July 12, 2024

U.S. Army Corps of Engineers, Jacksonville District
1520 Royal Palm Square
Suite 310
Ft. Myers, Florida 33919
ATTN: District Engineer

**RE: Comments on "Kingston Mixed-Use Development" (Clean Water Act Section 404 Permit Application SAJ-2024-00967 (SP-SJF)); Request for Public Hearing**

***Submitted via email to*** stephen.j.fleming@usace.army.mil

Dear District Engineer,

Sierra Club, the Center for Biological Diversity, and the Conservancy of Southwest Florida write to provide public comments regarding the Clean Water Act Section 404 permit application for the "Kingston Mixed-Use Development," in response to application notice SAJ-2024-00967 (SP-SJF), dated June 14, 2024.[1] Based on the information provided in that notice, the application appears to be for the same mixed-use development project for which the applicant CAM7-Sub, LLC previously sought a State 404 Program permit.[2] Due to the significant effects that the proposed development will have on wetlands and wetlands ecosystems, the endangered Florida panther, and other imperiled wildlife species, the U.S. Army Corps ("Corps") should prepare an Environmental Impact Statement ("EIS") to comply with the National Environmental Policy Act ("NEPA") and properly inform its decision regarding the permit application. The Corps must also complete Endangered Species Act formal consultation with the U.S. Fish and Wildlife Service ("FWS") regarding species impacts. Furthermore, the Corps must determine that the project is in the public interest and complies with requirements to avoid and minimize impacts, and to select the "least environmentally damaging practicable alternative," as required by the Clean Water Act ("CWA"), before issuing a permit. In light of the available information

[1] The materials cited in this comment letter were submitted to the Corps on a thumb drive confirmed as delivered by FedEx on July 12, 2024 at 9:49 am, for inclusion in the administrative record.

[2] *See* Florida Department of Environmental Protection, Nov. 20, 2023, State 404 Permit Public Notice, Permit Application No. 423130-001 sought by CAM7-Sub, LLC/Cameratta Companies, LLC for the "Kingston Project" in Lee County.

about the effects of the proposed development on the environment and federally listed species, the Corps should deny the application. Our organizations also request a public hearing, for the reasons detailed below.

The Sierra Club was founded in 1892 and is the nation's oldest grassroots environmental organization. The Sierra Club is incorporated in California, and has approximately 647,600 members nationwide, with about 31,303 members in its Florida Chapter alone. The organization is dedicated to the protection and preservation of the environment. The Sierra Club's mission is to explore, enjoy and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments. One of the Sierra Club's main national initiatives, the Conservation Campaign, tackles pressing environmental problems including climate change and threats to wildlife. Sierra Club has long advocated for protections for Florida species under the Endangered Species Act, including litigation to ensure the U.S. Fish and Wildlife Service meets its obligations.

The Center for Biological Diversity (Center) is a national, nonprofit organization dedicated to protecting all species, great and small, hovering on the brink of extinction using science, law, and creative media, with a focus on protecting the lands, waters and climate species need to survive. The Center has more than one million members and supporters, more than 99,000 of whom live in Florida and care about the species who live here. To that end, the Center's Florida office works to protect many Florida species including the Florida panther, eastern indigo snake, Florida bonneted bat, wood stork, northern crested caracara, red-cockaded woodpecker, Everglade snail kite, and gopher tortoise.

The Conservancy of Southwest Florida is a non-profit corporation headquartered in Naples, Florida. The Conservancy has more than 4,500 members and supporters. The mission of the Conservancy is to protect the environment and natural resources of Southwest Florida, including endangered species such as the Florida panther. The Conservancy pursues this mission through policy and advocacy, environmental education, scientific research, and in providing rehabilitation for native wildlife. The Conservancy has been engaged in advocacy for the protection of the Florida panther and other listed species for many years, including active involvement in local land-use planning and engagement in state and federal permitting processes for projects within panther habitat. The Conservancy has conducted scientific field research focused on the Florida panther. The Conservancy's environmental education has highlighted the Florida panther and features exhibits about this species in its nature center located in Naples, Florida. As we celebrate our 60th anniversary, we continue to protect southwest Florida's unique natural environment and quality of life… now and forever.

For the reasons detailed in this letter, our organizations object to the issuance of the proposed permit.

The Corps' June 14, 2024 notice for the "Kingston Mixed-Use Development" (hereafter "Kingston Development") permit application states that the project site encompasses

approximately 6,687.50 acres, of which 3,293.89 acres will be "conservation area,"[3] and ostensibly the remaining 3,393.61 acres developed areas in the construction footprint. This is materially similar to the acreages described in the application CAM7-Sub, LLC/Cameratta Companies previously submitted to Florida Department of Environmental Protection (FDEP) for a State 404 Program permit, which covered a project area of approximately 6,676.82 acres, with about 3273.62 acres in conservation areas, and 3,403.20 acres of development footprint.[4] The publicly available information regarding that application to FDEP includes a "Technical Assistance" analysis prepared by the U.S. Fish and Wildlife Service ("FWS" or "the Service") regarding the impacts of the project on species listed under the Endangered Species Act ("ESA"), which provides some insight into the anticipated impacts of the Kingston Development despite serving no direct purpose in the federal permitting process.[5]

