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RE: Draft Environmental Impact Statement, SR 998/SW 177th Avenue/Krome Avenue (South)

Dear Ms. Boucle and Mr. Hawk,

On behalf of the National Parks Conservation Association, Tropical Audubon Society, Clean Water Action, and 1000 Friends of Florida, we are submitting the following comments on the draft environmental impact statement (DEIS) for the Krome Avenue South project in Miami-Dade County, Florida. For the reasons explained below, the proposed action does not comply with the requirements of the National Environmental Policy Act (42 U.S.C. § 4321 *et seq.*) ("NEPA"), 4(f) of the Transportation Act (49 U.S.C. § 303), and the Endangered Species Act (16 U.S.C. § 1531, *et. seq.*). We urge the Federal Highway Administration and Florida Department of Transportation not to pursue the preferred alternative identified in the DEIS.

I. The DEIS Does Not Comply With NEPA

A. The Alternatives Analysis is Flawed and Biased.

The consideration of alternatives "is the heart of the environmental impact statement."[1] An agency must "rigorously explore and objectively evaluate all reasonable alternatives."[2] The purpose of this requirement is "to insist that no major federal project should be undertaken without intense consideration of other more ecologically sound courses of action, including shelving the entire project, or of accomplishing the same result by entirely different means."[3]

FHWA identifies the following alternatives:

- Four Alternate Corridors (including Krome Avenue)
- No-Build Alternative
- Transportation System Management Alternative
- Action Plan Alternative
- Proposed Build Alternatives

The DEIS falls far short of closely examining a range of reasonable alternatives as the law requires.

The Four Alternate Corridors

FHWA identifies four alternate corridor locations, which include (1) SW 187th Avenue/Redland Road; (2) SW 182nd Avenue/Roberts Road; (3) SW 177th Avenue/Krome Avenue; and (4) SW 167th Avenue/Tennessee Road.

Because three of the four alternate corridors do not "address the critical need for improved safety on Krome Avenue,"[4] FHWA concludes that only the Krome Avenue option is a reasonable alternative worthy of additional discussion and analysis.

The primary purpose and need of this project, however, is not making Krome Avenue safer by improving (i.e. widening) Krome Avenue. Instead, the DEIS states, "the overall need for this project…is to address safety deficiencies along the entire study segment of the Krome Avenue Corridor."[5] There is no analysis of whether any of the three alternate corridors could otherwise address these safety deficiencies without having to resort to the expensive and most environmentally damaging alternative of widening Krome Avenue. For instance, by pursuing these or other alternate corridors, FHWA may be able to relieve congestion on Krome Avenue, thereby reducing the risk of accidents and improving the safety of Krome Avenue.

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[1] 40 C.F.R. § 1502.14.
[2] *Id.* § 1502.14(a).
[3] *Environmental Defense Fund v. Corps of Engineers*, 492 F.2d 1123, 1135 (5th Cir. 1974).
[4] *See* DEIS 2-17, 2-18.
[5] DEIS at 1-1; 1-3.

The case of *Town of Matthews v. U.S. Dep't. of Transportation*,[6] is instructive. In *Matthews*, DOT had proposed making Highway 51 in Matthews, North Carolina a straighter, wider road. The town of Matthews repeatedly asked DOT to include a bypass alternative. DOT dismissed the alternative on the basis that the purpose of the project was to repair the highway and thus only alternative methods of repairing the road were within the scope of the project and needed to be considered in the EIS. The Court disagreed, finding that the purpose of the project included not only repairing the road but also upgrading it to handle increased traffic needs. The court found that DOT failed to study bypass alternatives to determine whether diverting traffic away from Highway 51 would eliminate the need for the proposed improvements. The court concluded:

> [NEPA] does not permit the agency to eliminate from discussion or consideration a whole range of alternatives, merely because they would achieve only some of the purposes of a multi-purpose project…Obviously, any genuine alternative to a proposed action will not fully accomplish all of the goals of the original proposal. One of the reasons that Congress has required agencies to set out and evaluate alternative actions is to give perspective on the environmental costs, and the social necessity, of going ahead with the original proposal. [7]

Accordingly, FHWA must thoroughly examine alternate corridors that may otherwise accomplish the purpose of reducing congestion and improving the safety of Krome Avenue and compare their environmental impacts to that of the preferred alternative.

