

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

Ft. Myers Division

SIERRA CLUB and ENVIRONMENTAL
CONFEDERATION OF SOUTHWEST
FLORIDA,

Plaintiffs,

v.

U.S. FISH AND WILDLIFE SERVICE, *et al.*,

Defendants.

Case No. 2:20-cv-00013-SPC-NPM

PLAINTIFFS' RENEWED MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Florida panther is one of the most endangered species on the planet. Its only remaining habitat is in Southwest Florida, an area that is experiencing rapid growth and development. A series of road expansions in and around panther habitat by the Florida Department of Transportation (“FDOT”), including the project at issue in this litigation, accommodate and spur this development. They also pose a major threat to the Florida panther, with vehicle strikes constituting one of the species’ leading causes of death.

Congress enacted the Endangered Species Act (“ESA”) to guard against these dangers. The ESA requires that federal projects not jeopardize the continued existence of an endangered species and prohibits the “take” of (meaning harm to) endangered species. And where a federal project may “incidentally” take species, U.S. Fish and Wildlife Service (“USFWS”) may shield the permittee (and others) from liability for that take only after conducting mandated analyses and establishing a limit on that take. This “take limit” is Congress’ indispensable guardrail for protecting endangered species, as it requires agencies to re-assess the impact of a federal project should more harm occur than expected or should USFWS’ assumptions prove wrong.

In this case, USFWS violated the ESA by failing to set a limit on the incidental take of Florida panthers resulting from vehicle strikes following FDOT's expansion of State Road 82 ("SR 82"). USFWS thus authorized an unlimited number of panther deaths resulting from vehicle strikes and shielded those from liability, running afoul of the ESA. USFWS further contravened the ESA by failing to perform an adequate analysis of the baseline status of the species and the cumulative impacts that the SR 82 expansion—when considered along with the region's burgeoning development, increased traffic, and other road projects—would have on the species. If allowed to stand, this approach portends enormous consequences for the panther as USFWS considers additional road projects, segment by segment, in the panther's remaining range.

Additionally, the U.S. Army Corps of Engineers ("Corps") unreasonably relied on USFWS' deficient analyses and conclusions to (1) produce a similarly flawed Environmental Assessment ("EA") of the proposed project under the National Environmental Policy Act ("NEPA"); and (2) issue a dredge and fill permit under the Clean Water Act ("CWA") for the project's construction.

After Plaintiffs initiated this litigation, USFWS impermissibly attempted to justify its unlawful actions post-hoc and then *reduced* protections for the panther.

The Corps unreasonably relied on USFWS' post-suit actions to supplement the EA and modify its permit to incorporate the reduced protections.

These agency actions were arbitrary and capricious, in violation of federal law, and must be set aside under the Administrative Procedure Act ("APA"), [5 U.S.C. § 706\(2\)](#). Plaintiffs therefore respectfully request that summary judgment be granted in their favor on Counts Two and Four through Eight of the Second Amended Complaint for violations of the ESA, [16 U.S.C. §§ 1531–1544](#), and NEPA, [42 U.S.C. §§ 4321–4370h](#). ([ECF No. 65](#).)¹

LEGAL FRAMEWORK

I. The Endangered Species Act.

Congress enacted the ESA to provide for the conservation of threatened and endangered species. [16 U.S.C. § 1531](#). Congress passed the ESA in response to increasing concerns about how many species had been rendered extinct "as a consequence of economic growth and development untempered by adequate concern and conservation." [Id. § 1531\(a\)\(1\)](#). Congress thus made a "conscious decision ... to give endangered species priority over the 'primary missions' of federal agencies." [Tennessee Valley Auth. v. Hill, 437 U.S. 153, 185 \(1978\)](#).

¹ The Court previously dismissed as moot Counts One and Three, which relate to a different road expansion project, after concluding that the project had been cancelled. ([ECF No. 59](#).)

Indeed, an “examination of the language, history, and structure [of the ESA] indicates beyond doubt that Congress intended endangered species to be afforded the highest of priorities.” [Id. at 174](#). “The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.” [Id. at 184](#).

Section 7 of the ESA creates a duty for each federal agency to ensure that its actions do not jeopardize the existence and recovery of a species. [16 U.S.C. § 1536\(a\)\(2\)](#); [50 C.F.R. § 402.14](#). Federal agencies are to accomplish this through consultation with federal wildlife agencies—here, USFWS. [16 U.S.C. § 1536\(a\)\(2\)](#).

Federal wildlife agencies must employ the “best scientific and commercial data available” to create a Biological Opinion (“BiOp”) detailing how the federal action will affect protected species and their habitat in the action area.² [16 U.S.C. § 1536\(a\)\(2\), \(b\)\(3\)\(A\)](#); [50 C.F.R. § 402.14\(g\), \(h\)](#). This includes evaluating the baseline status of the species and the effects of the action, including cumulative effects. [50 C.F.R. §§ 402.02, 402.14\(g\)](#); [Fla. Key Deer v. Brown](#), 364 F. Supp. 2d 1345, 1353 (S.D. Fla. 2005), [aff’d sub nom. Fla. Key Deer v. Paulison](#), 522 F.3d 1133 (11th Cir. 2008). Based on this analysis, the wildlife agency must formulate its opinion

² “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.” [50 C.F.R. § 402.02](#).

as to whether the action is likely to jeopardize the continued existence of listed species. [16 U.S.C. § 1536\(a\)\(2\)](#); [50 C.F.R. § 402.14\(g\)\(4\)](#). The obligation to ensure against a likelihood of jeopardy requires agencies to give the benefit of the doubt to protected species. See [Tenn. Valley Auth., 437 U.S. at 174–84](#).

Section 9 of the ESA prohibits any person, including federal agencies, from “taking” a protected species. [16 U.S.C. § 1538\(a\)\(1\)\(B\)](#).³ Congress established penalties for illegal take and authorized the public to bring civil suits to ensure compliance with the Act. [Id. § 1540\(a\)–\(b\), \(g\)](#).

Recognizing that take may still occur as a result of otherwise lawful activities, Section 7 authorizes exemptions to liability for “incidental take” under limited circumstances. [Id. § 1536](#). If incidental take is anticipated, the wildlife agencies must formulate an incidental take statement (“ITS”) that, among other things, specifies the amount or extent of incidental take shielded from liability. [Id. § 1536\(b\)\(4\), \(o\)](#); [50 C.F.R. § 402.14\(g\)\(7\), \(i\)\(1\)\(i\), \(i\)\(4\)–\(5\)](#). The wildlife agencies must numerically quantify take and may only employ a “surrogate” in lieu of a numerical limit if the agency (1) describes the causal link between the surrogate and actual take; (2) explains why it could not numerically quantify

³ “Take” includes harassing, wounding, and killing protected species. [16 U.S.C. § 1532\(19\)](#).

take; and (3) sets a clear standard for determining when the anticipated take has been exceeded. [50 C.F.R. § 402.14\(i\)\(1\)\(i\)](#).

An ITS serves as a check on the BiOp, acting as a “trigger” by denoting when an unacceptable level of take has occurred, which then invalidates the safe harbor provision and requires the federal agency to (1) reinitiate consultation to reevaluate the action; (2) determine if the action may now jeopardize protected species; and (3) determine what additional protective measures may be required to reduce impacts from the action. [50 C.F.R. §§ 402.14\(i\)\(3\), \(4\), 402.16\(a\)](#); [Ctr. for Biological Diversity v. Salazar](#), 695 F.3d 893, 910–11 (9th Cir. 2012); [Miccosukee Tribe of Indians of Fla. v. United States \(“Miccosukee Tribe I”\)](#), 566 F.3d 1257, 1274 (11th Cir. 2009). An ITS cannot be effective “if there is no such ‘trigger’ to require the agency to reconsider its approval of the incidental take.” [Nat’l Wildlife Fed’n v. Nat’l Marine Fisheries Serv.](#), 235 F. Supp. 2d 1143, 1160 (W.D. Wash. 2002).

II. The National Environmental Policy Act.

NEPA is the “basic national charter for protection of the environment.” [40 C.F.R. § 1500.1\(a\) \(2018\)](#).⁴ “The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences,

⁴ Plaintiffs cite the regulations and guidance that were in place at the time of the agency’s action (2018). [40 C.F.R. § 1506.13 \(2020\)](#).

and take actions that protect, restore, and enhance the environment.” [*Id.*](#)

[§ 1500.1\(c\)](#). Pursuant to NEPA, agencies conduct detailed analyses in either an EA or environmental impact statement (“EIS”). In either document, an agency must analyze the cumulative impacts of its actions on the environment. [*Id.*](#)

[§ 1508.7; *Nat’l Wildlife Fed’n v. Souza*, No. 08-14115-CIV, 2009 WL 3667070, at *26](#)

[\(S.D. Fla. Oct. 23, 2009\); *Grand Canyon Trust v. FAA*, 290 F.3d 339, 341–43 \(D.C.](#)

[Cir. 2002\)](#). The EA or EIS must incorporate “[a]ccurate scientific analysis” and be based on “high quality” scientific information. [40 C.F.R. § 1500.1\(b\)](#).

PROCEDURAL HISTORY

On January 9, 2020, Plaintiffs filed suit challenging USFWS’ BiOp and ITS for SR 82 as violating the ESA and challenging the Corps’ actions that relied on the BiOp as violating NEPA. ([ECF No. 1](#).) On March 30, 2020, Plaintiffs amended the Complaint to add an ESA claim against the Corps. ([ECF No. 24](#).)

On June 30, 2020, USFWS issued an Amended BiOp in response to this litigation purporting to “clarify” its earlier conclusions. Letter from Roxanna Hinzman, USFWS, to Colonel Jason A. Kirk, Corps, June 30, 2020, at 1 (A.R. 8594, at 8594–652) (hereinafter “Am. BiOp”).⁵ On January 5, 2021, Plaintiffs filed the

⁵ Plaintiffs cite documents from USFWS’ administrative record as “A.R. ####” to denote the applicable bates stamp number(s). Plaintiffs cite the Corps’ administrative record as “CORPS A.R. ####” to denote the applicable bates stamp number(s).

