



February 21, 2012

SENT VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

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(via U.S. mail and email)

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Department of the Interior
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Secretary Tom Vilsack
U.S. Department of Agriculture
1400 Independence Ave., S.W.
Washington, DC 20250

Secretary John Bryson
U.S. Department of Commerce
1401 Constitution Ave., NW
Washington, D.C. 20230

Re: 60-Day Notice of Intent to Bring a Citizen Suit under the Endangered Species Act for Violations of Section 7

Dear Sirs:

On behalf of Florida Defenders of the Environment (“FDE”) and Florida Wildlife Federation (“FWF”) and pursuant to Section 11(g) of the Endangered Species Act (“ESA”), 16 U.S.C. § 1540(g)(2)(C), this letter provides notice of FDE’s and FWF’s intent to bring a civil action in federal district court for violations of the ESA, 16 U.S.C. §§ 1531 *et seq.*, and its implementing regulations, 50 C.F.R. §§ 402 *et seq.* The lawsuit will allege that the U.S. Forest Service has violated and continues to violate Section 7 of the ESA as described in this letter.

The names, addresses and phone numbers of the organizations giving notice of intent to bring a civil action are as follows:

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I. Background

In 1942, Congress authorized the construction of the Cross Florida Barge Canal for the purposes of promoting national defense and facilitating the safe transport of military supplies. Pub. L. No. 77-675, 56 Stat. 703 (July 23, 1942). Proponents had been advocating for a cross-Florida canal for decades, but the final plan was largely a response to heavy shipping losses through the Florida Straits during World War II. The Canal was designed as a 107-mile barge canal connecting Palatka on the St. John's River to Yankeetown on the Gulf of Mexico. The proposal also called for the impoundment of the Ocklawaha River at Rodman Dam (now called, "Kirkpatrick Dam").

In 1964, the U.S. Army Corps of Engineers (the "Corps") began constructing the Canal and in 1968, a dam, now known as Kirkpatrick Dam, was completed. The dam is approximately 6,800 feet long, with nearly 2,800 feet occupying public lands in the Ocala National Forest. The dam permanently impounded the Ocklawaha River, flooding approximately 9,000 acres of floodplain forest, including approximately 600 acres in the Ocala National Forest, by creating an artificial impoundment known as Rodman Reservoir. As part of the Canal project, the Corps dredged and constructed a navigation channel and lock, which connected the Ocklawaha River impoundment to the lower St. John's River.

On January 19, 1971, President Richard Nixon ordered a "halt to further construction of the Cross Florida Barge Canal to prevent potentially serious environmental damages." *U.S. v. 2,997.06 Acres of Land*, 471 F.2d 320, 325 n.8 (5th Cir. 1972). One week later, the U.S. District Court for the District of Columbia issued an order enjoining any further construction of the canal, citing the "strong probability" that further construction would "irreparably damage marine and plant life and a primary source of drinking water for the State of Florida." *Environmental Defense Fund v. Corps of Engineers*, 324 F.Supp. 878 (D.D.C. 1971). Only a third of the canal was ever completed.

In the years that followed, numerous state and federal agencies and officials recommended restoring the Ocklawaha River to its natural state. The Florida Game and Fresh Water Fish Commission and the U.S. Forest Service repeatedly expressed support for draining Rodman Reservoir, restoring the Ocklawaha River, and

establishing it as a National or State Wild and Scenic River. In the late 1970s, President Carter, Florida Governor Reubin Askew, and numerous independent scientists concurred with state and federal agencies' recommendations to restore the river. In fact, every Florida Governor since Governor Askew supported restoration. In 1990, Congress officially de-authorized the Cross Florida Barge Canal. Pub. L. No. 101-640 § 402, 104 Stat. 4644 (Nov. 28, 1990). Despite this near unanimous support for restoration, specific proposals stalled, primarily due to opposition from the organized bass fishing community.

In 1991, the Corps transferred ownership of Kirkpatrick Dam to the State of Florida. Because a substantial portion of Kirkpatrick Dam is on the Ocala National Forest and the reservoir has inundated approximately 600 acres of U.S. Forest Service land, the State is required to obtain a Special Use Permit under the National Forest Management Act ("NMFA") to continue operating the dam on National Forest land.

On January 21, 1994, the U.S. Forest Service issued the Florida Department of Environmental Protection ("FDEP") a Special Use Permit, which authorized FDEP to maintain and operate Kirkpatrick Dam on Ocala National Forest lands for a period of five years. The permit specifically provided that upon termination or expiration of the permit, FDEP shall remove within a reasonable time all structures and improvements, and restore the site. The permit further provided that if FDEP failed to remove all structures within a reasonable time, the structures would become the property of the United States. *See* 1994 Special Use Permit ¶ V.D.; 36 C.F.R. § 251.60(i).