Transportation System Management Alternative

The Transportation System Management Alternative consists of upgrading deficient roadway areas with improved signage, turn lanes, pavement markings, and traffic signals. FHWA wastes little time in also rejecting this alternative, concluding that "this alternative will not satisfy the safety, capacity, and traffic operations improvement needs along this section of roadway."[8]

It appears FHWA bases its determination on certain short-term safety improvement projects that were implemented at ten intersections along Krome Avenue between 2003 and 2007. These improvements were made to reduce crashes at intersections. The DEIS states these improvements "did not substantially enhance...safety issues" and that "safety ratios have remained at or above twice the statewide average subsequent to these improvements." Yet, there is no discussion of what these "safety issues" are or what higher than average "safety ratios" mean. Did these improvements achieve their purpose of reducing crashes at intersections? To the extent that head-on and ran-off-the-road crashes remain a problem, the DEIS relies largely on speculation that increased

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[6] 527 F. Supp. 1055 (W.D. N.C. 1981).
[7] *Id.* at 1057 (internal citations omitted).
[8] DEIS at 2-23.

congestion leads to driver frustration, which results in these types of crashes.[9] Further, FHWA concedes that it did not anticipate that these short-term improvements would reduce those incidents, but the DEIS fails to explain whether additional improvements under the Transportation System Management Alternative could help alleviate those concerns in the future. Instead, FHWA summarily concludes that congestion along Krome Avenue is attributed to a lack of through lane capacity and high turning volumes and therefore any additional improvements under this alternative must be eliminated. NEPA requires more than just conclusory, self-serving statements and FHWA must provide a reasoned explanation as to why only additional lanes will relieve congestion and presumably reduce head-on and ran-off-the-road crashes.[10]

Proposed Build Alternatives

DEIS proposes five build alternatives. These include:

> *Alternative 1* (a two-lane divided rural roadway with a 148-foot-wide typical section)
>
> *Alternative 2* (a two-lane divided rural roadway with passing zones with a 160-foot-wide typical section)
>
> *Alternative 3* (a four-lane divided rural roadway with a 206-foot wide typical section)
>
> *Alternative 4* (a four-lane divided rural roadway, with a 172-foot-wide typical section)
>
> *Alternative 5* (a four-lane divided roadway, with a suburban typical section requiring 148-feet of right-of-way and a rural typical section requiring 166-feet of right-of-way).

Of these five alternatives, FHWA determines that Build Alternatives 1 and 2 will fulfill "some" of the purpose and need of the project while Build Alternatives 3, 4, and 5 would fulfill the purpose and need of the project.[11]

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[9] *See* DEIS at 1-5. FHWA states it is "evident that traffic volume growth and the resulting congestion have contributed to driver frustration and attempts to make risky maneuvers along Krome Avenue." Yet, the agency fails to cite a single study or other data to support its conclusion.

[10] *Seattle Audubon Soc'y v. Mosely*, 798 F.Supp. 1473, 1482 (W.D. Wash. 1992) ("[t]he agency may not rely on conclusory statements unsupported by data, authorities, or explanatory information."); *Earth Island Inst. v. U.S. Forest Service*, 442 F.3d 1147, 1160 (9th Cir. 2006) (An agency has acted arbitrarily and capriciously when it fails to make a reasoned decision based on an evaluation of evidence).

[11] DEIS at 2-47, 2-48.

FHWA's rejection of Build Alternatives 1 and 2 is flawed in several respects. While FHWA recognizes that Alternative 2 will increase safety with the establishment of a grass median, it concludes that "existing/future congestion will not be alleviated" even though the alternative calls for passing zones. Based on FHWA's prior logic, these improvements would presumably help reduce traffic congestion by providing additional lane capacity and allow "frustrated" drivers to pass slower vehicles (thereby also helping reduce head-on and off-the-road collisions). FHWA provides no support for its determination that Alternative 2 will not alleviate congestion.[12] Likewise, FHWA dismisses Build Alternative 1 for not alleviating congestion, not enhancing the corridor as an evacuation route and not being consistent with the Miami-Dade County CDMP, despite satisfying safety concerns, improving area water quality and quantity, having the least impacts to surface waters and the EEL property, requiring the fewest relocations, and having the lowest total cost.

It appears that FHWA's dismissal of Alternatives 1 and 2 and selection of a four-lane alternative as the preferred alternative stems in large part from a very narrowly defined purpose and need statement. In addition to identifying the overall purpose of the project as addressing safety deficiencies along Krome Avenue, FHWA includes a host of additional "needs" in its "purpose and need statement." These "needs" include both "project needs" (increased capacity and design deficiencies) and "area wide needs" (evacuation routes and emergency services, consistency with federal, state, or local government authority, social demand and economic development, and regional connectivity).[13] If this weren't enough, the DEIS includes several additional "objectives" an alternative must satisfy.[14] These "project needs," "area wide needs," and "objectives" serve as an exhausting set of project conditions which have the effect of defining the action so narrowly that only the preferred alternative would completely satisfy the agency's purpose and need statement. As courts have explained, the manner in which an agency defines the project's purpose "sets the contours for its exploration of available alternatives."[15] Therefore, an agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative would accomplish the goals of the agency's action, and "the EIS would become a foreordained formality."[16]

Accordingly, FHWA must reassess the purpose and need statement for this project and redefine it in such a way that allows for a reasonable range of alternatives to be fully considered and whose environmental impacts would be meaningfully measured against those of the preferred alternative.