Second Amended Complaint challenging the Defendants' post-suit actions as unlawful as well. ([ECF No. 65.](#)) On January 19, 2021, and January 26, 2021, the Defendants and FDOT filed their answers. ([ECF Nos. 67, 71.](#))

On October 25, 2021, Plaintiffs moved for summary judgment. ([ECF No. 92.](#)) On September 16, 2022, the Magistrate Judge granted Defendants' motion to strike certain exhibits to Plaintiffs' motion and Plaintiffs' motion without prejudice to refile. ([ECF No. 108.](#)) On October 18, 2022, the Court overruled Plaintiffs' objections to the Magistrate's order. ([ECF No. 111.](#))

On June 28, 2022, Defendants filed a motion for judgment on the pleadings seeking to dismiss the case as moot. ([ECF No. 105.](#)) On January 12, 2023, the Magistrate Judge recommended that the district court deny Defendants' motion. ([ECF No. 112.](#)) On March 20, 2023, the Court overruled FDOT's objections to the Magistrate Judge's Report and Recommendation. ([ECF No. 120.](#))⁶

STATEMENT OF MATERIAL FACTS

I. The Florida Panther is Critically Endangered.

1. The Florida panther is one of the most endangered species in the world, with only between 120 and 230 adult panthers left in the wild. John J. Cox et al.,

⁶ This motion is filed in accordance with [ECF Nos. 82](#) and [91](#) (enlarging page limits).

Florida Panther Habitat Use: New Approach to an Old Problem, 70 J. Wildlife Mgmt. 1778–85 (2006) (A.R. 4778, at 4778–85); Am. BiOp at 6 (A.R. 8594, at 8599).

2. Taking the panther off the Endangered Species list could only be considered when three, viable, self-sustaining populations of at least 240 individuals each have been established and maintained for at least twelve years. USFWS, *Florida Panther Recovery Plan* at xi (3rd rev. 2008) (A.R. 5070, at 5081) (hereinafter “Recovery Plan”).

II. Habitat Loss and Degradation Threaten Panther Survival.

3. Habitat loss and fragmentation pose significant threats to the panther. *See* Letter from USFWS To Colonel Jason A. Kirk, Corps, at 7 (June 30, 2020) (A.R. 8273, at 8279) (hereinafter “BiOp”).

4. Panthers are wide-ranging carnivores with home ranges spanning up to hundreds of thousands of acres. USFWS, *Status of the Species—Florida Panther* 4 (2015) (A.R. 7237, at 7240) (hereinafter “2015 Status”).

5. Historically living across the Southeastern United States, panthers are now restricted to less than 5% of that range and are located primarily in fragmented habitat in Southwest Florida. *Id.* at 6–7 (A.R. 7237, at 7242–43).

6. Major highways and urban or agricultural development isolate these remaining habitat patches, and “they are rapidly being lost to the same development that threatens southern Florida.” *Id.* at 7 (A.R. 7237, at 7243).

7. Panthers need large areas to hunt, forage, and breed, and are particularly sensitive to habitat fragmentation. *Id.* at 4, 12 (A.R. 7237, at 7240, 7248).

8. As USFWS has acknowledged, the long-term survival of panthers could require as much as 156,000 to 234,000 square miles (roughly 60–70% of their historical range) of habitat, in contrast to the 3,548 square miles in Southwest Florida now occupied by the panther. *Id.* at 6 (A.R. 7237, at 7242); Recovery Plan at 26–27 (A.R. 5070, at 5112–13).

9. Connections between panther habitat areas are vital for the species’ survival because small, segregated patches of habitat will not provide panthers what they need to survive. Cindy Thatcher et al., *A Habitat Assessment for Florida Panther Population Expansion into Central Florida*, 90 *J. of Mammalogy* 919, 923–24 (2009) (A.R. 5303, at 5308–09); Karen Root, *Florida Panther: Using Models to Guide Recovery Efforts*, in *Species Conservation and Management: Case Studies* 491, 496–497 (H.R. Akçakaya et al., eds. 2004) (A.R. 4539, at 4542–43).

10. Development in Southwest Florida has been exceedingly rapid in recent years, with over 350 square miles of undeveloped lands lost between 1985 and 2003 in Collier, Lee, and Hendry Counties—prime panther habitat areas.

Recovery Plan at 36, 38, 46 (A.R. 5070, at 5122, 5124, 5132).

11. Studies project that the human population in these counties will increase by 55% between 2000 and 2030. *E.g.*, Randy Kautz et al., *How Much Land is Enough? Landscape-scale Conservation for the Florida Panther*, 130 *J. Biological Conservation* 118, 119 (2006) (A.R. 4786, at 4787) (hereinafter “Kautz 2006”).

12. Accompanying these developments are road expansion projects in and near prime panther habitat, like the SR 82 expansion at issue. *See, e.g.*, FDOT, *State Road 82 Project Development and Environment Study*, 44–46 (2009) (CORPS A.R. 286, at 342–44) (hereinafter “PD&E Study”).

13. Highway expansions and attendant increases in traffic volume and speed directly eliminate panther habitat and impede the panthers’ movement.

Recovery Plan at 39–40 (A.R. 5070, at 5125–26).

14. Road expansions in and around Florida panther habitat will likely result in less and more fragmented panther habitat, harming the panthers’ movement, foraging, and mating. Recovery Plan at 39–40, 51 (A.R. 5070, at 5125–26, 5137).

III. Vehicle Strikes are a Leading Cause of Death for Florida Panthers.

15. A leading cause of death for the Florida panther is vehicular collisions.

2015 Status at 12 (A.R. 7237, at 7248) (describing vehicular collisions as a “significant source of mortality” for the Florida panther).

16. Vehicle strikes occur when panthers attempt to cross highways; as traffic increases, so does the potential for collisions. *See* BiOp at 10 (A.R. 8273, at 8282).

17. Between 1979 and May 2020, 242 Florida panthers were hit by vehicles in Southwest Florida; 236 of them died as a result. *Id.*

18. In Collier County, where the SR 82 expansion is located, studies showed an increase in vehicle-related deaths by a factor of four from 2000 to 2005. 2015 Status at 12–13 (A.R. 7237, at 7248–49).

19. Increased development and road expansions will also likely lead to more panther deaths from vehicle strikes. Recovery Plan at 39–40, 68 (A.R. 5070, at 5125–26, 5137).

IV. FDOT Decided to Expand SR 82 in Florida Panther Habitat.

20. In July 2009, FDOT issued a Project Development and Environment Study detailing its plans to expand all twenty-three miles of SR 82, including the project at issue in this case. PD&E Study at 3 (CORPS A.R. 286, at 297).

21. FDOT plans to transform the SR 82 expansion at issue from a two-lane rural road into an eventual six-lane suburban highway with a thirty-foot median and rights-of-way for stormwater retention ponds. BiOp at 3 (A.R. 8273, at 8275).

22. The SR 82 expansion at issue lies between several preserves and agricultural lands, forcing the wide-ranging carnivore to cross the road for hunting, breeding, and roaming. *See id.* at 10 (A.R. 8273, at 8282).

23. The SR 82 expansion at issue is in the Florida panther's secondary habitat zone. *Id.* at 8, 11 (A.R. 8273, at 8280, 8283).

24. Secondary habitat zone consists of natural and disturbed lands that have potential to support an expanding panther population and is an "essential component[]" of a landscape-scale conservation plan for the protection of a viable panther population in south Florida." Kautz 2006 at 123–24, 130–31 (A.R. 4786, at 4791–92, 4798–99); Recovery Plan at 27 (A.R. 5070, at 5113).

25. Panthers inhabit the project action area,⁷ with 6,000 radio-transmitted observations documented there from 145 collared panthers. BiOp at 8 (A.R. 8273, at 8280).

⁷ The action area includes the "construction footprint" and "all lands located in the Service's panther Focus Area ... within 25 mi of the Project footprint." BiOp at 5 (A.R. 8273, at 8277).

26. There have been 297 verified panther sightings in the action area between September 8, 2009, and January 11, 2018. Am. BiOp. at 8 (A.R. 8594, at 8601).

V. USFWS Consulted with the Corps Regarding the CWA Dredge and Fill Permit for the SR 82 Expansion.

27. On April 20, 2017, FDOT applied to the Corps for a CWA Section 404 dredge and fill permit for the SR 82 project at issue in this case. Application for Department of the Army Permit (CORPS A.R. 2488, at 2488–90).

28. On April 26, 2018, USFWS initiated formal consultation on panther impacts for the SR 82 expansion project. BiOp at 2 (A.R. 8273, at 8274).

29. On June 29, 2018, USFWS issued a BiOp finding that the SR 82 expansion would adversely impact the Florida panther but was not likely to jeopardize its continued existence. *Id.* at 1, 12–13, 16 (A.R. 8273, at 8273, 8284–85, 8288).

30. USFWS acknowledged at least one Florida panther that had been killed by a vehicle strike within the SR 82 project action area and another that had died from a vehicle strike within the project footprint. *Id.* at 8 (A.R. 8273, at 8280).

31. USFWS acknowledged that traffic and the threat of vehicular strikes are expected to increase on the road at issue. *Id.* at 12–13 (A.R. 8273, at 8284–85).

32. USFWS acknowledged that panthers have a “habit” of crossing busy roads. *Id.* at 12 (A.R. 8273, at 8284).

33. USFWS acknowledged it is likely that panthers may be injured or killed by vehicles using the widened roadway. *Id.* at 12–13 (A.R. 8273, at 8284–85).

34. USFWS acknowledged that a team of researchers collect panthers' radio-transmitted locations three days per week, creating a large database of recorded panther locations. *Id.* at 7–8 (A.R. 8273, at 8279–80). USFWS has acknowledged the accuracy of this telemetry data. Am. BiOp at 8 (A.R. 8594, at 8601).

35. This data has been collected through decades of radio-transmitted and aerial surveys, physical evidence collection, and physical surveying. *See, e.g., id.*⁸

36. USFWS has relied on panther population estimates to assess the viability of the population, the size and number of home ranges, panther travel corridors, and yearly breeding activity to make decisions about panther conservation efforts. 2015 Status at 11 (A.R. 7237, at 7247); BiOp at 8 (A.R. 8273, at 8280).