As detailed below, that Technical Assistance document ("TA Form") projected that the traffic induced by the Kingston Development alone would very high probability of killing *at least* 3 additional Florida panthers *per year* due to vehicle collisions, and purported to provide a liability shield for killing of up to 22 panthers per year via vehicle collisions from induced traffic from the project.[6] The Kingston Development will also destroy and degrade thousands of acres of Florida panther habitat, which experts have identified as essential for the panther's survival and recovery into its historical range, reducing the population that can be supported.[7] In light of a current panther population estimated at only 120–230 adults and subadults, and the best available scientific information indicating that the population is no longer growing and may be in decline, these impacts plainly rise to the level of significance. Furthermore, the cumulative effects on the Florida panther from habitat loss and vehicle impacts induced by the Kingston Project, along with the effects of other reasonably foreseeable development projects in Collier County appear to rise to the level where they would reasonably be expected to reduce the panther's ability to survive and recover. The proposal also will have reasonably foreseeable adverse effects on other ESA-listed species, as well as on adjacent conservation lands. All of these significant species effects must be evaluated in an EIS.

Additionally, because of the substantial species impacts described herein, the Corps must engage in thorough, formal consultation with the U.S. Fish and Wildlife Service (FWS) to minimize the species impacts and ensure issuing this permit will not jeopardize the Florida panther or any other federally protected species.

Finally, the Corps must deny the permit because it is contrary to the public interest and would not comply with the CWA 404(b)(1) guideline requirements to avoid and minimize impacts and to select the least environmentally damaging practicable alternative.

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[3] *See* U.S. Army Corps of Engineers Jacksonville District, Public Notice SAJ-2024-00967 (SP-SJF), *available at* https://www.saj.usace.army.mil/Missions/Regulatory/Public-Notices/Article/3808962/saj-2024-00967-sp-sjf/.

[4] *See* Kingston FWS Technical Assistance Form for Permit Application No. 423130-001, Oct. 26, 2023 (describing affected acreages associated with State 404 Permit application for Kingston Development) (hereafter "Kingston TA Form").

[5] As explained below, this document was created as part of a state Clean Water Act permitting scheme that was set aside as unlawful in federal district court.

[6] Kingston TA Form at 6, 22, 23.

[7] Kingston TA Form at 23.

## LEGAL BACKGROUND

### Endangered Species Act ("ESA") Requirements

The ESA is "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation[,]" and "[t]he plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost."[8] To achieve this goal, the ESA "provides both substantive and procedural provisions designed to protect endangered species and their habitats."[9] For instance, under section 9 of the ESA, it is unlawful for any person to "take" an endangered species.[10] The ESA defines "take" in the "broadest possible manner to include every conceivable way" a person could harm or kill fish or wildlife."[11] Accordingly, the ESA defines "take" as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."[12] The ESA's prohibition against take applies to all "persons," including federal and state government officials.[13]

"Conservation," also referred to as "recovery," is at the heart of the ESA. Conservation is defined as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided [by the ESA] are no longer necessary." [14] The ESA's conservation purpose "is reflected not only in the stated policies of the Act, but in literally every section of the statute."[15]

When a federal agency plans to authorize, fund, or carry out an action that may affect species protected under the ESA, section 7 mandates that the federal "action agency" must consult with FWS to "insure that any action authorized, funded, or carried out by such agency. . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species."[16] Jeopardize means "to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed

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[8] *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 180, 184 (1978).
[9] *Am. Rivers v. Nat'l Marine Fisheries Serv.*, 126 F.3d 1118, 1121 (9th Cir. 1997).
[10] 16 U.S.C. § 1538(a)(1)(B).
[11] S. Rep. No. 307, 93rd Cong., 1st Sess. 1, *reprinted in* 1973 U.S. Code Cong. & Admin. News 2989, 2995.
[12] 16 U.S.C. § 1532(19). FWS defines harm to mean "an act which actually kills or injures wildlife." 50 C.F.R. § 17.3. FWS defines "harass" to mean "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering." *Id.*
[13] 16 U.S.C. § 1532(13).
[14] *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d at 438 (citing 16 U.S.C. § 1532(3)). "Recovery" is defined as the "improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act." 50 C.F.R. § 402.02.
[15] *Babbitt v. Sweet Home Chapter of Cmties. for a Great Or.*, 515 U.S. 687, 699 (1995) (quoting *Hill*, 437 U.S. at 184).
[16] 16 U.S.C. § 1536(a)(2).

species in the wild by reducing the reproduction, numbers, or distribution of that species."[17] "To 'insure' … means '[t]o make certain, to secure, to guarantee'" that jeopardy will not occur.[18] Until the consultation concludes, an agency cannot commit to an action in a way that would foreclose alternatives to avoid jeopardy.[19]

During consultation, the action agency must ask FWS and/or National Marine Fisheries Service (NMFS)[20] whether any listed or proposed species may be present in the area of the agency action.[21] If listed or proposed species may be present, the agency must prepare a "biological assessment" to determine whether the listed species may be affected by the proposed action.[22] If an agency determines that its action "may affect" but is "not likely to adversely affect" a listed species or its critical habitat, it may complete "informal consultation," during which FWS must concur in writing with the agency's determination.[23] If the agency determines that its action is "likely to adversely affect" a listed species or critical habitat, or if FWS does not concur with the agency's "not likely to adversely affect" determination, the agency must engage in "formal consultation."[24] An agency is relieved of the obligation to consult on its actions only where the action will have "no effect" on listed species or designated critical habitat.