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12 "A conclusory statement unsupported by empirical or experimental data, scientific authorities, or explanatory information of any kind not only fails to crystalize the issues, but affords no basis for a comparison of the problems involved with the proposed project and the difficulties involved in the alternatives." *Seattle Audubon Society*, at 1479.

13 DEIS at 2-46.

14 *Id.*

15 *Wyoming v. United States Dep't of Agric.*, 661 F.3d 1209, 1244 (10th Cir. 2011).

16 *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991).

Notwithstanding the need for a less narrowly defined purpose and need statement, NEPA still requires a full assessment of alternatives that only meet a portion of the stated need and purpose of a project.[17] As the Eleventh Circuit Court of Appeals explained in *North Buckhead Civic Association v. Skinner*, "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." Thus, even though Build Alternatives 1 and 2 may not satisfy every single one of the purposes identified by FHWA, FHWA must still provide a detailed analysis as to why these limitations outweigh their significant environmental benefits over the preferred alternative.

The Need for a Less Damaging Alternative

In summary, the FHWA has failed to "rigorously explore and objectively evaluate all reasonable alternatives,"[18] particularly those that do not require the expansion of Krome Avenue to four lanes. Of great relevance here is the "18 Mile Stretch" of US Highway 1 from Florida City in Miami-Dade County to Key Largo in the Monroe County (the Florida Keys). The original plans for that project called for doubling capacity and widening the road from two lanes to four. The project was controversial from the beginning due to the many of the same issues that are present here, such as inducing and facilitating additional growth and development.[19] After 15 years of review, controversy and litigation, the four-lane proposal was modified by a surgical set of roadway improvements that improved the road's ability to safely handle the existing and projected traffic volumes and improve the key safety needs of the existing road, with a substantially reduced environmental impact and without increasing its capacity to accommodate great traffic volumes.[20]

The proposed widening of Krome Avenue is within the same ecosystem, and begs for the same type of solution. Indeed, the Florida Department of Transportation has previously adopted the "Krome Avenue Action Plan," ("KAAP") consisting of a series of shoulder, intersection and other improvements to the entire length of Krome Avenue that would substantially increase its safety without necessitating expansion to four-lanes.

Reliance on the KAAP in lieu of expanding the entire length of Krome Avenue to four lanes was previously rejected by FDOT because at some point after the KAAP was completed and implementation began, the state began to project higher traffic volumes than those assumed in the KAAP. However, in light of more current information about the reduced population projections for Miami –Dade County, that issue is once again an

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[17] *North Buckhead Civic Association v. Skinner*, 903 F.2d 1533, 1542 (11th Cir. 1990) (citing *Natural Resources Defense Council, Inc. v. Callaway*, 524 F.2d 79, 93 (2nd Cir. 1975); *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 834-35 (D.C. Cir. 1972)).

[18] 40 C.F.R. § 1502.14 (a), (b).

[19] *See Florida Keys Citizens Coalition, Inc. v. United States Army Corps of Engineers*, 374 F.Supp.2d 1116 (S.D. Fla. 2005).

[20] *Id.* at 1130-1131.

open question and FHWA must prepare an alternatives analysis that considers this more current information.[21]

B. FHWA Unlawfully Segments a 37-Mile Road Widening Project.

As we explained in our October 16, 2013 comments to the U.S. Army Corps of Engineers regarding this project, the applicant, Florida Department of Transportation ("FDOT"), plans to expand the entire 37-mile length of Krome Avenue to four lanes. These plans are described in FDOT District 5's, Roadway Project Proposal and accompanying hearing notice and program details.

NEPA requires that agencies analyze the impacts of all phases of construction as "connected actions" and "cumulative actions."[22] Connected actions are actions which:

> automatically trigger other actions which may require environmental impact statements; cannot or will not proceed unless other actions are taken previously or simultaneously; and are independent parts of a larger action and depend on the larger action for their justification.[23]

Cumulative actions are those "which when viewed with other proposed actions have cumulatively significant impacts."[24]

The DEIS makes bare mention of the other segment of this project-the "Krome Avenue (North)" project[25]-and contains no analysis of how these actions when considered as a whole will affect the human environment. It simply lists this other segment as one of the "past, present, and reasonably foreseeable future actions with cumulative impacts on the areas of influence of the Krome Avenue project." NEPA demands more and requires a "hard look" of the project's cumulative effects.[26] All phases and segments of the Krome Avenue project are intertwined and can be viewed as "links in the same bit of chain."[27] Operating as connected and/or cumulative actions, the plan to widen Krome Avenue over the entire 36-mile stretch creates reasonably foreseeable impacts to wetlands, listed species, and 4(f) properties, and has significant growth inducing effects on the region. Therefore, the direct, indirect, and cumulative effects of the entire 37-mile proposal must be considered together with this 9.5-mile portion.