37. USFWS' administrative record contains years of data identifying panther deaths resulting from vehicle strikes, down to the roads upon which the strikes occurred. *See, e.g., Fla. Fish & Wildlife Conservation Comm'n, Annual Report on*

⁸ *See also* Recovery Plan at 14–16 (A.R. 5070, at 5100–01) (summarizing data); Roy McBride et al., *Florida Panther Annual Count 2012* (2012) (A.R. 6012, at 6012–33) (hereinafter “Annual Survey 2012”); Deborah Jansen et al., *Florida Panther (Puma concolor coryi) Research and Monitoring in Big Cypress National Preserve 2004–2005 Annual Report* (2005) (A.R. 4735, at 4735–65); Darrell Land et al., *Panther Genetic Restoration Management Annual Report 2002–2003* (2003) (A.R. 4204, at 4204–4316) (hereinafter “Panther Genetic Restoration Report 2002–2003”); Roy McBride, *The Documented Panther Population (DPP) and Its Current Distribution from July 1, 2002 to June 30, 2003* (2003) (A.R. 4192, at 4192–4203); Roy McBride, *Current Panther Distribution, Population Trends, and Habitat Use Report of Field Work: Fall 2000–Winter 2001* (2001) (A.R. 3918, at 3918–43).

the Research and Management of Florida Panthers: 2013–2014 at appx. IV (2014) (A.R. 7065, at 7133–44) (hereinafter “Annual Report 2013–2014”); Roy McBride et al., *Florida Panther Annual Count 2010*, at 15–19 (2010) (A.R. 5501, at 5516–20) (hereinafter “Annual Count 2010”).

38. The BiOp stated that habitat loss and fragmentation are some of the greatest threats to the panther’s survival and recovery and admitted that this project, among many other development projects, will result in habitat loss and fragmentation. BiOp at 7, 11–15 (A.R. 8273, at 8279, 8283–87).

39. USFWS listed five general categories of state and county actions, and cited undisclosed information provided from a consultant to find that roughly 1,301 acres would be developed per year. *Id.* at 15 (A.R. 8273, at 8287).

40. The BiOp generically grouped federal actions, e.g., “construction of highways and urban development,” and provided acreage impacts and mitigation for each of these categories. *Id.* at 9–10 (A.R. 8273, at 8281–82).

41. The BiOp stated USFWS had consulted on 84 federal projects (without identifying what those projects are, what the outcome of those consultations were, or what the anticipated or known impacts of those projects will be)

affecting approximately 41,868.6 acres of panther habitat (without identifying where that habitat is or how the habitat has been or is being affected). *Id.*

42. The BiOp then summarily concluded that “these Federal actions, individually and cumulatively, did not jeopardize the survival and recovery of the panther.” *Id.* at 10 (A.R. 8273, at 8282).

43. Ultimately, USFWS issued an ITS that exempted from liability any direct take stemming from “adverse effects” of the road expansion but did not set any take limit for vehicular strikes. *Id.* at 17 (A.R. 8273, at 8289).

44. The ITS limited take from habitat loss and degradation from the project’s construction using a habitat surrogate. *Id.*

45. The ITS required FDOT to reinitiate consultation only if its project construction impacted a larger geographical area than planned. *Id.* at 18 (A.R. 8273, at 8290). It contained no trigger for reinitiation for vehicle strikes. *Id.*

VI. The Corps Relied on USFWS’ BiOp and ITS.

46. On October 2, 2018, the Corps relied entirely on USFWS’ BiOp and ITS to issue an EA pursuant to NEPA along with a CWA dredge and fill permit for the SR 82 expansion. Department of the Army Environmental Assessment and Statement of Findings for SAJ-2017-01376 at 37–39, 46 (2018) (CORPS A.R. 4604,

at 4640–51) (hereinafter “EA”); Permit No. SAJ-2017-01376 at 6 (2018) (CORPS A.R. 5045, at 5050) (hereinafter “404 Permit”).

47. The EA contained no independent analysis of panther impacts. Its cumulative impacts section failed to mention the panther. EA at 34–37 (CORPS A.R. 4604, at 4637–40).

48. The EA included no discussion of the many ongoing, planned, and projected developments and road projects set to occur in Southwest Florida, but instead vaguely referred to “development.” *Id.*

49. The EA explicitly refused to evaluate the cumulative impacts of future developments in the region, claiming it would instead evaluate those projects individually when they occur. *Id.* at 36 (CORPS A.R. 4604, at 4639).

VII. In Response to this Litigation, USFWS Issued an Amended BiOp.

50. On April 30, 2020, USFWS asked to reinitiate consultation with the Corps to “clarify [its] reasoning” in the BiOp. Email from Andrew A. Kizlauskas, Corps, to John Wrublik, USFWS, at 2 (Jun. 24, 2020) (A.R. 8585, at 8586) (hereinafter “Corps 2020 Email”).

51. On June 24, 2020, although the Corps was “not aware of any changes to the project or new information,” it agreed to reinitiate given the “concerns” in Plaintiffs’ notice letter for the Corps’ ESA violations. *Id.* at 1 (A.R. 8585, at 8585).

52. On June 30, 2020, USFWS issued an Amended BiOp to “clarify” its prior findings “[c]onsidering recent litigation challenging this Project with respect to the panther.” Am. BiOp at 1 (A.R. 8594, at 8594).

53. The only new data USFWS mentioned in the Amended BiOp (and added to the administrative record) consisted of more information on the presence and concentration of panthers, both overall and in the action area, and updated data specifying the number and causes of panther deaths. *Id.* at 8 (A.R. 8594, at 8601).

54. The only substantive change between the original and Amended BiOp was that USFWS reduced the mitigation it required from FDOT for harms resulting from the road expansion. *Id.* at 9 (A.R. 8594, at 8602) (reducing panther habitat units required from FDOT for mitigation from 192 to 152).

55. As to cumulative effects, the Amended BiOp relied on the same estimated habitat loss per year, and summarily concluded the impact will be “small,” short-term, and increase over time, without any explanation or analysis of how a small and ever-increasing loss will impact the panther. *Id.* at 15 (A.R. 8594, at 8608).

56. The Amended BiOp for the first time claimed the anticipated habitat loss to be a “worst-case scenario.” *Id.* at 15–16 (A.R. 8594, at 8608–09). USFWS cited no evidence for this proposition. *Id.*

57. As to baseline, USFWS made only minimal changes related to removing details related to another species, the Audubon's crested caracara. *Compare* BiOp at 9–10 (A.R. 8273, at 8281–82) *with* Am. BiOp at 9–10 (A.R. 8594, at 8602–03).

58. In the Amended BiOp, USFWS for the first time claimed that it was too difficult for the agency to estimate the increase in traffic and the impact of that traffic on panthers so as to set a numerical take limit for vehicular fatalities. Am. BiOp at 6, 13–14 (A.R. 8594, at 8599, 8606–07). It cited no support for this. *Id.*

59. The Amended BiOp also asserted for the first time and without evidence that USFWS could not estimate future panther deaths because it did not have data about the amount, source, or timing of increases in traffic volumes expected from the SR 82 expansion. *Id.* at 19 (A.R. 8594, at 8612).

60. And the Amended BiOp contended for the first time and without evidence that USFWS could not “determine if a panther mortality on that road is due to the Project or due to traffic resulting from other development in the area.” *Id.*

61. USFWS recognized that the impacts from construction and operation of the road expansion are separate and distinct. *Id.* at 13–14 (A.R. 8594, at 8606–07).

62. But the Amended BiOp stated for the first time that the same take limit USFWS had created for habitat loss and degradation now also serves as a “surrogate” for incidental take from vehicle strikes. *Id.* at 18 (A.R. 8594, at 8611).

VIII. The Corps Relied on USFWS’ Inadequate Amended BiOp and ITS.

63. The Corps relied upon and incorporated the Amended BiOp and ITS to modify the CWA 404 permit and supplement the EA. Letter from Colonel Andrew D. Kelly, Corps, to Nicole Monies, FDOT (Sept. 29, 2020) (CORPS A.R. 7180, at 7180–83) (hereinafter “404 Permit Modification”); Supplement to the Department of the Army Environmental Assessment and Statement of Findings for SAJ-2017-01376 (2020), at 1–4 (CORPS A.R. 7243, at 7243–47) (hereinafter “Supplemental EA”).

64. The Supplemental EA adopted the same analysis from the original EA as to cumulative impacts. Supplemental EA at 1–4 (CORPS A.R. 7243, at 7243–46).

STANDING

Plaintiffs have associational standing to pursue their claims because their members’ aesthetic and recreational interests will be harmed by Defendants’ actions. [*Friends of the Earth, Inc. v. Laidlaw Env’t Servs. \(TOC\), Inc.*, 528 U.S. 167, 181 \(2000\)](#); [*Ouachita Watch League v. Jacobs*, 463 F.3d 1163, 1170 \(11th Cir. 2006\)](#); [*Cahaba Riverkeeper v. EPA*, 938 F.3d 1157, 1162 \(11th Cir. 2019\)](#). They have

constitutional standing because they have suffered an injury in fact caused by Defendants' actions that can be redressed by a favorable judicial decision requiring compliance with the ESA and NEPA. [*Jacobs*, 463 F.3d at 1170](#).