FDEP's permit for Kirkpatrick Dam expired on December 31, 1999, but the U.S. Forest Service twice extended it to allow the State additional time to apply for a new occupancy permit describing their management intentions and providing environmental analysis to support their proposal.

In 1999, FDEP and the Forest Service began the process of developing a revised Special Use Permit. As part of that process, FDEP tentatively agreed to partially restoring the Ocklawaha River, which required the development of a biological opinion under the Endangered Species Act and an Environmental Impact Statement under the National Environmental Policy Act ("NEPA").

In March 2001, the Forest Service issued a Notice of Intent to prepare an Environmental Impact Statement ("EIS") for the Occupancy and Use of National Forest Lands and Ocklawaha River Restoration. 66 Fed. Reg. 15,686 (March 20, 2001). In December 2001, U.S. Forest Supervisor Kearney signed a Record of Decision ("ROD") for the Occupancy and Use of National Forest Lands and Ocklawaha River Restoration,

which approved the continued use and occupancy of Ocala National Forest lands while the State of Florida was to complete a four-year “partial restoration of the Ocklawaha River.” 67 Fed. Reg. 2,651 (Jan. 18, 2002).¹ As outlined in the ROD:

Allowing the occupancy and use of National Forest land will require the State of Florida to obtain a Special Use Permit for Kirkpatrick Dam, Eureka Lock and Dam, and flooding of National Forest land. The implementation of this decision will be the reissuing of the Special Use Permit, which allows the continued use as long as progress is being made on the restoration effort based on the proposed schedule in the Special Use Permit. . . . If progress is not being made in accordance with the phased time line scheduled, then that would constitute grounds for revocation of the Special Use Permit.

ROD, at 11.

During preparation of the EIS, the Forest Service entered formal consultation with the U.S. Fish and Wildlife Service (“FWS”), pursuant to Section 7 of the ESA. FWS issued a Biological Opinion (“BiOp”) addressing the impacts of the proposed Special Use Permit and the partial restoration on endangered manatees and bald eagles. The BiOp noted that the leading cause of manatee mortality in the action area was the operation of Kirkpatrick Dam and Buckman Lock. Because the proposed action involved removal of those structures, the BiOp concluded the proposed restoration would have a positive effect on manatee. The BiOp concluded the proposed partial restoration would not jeopardize the continued existence of manatees or bald eagles. The BiOp further concluded that incidental takes were not anticipated for manatees. Additionally, the National Marine Fisheries Service (“NMFS”) concurred with the Forest Service’s earlier conclusion that the proposed restoration project would have “no adverse effect” on listed shortnose sturgeon. These “no jeopardy” and “no adverse effect” conclusions were predicated on the partial restoration of the Ocklawaha River as described in the EIS and accompanying ROD. In addition, both FWS and NMFS informed the Forest Service that reinitiation of consultation could become necessary if the amount of incidental take is exceeded, or the agency action is modified in a manner that causes an effect to the listed species not considered in the BiOp.

¹ Partial Restoration was to consist of restoring river hydrology and floodplain function to preconstruction conditions through breaching of the dam, with limited removal and/or alteration of structures and alteration of topography.

On May 30, 2002, the Forest Service prepared the Special Use Permit for FDEP to sign and accept. Shortly thereafter, however, FDEP refused to accept the permit. The State notified the Forest Service it “cannot meet the terms and conditions of the permit, [FDEP] feels obligated to return your land back to you, the U.S. Forest Service, along with the unsigned special use permit.” Under the Forest Service’s regulations, FDEP’s refusal to sign the permit resulted in the termination of the application and the denial of the requested use and occupancy of the Ocala National Forest. 36 C.F.R. § 251.62. Since then, FDEP has maintained and operated the Kirkpatrick Dam and reservoir without any valid permit in place.

In March 2010, the U.S. Forest Service again prepared a Special Use Permit for FDEP to sign and accept. The 2010 permit would have authorized the operation and maintenance of Kirkpatrick Dam, along with the partial restoration of the Ocklawaha River, as described in the 2002 EIS. The permit was again contingent on FDEP obtaining funding and permits necessary to implement and complete the partial restoration, and implementing mitigation actions. FDEP again declined to sign and accept the permit. As a result, there is no Special Use Permit in place for the Kirkpatrick Dam and reservoir.

