Everglades
Law Center, Inc.
Defending Florida's Ecosystems and Communities

www.evergladeslaw.org

Northern Everglades Office

P.O. Box 2693
Winter Haven, FL 33883
Phone: (561) 568-6740

May 12, 2014

Larry Williams
Field Supervisor
U.S. Fish & Wildlife Service
South Florida Ecological Services Office
1339 20th Street
Vero Beach, Florida 32960

RE: State Road 7 from Okeechobee Boulevard to Northlake Boulevard

Dear Mr. Williams,

We are writing on behalf of the Sierra Club (Loxahatchee Group) and Florida Wildlife Federation in regards to the State Road 7 project in Palm Beach County proposed by the Florida Department of Transportation ("FDOT") and Federal Highway Administration ("FHWA"). We are deeply concerned that FDOT and FHWA (in consultation with the U.S. Fish & Wildlife Service) have not avoided or minimized the project's impacts to the endangered Everglade snail kite and are instead relying mostly on mitigation in hopes of offsetting the project's impacts to the species.

Section 7(a)(2) of the Endangered Species Act states "each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency...is not likely to jeopardize the continued existence of any endangered species." The consultation process culminates with the Service's issuance of a biological opinion on the proposed project.

In preparing a biological opinion where the Service has determined that an action will jeopardize the continued existence of a listed species, the Service shall set forth "those reasonable and prudent alternatives which he believes would not violate subsection (a)(2) and can be taken by the Federal agency or applicant in implementing the agency action." 16 U.S.C. § 1536(b)(3)(A). Reasonable and prudent alternatives" are those that are "economically and technologically feasible, and that the Director believes would *avoid* the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat." 50 C.F.R. 402.02 (emphasis added).

Further, in preparing a biological opinion where the Service has determined that an action will not jeopardize a listed species, 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) (emphasis added).

Based on the plain language of the Endangered Species Act, the Service has a non-discretionary statutory obligation to identify alternatives to the proposed action that would "avoid" jeopardy. Further, where an action would not jeopardize the species, the Service must still "minimize" takes to listed species, develop reasonable and prudent measures, and set forth terms and conditions to implement these measures to achieve such minimization.[1] The Service must make 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).

Thus, Section 7 requires federal agencies, in consultation with the Service, to *avoid and minimize* impacts to the Everglade snail kite. Mitigation should only be considered after the Service explores ways to avoid and minimize impacts. This approach is also consistent with Section 404 of the Clean Water Act and state environmental resource permitting requirements,[2] which FDOT and FHWA must comply with due to the project's wetland impacts.

To date it appears FHWA and FDOT are continuing to pursue an alignment that will directly and indirectly impact snail kites foraging and nesting in Grassy Waters Preserve and other nearby wetlands. Instead of taking significant steps to

---

[1] For example, in *Ctr. for Biological Diversity v. BLM*, 422 F.Supp.2d 1115, 1140-41 (N.D. Cal. 2006), the court found the Service's failure to include any terms and conditions that specifically addressed minimizing the impact of off-road vehicles to listed desert tortoises, "violates the plain language of the ESA."

[2] *See Fla. Wildlife Fed'n v. United States Army Corps of Eng'rs*, 401 F.Supp.2d 1298, 1308 (S.D. Fla. 2004). Under section 404 of the Clean Water Act, the applicant must avoid wetland impacts, where reasonably possible. Second, the applicant must minimize impacts where unavoidable. Third, and finally, if all practicable project modifications have been accomplished and the project will nonetheless result in wetland loss, the applicant must compensate for this loss through mitigation. *See* Margaret "Peggy" Strand & Lowell M. Rothschild, Wetlands Deskbook, 92-93 (3rd Ed. 2009) (citing Memorandum of Agreement Between the U.S. Environmental Protection Agency and U.S. Department of the Army, Determination of Mitigation Under the Clean Water Act 404(b)(1) Guidelines (effective Feb. 7, 1990)). This approach has been codified in 33 C.F.R. 332.1(c)(1). *Id.* The South Florida Water Management District's "Basis of Review," similarly states that an applicant must make all practicable modifications to the development proposal that would "eliminate" or "reduce" impacts upon wetlands. "Any adverse impacts remaining after practicable design modifications have been implemented may be offset by mitigation." Basis of Review for Environmental Resource Permit Applications Within the South Florida Water Management District at 4.2.1.

avoid and minimize these impacts in the first place the agencies are relying mostly on a "conceptual mitigation plan" that focuses predominately on off-site habitat preservation. Although off-site habitat preservation can provide environmental benefits, the Endangered Species Act requires more than just protecting habitat from being impacted in the future. The Service must assess not only the impacts of the agency action on the survival of the species, but *also on its recovery*. 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."[3] "Recovery means more than just improved status; it means improvements to the point where the species may be delisted."[4]

Thus, allowing maximum take of a listed species in exchange for merely preserving habitat elsewhere is inconsistent with the survival *and recovery* mandate of Section 7. **Accordingly, the predominate focus here should be on avoiding and minimizing the impact**, particularly given that the Service has "concerns regarding the Everglades snail kite *population's* ability to withstand the likely adverse effects of the proposed project."[5] Moreover, to the extent mitigation measures are utilized, such measures must be "reasonably specific, certain to occur, and capable of implementation; they must be subject to deadlines or otherwise-enforceable obligations; and most important, they must address the threats to the species in a way that satisfies the jeopardy and adverse modification standards."[6] To date, it does not appear FDOT's "conceptual mitigation plan" meets these requirements, particularly the latter. According to the Service in its December 13, 2013 letter to FHWA, the Pine Glades North Mitigation Area does not appear to compensate for the loss of snail kite nesting habitat and it remains unclear what habitat value the Rangeline Corridors provide for snail kites.

We appreciate the Service's consideration of our comments and urge the agency to continue to engage in a thorough and comprehensive analysis of the project's direct, indirect, and cumulative effects to the endangered Everglade snail kite.

Sincerely,

Jason Totoiu
Counsel for Sierra Club (Loxahatchee Group) and Florida Wildlife Federation

---

[3] *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 930 (9th Cir. 2008).
[4] *Ctr. for Biological Diversity v. Provencio*, No. CV 10-330, 2012 WL 966031 at *12 (D. Ariz. Jan. 23, 2012).
[5] *See* June 25, 2013 letter from Larry Williams, U.S. Fish & Wildlife Service to Joseph Sullivan, Federal Highway Administration (emphasis added).
[6] *Ctr. for Biological Diversity v. Rumsfeld*, 198 F.Supp. 2d 1139, 1152 (D. Ariz. 2002) (citing *Sierra Club v. Marsh*, 816 F.2d 1376 (9th Cir. 1987)).

CC:

John Wrublick
U.S. Fish & Wildlife Service
South Florida Ecological Services Office
1339 20th Street
Vero Beach, Florida 32960

Garett Lips
U.S. Army Corps of Engineers
4400 PGA Boulevard, Suite 500
Palm Beach Gardens, Florida 33410