Plaintiffs submit ten declarations which demonstrate that their members have for decades been recreating in panther habitat, including by hiking, camping, canoeing, kayaking, biking, taking photographs, and seeking to witness a panther in the wild. Exhibits 1–10. These members have recreated, and continue to regularly recreate, in the panther's last remaining habitat, including the Florida Panther National Wildlife Refuge, Everglades National Park, Big Cypress National Preserve, Corkscrew Swamp Sanctuary, Cypress Cove Sanctuary, and Okaloacoochee Slough State Preserve. Exhibit 1 at 9–10 (Hollenhorst Dec. ¶¶ 19–21); Exhibit 2 at 4–5 (Umpierre Dec. ¶ 9); Exhibit 3 at 4 (Ayech Dec. ¶ 9); Exhibit 4 at 4, 5 (Vasturo Dec. ¶¶ 8, 10); Exhibit 6 at 5 (Roff Dec. ¶ 12); Exhibit 7 at 4 (Carle Dec. ¶ 11); Exhibit 8 at 4–5 (Martin Dec. ¶ 8); Exhibit 9 at 5–6 (Davenport Dec. ¶¶ 11–12); Exhibit 10 at 5 (Rutz Dec. ¶ 11). They monitor and research panthers, report and educate the public about panthers, and advocate on behalf of the panther. Exhibit 1 at 2–3 (Hollenhorst Dec. ¶ 4); Exhibit 2 at 3 (Umpierre Dec. ¶ 5); Exhibit 3 at 2–3, 7 (Ayech Dec. ¶¶ 5, 17);

Exhibit 4 at 3 (Vasturo Dec. ¶ 5); Exhibit 5 at 2 (Whitehead Dec. ¶ 4); Exhibit 7 at 2–3, 5 (Carle Dec. ¶¶ 5, 7, 13); Exhibit 9 at 3–4, 7 (Davenport Dec. ¶¶ 6–7, 15); Exhibit 10 at 3, 6 (Rutz Dec. ¶¶ 5, 14). And some members have even been fortunate enough to witness panthers in the wild. Exhibit 1 at 8 (Hollenhorst Dec. ¶ 17); Exhibit 2 at 1–2 (Umpierre Dec. ¶ 2); Exhibit 6 at 6–7 (Roff Dec. ¶¶ 13–14, 16); Exhibit 7 at 5 (Carle Dec. ¶ 13); Exhibit 8 at 5 (Martin Dec. ¶ 10).

Defendants' actions create a substantial risk that the members' recreational and aesthetic enjoyment of these areas, and their ability to witness panthers will be diminished. Exhibit 1 at 6–7, 10–12 (Hollenhorst Dec. ¶¶ 14, 16, 23, 25–26); Exhibit 2 at 9–10 (Umpierre Dec. ¶¶ 19–21); Exhibit 3 at 6–8 (Ayech Dec. ¶¶ 15, 17–18); Exhibit 4 at 8–10 (Vasturo Dec. ¶¶ 19–21, 23); Exhibit 5 at 7–8 (Whitehead Dec. ¶¶ 16, 18); Exhibit 6 at 9–10 (Roff Dec. ¶¶ 20–21, 23); Exhibit 7 at 7–8 (Carle Dec. ¶ 18); Exhibit 8 at 8–9 (Martin Dec. ¶¶ 15–16); Exhibit 9 at 8–9 (Davenport Dec. ¶¶ 18–19); Exhibit 10 at 8–9 (Rutz Dec. ¶¶ 18–19, 21). As Ms. Hollenhorst explained, "To me, the Panther represents wilderness, and the entire reason I moved to Florida was to be closer to true wilderness. If the Panthers are gone, or functionally gone, I'll never see Florida the same way." Exhibit 1 at 11–12 (Hollenhorst Dec. ¶ 25). These interests fall within the Plaintiffs' organizational

missions. Exhibit 1 at 3 (Hollenhorst Dec. ¶¶ 5–6); Exhibit 2 at 2 (Umpierre Dec. ¶ 4); Exhibit 3 at 2 (Ayech Dec. ¶ 4); Exhibit 4 at 2 (Vasturo Dec. ¶ 4); Exhibit 5 at 3 (Whitehead Dec. ¶ 5); Exhibit 6 at 3 (Roff Dec. ¶ 6); Exhibit 7 at 2 (Carle Dec. ¶ 4); Exhibit 8 at 2 (Martin Dec. ¶ 4); Exhibit 9 at 2 (Davenport Dec. ¶ 5); Exhibit 10 at 2 (Rutz Dec. ¶ 4). Plaintiffs therefore have standing.

LEGAL STANDARD

Summary judgment is appropriate “when the movant shows that there is no genuine dispute of material fact and that the movant is entitled to judgment as a matter of law.” [*Paez-Basto v. Acting Sec’y, Dep’t of Homeland Sec.*, No. 6:13-CV-1955-ORL-31, 2014 WL 4809528, at *1 \(M.D. Fla. Sept. 26, 2014\)](#) (citing [Fed. R. Civ. P 56\(a\)](#)). Under the APA, a court must “hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” [5 U.S.C. § 706\(2\)\(A\)](#). To determine whether an agency acted unlawfully, a court assesses whether the agency “examine[d] the relevant data and articulate[d] a satisfactory explanation for its action.” [Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.](#), 463 U.S. 29, 43 (1983); [Sierra Club v. Johnson](#), 436 F.3d 1269, 1273–74 (11th Cir. 2006); [Fla. Key Deer v. Brown](#), 364 F. Supp. 2d at 1358–59. The Court must consider whether the agency has “articulate[d] a satisfactory explanation for [its]

action including a rational connection between the facts found and the choice made.” [Paez-Basto, 2014 WL 4809528, at *1](#).

For NEPA claims, a court “ensure[s] that the agency took a ‘hard look’ at the environmental consequences.” [Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng’rs, 781 F.3d 1271, 1288 \(11th Cir. 2015\)](#) (internal citation omitted).

ARGUMENT

USFWS has unlawfully provided FDOT and the Corps with a safe haven for an unlimited number of Florida panther deaths from vehicle collisions resulting from the SR 82 expansion. It did so despite acknowledging that such deaths would likely occur, that such deaths had already occurred in the project footprint at issue, and that vehicle strikes are one of the primary causes of death for the critically endangered panther. Rather than correct this legal error after Plaintiffs sued, USFWS issued an Amended BiOp that again failed to set a numerical take limit for vehicle fatalities and instead unlawfully relied on a habitat surrogate that has no connection to vehicle strikes.

USFWS also unlawfully failed to analyze the impacts that development and road projects will cumulatively have on the Florida panther population. And the agency failed to analyze the baseline status of the species considering ongoing federal projects that will impact and have impacted the panther.

Finally, abrogating its independent duties under the ESA and NEPA, the Corps failed to undertake its own impacts analysis and instead unreasonably relied on USFWS' actions to (1) issue, and then modify, a CWA dredge and fill permit for the project; and (2) produce an EA and supplemental EA.

Defendants' actions are unlawful and must be set aside.

I. USFWS Violated the ESA by Failing to Set a Take Limit for Panther Deaths from Vehicular Strikes and Attempting Post Hoc to Rely on an Inapposite Habitat Surrogate.

USFWS violated the ESA when it extended take liability coverage without establishing a take limit for panther deaths from vehicular strikes. Rather than remedying this unlawful action after Plaintiffs sued, USFWS issued an Amended BiOp to try to justify its unlawful actions post hoc. In the Amended BiOp, USFWS relied on an inadequate habitat surrogate that bears no connection to vehicular strikes, that sets the take limit only as the acreage that FDOT planned to destroy for the road expansion, and that fails to include any meaningful mechanism for reinitiating consultation.

A. USFWS Failed to Set a Take Limit for Panther Vehicular Deaths.

Even though USFWS found that panthers will likely be injured or killed by vehicle strikes from operation of the SR 82 expansion, the ITS extended take liability coverage without setting a limit beyond which that take would be

deemed unacceptable. By not setting a limit, USFWS failed to provide a trigger to require the agency to reinitiate consultation as a result of vehicular strikes and determine whether additional protective measures were necessary. USFWS provided no explanation for these failures. BiOp at 17 (A.R. 8273, at 8289).

Whenever USFWS expects that a federal action could result in incidental take, it must issue an ITS that specifies the amount or extent of that take. [16 U.S.C. § 1536\(b\)\(4\)](#); [50 C.F.R. § 402.14\(g\)\(7\), \(i\)](#). Without a specific take limit, there is no meaningful “trigger” to require reinitiation when that take limit is exceeded. [50 C.F.R. § 402.16\(a\)\(1\)](#). Reinitiation cannot “be left to ‘the unfettered discretion of [USFWS], leaving no method by which the applicant or the action agency can gauge their performance.’” [Sierra Club v. U.S. Dep’t of Interior](#), 899 F.3d 260, 272 (4th Cir. 2018) (requiring USFWS to set “a clear standard for determining when the level of anticipated take has been exceeded”). “Th[e] lack of a clear standard also creates a transparency problem,” because, USFWS “makes the decision about whether to reinitiate consultation behind closed doors and without a record.” [Oceana, Inc. v. Ross](#), No. CV 08-1881 (PLF), 2020 WL 5834838, at *14 (D.D.C. Oct. 1, 2020).

Although the BiOp found that the operation of the SR 82 expansion would likely result in take of Florida panthers through vehicle strikes, USFWS did not set a take limit for vehicle strikes. USFWS acknowledged that “it is likely that over the life of the Project, panthers may be injured or killed by collisions with motor vehicles using the widened roadway.” BiOp at 12–13 (A.R. 8273, at 8284–85). And yet, the ITS used a habitat surrogate to limit take only from “the direct loss and degradation of habitat” from the project. *Id.* at 17 (A.R. 8273, at 8289). Thus, the ITS established no limit for incidental take from vehicle strikes, and thus no trigger for reinitiation as a result of that take, in violation of the ESA.

B. The Amended BiOp Cannot Justify USFWS’ Unlawful Actions.

USFWS’ transparent attempt to inject post-hoc rationalizations of its prior decision through a sham reinitiation of consultation and Amended BiOp should be rejected. See [Sec. & Exch. Comm’n v. Chenery Corp., 332 U.S. 194, 196 \(1947\)](#); [Gifford Pinchot Task Force v. USFWS, 378 F.3d 1059, 1076–77 \(9th Cir. 2004\)](#) (rejecting attempt to amend BiOps during litigation). USFWS claimed that it produced the Amended BiOp following reinitiation of consultation with the Corps. But that claim fails as a matter of fact and law.

First, USFWS acknowledged it sought only to “clarify [its] reasoning” in the BiOp. Corps 2020 Email at 2 (A.R. 8585, at 8586). But bolstering a litigation

position is not a basis to reinitiate consultation under the ESA. By regulation, reinitiation of consultation is designed for specific purposes: when (1) take limits are exceeded; (2) new information reveals impacts not previously considered; (3) an action is modified and will cause an effect not previously considered; or (4) a new species that may be affected is listed. [50 C.F.R. § 402.16\(a\)](#).