Effects determinations are based on the direct, indirect, and cumulative effects of the action when added to the environmental baseline.[25] "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."[26] "Effects of the action are all consequences to listed species or critical habitat that are caused by the proposed action, including the consequences of other activities that are caused by the proposed action but that are not part of the action."[27] "Effects of the action may occur later in time and may include consequences occurring outside the immediate area involved in the action."[28] "Cumulative effects are those effects of future State or private activities, not

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[17] 50 C.F.R. § 402.02.

[18] *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666–67 (2007) (cleaned-up) (discussing ESA section 7(a)(2)).

[19] 16 U.S.C. § 1536(a), (d), 50 C.F.R. § 402.09; *see, e.g.*, *Conservation L. Found. v. Ross*, 422 F. Supp. 3d 12, 29 (D.D.C. 2019) (following "may effect" determination, and absent a concurrence from consulting agency, "only a biological opinion … [reaching a no jeopardy conclusion] will … permit the action to carry forward."); *Oregon Wild, v. Constance Cummins*, 239 F. Supp. 3d 1247, 1262 (D. Or. 2017) ("…the Forest Service must complete a new ESA consultation prior to issuing grazing permits."); *cf. Defs. of Wildlife v. Jackson*, 791 F. Supp. 2d 96, 110 (D.D.C. 2011) ("It is 'well-settled that a court can enjoin agency action pending completion of section 7(a)(2) requirements.'" (quoting *Wash. Toxics Coal. v. EPA,* 413 F.3d 1024, 1034 (9th Cir.2005)).

[20] The FWS has jurisdiction primarily over terrestrial and freshwater species, whereas NMFS has jurisdiction primarily over marine species.

[21] 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12.

[22] *Id.*

[23] 50 C.F.R. § 402.14(a)-(b).

[24] *Id.* §§ 402.02, 402.14(a).

[25] *Id.* §§402.14(g); 402.02.

[26] *Id.* § 402.02.

[27] *Id.*

[28] *Id.*

involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation."[29]

These effects are then added to the environmental baseline, which "refers to the condition of the listed species or its designated critical habitat in the action area, without the consequences to the listed species or designated critical habitat caused by the proposed action."[30] It "includes the past and present impacts of all Federal, State, or private actions and other human activities in the action area, the anticipated impacts of all proposed Federal projects in the action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions which are contemporaneous with the consultation in process."[31]

In satisfying the obligations of section 7(a)(2), federal agencies must utilize the best available scientific information. The requirement to use the best available scientific and commercial data available "is to ensure that the ESA not be implemented haphazardly, on the basis of speculation or surmise."[32] While FWS "can draw conclusions based on less than conclusive scientific evidence, it cannot base its conclusions on *no* evidence."[33] The ESA section 7 consultation process concludes when FWS and/or NMFS either affirmatively concurs in a determination that the action is "not likely to adversely affect" any listed species or completes a Biological Opinion determining whether the action is "not likely to jeopardize" any listed species or result in adverse modification or destruction of critical habitat.[34] If the Biological Opinion determines that substantive obligations imposed by section 7(a)(2) will not be met, the action agency must either terminate the action (e.g., not issue the permit), implement an alternative proposed in the Biological Opinion, or seek an exemption from the Cabinet-level Endangered Species Committee.[35] In sum, an action that may affect a listed species and would irreversibly commit resources, such as issuance of a permit authorizing destruction of habitat, cannot lawfully be undertaken absent an affirmative determination from FWS and/or NMFS that the action either is not likely to adversely affect any listed species or its critical habitat or that the action is "not likely to jeopardize" any listed species or adversely modify or destroy critical habitat.

Violations of the ESA are reviewed under the Administrative Procedure Act's standard of review, which invalidates "agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[36] A decision is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation

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[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Bennett v. Spear*, 520 U.S. 154, 176 (1997) (discussing requirement in context of section 7(a)(2) consultation).
[33] *Pac. Coast Fed'n of Fishermen's Associations v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1094–95 (9th Cir. 2005) (citing *Nat'l Ass'n. of Home Builders v. Norton*, 340 F.3d 835, 847 (9th Cir. 2003) (emphasis added).
[34] 16 U.S.C. § 1536(a)(2).
[35] *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 366, 202 L. Ed. 2d 269 (2018).
[36] 5 U.S.C. § 706(2)(A).

for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[37]

The State 404 Programmatic Biological Opinion and FWS's "Technical Assistance Process" Determinations

