Endangered Species Act, as amended (Act).

The HCP covered area encompasses private, municipal, and County activities throughout suitable and occupied scrub-jay habitat in Charlotte County. The Applicant seeks an ITP for 30 years for the take of the covered species associated with its own infrastructure construction, as well as take associated with its regulation of private residential and commercial development throughout the covered area.

II. SECTION 10(a)(2)(A) HCP CRITERIA – ANALYSIS AND FINDING

1. The Impact to Result from Such Taking

Charlotte County's comprehensive planning estimates 3,056 acres of occupied scrub-jay habitat would be developed over the requested permit term. Any eastern indigo snakes occupying this habitat would also be directly harmed or displaced.

2. The steps taken to minimize and mitigate such impacts, and the funding that will be available to implement them.

The Applicant has developed an HCP that would minimize and mitigate the impact of the proposed take through a variety of measures, including: planning requirements, best management practices, development fees, and conservation land acquisition.

Funding to acquire, restore, manage, and endow management after permit expiration, will be generated by a development fee collected from project proponents. The County calculated this based on expected scrub management costs, projected development rates, and allowing for inflation. Fees are tiered based on property acreage. The HCP provides for stabilization, conservation, and long-term viability of the resident scrub-jay metapopulation rather than relying on a project-by-project ration of impact to mitigation acre ratio.

3. Alternative actions to the take were considered by the Applicant and reasons why such alternatives are not being utilized.

The Applicant considered the preferred alternative being implementation of the HCP as proposed. The Applicant considered a no action alternative without any pre-project consideration of covered species conservation so that project proponents, whether the Applicant or private, would individually have to seek incidental take authority. The HCP also compares costs to applicants of the proposed plan versus individual HCP applications, and versus the existing option of the statewide umbrella, Florida scrub-jay habitat conservation plan. The proposed plan would, according to the HCP, reduce costs to landowners while keeping conservation benefits in the County, and providing better long-term management for Charlotte county scrub habitats.

4. Other measures the Secretary may require as being necessary or appropriate for purposes of the plan.

No additional measures were found to be necessary.

III. SECTION 10(A)(2)(b) PERMIT ISSUANCE CRITERIA - ANALYSIS AND FINDINGS

1. The taking will be incidental.

The Service finds the proposed take of the covered species would be incidental to otherwise lawful activities that would occur as a result of commercial and residential construction, and scrub habitat management.

2. The Applicant will, to the maximum extent practicable, minimize and mitigate the impacts of the taking.

The "maximum extent practicable" concept consists of: (1) considering the economic objectives with the owner (reflected by the scope of the project and its design); (2) a measurement of the subsequent impact imposed on the endangered species; and (3) determining to what degree the extent of mitigation and minimization measures offered in

the HCP offsets the measured impact to the species. Minimization efforts do not take precedence over mitigation efforts or vice-versa. Minimization and mitigation can take many forms and combinations, to address direct, indirect, and cumulative adverse effects on the species.

A “Reserve” plan was developed to manage and expand existing public lands to benefit scrub habitats and the covered species. The Reserve comprises a network or system of habitat patches throughout the covered area that are either currently in public ownership, or expected to be acquired. Several properties already in public ownership are described in the appendices of the HCP. Over the proposed permit term of 30 years, a total of 4,496 acres would be dedicated to the Reserve. Of this total, 1,336 acres are still to be acquired over the permit term.

The HCP establishes a conservation program with the goals of: 1), enhancing viability of the M7 scrub-jay metapopulation by acquiring, restoring, and permanently managing habitat inside the Reserve; 2), minimize impacts to scrub-jay populations outside of the Preserve by expanding, restoring, and maintaining existing public lands and implementing avoidance and minimization measures; and 3), protecting scrub habitat species diversity and ecosystem integrity by acquiring, restoring, and permanently managing scrub habitats within the Reserve.

3. The Applicant will ensure that adequate funding for the conservation plan and procedures to deal with unforeseen circumstances will be provided.

The HCP, and other information provided by the Applicant, documents they will provide the funding necessary to carry out the proposed conservation measures. Funding will be generated by a development fee tiered to project acreages. Allowances are made to correct for inflation, and provisions are also made for possible shortfalls. After permit expiration, an endowment will be created to continue management of the Reserve. The HCP, and other information provided by the Applicant, has satisfactorily addressed procedures for dealing with unforeseen circumstances.

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

The wording of this criterion is identical to the “jeopardy” definition in the Service’s section 7 implementing regulation (50 C.F.R. § 402.02), which defines “jeopardize the continued existence of” as “to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” In accordance with section 7 of the ESA, the Service prepared an intra-agency biological opinion to evaluate whether the taking associated with the HCP would jeopardize the continued existence of any covered species. In the biological opinion, which is attached hereto and incorporated herein by reference, the Service concluded that the proposed incidental take of the Florida scrub-jay and the eastern indigo snake is not likely to jeopardize the continued existence of these species.