Here, USFWS asked the Corps to reinitiate consultation for the sole purpose of “clarify[ing]” its reasons for making the decision it made in 2018 because the agency was sued. Corps 2020 Email at 2 (A.R. 8585, at 8586). Even the Corps questioned this process, stating that it knew of no reason to reinitiate, aside from this lawsuit. *Id.* at 1 (A.R. 8585, at 8585). The Amended BiOp was a sham intended to manipulate the Court’s review of USFWS’ action.

Second, in the four business days between reinitiating and then issuing the Amended BiOp, USFWS failed to conduct any substantive analysis of the road project. When consultation is reinitiated, USFWS must again review all relevant information, evaluate the baseline of affected species, evaluate the individual and cumulative effects of the action, add these impacts to the baseline to determine whether jeopardy will occur, establish reasonable and prudent alternatives, and create an incidental take statement if take will occur. [50 C.F.R.](#)

[§ 402.14\(g\)\(1\)–\(7\)](#). But USFWS did none of these things here. Even though two years had passed since its original BiOp, there is no evidence in the record that USFWS revisited its determinations or analyses. Rather, USFWS spent that time improperly inserting argument into its BiOp to bolster its prior actions so as to try to defend them in this litigation.

The only new data mentioned in the Amended BiOp (and added to the administrative record) was more information (1) on the presence and concentration of panthers, both overall and in the action area; and (2) the number and causes of panther deaths. Amended BiOp at 8 (A.R. 8594, at 8601). None of that information supported USFWS' conclusions. To the contrary, it only further demonstrated that USFWS possessed ample data to estimate the panther population and to measure take from vehicle strikes. *Id.* (detailing more radio-transmitted data on panther presence in the action area and identifying an additional panther death resulting from a vehicle strike in the action area).

The only substantive change was that USFWS now *reduced* the mitigation it required from FDOT for harm resulting from the road expansion. *Id.* at 9 (A.R. 8594, at 8602) (reducing panther habitat units required from FDOT for mitigation

from 192 to 152). Thus, no evidence shows that USFWS actually re-consulted on the project, undertook any new analyses, or made any new determinations.

To the contrary, USFWS purported to reinitiate consultation only for the purpose of bolstering flawed conclusions the agency had already made. Specifically, in response to Plaintiffs' allegations, USFWS now claimed that it was too difficult to estimate the increase in traffic and the impact of that traffic on panthers, so as to set a numerical take limit for vehicular fatalities. *Id.* at 6, 13–14 (A.R. 8594, at 8599, 8606–07). And instead, USFWS contended that it would use the same habitat surrogate it had created for habitat loss and degradation as the take limit for vehicle strikes. *Id.* at 18 (A.R. 8594, at 8611).

“[P]iling on more evidence” to justify a decision USFWS had already made “is impermissible, whether termed an amendment or not.” [Gifford Pinchot, 378 F.3d at 1077](#). An agency cannot use post-hoc rationalizations to remedy inadequacies in the agency's original decision, and an agency cannot support the decision it has already made with additional explanation added after-the-fact and in response to legal challenge. See [Chenery, 332 U.S. at 196](#). An agency's decision, instead, must “be upheld, if at all, on the same basis articulated in the order by the agency itself.” [Burlington Truck Lines, Inc. v. United States, 371 U.S.](#)

156, 168–69 (1962); *Friends of the Clearwater v. Dombek*, 222 F.3d 552, 560 (9th Cir. 2000); *Camp v. Pitts*, 411 U.S. 138, 142–43 (1973) (agency cannot rely on post hoc rationalizations to defend its earlier decisions); *Nat'l Wildlife Fed'n*, 235 F. Supp. 2d at 1152 (“An agency seeking to justify its action may not offer a new explanation for the action, but must be judged on the rationale and record that led to the decision.”). To hold otherwise allows an agency to manipulate judicial review of agency action. *Gifford Pinchot*, 378 F.3d at 1077.

C. USFWS’ Amended BiOp Failed to Create a Numerical Take Limit for Panther Deaths from Vehicle Strikes.

Regardless of USFWS’ attempt to bolster its action post hoc, the Amended BiOp suffered the same flaws as its predecessor because it failed to create a numerical take limit for panther deaths resulting from vehicle strikes, even though it could have. USFWS’ post-hoc arguments for why it would be impractical to establish a numerical take limit are not supported by the record.

Courts have recognized that a take limit should be expressed as a specific number, as Congress intended. See *Miccosukee Tribe I*, 566 F.3d at 1274 (recognizing Congress’ preference for a numerical take limit); see also *Ariz. Cattle Growers’ Ass’n v. USFWS*, 273 F.3d 1229, 1249 (9th Cir. 2001) (ITS should use numerical take limit); *Oregon Nat. Res. Council v. Allen*, 476 F.3d 1031, 1037 (9th

[Cir. 2007](#)) (same); [Ctr. for Biological Diversity v. Bernhardt, 982 F.3d 723, 750 \(9th Cir. 2020\)](#) (same).

The Court of Appeals for the Eleventh Circuit has held that USFWS must establish a numerical take limit unless it is “impractical to do so.” [Miccosukee Tribe I, 566 F. 3d at 1274–75](#). Accord [Miccosukee Tribe of Indians of Fla. v. United States \(“Miccosukee Tribe II”\), 697 F. Supp. 2d 1324, 1331 \(S.D. Fla. 2010\)](#) (quoting [Ariz. Cattle Growers’, 273 F.3d at 1250](#)). “In this context, impracticality means that it was not possible to use some form of numerical population count.” [Id. at 1331](#).

Three important factors relevant to assessing the practicality of establishing a numerical incidental take trigger include: (1) “the availability and quality of actual or estimated population figures;” (2) “the ability to measure incidental take;” and (3) “the ability to determine the extent to which incidental take is attributable to the action prompting the biological opinion and incidental take statement, as opposed to other environmental factors.” [Id.](#)

USFWS bears the burden to establish that it was not practical to estimate a numerical value for take from vehicular strikes, and it did not meet its burden here. See [Ctr. for Biological Diversity, 422 F. Supp. 2d at 1137](#). USFWS did not demonstrate that it would be “impracticable” to establish a numerical take limit

for panther deaths from vehicle strikes based on the factors outlined in

[Miccosukee Tribe II](#), 697 F. Supp. 2d at 1330–31. Nor could it.

First, as detailed above, the administrative record shows that for decades, teams of researchers have collected data about the Florida panther population. “[T]he availability of population data increases the likelihood that establishing a numerical incidental take trigger is practical.” [Id.](#) at 1332. USFWS has ample data estimating, describing, and tracking the Florida panther population. As USFWS itself explained, a team of researchers collect panthers’ radio-transmitted location data three days per week, creating a large database of recorded panther locations, and also includes data from aerial and physical surveys. Am. BiOp at 7–8 (A.R. 8594, at 8600–01); Recovery Plan at 67–68 (A.R. 5070, at 5152–53).

Despite the ample data and population estimates at its fingertips, USFWS sought to defend its failure to set a numerical take limit for vehicular strikes by contending for the first time in the Amended BiOp that “the panther is wide-ranging and it is difficult to monitor panthers in their territories; especially un-collared panthers.” Am. BiOp at 18 (A.R. 8594, at 8611). Yet USFWS itself acknowledged the accuracy of the telemetry data it has. [Id.](#) at 8 (A.R. 8594, at 8601). And USFWS has repeatedly relied on that data to make decisions about

panther conservation efforts. *Id.* at 6–7 (A.R. 8594, at 8599–600). For example, in the most recent Status of the Species Report, USFWS relied on the same verified panther population estimates to determine the viability of the current population. 2015 Status at 11 (A.R. 7237, at 7247); [50 C.F.R. § 424.21](#) (five-year review requirement). And, as USFWS explained in the original BiOp, the agency uses this very data to estimate the size and number of home ranges and travel corridors that panthers use and to assess yearly breeding activity. BiOp at 8 (A.R. 8273, at 8280). USFWS articulated no reasoned basis to discount the data in its own administrative record that the agency itself relies on for related purposes.

This case is thus similar to *Miccosukee Tribe I*, where the Eleventh Circuit was unpersuaded by USFWS’ argument that it was not possible to create a numerical population-level take limit for affected bird species. [566 F.3d at 1274–1275](#). In that case, USFWS contended that the birds had “secretive” behavior, “cryptic” coloring, and “move[d] over expansive and remote areas.” [Id. at 1275](#). The court rejected these arguments, however, given that USFWS had spent a “great deal of time actually counting these particular birds and creating yearly population data based on their efforts.” [Id.](#) Compared to those birds, Florida panthers are even easier to measure because they are tracked and counted

regularly, live on land (not the air or sea), and exist only in Southwest Florida.

Second, USFWS did not contend it would not be able to measure and monitor the incidental take that would result from vehicle strikes on the SR 82 expansion. [Miccosukee Tribe I, 697 F. Supp. 2d at 1331](#). The record shows that USFWS had ample information monitoring existing vehicular strikes that have occurred on SR 82 pre-expansion: a Florida panther had been killed within the project action area on SR 82 just months preceding the original BiOp, and another panther died within the project footprint in 2012. Am. BiOp at 8 (A.R. 8594, at 8601). Takes from vehicle strikes are particularly measurable because they occur on roads, where humans can find and identify panthers that have been struck and hit by vehicles. This fact is further demonstrated by USFWS record evidence that clearly identifies panther deaths resulting from vehicle strikes, down to the roads upon which the strikes occurred.⁹

The nature of the take at issue here is far more measurable than the take at issue in [National Parks Conservation Association v. U.S. Department of Interior](#) (“NPCA”), 46 F. Supp. 3d 1254, 1335 (M.D. Fla. 2014), *adhered to on reconsideration*, No. 2:11-CV-578-FTM-29CM, 2015 WL 476163 (M.D. Fla. Feb. 5, 2015), *aff’d* 835

⁹ See, e.g., Annual Report 2013–2014 at appx. IV (A.R. 7065, at 7133–44); Annual Count 2010 at 15–19 (A.R. 5501, at 5516–20).