II. Section 7(a)(2)

Section 7(a)(2) of the ESA requires federal agencies to “insure” that “any action authorized, funded, or carried out by such agency” will not jeopardize the continued existence of any threatened or endangered species. 16 U.S.C. § 1536(a)(2). If an agency determines that an “action may affect listed species or critical habitat,” the agency must prepare a Biological Assessment that “evaluate[s] the potential effects of the action on listed and proposed species and . . . critical habitat and determine[s] whether any such species or habitat are likely to be adversely affected by the action.” 50 C.F.R. § 402.12. If the agency finds evidence of an adverse impact on any listed species, it must engage in formal consultation and prepare a Biological Opinion addressing whether the proposed action is likely to jeopardize the continued existence of the species. 50 C.F.R. § 402.12. If so, the BiOp must list reasonable and prudent alternatives that would avoid jeopardy. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14.

The BiOp must also specify whether any “incidental taking” of protected species will occur as a result of the proposed action. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 17.3. If so, the BiOp must include an “Incidental Take Statement” (“ITS”) that specifies the extent of the take, and any terms and conditions to minimize such impacts. *Id.*

Importantly, the incidental take statement functions as a safe harbor provision, insulating persons from Section 9 liability for takings committed during activities that are otherwise lawful and in compliance with the terms and conditions of the ITS. 16 U.S.C. § 1536(o). Any such incidental taking “shall not be considered to be a prohibited taking of the species concerned.” *Id.* Although the action agency is “technically free to disregard the Biological Opinion and proceed with its proposed action . . . it does so at its own peril.” *Bennett v. Spear*, 520 U.S. 154, 170 (1997). Thus, if the agency or applicant disregards the terms and conditions of an ITS, they may be subject to penalties under Section 9.

Finally, an agency must immediately reinitiate Section 7 consultation “where discretionary Federal involvement or control over the action has been retained or is authorized by law” and:

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
- (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16.

The original BiOp and its no jeopardy determination for listed manatee were based on the removal of Kirkpatrick Dam and the associated structures and the restoration of the Ocklawaha River. Similarly, NMFS’s “no adverse effect” determination for listed shortnose sturgeon was predicated on the removal of the dam. The Forest Service has, however, allowed the State of Florida to maintain the dam and its related structures on National Forest land. As a result, the no jeopardy and no adverse effect determinations rely on actions that have not occurred, and are therefore no longer applicable.

Manatees

The original BiOp's incidental take statement did not allow for any take of manatees. The leading cause of manatee mortality in the action area, however, is related to the operation and maintenance of Kirkpatrick Dam and Buckman Lock. The structures have crushed or drown manatees as they migrate between the Ocklawaha and St John's Rivers. Despite the installation of manatee protection devices at the Buckman Lock, manatees continue to pass through the system and have been spotted in Rodman Reservoir and in the river upstream of the lock.² Once in the impoundment, these manatees can follow the old river channel to the spillway where they continue to be at risk of harm by getting caught in the gates. Additionally, the manatee protection devices have malfunctioned in the past and have been closed periodically for repairs.³ Removal of Kirkpatrick Dam would have removed the main cause of manatee mortality in the area and would have re-opened the species' natural migration corridor. The Forest Service's failure to either eject the State of Florida or compel the state to implement the Ocklawaha River restoration plan as contemplated by the original BiOp represents a change in circumstances requiring reinitiation of consultation. 50 C.F.R. § 402.16(a)-(c).

Further, the existence of the dam blocks or impedes access to important manatee migratory and wintering areas along the upper Ocklawaha River, including Silver Springs. If the Ocklawaha River was restored allowing uninterrupted access to this system by manatees, Silver Springs and the Silver River could provide warm water habitat for many hundreds of manatees.⁴

In addition, there is information suggesting that the loss of warm water refugia in the lower St John's River has resulted in increased numbers of manatees migrating through the Ocklawaha River in search of alternative refugia. The increase in numbers

² See Report indicating manatees spotted upstream of lock in 2011 *available at* <http://sites.google.com/site/ocklawahaman/manatees-of-the-ocklawaha-river-fl>

³ See *e.g.*, U.S. Coast Guard, Local Notices to Mariners, Notice No. 31-05 (Aug. 2, 2005); Notice No. 27-05 (July 6, 2005); Notice No. 22-05 (June 1, 2005); Notice No. 1405 (Apr. 5, 2005).

⁴ Survey of Rodman Reservoir and middle-Ocklawaha River springs during spring 2008 draw-down conditions: FWC and FWS (February 26, 2008) *available at* http://www.savethemanatee.org/FWC_USFWS_survey.pdf

and frequency of manatees in the Ocklawaha River raises the potential for increased mortality as a result of the operation of the dam and lock. Because this potential increase in harm to manatees was not previously considered, the Forest Service must reinitiate consultation. 50 C.F.R. § 402.16(b).