CAM7-Sub, LLC/Cameratta Companies previously submitted a State 404 Program permit application to FDEP, and FWS prepared a "Technical Assistance Process" document for the application, purportedly in compliance with a process set forth in FWS's Biological Opinion for EPA's approval of the Florida State 404 permitting program.[38] The following discussion of that Biological Opinion, which was subsequently vacated, is intended to provide context for the detailed discussion below of the analysis that FWS included in its Technical Assistance document ("TA Form") for the Kingston application.[39]

FWS issued a "no jeopardy" conclusion in its Biological Opinion for EPA's approval of the Florida State 404 permitting program ("State 404 Programmatic BiOp"), which relied on a "structured process" established pursuant to a Memorandum of Understanding (MOU) between FDEP, the Florida Fish and Wildlife Conservation Commission (FWC), and FWS.[40] The State 404 Programmatic BiOp characterized that structured process as being "as protective" as ESA section 7 consultation,[41] though a federal district judge later found that it was not.

With regard to how cumulative effects would be considered in making the effects determinations pursuant to the "structured process," the 404 Programmatic BiOp stated: "The USFWS evaluation of the likelihood that a permit action may jeopardize a species or adversely modify critical habitat will take into account the effects of any unrelated non-federal actions occurring in the project area, similar to the way a cumulative effects analysis is conducted under section 7 of the ESA."[42] The State 404 Programmatic BiOp stated that State 404 permit applications must include: "Analysis of any cumulative effects, which are the effects of future State or private activities that are reasonably certain to occur within the project area."[43] It

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[37] *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[38] U.S. Fish and Wildlife Service, Programmatic Biological Opinion for U.S. Environmental Protection Agency's Approval of FDEP's Assumption of the Administration of the Dredge and Fill Permitting Program under Section 404 of the Clean Water Act (hereafter "State 404 Programmatic BiOp").

[39] The State 404 Programmatic BiOp was held unlawful on ESA grounds and vacated in April 2024 in litigation brought by plaintiffs including CBD, CSWF, Sierra Club. *Ctr. for Biological Diversity v. Regan*, No. CV 21-119 (RDM), 2024 WL 1602457, at *28 (D.D.C. Apr. 12, 2024), *judgment entered*, No. CV 21-119 (RDM), 2024 WL 1591671 (D.D.C. Apr. 12, 2024). Appeals are pending.

[40] State 404 Programmatic BiOp at 68–69.

[41] State 404 Programmatic BiOp at 56.

[42] State 404 Programmatic BiOp at 20. *See also id*. at 25 ("The USFWS evaluation of the likelihood that a permit action may jeopardize a species or adversely modify critical habitat will take into account the effects of any unrelated non-federal actions occurring in the project area, similar to the way a cumulative effects analysis is conducted under section 7 of the ESA.").

[43] State 404 Programmatic BiOp at 16.

defined "project area" to mean: "a portion of the State-assumed waters where specific dredging or filling activities are permitted and consist of a bottom surface area, any overlying volume of water, and any mixing zones," but specified that, "[i]n the context of the review of State 404 permit applications for endangered and threatened species, also includes those areas outside the immediate area of activity which may affect listed species using those areas."[44]

With regard to how jeopardy would be evaluated as part of the "structured process," the State 404 Programmatic BiOp stated that "the USFWS's project-specific, species-specific, review of the likelihood that a permit action may jeopardize a species or adversely modify critical habitat will take into account the effects of any unrelated non-federal actions occurring in the project area, similar to the way a cumulative effects analysis is conducted under section 7 of the ESA."[45] "Assessment of adverse cumulative impacts must be considered during the review of State 404 permit applications; the assessment of expected impacts to species that may be caused from a particular project must be considered along with the impacts that may have been caused from past authorized projects, as well as those future projects that are reasonably certain to occur."[46]

National Environmental Policy Act ("NEPA") Requirements

Under NEPA, every federal agency that takes a major federal action "significantly affecting the quality of the human environment" is required to prepare a detailed statement discussing: (i) the reasonably foreseeable environmental effects of the proposed action; (ii) any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented; (iii) a reasonable range of alternatives to the proposed action; (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (v) any irreversible and irretrievable commitments of Federal resources which would be involved in the proposed action should it be implemented.[47] For proposed actions with significant adverse environmental effects, the agency must complete an environmental impact statement (EIS). "Significant effects" means adverse effects that an agency has identified as significant based on the criteria in 40 C.F.R. § 1501.3(d).[48]

Section 1501.3(d) in turn provides: "In considering whether an adverse effect of the proposed action is significant, agencies shall examine both the context of the action and the intensity of the effect. In assessing context and intensity, agencies should consider the duration of the effect. Agencies may also consider the extent to which an effect is adverse at some points in time and beneficial in others (for example, in assessing the significance of a habitat restoration action's effect on a species, an agency may consider both any short-term harm to the species during implementation of the action and any benefit to the same species once the action is complete). However, agencies shall not offset an action's adverse effects with other beneficial effects to determine significance (for example, an agency may not offset an action's adverse effect on one species with its beneficial effect on another species).