[F.3d 1377 \(11th Cir. 2016\)](#). In *NPCA*, the take at issue was not from vehicular strikes and it was not lethal take. *Id.* Instead, the panther takes there involved “harassment” resulting from recreational vehicle use in a portion of a national preserve. *Id.* at 1334–35. In that context, the court found that a numerical take limit was impracticable, because USFWS could not estimate how many panthers would occur within the project footprint and in turn how many panthers would be harassed by recreational vehicles. *Id.*

This case is also distinguishable from *Miccosukee Tribe II*, where the district court found that it was likely impracticable for USFWS to measure individual take for affected sparrows because USFWS could not count every egg, adult, nestling, or juvenile that might be affected by the actions at issue. [697 F. Supp. 2d at 1327, 1335–36](#). Here, by contrast, USFWS has shown it can (and already does) maintain regular, well-documented data on the annual panther deaths resulting from vehicle strikes, including their number and locations—even those that have occurred in the project footprint for the very road segment at issue.¹⁰

Third, USFWS would be able to determine the take that would be attributable to vehicle strikes resulting from the SR 82 expansion “as opposed to

¹⁰ See, e.g., BiOp at 8 (A.R. 8273, at 8280); Annual Report 2013–2014 at appx. IV (A.R. 7065, at 7133–44); Annual Survey 2012 at 17–21 (A.R. 6012, at 6029–33); Annual Count 2010 at 15–19 (A.R. 5501, at 5516–20).

other environmental factors.” [Id. at 1331](#). As demonstrated above, USFWS already monitors panther deaths and determines which deaths resulted from vehicle strikes, as opposed to other environmental factors, and determines the locations of those strikes. USFWS asserted for the first time in the Amended BiOp that it could not estimate future panther deaths because it does not have data about the amount, source, or timing of increases in traffic volumes expected from the SR 82 expansion. Am. BiOp at 19 (A.R. 8594, at 8612). And USFWS contended for the first time that it could not “determine if a panther mortality on that road is due to the Project or due to traffic resulting from other development in the area.” *Id.* However, data existed for USFWS to make those determinations, and USFWS was required to obtain and use it.

USFWS has a duty to obtain and use the “best scientific and commercial data available.” [16 U.S.C. § 1536\(a\)\(2\)](#); [50 C.F.R. § 402.14\(c\)\(4\), \(d\)](#). USFWS cannot escape these “obligations by not obtaining accurate scientific information.” [Sierra Club, 899 F.3d at 272](#). “These are not passive directives; rather, [USFWS] ‘must seek out and consider all existing scientific data relevant to the decision it is tasked with making.’” [Appalachian Voices v. U.S. Dep’t of Interior, 25 F.4th 259, 269 \(4th Cir. 2022\)](#).

Despite USFWS' statements to the contrary, ample data existed showing projected traffic patterns that would result from the SR 82 expansion, just as it does for any FDOT project. Florida law requires FDOT to study, compile, and furnish data and information as to *all* road construction in the state. [Fla. Stat. § 334.24](#) (duty to compile, maintain, and provide information relating to roads and road building and repair); [id. § 334.044\(20\)](#) (FDOT must conduct research studies and collect data necessary for the improvement of the state transportation system). Indeed, part of FDOT's justification for the project, as recounted by USFWS, suggests it had, indeed, projected the increase in traffic. BiOp at 12 (A.R. 8273, at 8284). Like with any road project, FDOT generated traffic projections to determine the need for and scope of the project.¹¹ PD&E Study at 3, 17, 44–46 (CORPS A.R. 286, at 297, 313, 342–44) (daily traffic projections). The record shows that the Corps had this information for its NEPA review and CWA Section 404 permit processing. *Id.* For reasons unexplained, however, USFWS failed to obtain it. USFWS cannot avoid its statutory duties by failing to obtain

¹¹ Of course, traffic projection studies are a routine part of the process for design and approval of road projects. See, e.g., [Citizens for Smart Growth v. Peters](#), 716 F. Supp. 2d 1215, 1223 (S.D. Fla. 2010) (FDOT's traffic and growth modeling used to determine the purpose and need for a project was not arbitrary); [Fla. Wildlife Fed'n v. Goldschmidt](#), 506 F. Supp 350, 377 (S.D. Fla. 1981) (relying on testimony regarding the "extensive computer analyses of traffic volumes with and without the highway conducted in the preliminary phases of preparation of the EIS").

relevant, available information, and then relying on the absence of that information to defend its inadequate action. [Sierra Club, 899 F.3d at 272](#); [Appalachian Voices, 25 F.4th at 269](#).

That projections based on this information may not be certain does not relieve the agency of its ESA obligations. To the contrary, under the ESA “an agency cannot abdicate its responsibility to evaluate the impacts of an action on a species by labeling available information ‘uncertain,’ because doing so violates Congress’ intent that agencies ‘give the benefit of the doubt to the species.’” [Miccosukee Tribe I, 566 F.3d at 1267](#) (quoting [Nat. Res. Def. Council v. Kempthorne, 506 F. Supp. 2d 322, 360 \(E.D. Cal. 2007\)](#)).

Finally, USFWS has previously estimated deaths for big cats like the panther that would result from vehicle strikes due to increased traffic from a federal action. In *Sierra Club v. U.S. Department of Interior*, the Fifth Circuit affirmed USFWS’ take limit of one ocelot or jaguarundi, which are both endangered big cats like the panther, for construction and operation of a liquefied natural gas export terminal, including related traffic. [990 F.3d 909, 911, 913–14 \(5th Cir. 2021\)](#). The BiOp at issue there not only set a vehicular take limit, it also placed special requirements on the federal agencies and permittee when

vehicular mortality occurred, regardless of whether the take limit was exceeded.

[*Id.* at 914](#) (discussing obligation to have a discussion if just one big cat was killed by a vehicle). In that case, the risk to the big cats largely derived from the increase in traffic. The same is true here. That USFWS has elsewhere estimated a number for take of big cats from vehicle strikes caused by increased traffic from a project undermines USFWS' bare, belated contention that it could not do so here.

D. USFWS Cannot Rely Post Hoc on a Habitat Surrogate Created to Limit Take from Habitat Loss to Extend Liability Coverage for Panther Take from Vehicle Strikes.

Rather than provide a numerical take limit for panther deaths from vehicle strikes in the Amended ITS, USFWS purported to rely on a habitat surrogate that the agency created in the original ITS to limit take from habitat loss and degradation from the project's construction. The habitat surrogate, however, involves only the habitat area that project construction would destroy, and nothing thereafter. It has no relation to the operation of the roadway or to vehicle strikes from operation of the roadway.

Under the ESA, a surrogate for numerical take is only permitted when USFWS (1) explains why it is not practical to express the amount or extent of anticipated take (or to monitor take-related impacts) in terms of individuals of the listed species; (2) describes the causal link between the surrogate and take of

the listed species; and (3) sets a clear standard for determining when the level of anticipated take has been exceeded. [50 C.F.R. § 402.14\(i\)\(1\)\(i\)](#); [Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.](#), 698 F.3d 1101, 1126–27 (9th Cir. 2012) (agency must explain why it did not create a numerical cap on take); [Allen](#), 476 F.3d at 1037–38 (“A surrogate is permissible if no number may be practically obtained” and “perform the functions of a numerical limitation” including serving as a trigger); [Ariz. Cattle Growers’](#), 273 F.3d at 1250 (same); [Miccosukee Tribe II](#), 697 F. Supp. 2d at 1331 (agency must explain why no numerical value could be practically obtained and a reasonable nexus between the surrogate and take); [Oceana, Inc., v. Ross](#), No. 15-0555 (PLF), 2020 WL 5995125, at *11 (D.D.C. Oct. 19, 2020) (same); [Nat. Res. Def. Council, Inc. v. Evans](#), 279 F. Supp. 2d 1129, 1184–85 (N.D. Cal. 2003); [USFWS, ESA Section 7 Consultation Handbook](#) 4-47 to 4-48 (1998) (same) [hereinafter “ESA Section 7 Handbook”]. USFWS failed to justify its use of the habitat surrogate for the SR 82 expansion in the BiOps.

First, as explained in detail above, USFWS failed to demonstrate it was impractical to set a numerical take limit for vehicular strikes. Nor could it.

Second, USFWS failed to articulate any link between habitat loss from construction and panther deaths from vehicular strikes (because, in fact, there is

none). To establish such a link, USFWS would have had to demonstrate “a reasonable nexus” “between the ecological surrogate and the take.” [Miccosukee Tribe II, 697 F. Supp. 2d at 1331](#). Accord [Ariz. Cattle Growers’, 273 F.3d at 1250](#) (surrogate must “establish a link between the activity and the taking of species” and contain measurable guidelines that allow the applicant to determine when incidental take is exceeded and, thus, when to reinitiate consultation); [Allen, 476 F.3d at 1038-39](#) (same); [Oceana, 2020 WL 5834838, at *5-8](#) (finding agency explanation of surrogate inadequate).

But USFWS did not draw any connection between vehicular strikes and habitat loss. Am. BiOp at 18–19 (A.R. 8594, at 8611–12). Instead, USFWS recognized that these impacts are separate and distinct, as it had to, because there is no connection between the two. Habitat loss results from land clearing and construction activities. Any related take results from the destruction of habitat during construction. And that take begins and ends with construction. In contrast, take in the form of vehicle strikes arises from operation of the roadway. It follows project completion and habitat loss. And it occurs from ongoing activity. *Id.* at 13–14 (A.R. 8594, at 8606–07).

Finally, USFWS failed to provide any guidelines to determine when incidental take from vehicular strikes would be exceeded. Because the Amended ITS is based on habitat loss from construction, rather than roadway operation, USFWS failed to establish any measure by which a vehicle strike take limit would be exceeded. But at its core, a surrogate for numerical take “must be able to perform the functions of a numerical limitation.” [Allen, 476 F.3d at 1038](#). Indeed, without a meaningful trigger, an “ITS cannot be effective.” [Nat’l Wildlife Fed’n, 235 F. Supp. 2d at 1160](#). “Most importantly, the purpose of establishing a permissible take in an ITS is to ensure that *even if the project is implemented in strict accordance with the plan*, it will not result in a level of harm to the protected species that would cause the agency to reconsider its jeopardy determination.” [Id.](#) (citing [Ariz. Cattle Growers’, 273 F.3d at 1249](#)) (emphasis added).