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[21] A long line of federal courts have held that agency reliance on data that is stale or inaccurate invalidates environmental review. *Northern Plains Resource Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1086 (9th Cir. 2011); *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005); *Seattle Audubon Soc. v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993).

[22] 40 C.F.R. § 1508.25.

[23] *Id.*

[24] *Id.* § 1508.25(a)(2).

[25] *See* DEIS at S-2, 4-76.

[26] *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976).

[27] *Northwest Resource Info. Ctr. v. NMFS*, 56 F.3d 1060, 1068 (9th Cir. 1995).

C. The DEIS Fails to Consider the Indirect, Growth Inducing Impacts of this Project.

Courts have long found that road projects, such as the proposed project, have indirect, growth inducing impacts.[28] As one federal judge put it, "one need not be an expert in traffic engineering or land-use planning to recognize that road building is a potential cause of urbanization."[29]

The DEIS does not adequately analyze the potential indirect, growth inducing impacts of this project and largely relies on existing policies within Miami-Dade County's Comprehensive Development Master Plan and current urban development boundary to argue that there is limited potential for growth inducing effects. While courts have permitted DOT in certain cases to refer to local land use plans in their analysis of a project's indirect effects, FHWA cannot rely on the CDMP in this instance to avoid having to address the potential growth inducing and cumulative effects of this project.

Unlike those cases where there may otherwise not be any currently pending projects in the area and FHWA turns to local plans as evidence of safeguards against future growth, FHWA identifies four developments of regional impact proposed for the area: Kendall Town Center, Parkland, Providence, and Florida City Commons.[30] Of these four DRIs, Kendall Town Center is currently under development and the Parkland DRI is currently under review.

The Parkland Development of Regional Impact (DRI) would result in increased development and may have widespread environmental impacts. The Parkland project would consist of the construction of 6,941 residential dwelling units; 200,000 sq. ft. of retail space; a 100,000 sq. ft. medical office complex; a 200 room hospital; a 550,000 sq. ft. industrial complex; two K-8 schools and one high school; 50,000 sq. ft. of community uses; and 67.6 acres of public parks.[31] A critical requirement for the advancement of the Parkland project is the widening of Krome Avenue. The Initial Recommendation on the Parkland DRI Application to Amend the Comprehensive Development Master Plan for Miami-Dade County, which was filed in association with the Application for Development Approval for the Parkland DRI, cites the need for substantial roadway improvements to sections of Krome Avenue because of anticipated significant impacts on

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[28] *See, e.g., N. Carolina Alliance for Transp. Reform, Inc. v. U.S. Dep't of Transp.*, 151 F. Supp. 2d 661, 696-97 (M.D. N.C. 2001).

[29] *See Highway J. Citizens Group v. U.S. Dep't. of Transp.*, 656 F. Supp. 2d 868 (E.D. Wisc. 2009) (citing Douglas S. Kelbaugh, *Repairing the American Metropolis* 22-26 (2002); H.V. Savitch, *Encourage, Then Cope: Washington and the Sprawl Machine, in Urban Sprawl: Causes, Consequences & Policy Responses* 141, 152 (Gregory D. Squires ed., 2002); Andres Duany et al., *Suburban Nation: The Rise of Sprawl and the Decline of the American Dream* 89-90 (2000)).

[30] DEIS at 1-13.

[31] http://www.miamidade.gov/govaction/matter.asp?matter=083577&file=true&yearFolder=Y2008

the roadway.[32] It also notes that the current roadway capacity of sections of Krome Avenue is insufficient to accommodate proposed development. That the widening of Krome Avenue is a requirement to the advancement of the Parkland DRI is explicitly stated in this document: "The applicant of the Parkland DRI is proposing…the construction of Krome Avenue, between SW 136 Street and SW 152 Street, as a four-lane facility. For this application to meet concurrency, these roadway improvements must be in place at the time of development construction."[33]

In addition to Parkland's reliance on the Krome Avenue expansion for its construction, and despite statements to the contrary, FHWA identifies economic development as a purpose of this project, and eliminates project alternatives in part because they "will not accommodate the social and economic demands of a growing future Miami-Dade County."[34]