The intra-agency biological opinion considers possible effects to the Florida bonneted bat (*Eumops floridanus*), and it also incorporates a conference opinion for the gopher tortoise (*Gopherus polyphemus*). The biological opinion concludes that the project may affect, but is not likely to adversely affect the bonneted bat. The conference opinion for gopher tortoise recognizes that the applicant will abide by Florida management requirements for this species, but makes clear that consultation would be reopened in the event the gopher tortoise becomes listed in Florida.

5. Additional measures as required by the Director of the Service will be implemented.

The HCP has incorporated all elements necessary for issuance of a section 10(a)(1)(B) permit. These elements are addressed elsewhere in this recommendation memorandum.

6. The Director of the Service has received the necessary assurances that the plan will be implemented.

As described in the HCP, the applicant has committed to implementing the conservation, monitoring, and reporting requirements. Any permit issued in this matter would only be effective when the mitigation measures have been carried out in accordance with the special conditions of the permit. Failure to perform the obligation outlined by the conditions of the section 10(a)(1)(B) permit may be grounds for suspension or revocation of the permit.

IV. GENERAL CRITERIA AND DISQUALIFYING FACTORS

The Service has no evidence the ITP application should be denied on the basis of criteria and conditions set forth in 50 CFR § 13.21(b)-(c).

V. PUBLIC COMMENTS

A Notice of Availability was published in the Federal Register announcing the availability of the EA and HCP for public comment. The public comment period extended from February 21, 2014, to April 22, 2014. The Service received six comments on the application during the comment period.

One commentator objected to ITP issuance based on a perceived likelihood of extinction of Florida scrub-jays, claims that issuance of previous ITPs has killed most of the scrub-jays in Florida, and that relocation of species results in mortality of the relocated individuals. The Service analyzed the effects of the requested take in its biological opinion and determined that issuance of the ITP would not jeopardize the continued existence of the scrub-jay, eastern indigo snake, or gopher tortoise. Per our findings in section III, above, the Service believes the Applicant's mitigation proposal is practicable and commensurate with the proposed impacts.

Two commentators recommended ITP issuance. They cited the effective protection the ITP and associated HCP would provide to the covered species and the benefit to

thousands of Charlotte County property-owners whose property values and ability to develop parcels have previously been adversely affected by the scrub-jay review areas.

One commentor expressed concern that development fees disproportionately affect larger landowners, and that properties within Reserve acquisition priority areas would effectively be restricted from developing. The HCP describes the economic plan that went into the proposed development fee. The fees are tiered to lot or property size, as this is a readily measurable factor highly correlated with the probable impacts that an individual development might have on covered species. As described at section 4.2.2 of the HCP, impact avoidance measures, and mitigation-land acquisition priority are greater for large tracts. Historic attempts to acquire sufficient concentrations of small lots to provide scrub mitigation have not been as successful as targeting larger tracts for acquisition and management (HCP section 4.2.2). The HCP at section 4.4 explicitly provides a case-by-case, biological, and landscape-based evaluation for any tract greater than 3 acres without distinguishing between those inside or outside the Reserve acquisition area. Development on any given tract is not absolutely prevented by the HCP.

The Conservancy of Southwest Florida was concerned that the HCP in its current form does not meet issuance criteria for adequately avoiding, minimizing, and mitigating to the maximum extent practicable. Specifically, they call for reducing the allowable take; mitigating at a 2:1 ratio consistent with Service “policy”; exclusion of existing conservation lands, including those for the existing Capital Improvement Projects ITP (TE108859-0, issued September 11, 2007, expires September 17, 2017), from this new HCP; providing greater avoidance, minimization, and mitigation measures; limiting the permit term to 25 years to account for uncertainties of mitigation; and they recommend that the HCP and EA be revised and readvertised.

While the take covered by this HCP could be reduced by 1,481 acres, there is nothing preventing the owners of those lands from applying for their own incidental take permits, and the mitigation for those lands is contributed to a fund that so far has not acquired any land for the benefits of scrub-jays in any of the three metapopulations in Charlotte County. By keeping the mitigation from Charlotte County development in the County, the genetic variety contributed by the Central Charlotte metapopulation will be retained, and individuals and families from the Northwest Charlotte and the southern portion of the Sarasota metapopulations will be available for translocation.

Service conservation strategy for the Florida scrub-jay calls for a 2:1 mitigation to impact ratio in most areas, but this increases to 3:1 in scrub-jay metapopulations of greater value to species recovery. These ratios are based on broad-scale, population-wide analyses of scrub-jay recovery needs. The Applicant has provided a localized, small-scale population viability analysis instead of relying on the Service’s general conservation strategy.

The Applicant’s population viability analyses for the three metapopulations that occur in Charlotte County revealed that only one (the Central Charlotte metapopulation) has any chance of remaining viable for the next 100 years, and there is not enough land left

owned by willing sellers in the Central Charlotte area to provide 2:1 mitigation. Maintaining a strict 2:1 ratio would result in mitigation being applied to areas outside Charlotte County, which would seem to be acceptable until the lack of habitat management is considered. As noted above in section III.4, the intra-Service biological opinion prepared for this decision concluded that the proposed HCP would minimize and mitigate eastern indigo impacts to the maximum extent practicable.