But the habitat loss surrogate here does not give any guideline, much less a meaningful one, for when vehicular strikes will reach an unacceptable level. And as a result, the Amended ITS creates no limit on that take, extending liability coverage for any number of vehicle strikes in perpetuity. With USFWS’ habitat surrogate, take could only be exceeded if FDOT destroyed more habitat than planned during construction. The Amended ITS provides no way to determine

when the loss from vehicular strikes will be exceeded because it sets no limit on vehicular take. Indeed, because the surrogate is time-limited (the habitat loss begins and ends with the construction period), it served as no limit for vehicular strikes at all.¹²

USFWS' post-hoc attempt to justify its failure to set a vehicular strike take limit by relying on the habitat surrogate it created for habitat loss from construction fails. USFWS failed to establish the required connection between vehicle strikes and habitat loss to support the use of habitat surrogate and failed to create the requisite guideline for reinitiation based on vehicular strikes.

II. USFWS Failed to Evaluate the Effects of the Action.

In addition to the above failures, USFWS' BiOp impermissibly failed to evaluate, and in some cases even to identify, the effects of the SR 82 expansion and the cumulative effects of surrounding activities, thereby precluding a reasoned basis for its no jeopardy conclusion. USFWS was tasked with evaluating how many more fatalities, primarily those caused by vehicular

¹² Courts have even rejected USFWS' attempts to rely on a surrogate for take *resulting from habitat loss* when that habitat loss is coextensive with the project itself. [Allen, 476 F.3d at 1037–41](#); [Nat'l Wildlife Fed'n, 235 F. Supp. 2d at 1160](#). A habitat loss surrogate then, cannot possibly be adequate to set a limit for take resulting not from habitat loss at all, but rather from vehicular take that follows construction.

collisions, and acres of habitat loss and fragmentation, the Florida panther could endure and still survive. This it failed to do.

USFWS' analysis of the effects of habitat loss was inadequate and overly narrow. USFWS stated that habitat loss and fragmentation is one of the greatest threats to the panther and admitted that this project, among many other development projects, will result in habitat loss and fragmentation. BiOp at 7, 10–15 (A.R. 8273, at 8279, 8282–87). USFWS then listed five general categories of state and county actions and cited undisclosed information provided from a consultant to find that roughly 1,301 acres would be developed per year. *Id.* at 15 (A.R. 8273, at 8287). USFWS however dismissed the loss of over twenty acres of habitat and another 1,300 acres estimated to be lost each year as de minimis, by contending it amounts to only a small percentage of the panther's home range. *Id.* at 11–12, 15–16 (A.R. 8273, at 8283–84, 8287–88). USFWS concluded that the long-term impact of this loss may adversely affect the panther, but the "analysis" abruptly ended there. *Id.* at 15 (A.R. 8273, at 8287).

First, USFWS' failure to explain or support its calculation that 1,301 acres of panther habitat would be developed each year rendered the BiOp inadequate.

See [Souza, 2009 WL 3667070, at *11-12](#) (finding cumulative impact analysis arbitrary due to agency's reliance on an unexplained fish density calculation).

Second, USFWS' narrow focus on that acreage as a percentage of the panther's home range unreasonably skewed the impacts of the project. USFWS ignored the fact that driven down to less than 5% of its historical range and now cornered in Southwest Florida, each remaining acre is even that much more essential for the panther's survival. See 2015 Status at 6-7 (A.R. 7237, at 7242-43). USFWS provided no reasoned basis to make its assessment by comparing habitat loss to the panther's home range, rather than to its actual or reasonably foreseeable remaining habitat, or that which it requires for survival.

Moreover, the ESA requires a cumulative effects analysis precisely to prevent an agency from viewing a single project in isolation, which would allow it to dismiss any single project as inconsequential. See, e.g., [Nat'l Wildlife Fed'n v. Norton, 332 F. Supp. 2d 170, 177-79 \(D.D.C. 2004\)](#) (cumulative effects analysis insufficient where USFWS failed to identify specific projects reasonably certain to occur given the danger of habitat loss for the panther). With road projects already segmented, leading to piecemeal review, USFWS' tunnel vision on acreage lost as a percentage of the panther's home range unreasonably

minimized the impact (direct, indirect, and cumulative) of this growth and development and predetermined the jeopardy analysis. USFWS ignored that the panther is going extinct not because of any one project, but because of decades of projects fragmenting and destroying its habitat a sliver at a time.¹³

This approach was rejected in *National Wildlife Federation v. Norton*, where USFWS attempted to justify a mine's habitat destruction by finding that it would involve a small percentage of the panther's total habitat. [Id. at 177](#). The court found USFWS' failure to take the next step after calculating what percentage the acreage loss is compared to the panther's range to explain what the percentages meant for the panther was a "failure to make a 'rational connection between the facts found and the choice made.'" [Id.](#) For example, how would this short-term and long-term loss affect the quality and quantity of the panther's habitat? How would the increase in traffic caused by the development exacerbate panther road fatalities? And how would the loss of habitat impact intraspecific aggression and potential for genetic disorders? USFWS' action here suffers the same deficiency and must be set aside.

¹³ While the Court earlier dismissed Plaintiffs' challenges to the SR 29 BiOp as moot on representations from FDOT that the project may not move forward, USFWS' action there contained the same dangerous pattern of legal flaws.

Similarly, in *Greenpeace*, the court overturned a BiOp due to the agency's failure to properly consider the individual and cumulative effects of fishing practices on an endangered sea lion. [*Greenpeace v. Nat'l Marine Fisheries Serv.*, 80 F. Supp. 2d 1137, 1149 \(W.D. Wash. 2000\)](#). The court criticized the agency's failure to "analyze and develop projections based on information that was available" and the agency's so-called analysis, which was "nothing more than a list." [*Id.* at 1149–50](#). As in *Greenpeace*, the BiOps challenged in this case illustrate USFWS' repeated refusal to address the cumulative loss of habitat. These narrow, short-sighted analyses are the antithesis of what a jeopardy analysis requires and, if allowed to continue, will leave the panther on the road to extinction. *See also* [*Nat'l Wildlife Fed'n v. Coleman*, 529 F.2d 359, 366, 373–75 \(5th Cir. 1976\)](#)¹⁴ (invalidating BiOp in part for failure to analyze "primary effects of the highway ... from the inherent development which accompanies a new highway" and focusing only on small acreage of habitat to be lost).

Third, USFWS' cumulative effects analysis failed to identify and discuss any of the specific, known, and reasonably certain projects in the area, which is necessary for a meaningful analysis. The agency unreasonably relied on the

¹⁴ *See* [*Bonner v. City of Pritchard*, 661 F.2d 1206, 1209 \(11th Cir. 1981\)](#) (en banc) (adopting as binding precedent decisions by Fifth Circuit prior to October 1, 1981).

unsupported mathematical computation of annual acreage losses without discussing any specific projects. With the rampant development planned and underway in Collier County, the information necessary for this analysis was readily available. Recovery Plan at 36, 38, 46 (A.R. 5070, at 5122, 5124, 5132); Kautz 2006 at 119 (A.R. 4786, at 4787). USFWS must aggregate projects' effects to ensure that their cumulative effects are perceived and measured." See [Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.](#), 265 F.3d 1028, 1035–37 (9th Cir. 2001) (invalidating BiOps where agency disregarded "projects with a relatively small area of impact but that carried a high risk of degradation when multiplied by many projects and continued over a long time period."). To hold otherwise, would be "tantamount to assuming that no project will ever lead to jeopardy of a listed species." [Id.](#)

A meaningful evaluation of cumulative effects from habitat loss and fragmentation was particularly important in this case, considering that so much panther habitat has been lost and is under ever-increasing threat due to intense development and road expansions. Indeed, as USFWS has acknowledged, "cumulative effects can be the deciding factor in determining the likelihood of jeopardy." [ESA Section 7 Handbook at 4-32.](#) Failure to properly address

cumulative effects renders a BiOp's conclusion arbitrary and capricious. *See Coleman*, [529 F.2d at 373–75](#) (invalidating BiOp in part for agency's failure to analyze a "principal" indirect effect from highway construction of inherent development that will accompany it); [Fla. Key Deer](#), [364 F. Supp. 2d at 1357](#) (holding alternatives were arbitrary and capricious because they failed to consider the cumulative effect of projects within the habitat of listed species).

Fourth, another omission in the BiOp was USFWS' failure to analyze the individual and cumulative impacts of road fatalities, a leading cause of panther deaths. 2015 Status at 12 (A.R. 7237, at 7248). In the BiOp, USFWS recognized that fatalities from vehicular strikes are a significant threat to the panther. BiOp at 7 (A.R. 8273, at 8279). USFWS expected that panther usage and movement in this area—i.e., 6,000 telemetry observations from 145 collared panthers—would not change. *Id.* at 8, 13 (A.R. 8273, at 8280, 8285). USFWS admitted that panthers have a "habit of crossing busy roadways." *Id.* at 12 (A.R. 8273, at 8284). USFWS also admitted that traffic—one of the main justifications for this project—and the threat of vehicular strikes are expected to increase on this road. *Id.* at 12–13 (A.R. 8273, at 8284–85). USFWS even found that it was likely panthers may be injured or killed by vehicular collisions over the life of the project. *Id.*

However, USFWS ultimately concluded, without support or explanation, that it expected panther road fatalities from the project to be “small” in number. *Id.* at 16 (A.R. 8273, at 8288). USFWS did not explain what it meant by “small.” Given that there are fewer than 120 to 230 adult panthers remaining in the wild, what USFWS may have meant by a “small number” is critical to evaluating any conclusion USFWS drew. And what impact even a “small number” of road fatalities might have on the population had to be assessed. But the BiOp contained no evaluation of how this increased threat or the “small number” of anticipated deaths would affect the panther’s survival and recovery.