Thus, not only does FHWA realize the potential for several DRIs to be developed within close proximity to Krome Avenue but the agency specifically considers the project's ability to accommodate economic development as an "area-wide need" relevant to its alternative selection process. Therefore, FHWA must consider what growth-inducing consequences this project will have on the region, particularly when it is pursuing a preferred alternative that it believes meets the need for economic development to a "high degree." Further, the agency must go beyond merely identifying the Parkland and Kendall Town Center DRIs as "past, present, and reasonably foreseeable future actions" for purposes of its cumulative impacts discussion, but actually analyze the cumulative effects these DRIs will have on the environment. For example, will the Kendall Town Center DRI generate additional traffic on Krome Avenue, thereby negating any benefits the agency envisions from widening the road to four lanes? This is not merely a theoretical inquiry nor is it only relevant to the proposed DRIs. As the court in *Highway J. Citizens Group v. U.S. Dep't. of Transportation* explained:

> A related problem is that of 'induced traffic'-that is, additional traffic resulting from motorists' decisions to take advantage of additional highway lanes. Expanding road capacity may cause induced traffic because the increased capacity makes driving less burdensome, and as a result, motorists who otherwise would not have used the roads decide to make additional or longer trips.[35]

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[32] http://www.miamidade.gov/planning/cdmp/Parkland/Parkland_Init_Recs.pdf

[33] *Id.* at 53-54.

[34] *See* DEIS at 2-23; 2-25; 2-46 (describing the ability of the no build, TSM, action plan, and Build Alternatives 1 and 2, to meet social demand/economic development as "nil."). FHWA's reliance on this "area wide need" as a factor in its decision-making process directly contradicts and cannot be reconciled with its position on page 4-1 that "economic development is not a project purpose."

[35] *Id.* (citing Andres Duany et al., *Suburban Nation: The Rise of Sprawl and the Decline of the American Dream* 89-90 (2000)).

The DEIS makes no mention of the potential for the preferred alternative, or any other alternative that calls for the expansion of Krome Avenue to four lanes, to induce additional traffic, thus defeating the intended purpose of reducing area congestion.

The FHWA must also discuss what these growth-inducing impacts may mean for the Comprehensive Everglades Restoration Plan (CERP). By attracting and encouraging further urban development in and around the Everglades, the expansion of Krome Avenue has the potential to significantly impede the ability of the State and Federal government to implement several CERP projects. One of the most critical aspects of Everglades restoration is securing significant amounts of land for water storage. As the amount of land available for water storage and other restoration uses is reduced, so are the chances of restoration success. There are numerous restoration projects planned for the vicinity of Krome Avenue. These projects include the North Lakebelt project, the Biscayne Bay Coastal Wetlands Project, the C-111 Spreader Canal Project and Federal Project, The 3A-3B Seepage Management Project, the Dade/Broward Levee Canal Project, the S-356/L31 North Seepage Management Project and the Modified Water Deliveries Project. All of these projects depend on a specific amount of land (to be purchased or otherwise secured) being used for water storage. If land acquisition costs rise as a result of increased market values or if needed lands are lost to development, the final design of these projects and others will be compromised, thus reducing restoration success. The FHWA must examine these potential indirect impacts of the proposed project.

II. The Proposed Project Does Not Comply with 4(f) of the Transportation Act

Section 4(f) of the Transportation Act prohibits the Secretary of Transportation from approving a transportation program or project requiring the use of publicly owned land of a public park, recreation area, or wildlife and waterfowl refuge of national, state, or local significance, or land of a historic site of national, state, or local significance unless:

> (1) there is no prudent and feasible alternative to using that land; and
> (2) the program or project includes all possible planning to minimize harm to the park, recreation area, wildlife and waterfowl refuge, or historic site resulting from the use.[36]

An alternative is "feasible" "if it can be built as a matter of sound engineering" and prudent "unless there are truly unusual factors present in a particular case or the cost or community disruption resulting from alternative routes reached "extraordinary magnitudes" or the alternative routes present "unique problems."[37]

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[36] 49 U.S.C. § 303(c).

[37] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 411-413 (1971).