[44] State 404 Programmatic BiOp at vii.
[45] State 404 Programmatic BiOp at 66 (discussing cumulative effects of EPA assumption decision).
[46] State 404 Programmatic BiOp at 21.
[47] 42 U.S.C. § 4332(2)(C)(i)–(v).
[48] 40 C.F.R. § 1508.1(mm) (effective July 1, 2024).

(1) Agencies shall analyze the significance of an action in several contexts. Agencies should consider the characteristics of the geographic area, such as proximity to unique or sensitive resources or communities with environmental justice concerns. Depending on the scope of the action, agencies should consider the potential global, national, regional, and local contexts as well as the duration, including short-and long-term effects.
(2) Agencies shall analyze the intensity of effects considering the following factors, as applicable to the proposed action and in relationship to one another:

(i) The degree to which the action may adversely affect public health and safety.
(ii) The degree to which the action may adversely affect unique characteristics of the geographic area such as historic or cultural resources, parks, Tribal sacred sites, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
(iii) Whether the action may violate relevant Federal, State, Tribal, or local laws or other requirements or be inconsistent with Federal, State, Tribal, or local policies designed for the protection of the environment.
(iv) The degree to which the potential effects on the human environment are highly uncertain.
(v) The degree to which the action may adversely affect resources listed or eligible for listing in the National Register of Historic Places.
(vi) The degree to which the action may adversely affect an endangered or threatened species or its habitat, including habitat that has been determined to be critical under the Endangered Species Act of 1973.
(vii) The degree to which the action may adversely affect communities with environmental justice concerns.
(viii) The degree to which the action may adversely affect rights of Tribal Nations that have been reserved through treaties, statutes, or Executive Orders."[49]

The Corps must consider reasonably foreseeable changes to the environment from the proposed action or alternative and include direct, indirect, and cumulative effects.[50] "Reasonably foreseeable" means sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision.[51] "Direct effects" are "caused by the action and occur at the same time and place."[52] "Indirect effects" are "caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth- inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems."[53] "Cumulative effects" are "effects on the environment that result from

[49] 40 C.F.R. § 1501.3(d) (effective July 1, 2024).
[50] 40 C.F.R. § 1508.1(g) (effective through June 30, 2024); 40 C.F.R. § 1508.1(i) (effective July 1, 2024).
[51] 40 C.F.R. § 1508.1(aa) (effective through June 30, 2024); 40 C.F.R. 1508.1(ii) (effective July 1, 2024).
[52] 40 C.F.R. § 1508.1(g)(1) (effective through June 30, 2024); 40 C.F.R. § 1508.1(i)(1) (effective July 1, 2024).
[53] 40 C.F.R. § 1508.1(g)(2) (effective through June 30, 2024); 40 C.F.R. § 1508.1(i)(2) (effective July 1, 2024).

the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative effects can result from actions with individually minor but collectively significant actions effects taking place over a period of time."[54]

The cumulative impacts analysis must identify:

(i) the area in which the effects of the proposed project will be felt;
(ii) the impact expected in that area;
(iii) those other actions—past, present, and proposed, and reasonably foreseeable—that have had or will have impact in the same area;
(iv) the effects of those other impacts; and
(v) the overall impact that can be expected if the individual impacts are allowed to accumulate.[55]

This type of analysis "prevents agencies from ignoring the environmental effects of other actions . . . because those effects set the baseline state of affairs and thus the context in which the significance of proposed federal action must be evaluated."[56]

Though an agency should not engage in irrational speculation about indirect and cumulative impacts when preparing an environmental impact statement, reasonable forecasting and speculation is "implicit in NEPA" and an agency must "fulfill its duties to the fullest extent possible."[57] This "rule of reason" does not wholly absolve an agency of the duty to forecast impacts in good faith based on available information; in fact, it has an overriding statutory duty to do just that.[58] The D.C. Circuit court has explained that upon judicial review, it will not allow agencies "to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as 'crystal ball inquiry,'" but instead it will hold them to compliance "to the fullest extent possible."[59]

In rejecting comments urging changes to its existing definition of "reasonably foreseeable" ("sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision") that would, inter alia, require consideration of effects only when the agency has "a high degree of confidence that the effect is more likely than not to occur," CEQ recently confirmed:

> the application of reasonably foreseeable is influenced by the context of the proposed action. Inherent in the application of reasonably foreseeable is the concept that Federal agencies are not required to 'foresee the unforeseeable' or engage in speculative

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[54] 40 C.F.R. § 1508.1(i)(3) (effective July 1, 2024); *see also* 40 C.F.R. § 1508.1(g)(3) (effective though June 30, 2024).

[55] *Sierra Club v. FERC*, 827 F.3d 36, 49 (D.C. Cir. 2016) (quoting *Taxpayers of Michigan Against Casinos [TOMAC] v. Norton*, 433 F.3d 852, 864 (D.C. Cir. 2006)) (internal quotation marks omitted).

[56] *Sierra Club v. U.S. Army Corps of Engineers*, 803 F.3d 31, 51 (D.C. Cir. 2015).