Charlotte County's Capital Improvement Projects ITP expires September 17, 2017. Up to the present, the developments considered in that ITP have not been constructed. Consolidating that previous project into the current HCP will improve management oversight by the Applicant and by the Service. As the Conservancy suggests, it might be appropriate to vacate TE108859-0. It would be reasonable; however, for the Applicant to retain TE108859-0 as a contingency until the Service concludes its review of the current HCP, and until the HCP is successfully implemented. Given the short period in which TE108859-0 and any permit issued in response to the current HCP would overlap, the Service has not pursued vacation of TE108859-0. This would be an administrative matter should it become necessary before TE108859-0's expiration.

The management of 3,056 acres of existing conservation land is supposed to be fully funded, but the reality of the recent economic downturn resulted in gross underfunding of many counties' programs, including those for managing conservation lands. Ideally, mitigation money should not be used for the management of existing conservation land; however, if the land was placed in conservation without a guaranteed source of adequate funding for habitat management, then using some of the mitigation from this HCP for management is preferable to letting those conservation lands go unmanaged, and ultimately become unsuitable for those species dependent on them.

The nature of conservation planning in an HCP lacks the kind of precision that might suggest a 25-year term over the proposed 30-year term. The Conservancy's comments do not provide specific information that would improve our level of planning precision. Evaluation points have been built into the adaptive management provisions of the HCP to ensure that conservation acquisition keeps pace with development, and to address unforeseen circumstances. The HCP and ITP provide the mechanisms for possible amendment in the future in response to uncertain situations as they arise. If necessary, revision of the EA, HCP, or ITP; and re-advertising would be considered in future adaptive planning for unforeseen circumstances.

The Center for Biological Diversity "join[ed] the Conservancy of Southwest Florida in its concerns articulated in its comment letter." However, the Center's own comments addressed climate change and sea level rise concerns and called for the HCP to address the Florida bonneted bat, loggerhead sea turtle, and Florida manatee. As scrub habitat naturally occurs on some of the highest and driest terrain in Florida, it has often been converted to agriculture or developed. Loss and fragmentation of scrub habitats is the leading reason scrub-jays were federally-listed. As the remaining undeveloped scrub lands are likely the last to be inundated, they are in danger of further conversion and development as people move away from coastal areas. Using the scrub-jay as a keystone

species for all species occurring in scrub, the County commissioned population viability analyses on the different metapopulations of scrub-jays that occur in Charlotte County. These analyses found that there was only one metapopulation of scrub-jays in Charlotte County (east of the Peace River) that had a good chance of maintaining viable populations for at least the next 100 years. The Applicant crafted the HCP to obtain mitigation from continued development in areas where there is already so much development that scrub-jay populations will never be viable, and to put that mitigation toward acquiring, restoring, and managing scrub habitat in the area east of the Peace River. This approach will not only conserve more scrub in Charlotte County than would otherwise be gained, but it conserves it inland where development pressures are expected to be greater as lands immediately adjacent to coasts and rivers are inundated.

Although little is known about the Florida bonneted bat's roosting and foraging habits or locations, the Applicant agreed to implement what the Service currently believes are appropriate actions when undertaking habitat management activities on County-owned conservation lands. As to the impact of development on the Florida bonneted bat, the Applicant has incorporated adaptive management measures in the HCP that contemplate possible amendments at a future date as we learn more about this species' location and needs.

The Applicant does not exercise legal jurisdiction over sea turtles and manatees to the same degree as the covered species. The County is currently working with the Service and the Florida Fish and Wildlife Commission to develop a countywide Manatee Protection Plan, but a greater share of the legal authorities for any protection plan would lie with the Service and State of Florida. Management issues concerning these marine species are categorically distinct from those encountered in upland scrub habitats. The HCP covers the impact of developing currently undeveloped parcels in scrub habitats and lands that are currently, and will in the future be under the County's control as scrub conservation areas. No lands fitting these descriptions coincide with loggerhead nesting areas or loggerhead proposed Critical Habitat.

VI. National Environmental Policy Act – Analysis and Findings

Issuance of the ITP will result in the authorization of take of the Florida scrub-jay and the eastern indigo snake incidental to commercial, residential, and municipal construction and land management in the covered area. Issuance of the Permit would be predicated on the full implementation of the Permittee's HCP and compliance with all other requirements for ITP issuance, including the terms of the permit. The Applicant modified drafts of the HCP based on pre-application consultations with the Service and provided mitigation and minimization measures for incidental take associated with the proposed activities.

Our evaluation in the EA of the direct, indirect, and cumulative impacts of issuing the ITP concluded in finding that the action would not have a significant effect on the human environment. The total effects from issuing the ITP would not cause permanent and irreversible changes in the current state of the physical and biological environment,