FHWA has promulgated regulations interpreting 4(f)'s mandate. These regulations are set forth in 23 C.F.R. § 774. In addition to these regulations, DOT developed a "Section 4(f) Policy Paper" in 2012, providing agency guidance on administering Section 4(f).[38]

The DEIS states that Miami-Dade County's Owaissa Bauer Pineland Preserve Addition No. 1 was initially considered for "potential Section 4(f) involvement on the project" and "may be protected under the park or wildlife refuge category."[39] On April 11, 2006 Miami Dade County Department of Environmental Resources Management (DERM) submitted a letter to the Florida Department of Transportation in response to an information request regarding the "significance" of this property for purposes of a making a determination of applicability under 4(f).[40] DERM responded by indicating that the subject property is a "critically imperiled pine rockland, acquired for the purpose of conservation, that will function as a natural pine rockland preserve in perpetuity."[41] This property was designated by the Miami-Dade County Board of County Commissioners as an "Environmentally Endangered Lands" site and "has been ranked #1 on the State's Conservation and Recreation Lands (CARL) Bargain Share List as part of the 'Dade Archipelago' project. The site was acquired with 50-50 matching funds by the County and the State in order to protect its natural resources."[42] DERM further explained that the Florida Natural Areas Inventory designates pine rockland habitat as "critically imperiled globally" and this preserve serves as significant habitat for plants and animals. Several migratory bird species and raptors have been observed on site.[43] "This preserve is a natural preserve of Statewide significance."[44]

On May 24, 2006 and again on June 19, 2006, FDOT sent a letter to FHWA stating that it was their opinion that Section 4(f) does not apply and on June 19, 2006, FHWA "concurred" with FDOT's determination.[45]

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[38] U.S. Department of Transportation, Federal Highway Administration, Office of Planning, Environment, and Realty, Project Development and Environmental Review, *Section 4(f) Policy Paper*, July 20, 2012 (Hereinafter "Section 4(f) Policy Paper").

[39] DEIS at 3-17.

[40] Letter from Emillie M. Young, Program Director, Environmentally Endangered Lands Program, Department of Environmental Resources Management to Alice Bravo, Florida Department of Transportation, District Planning and Environmental Management Office, April 11, 2006. (Included in DEIS, Appendix K).

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] This "concurrence" consists of a simple "check mark" and signature at the bottom of FDOT's June 19, 2006 letter. The DEIS and appendices contain no documentation in support of FHWA's concurrence. NEPA requires agencies to disclose their analysis in the EIS itself to promote informed public participation and informed decisionmaking. *Highway J. Citizens Group*, 656 F. Supp. 2d 868 (citing *False Pass v. Watt*, 565 F.Supp. 1123, 1141 (D. Alaska 1983) ("The adequacy of the environmental impact statement itself is to be judged solely by the information contained in that document.")).

It is not entirely clear from FDOT's "Section 4(f) Determination of Applicability" just why FDOT believes this site is not a "wildlife refuge" for purposes of 4(f). FHWA also provides no explanation as part of its concurrence. It appears, however, that this determination was made based the site's primary function of providing habitat for rare plant species, rather than animals, even though several federally protected migratory birds use the site.[46]

FDOT's determination and FHWA's concurrence is arbitrary and capricious. In fact, FHWA's own guidance supports a finding that Owaissa Bauer Pineland Preserve Addition No. 1 is a "wildlife refuge" within the meaning of 4(f).

The term "wildlife and waterfowl refuge" is not defined under the Transportation Act or the agency's implementing regulations.[47] As FHWA explains however, the National Wildlife Refuge System Administration Act (Pub. L. 89-669, 80 Stat. 926) was passed in 1966 on the same day as Section 4(f).[48] Accordingly, FHWA considers this contemporaneous legislation in its implementation of Section 4(f) regarding "refuges."[49] "For purposes of 4(f), National Wildlife Refuges are always considered wildlife and waterfowl refuges by FHWA in administering Section 4(f)."[50]

Since the enactment of the National Wildlife Refuge System Administration Act in 1966, Congress passed the National Wildlife Refuge Improvement Act in 1997 providing the U.S. Fish & Wildlife Service further direction in its administration of the National Wildlife Refuge System.[51] The Refuge Improvement Act makes plant conservation a priority of the refuge system and sates in pertinent part:

> "The System was created to conserve fish, wildlife, and *plants and their habitats*…"[52]
>
> "The Mission of the System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and *plant resources and their habitats* within the United States for the benefit of present and future generations of Americans."[53]
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> "In administering the System, the Secretary [of the Interior] shall-provide for the conservation of fish, wildlife, and plants, and their habitats within the

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[46] *See* DEIS, Appendix K, "Section 4(f) Determination of Applicability, May 2006 at 4-5.
[47] *See* "Section 4(f) Policy Paper" at 26.
[48] *Id.*
[49] *Id.*
[50] *Id.* (emphasis added).
[51] Pub. L. 105-57 (codified at 16 U.S.C. §§ 668dd, 668ee).
[52] 16 U.S.C. § 668dd (note) (emphasis added).
[53] *Id.* § 668dd(a)(2) (emphasis added).

system…[and] monitor the status and trends of fish, wildlife, and *plants* in each refuge."[54]

In fact, over the years the U.S. Fish & Wildlife Service has established refuges for the primary purpose of plant conservation.[55] One of these refuges, Lake Wales Ridge National Wildlife Refuge, is right here in Florida.[56]