There was zero analysis of how these road fatalities would impact the Florida panther. There was also zero analysis, or even mention, of how this threat in combination with the cumulative effects from known or anticipated traffic-inducing development will impact the panther’s survival. These failures rendered the BiOp arbitrary and capricious. See [*Idaho Rivers United v. Nat’l Marine Fisheries Serv.*, No. C94-1576R, 1995 WL 877502, at *4 \(W.D. Wa. Nov. 9, 1995\)](#) (failure to analyze potential impact to species regardless of anticipated infrequency of its occurrence was arbitrary and capricious); [*Sw. Ctr. For Biological Diversity v. Bartel*, 470 F. Supp. 2d 1118, 1138–39 \(S.D. Cal. 2006\)](#) (agency must

evaluate impact of that take, despite its rarity, on survival of species as a whole);

[*Def. of Wildlife v. U.S. Dep't of Interior*, 931 F.3d 339, 359–60 \(4th Cir. 2019\)](#)

(vacating BiOp in part for failure to evaluate how a threat to species would impact both its survival *and* recovery).¹⁵ With so few panthers remaining, even a “small” number of deaths could be detrimental to the panthers’ survival.

Finally, the Amended BiOp suffered from the same flaws as the BiOp by failing to (1) explain the basis of the 1,300 acre estimate, Am. BiOp at 15 (A.R. 8594, at 8608); (2) analyze how the estimated 1,300 acres of habitat loss per year and increases in traffic (5,000 new cars on the road per year) and vehicle mortality will impact panther survival and recovery, *id.*; and (3) analyze how the 5,000 new cars per year that would “increase” vehicle mortality would affect panther survival and recovery, *id.* at 15–16 (A.R. 8594, at 8608–09).

Moreover, the post-hoc rationalizations contained in the Amended BiOp were improper and should be rejected for the reasons argued above. The Amended BiOp claimed for the first time, without support or explanation, that the anticipated habitat loss was a “worst-case scenario.” *Id.* USFWS then added an attempt to punt the long-term effects analysis by stating it would continue to

¹⁵ See also [*Fla. Key Deer*, 364 F. Supp. 2d at 1357](#) (listing “secondary effects” from the BiOp such as “increased traffic” as relevant to the cumulative effects analysis).

“monitor the effects” and “encourage” development of habitat conservation plans and incidental take permits. But no legal authority allows USFWS to rely on potential future actions in lieu of meeting its present obligations. *Id.*

III. USFWS Failed to Analyze the Baseline Conditions.

USFWS also impermissibly failed to analyze the baseline conditions for the Florida panther, particularly the impact of federal projects in the action area related to development, mining, and roads.

First, the BiOp makes only general references to federal actions “such as construction of highways and urban development,” but nothing in the BiOp or record identifies those projects. BiOp at 9–10 (A.R. 8273, at 8281–82). Instead, USFWS vaguely said it has consulted on 84 projects (without identifying what those projects are, the outcome of those consultations, or the anticipated or known impacts of those projects) affecting approximately 41,868.6 acres of panther habitat (without identifying where that habitat is or how the habitat has been affected). *Id.* Tellingly, the record includes a BiOp for only one other project, and USFWS cited it solely for its climate analysis. USFWS, Biological Opinion for Everglades Restoration Transition Plan, Phase 1 (Nov. 2010) (A.R. 5719, at 5722–999); BiOp at 11, 21 (A.R. 8273, at 8283, 8293).

USFWS' failure to list or include information on other projects USFWS considered for its baseline assessment frustrates the Court's ability to assess the adequacy of that baseline assessment. As a result, nothing in the record indicates what projects USFWS may have considered or whether they included the bevy of projects planned or ongoing in panther habitat areas.

Second, even if merely stating that the agency reviewed unidentified actions were sufficient for a baseline analysis—and it is not—USFWS' analysis still fell short of the ESA's requirements because it failed to *analyze* the impacts of these actions on the panther. USFWS merely listed a number of unidentified projects with acres affected and the habitat preserved through mitigation, and then summarily concluded that “these Federal actions, individually and cumulatively, did not jeopardize the survival and recovery of the panther.” BiOp at 10 (A.R. 8273, at 8282). [Oceana, 2020 WL 5995125, at *11](#) (USFWS cannot just “list and describe data that it purported to incorporate into its jeopardy analysis—without indicating how that data actually factors into the analysis”). USFWS articulated no analysis to reach its conclusion. Instead, the BiOp forces the Court simply to take the agency at its word. But the APA and ESA require more than that for an agency determination to stand.

The BiOp thus also failed to address the potential increased risk of vehicle strikes resulting from both development (e.g., more cars on the road) and expanded roadways (e.g., traffic increases, farther stretches for panthers to cross, increased speeds) associated with these unnamed 84 projects. And it failed to identify the location of habitat affected by these unnamed 84 projects and any impacts on the connectivity between habitat areas. As explained above, isolated habitat areas can increase the risk of intraspecies aggression and further exacerbate the limited genetic variation in panthers. These are matters that a baseline assessment of the species would, at a minimum, be required to address and analyze to justify any conclusion the agency draws. [*Def. of Wildlife v. Babbitt*, 130 F. Supp. 2d 121, 128 \(D.D.C. 2001\)](#) (requiring USFWS to conduct an “analysis of the status of the environmental baseline given the listed impacts, not simply a recitation of the activities of the agency”).

Here, as in *Souza*, “[w]hile the biological opinion does reference these other projects, ... there is no analysis of these projects or their impacts.” [2009 WL 3667070, at *6](#). In the BiOp, USFWS did not identify any of the projects it claimed to have considered. Nor are they present in the record. It therefore could not, and indeed did not, analyze the impacts of those projects.

This case is readily distinguishable from [Miccosukee Tribe I](#), 566 F.3d at [1268–69](#). There, the court found that the BiOp was not required to “thoroughly discuss state actions” that USFWS had previously determined had “no impacts” on the species, particularly since none of the projects identified by plaintiffs would adversely impact the species at issue. [Id. at 1268](#). Here, by contrast, USFWS did not claim that the prior 84 actions had “no impact” on the species. Further, the record shows that Southwest Florida is experiencing a boom of development and attendant road projects that individually and cumulatively pose threats to panthers. USFWS was therefore required to discuss those actions to demonstrate the adequacy of its baseline assessment.

Finally, the same hollow analysis persisted in the Amended BiOp. USFWS made only minimal changes to the baseline analysis directed at removing details relevant to consultation regarding another species. *Compare* BiOp at 9–10 (A.R. 8273, at 8281–82) *with* Am. BiOp at 9–10 (A.R. 8594, at 8602–03).

IV. The Corps Unlawfully Relied on USFWS’ Flawed BiOps and ITSs.

The Corps, for its part, violated the ESA by arbitrarily relying on the facially flawed BiOps when issuing its EA for the SR 82 expansion and accompanying CWA Section 404 permit, and supplemental EA and permit modification. The Corps must ensure that its actions not jeopardize the survival

and recovery of protected species. [16 U.S.C. § 1536\(a\)\(2\)](#). An agency cannot rely on a “facially flawed BiOp” or “blindly adopt” the faulty conclusions of USFWS. See [Am. Rivers v. FERC](#), 895 F.3d 32, 55 (D.C. Cir. 2018) (NEPA document arbitrarily incorporated BiOp’s inadequate cumulative impacts analysis); [Norton](#), [332 F. Supp. 2d at 182](#). The Corps cannot “abrogate its responsibility to ensure that its actions will not jeopardize a listed species; its decision to rely on a [US]FWS biological opinion must not have been arbitrary or capricious.” [Fla. Key Deer v. Paulison](#), 522 F.3d 1133, 1144 (11th Cir. 2008).

Here, the Corps failed to assess the impacts of its actions, because it relied entirely on the flawed USFWS’ BiOps. EA at 19, 37–39, 46 (CORPS A.R. 4604, at 4622, 4640–42, 4649); Supplemental EA, at 1–4 (CORPS A.R. 7243, at 7243–46); 404 Permit at 6 (CORPS A.R. 5344, at 5349); 404 Permit Modification at 1–2 (CORPS A.R. 7180, at 7180–81) (modifying the permit relying on and incorporating the Amended BiOp). As shown above, USFWS’ BiOps were facially flawed, and it was therefore unreasonable for the Corps to rely on them.

Further, because the Corps relied entirely on the BiOps, the Corps’ EA also violated NEPA. Indeed, its cumulative impacts section failed to mention the panther at all. EA at 34–37 (CORPS A.R. 4604, at 4637–40). The Corps included

no discussion of the many ongoing, planned, and projected developments and road projects set to occur in Southwest Florida, but instead vaguely referred to “development.” *Id.* And the Corps explicitly refused to evaluate the cumulative impacts of future developments in the region, claiming it would instead evaluate those projects individually when they occur. *Id.* at 34. The Supplemental EA followed suit. Supplemental EA at 1–4 (CORPS A.R. 7243, at 7243–46). “[P]erfunctory references do not constitute analysis useful to a decisionmaker in deciding whether, or how, to alter the program to lessen cumulative environmental impacts.” [Nat. Res. Def. Council, Inc. v. Hodel, 865 F.2d 288, 299 \(D.C. Cir. 1988\)](#). See [Souza, 2009 WL 3667070, at *26](#) (rejecting EA when the Corps failed to “even mention” “the combined impacts of development” and the project’s wetlands loss). As such, the EAs should also be set aside for failing to evaluate cumulative impacts. [Fla. Wildlife Fed’n v. U.S. Army Corps of Eng’rs, 401 F. Supp. 2d 1298, 1326 \(S.D. Fla. 2005\)](#).

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that summary judgment be granted in their favor. Pursuant to Local Rule 3.01(h), Plaintiffs respectfully request oral argument on Plaintiffs’ Renewed Motion for Summary Judgment and estimate that sixty minutes will be required.

Respectfully submitted this 27th day of March 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on this the 27th day of March 2023, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of the filing to all counsel of record.

/s/ Bonnie Malloy
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