[57] *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1310 (D.C. Cir. 2014) (quoting *Scientists' Institute for Public Information, Inc. v. Atomic Energy Com.*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)).

[58] *Atomic Energy Com.*, 481 F.2d 1079 at 1092.

[59] *Del. Riverkeeper Network*, 753 F.3d at 1310*; Atomic Energy Com.*, 481 F.2d 1079 at 1092. *See also* 42 U.S.C. § 4332; 40 C.F.R. § 1500.2 (effective July 1, 2024).

> analysis. Agencies must forecast to the extent they can do so either quantitatively or qualitatively within a reasonable range. Further, the term "reasonably foreseeable" is consistent with the ordinary person standard—that is, what a person of ordinary prudence would consider in reaching a decision.[60]

With these definitions and principles in mind, it is clear that NEPA analysis should include environmental impacts from growth-inducing effects caused by a proposed project.[61] The Council for Environmental Quality (CEQ) has stated that in the case of proposed development:

> It will often be possible to consider . . . the development trends in that area or similar areas in recent years . . . . The agency has the responsibility to make an informed judgment, and to estimate future impacts on that basis, especially if trends are ascertainable. . . . The agency cannot ignore these uncertain, but probable, effects of its decisions.[62]

In other words, an agency must consider reasonably foreseeable future developments, including transportation infrastructure, and analyze the impacts stemming from those developments. Complete NEPA analyses should include environmental impacts from growth-inducing effects of projects, such as increased commercial activity, growing networks of roads, and stimulation of more, high-intensity land uses. These impacts include wildlife road mortality.[63]

With regard to assessing the cumulative effects of an action on environmental resources, including species listed under the ESA, the scope of the cumulative effects review under NEPA is different than the scope of review during ESA consultation.[64] NEPA regulations require an

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[60] National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35442, 35550 (May 1, 2024).

[61] *See, e.g., TOMAC*, 433 F.3d at 858–859 (finding an agency's environmental assessment supplement "thorough and reasonably conducted" where it predicted the pattern and extent of residential and commercial growth induced by construction of the proposed casino as well as air-quality impacts including "vehicle emissions resulting from increased traffic associated with indirect development throughout the region"); *see also Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 27 (D.C. Cir. 2008) (analyzing an environmental assessment that analyzed, among many things, "the possibility that the casino would increase local traffic" which would in turn result in delays).

[62] Memorandum to Agencies: Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026 (March 23, 1981), *available at* https://www.energy.gov/nepa/articles/forty-most-asked-questions-concerning-ceqs-national-environmental-policy-act.

[63] *See e.g., Sierra Club v. Van Antwerp*, 661 F.3d 1147, 1155–1157 (D.C. Cir. 2011) (remanding Section 404 permit where Army Corps' Finding of No Significant Impact failed to address increased road mortality to eastern indigo snake from habitat fragmentation from mall construction).

[64] *See, e.g., Nw. Envtl. Def. Ctr. v. Nat'l Marine Fisheries Serv.*, 647 F. Supp 2d 1221, 1247 (D. Or. 2009) ("The ESA requires [the Service] to consider only future non-federal activities that are reasonably certain to occur within the action area…whereas NEPA requires the [action agency]

assessment of cumulative impacts that includes the effects of future federal actions, unlike the regulations implementing the ESA's consultation requirements, which limit the analysis to "those effects of future State or private activities, not involving Federal activities[.]"[65] Furthermore, whereas NEPA requires consideration of "reasonably foreseeable" cumulative effects of the proposal and other actions, ESA regulations require consideration of those cumulative effects that are "reasonably certain to occur."[66]

Effects on listed species need not reach the level of "jeopardy" under the ESA to be significant for NEPA purposes.[67] Moreover, an action agency cannot satisfy NEPA merely by stating that the project will ultimately incorporate the results of an ESA section 7 consultation process; because NEPA requires that the extent of the impacts be identified and made available for public review, such reliance on the content of a yet-to-be-developed biological opinion cannot satisfy NEPA's requirement to provide the public with an opportunity for comment on the actual extent of the impacts that will occur.[68]

An agency's "finding of no significant impact shall state the authority for any mitigation that the agency has adopted and any applicable monitoring or enforcement provisions. If the agency finds no significant effects based on mitigation, the mitigated finding of no significant impact shall state the enforceable mitigation requirements or commitments that will be undertaken and the authority to enforce them … and the agency shall prepare a monitoring and compliance plan for that mitigation consistent with § 1505.3(c)."[69]

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to consider all past, present, and foreseeable future actions, regardless of who performs the action, that combine with the proposed action to cause an incremental environmental impact[.]").

[65] 50 C.F.R. § 402.02.

[66] 50 C.F.R. § 402.02.