Further, it is FHWA's stated position that the term "wildlife refuge" encompasses more than just federal national wildlife refuges. FHWA states that "any significant publicly owned public property (including waters) where the primary purpose of such land is the conservation, restoration, or management of wildlife and waterfowl resources, including, but not limited to, endangered species and their habitat is considered by FHWA to be a wildlife and waterfowl refuge for purposes of Section 4(f)."[57] FHWA provides examples in its Policy Paper of properties that may function as wildlife and waterfowl refuges for purposes of Section 4(f). These examples include "…a wildlife reserve, preserve or sanctuary…that are permanently set aside (in a form of public ownership) primarily for refuge purposes."[58]

In view of FHWA's position that "wildlife refuges" can include federal, state, and local public lands, that all national wildlife refuges are considered 4(f) properties regardless of their primary purpose, that one of the primary missions of the federal refuge system is to conserve plant resources, and that some national wildlife refuges have been established primarily for the preservation of plants, including endangered plants, FHWA's apparent position that the Owaissa Bauer Pineland Preserve Addition No. 1 is not a "wildlife refuge" within the meaning of 4(f) is inconsistent with the agency's own guidance and practices. This property seeks to protect critically imperiled habitat for several state listed and federal candidate plant species, much in the same way that the United States Fish & Wildlife Service does through refuges like Lake Wales Ridge. FHWA's

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[54] *Id.* § 668dd(a)(4) (emphasis added). The Refuge Improvement Act further establishes a "comprehensive conservation planning" process and the Secretary of the Interior must "identify and describe…the distribution, migration patterns, and abundance of fish, wildlife, and *plant* populations and related habitats within the planning unit" as well as "significant problems that may adversely affect the populations and *habitats of* fish, wildlife, and *plants* within the planning unit and the actions necessary to correct or mitigate such problems." *Id.* § 668dd(e)(2) (emphasis added).

[55] One example is the Antioch Dunes National Wildlife Refuge, founded in 1980 to protect endangered plants and insects-the Antioch evening primrose, the Contra Costa wallflower, and the Lange's metalmark butterfly. *See* http://www.fws.gov/refuge/Antioch_Dunes/about.html.

[56] *See* U.S. Fish & Wildlife Service, "Lake Wales Ridge National Wildlife Refuge" at http://www.fws.gov/refuges/profiles/index.cfm?id=41577 ("Lake Wales Ridge National Wildlife Refuge is the first Refuge designated primarily for the preservation of endangered plants"). Lake Wales Ridge contains 23 listed plants and was "envisioned to protect the last vestiges of a globally imperiled ecosystem where plants found nowhere else on earth exist." http://www.fws.gov/lakewalesridge/ccp/index.html

[57] Section 4(f) Policy Paper at 26.

[58] *Id.*

determination that this property does not qualify as a 4(f) property cannot be reconciled with the agency's position on national wildlife refuges and is arbitrary and capricious.

As a 4(f) property that will undoubtedly be "used" by all of the four-lane project alternatives,[59] FHWA must determine that no prudent and feasible alternative to using the Owaissa Bauer Pineland Preserve Addition No. 1 exists before going any further in the decision-making process. Clearly, there remain several less impactful alternatives for the agency to choose from, as well as alternatives that would avoid impacting this critically important property all together, and FHWA must reconsider its selection of the preferred alternative. Failure to do so will violate 4(f) of the Transportation Act.

III. The Proposed Project Violates the Endangered Species Act

If a federal project may affect a listed species, the action agency (FHWA) must engage in "consultation" with the U.S. Fish & Wildlife Service ("Service") under Section 7 of the ESA. Section 7 is the central enforcement provision that operates to prohibit federal agencies from authorizing, funding, or otherwise carrying out any action that is likely to "jeopardize" the continued existence of an endangered species or result in the destruction or adverse modification of the species' critical habitat.[60] 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."[61]

The Service's implementing regulations set forth the specific process for consultation.[62] The process begins with the action agency requesting from the Service information regarding whether any listed or proposed species may be present in the area of the agency action.[63] The "action area" means "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action."[64] If listed species may be present, the action agency may prepare a "biological assessment" to determine whether the listed species will likely be adversely affected by the proposed action.[65] If the action agency determines that the proposed action is likely to adversely affect a listed species or adversely modify its critical habitat, the agency must engage in formal consultation with the Service.[66] The threshold for triggering formal consultation is "very low" and "any possible effect…triggers formal consultation requirements."[67]

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[59] That this property will be "used" by several of the project build alternatives, including the preferred alternative, is not in dispute. *See* DEIS at 4-41-4-43.
[60] *Id.* § 1536(a)(2).
[61] 50 C.F.R. § 402.02.
[62] *See* 50 C.F.R. § 402
[63] 50 C.F.R. § 402.14(a).
[64] *Id.* § 402.02.
[65] 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12.
[66] 50 C.F.R. § 402.14.
[67] 51 Fed. Reg. 19, 949-19,950 (June 3, 1986).