Shortnose Sturgeon

Similarly, NMFS's concurrence with the Forest Service's conclusion that the proposed action would have no adverse effect on shortnose sturgeon was also based on implementation of the proposed restoration. NMFS recognized that the "[r]emoval of the dam and restoration of the Ocklawaha River to its natural state could potentially provide additional spawning habitat for the shortnose sturgeon." EIS, at Appendix J, p. J-7 (concurrence letter from NMFS). Because the Forest Service has allowed the dam to remain in place, the agency must reinitiate consultation to examine the impacts to this listed species.

III. Section 7(a)(1)

Section 7(a)(1) of the ESA requires all federal agencies to "utilize their authorities in furtherance of the purposes of the" Act. 16 U.S.C. § 1536(a)(1). Section 7(a)(1) requires federal agencies, such as the Forest Service, to "carry[] out programs for the conservation" of listed species. *Id.* "Conservation" means to use "all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to the [ESA] are no longer necessary." 16 U.S.C. § 1532(3). By its terms, Section 7(a)(1) requires the Forest Service to carry out a conservation program for endangered manatee and shortnose sturgeon. This is an additional, mandatory obligation. *See Sierra Club v. Glickman*, 156 F.3d 606 (5th Cir. 1998). Maintaining Kirkpatrick Dam, Rodman Reservoir, and the associated navigation canal and lock do not further the conservation of either species. To the contrary, as detailed above, the continued maintenance of the dam and associated facilities harms and/or kills manatees and shortnose sturgeon and the Forest Service has not identified, or consulted with NMFS or FWS regarding the steps necessary to recover these species to the point where they can be removed from ESA protection. Under Section 7(a)(1), the Forest Service must develop procedures and a plan to assist these species in their recovery.⁵

⁵ While the restoration plan in the EIS and BiOp may have counted for the Forest Service's conservation plan, that plan has now twice fallen through and been rejected. Any other plan is wholly absent from the record.

IV. Procedural Consultation Requirements of the ESA

The ESA's substantive protections are implemented in part through the procedural consultation process, which Congress designed explicitly "to ensure compliance with the [ESA's] substantive provisions." *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). "If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result." *Id.* (citing *TVA v. Hill*, 437 U.S. 153 (1978)). To fulfill these procedural duties, federal agencies must consult with the appropriate federal fish and wildlife agency.

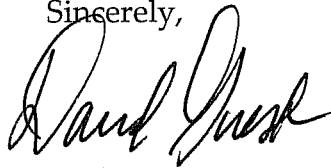
Compliance with the procedural provisions of the ESA – making the determination of the effects of the action through the consultation process – is integral to compliance with the substantive requirements of the Act. Under this statutory framework, federal actions that "may affect" a listed species or critical habitat may not proceed unless and until the federal agency insures, through completion of the consultation process, that the action is not likely to cause jeopardy or adverse modification of critical habitat. 16 U.S.C. § 1536(a); 50 C.F.R. §§ 402.14, 402.13; *Pacific Coast Fed'n of Fishermen's Assoc. v. U.S. Bureau of Reclamation*, 138 F. Supp.2d 1228 (N.D. Cal. 2001) (enjoining delivery of Klamath project water to irrigators until a valid consultation was complete); *Greenpeace v. National Marine Fisheries Service*, 106 F. Supp.2d 1066 (W.D. Wash. 2000) (enjoining ocean-bottom fishing until § 7(a)(2) consultation was complete); *Conner v. Burford*, 848 F.2d at 1441, 1453-55 (enjoining oil and gas lease sales and related surface-disturbing activity until comprehensive biological opinion assessing the effects of all phases of the oil and gas activities was complete); *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1057 (9th Cir. 1994) ("the Forest Service cannot go forward with these activities without first complying with the consultation requirements of the ESA.")

The continued operation and maintenance of the dam and associated facilities are actions that harm listed species and that may not proceed until the ESA § 7(a)(2) consultation process has been completed. Because there is no current valid biological opinion in place, the Forest Service is in violation of the procedural consultation requirements of the ESA.

If the Forest Service does not cure the violations of law described above, upon expiration of the 60 days from the date of this letter, FDE and FWF intend to file suit against the U.S. Forest Service under the citizen suit provision of the ESA, and if appropriate, seek preliminary or permanent injunctive relief to protect the listed species pending compliance with the law. 16 U.S.C. § 1540(g). If you would like to discuss the

significant ESA violations described herein and seek a mutually acceptable solution to them, please feel free to contact me.

Sincerely,



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