[67] *Makua v. Rumsfeld*, 163 F. Supp 2d 1202, 1218 (D. Hawaii 2001) ("A [Finding of No Significant Impact] … must be based on a review of the potential for significant impact, including impact short of extinction. Clearly, there can be a significant impact on a species even if its existence is not jeopardized."); *National Wildlife Federation v. Babbitt*, 128 F. Supp.2d 1274, 1302 (E.D. Cal. 2000) (requiring EIS under NEPA for ESA section 10 Habitat Conservation Plan even though mitigation plan satisfied ESA where there were substantial questions about effectiveness of mitigation); *Portland Audubon Society v. Lujan*, 795 F. Supp. 1489, 1509 (D. Or. 1992) (rejecting action agency's request that the court "accept that its consultation with the United States Fish and Wildlife Service under the Endangered Species Act constitutes a substitute for compliance with NEPA.").

[68] *Cf. Portland Audubon Soc'y v. Lujan*, 795 F. Supp. 1489, 1509 (D. Or. 1992) (explaining that ESA consultation cannot substitute for EIS preparation, even where the action agency also prepared an EA, because "The purpose of the Endangered Species Act and the purpose of NEPA are not the same. For example, there is no substitute in the Endangered Species Act for the public comment commanded by NEPA."); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 649-650, 653 (9th Cir. 2014) (concluding that the implementation of a Biological Opinion was not exempt from NEPA requirements to prepare an EIS or EA and FONSI because "[w]e cannot say that Section 7 of the ESA renders NEPA 'superfluous' when the statutes evaluate different types of environmental impacts through processes that involve varying degrees of public participation.").

[69] 40 C.F.R. § 1501.6(d) (effective July 1, 2024).

Where an environmental assessment relies on mitigation measures to reach a finding of no significant impact, that mitigation must be assured to occur and must "completely compensate for any possible adverse environmental impacts."[70] A court will not accept conclusory statements that mitigation measures are effective: the agency must be able to support its conclusions with information in the administrative record.[71] In an EA, the government must detail the mitigation measures it relied on to obtain a FONSI.[72] NEPA requires agencies to "analyze the mitigation measures in detail [and] explain how effective the measures would be. A mere listing of mitigation measures is insufficient to qualify as the reasoned discussion required by NEPA."[73] If the effectiveness of such mitigation is not assured, then the agency cannot sign a FONSI and must prepare an EIS.[74] If the plaintiff raises substantial questions whether a project may have a significant effect, an EIS must be prepared.[75]

In cases requiring an environmental impact statement, the record of decision must "[s]tate whether the agency has adopted all practicable means to mitigate environmental harm from the alternative selected, and if not, why the agency did not. Mitigation shall be enforceable when the record of decision incorporates mitigation and the analysis of the reasonably foreseeable effects of the proposed action is based on implementation of that mitigation. The agency shall identify the authority for enforceable mitigation, such as through permit conditions, agreements, or other measures, and prepare a monitoring and compliance plan consistent with § 1505.3(c)."[76]

Agencies "shall prepare and publish a monitoring and compliance plan for mitigation when:

> (1) The analysis of the reasonably foreseeable effects of a proposed action in an environmental assessment or environmental impact statement is based on implementation of mitigation; and
>
> (2) The agency incorporates the mitigation into a record of decision, finding of no significant impact, or separate decision document."[77]

"The agency should tailor the contents of a monitoring and compliance plan … to the complexity of the mitigation committed to and include:

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[70] *Cabinet Mountains Wilderness/Scotchman's Peak Grizzly Bears v. Peterson*, 685 F.2d 678, 682 (D.C. Cir. 1982).

[71] *Sierra Club v. Peterson*, 717 F.2d 1409 (D.C. Cir. 1985).

[72] *Robertson v. Methow Valley Citizen's Council*, 490 U.S. 332, 353 (1989); *Carmel-By-the-Sea v. United States Dep't of Transp*., 123 F.3d 1142, 1154 (9th Cir. 1997) ("mitigation must be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated"); *Neighbors of Cuddy Mountain v. United States Forest Serv*., 137 F.3d 1372 (9th Cir. 1998).

[73] *Northwest Indian Cemetery Protective Assn. v. Peterson*, 764 F.2d 581, 697 (9th Cir. 1985), *rev'd on other grds*, 485 U.S. 439 (1988).

[74] *See Foundation for North American Wild Sheep v. U.S. Dep't of Agric*., 681 F.2d 1172, 1178 (9th Cir. 1982).

[75] *The Steamboaters v. FERC*, 759 F.2d 1382, 1392 (9th Cir. 1985) ("The plaintiff need not show that significant effects *will in fact occur,* but if the plaintiff raises substantial questions whether a project may have a significant effect, an EIS *must* be prepared.") (citing *Foundation for North American Wild Sheep,* 681 F.2d at 1178)).

[76] 40 C.F.R. § 1505.2(c) (effective July 1, 2024).

[77] 40 C.F.R. § 1505.3(c) (effective July 1, 2024).