During formal consultation the Service must review all relevant information, evaluate the status of the listed species, "evaluate the effects of the action and cumulative effects on the listed species," and formulate its biological opinion as to "whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species…"[68] The Service's evaluation must be based on the "best scientific and commercial data available."[69] This process culminates in the issuance of a "biological opinion" explaining how the proposed action will affect the listed species or critical habitat.[70]

If the biological opinion concludes that the proposed action will "jeopardize the continued existence" of a listed species or adversely modify its critical habitat, the biological opinion must outline "reasonable and prudent alternatives" to the proposed action.[71] If, on the other hand, the biological opinion concludes that the action is not likely to jeopardize the continued existence of a listed species, and will not result in the destruction or adverse modification of critical habitat, the Service must provide an incidental take statement ("ITS"), specifying the amount or extent of such incidental taking on the listed species, any "reasonable and prudent measures" that the Service considers necessary or appropriate to minimize such impact, and setting forth the "terms and conditions" that must be complied with by the action agency to implement those measures.[72]

There is no record of the Federal Highway Administration, U.S. Army Corps of Engineers, or any other federal agency having ever consulted with the U.S. Fish & Wildlife Service regarding the project's impacts to the endangered Florida Panther. There is also no discussion in the DEIS of the project's impacts to panthers. On June 26, 2007 a four-year old male panther known as UCFP101 was struck and killed by a vehicle one mile east of Krome Avenue.[73] A web-based search of biological opinions prepared by the Service over the last few years reveals three telemetry points along Krome Avenue just south of US 41 as well as numerous panther telemetry points along and outside the eastern edge of Everglades National Park. These data points occur within just a few miles of Krome Avenue and well within the 25-mile "action area" the Service often relies on in its biological opinions to assess projects that may adversely affect the panther.[74] Given

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[68] 50 C.F.R. § 402.14(g)(1)-(4).
[69] 16 U.S.C. § 1536 (a)(2).
[70] *Id.* § 1536(b); 50 C.F.R. § 402.14.
[71] 16 U.S.C. § 1536(b)(3)(A).
[72] *Id.* § 1536(b)(4); 50 C.F.R. § 402.14(i).
[73] Annual Report on the Research and Management of Florida Panthers, 2011-2012, Florida Fish & Wildlife Conservation Commission 25, 2012.
[74] *See* U.S. Fish and Wildlife Service, Biological Opinion for the Tamiami Trail Modifications: Next Steps Project, at 139 (October 18, 2010) available at http://www.fws.gov/verobeach/verobeach_old-dont_delete/images/biologicalopinion/20101018_Memo_Service%20to%20NPS_BO%20FA0398%20Tamiami%20Trail%20Mod%20Next%20Steps.pdf.

that vehicle collisions remain one of the leading causes of panther mortality,[75] and the number of panthers recorded in the area over recent years,[76] it is inexplicable why FHWA has not consulted with the Service regarding the project's impacts to species and what measures may need to be implemented to avoid and minimize the "take" of this species. FHWA's failure to consult not only violates the procedural requirements of Section 7 of the ESA but also its substantive requirement that an agency ensure its actions do not jeopardize the continued existence of an endangered species.

Conclusion

Thank you for the opportunity to provide public comments on this project. We urge the FHWA to abandon its preferred alternative and avoid engaging in an activity that will have significant, adverse environmental impacts to the region. Please send me at the above address all future notices, announcements, EISs, decision notices, bid announcements, and contracts for this project.

Sincerely,

Jason Totoiu
General Counsel
Everglades Law Center

Counsel for National Parks Conservation Association, Tropical Audubon Society, Clean Water Action, and 1000 Friends of Florida.

Cc:

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Biscayne Restoration Program Analyst
National Parks Conservation Association

Laura Reynolds
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[75] *See* Florida Fish & Wildlife Conservation Commission, News Release, "New Speed Zone on Hendry Highway Will Help Protect Florida Panther," April 3, 2012 at http://myfwc.com/news/news-releases/2012/april/03/panther-hendry-zone/

[76] Of course the telemetry data does not take into account un-collared panthers, particularly young males that may be dispersing across the vicinity of the project. The Service notes that young male panthers have a mean dispersal distance of 24.9 miles and a mean maximum dispersal distance of 42.3 miles. *See supra* note 74 at 10.

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