(1) A basic description of the mitigation measure or measures;
(2) The parties responsible for monitoring and implementing the mitigation;
(3) If appropriate, how monitoring information will be made publicly available;
(4) The anticipated timeframe for implementing and completing mitigation;
(5) The standards for determining compliance with the mitigation and the consequences of non-compliance; and
(6) How the mitigation will be funded."[78]

An agency's "Finding of No Significant Impact" and decision not to prepare an Environmental Impact Statement are reviewed under the Administrative Procedure Act's "arbitrary-and-capricious standard."[79] Under the Administrative Procedure Act ("APA"), courts 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."[80] In determining whether the agency acted arbitrarily and capriciously, courts ask whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action."[81] The court's ultimate task is to "ensure that the agency took a 'hard look' at the environmental consequences of the proposed action."[82]

Clean Water Act ("CWA") Section 404

The CWA is designed to "restore and maintain the chemical, physical and biological integrity of the Nation's waters."[83] The CWA generally prohibits the discharge of pollutants, including dredged or fill material, into the waters of the United States unless authorized by a permit.[84] Section 404 of the CWA authorizes the Corps to issue permits for the discharge of dredge or fill material into waters of the United States.[85]

A section 404 permit must satisfy regulations promulgated by the Corps and the Environmental Protection Agency ("EPA").[86] The regulations under section 404(b)(1) of the CWA provide that adverse impacts to wetlands must be avoided to the extent that practicable alternatives are available which will result in less adverse impacts.[87] A "practicable" alternative is one that is "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes."[88] "[A]n applicant cannot define a project in order to preclude the existence of any alternative sites and thus make what is

[78] 40 C.F.R. § 1505.3(d) (effective July 1, 2024).
[79] *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1288 (11th Cir. 2015) (citing *Hill v. Boy,* 144 F.3d 1446, 1450 (11th Cir.1998)).
[80] 5 U.S.C. § 706.
[81] *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).
[82] *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1288 (11th Cir. 2015) (quoting *Sierra Club v. U.S. Army Corps of Eng'rs,* 295 F.3d 1209, 1216 (11th Cir. 2002)).
[83] 33 U.S.C. § 1251(a).
[84] *See id*. § 1311(a).
[85] 33 U.S.C. § 1344.
[86] *Friends of the Earth v. Hintz*, 800 F.2d 822, 831 (9th Cir. 1986).
[87] 40 C.F.R. § 230.10(a).
[88] *Id.* § 230.10(a)(2).

practicable appear impracticable."[89] Whether an alternative is practicable also depends on the weight of the potential harm.[90]

The 404(b)(1) Guidelines establish that, for prospective impacts to special aquatic sites like wetlands,[91] when an activity or project "does not require access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose (*i.e.*, is not 'water dependent')," there is a presumption that practicable alternatives that do not involve impacting those sites are available, "unless clearly demonstrated otherwise."[92] Furthermore, all practicable alternatives that do not involve impacts to a special aquatic site like a wetland are presumed to have less adverse impact than the alternative that does impact a special aquatic site, "unless clearly demonstrated otherwise."[93]

To determine whether a practicable alternative exists, the Corps must undertake a multi-step analysis.[94] The Corps must first determine whether the project is water dependent. A water-dependent project is one that "requires access or proximity to or siting within the special aquatic site in question to fulfill its basic purpose."[95] If the Corps determines that the project is not water-dependent, it then must presume that practicable alternatives not involving wetlands exist.[96] The Corps may not grant a permit unless the presumption is rebutted by a clear contrary demonstration by the Project applicant.[97] Where no practicable alternative sites exist that would avoid filling or have a less adverse impact on wetlands, the Corps must consider whether "appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge on the aquatic ecosystem."[98]

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[89] *Sylvester v. U.S. Army Corps of Engin'rs*, 882 F.2d 407, 409 (9th Cir. 1989).

[90] *See, e.g.*, *Alameda Water & Sanitation Dist. v. Reilly*, 930 F. Supp. 486, 492 (D. Colo. 1996) (upholding EPA determination that practicable alternatives existed even though the record showed "very substantial regulatory and legal obstacles to these alternatives" such as moving an entire town and obtaining a Presidential exemption, because "the impacts [of the proposed project] were much greater" than the impacts of those alternatives).

[91] *Id.* at § 230.3(m) (defining "special aquatic sites" as "those sites identified in Subpart E," which contain "special ecological characteristics of productivity, habitat, wildlife protection, or other important and easily disrupted ecological values"); *id.* § 230.41 (a section in Subpart E describing wetlands and explaining that "[t]he discharge of dredged or fill material in wetlands is likely to damage or destroy habitat and adversely affect the biological productivity of wetlands ecosystems by smothering, by dewatering, by permanently flooding, or by altering substrate elevation or periodicity of water movement," by "chang[ing] the wetland habitat value for fish and wildlife," and through "disruptions in flow and circulation patterns" where "apparently minor loss of wetland acreage may result in major losses through secondary impacts").

[92] *Id.* § 230.10(a)(3).

[93] *Id.*

[94] 40 C.F.R. § 230.5.

[95] *Id.* § 230.5(a), (c), (f); *id.* § 230.10(a)(3).

[96] *Id.* at §§ 230.10(a)(3); 230.5.

[97] *Id.*

[98] *Id.* at § 230.10(d); *see also Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 544 (11th Cir. 1996) (indicating that where "filling of wetlands cannot be avoided, the 'appropriate and practicable steps' must be taken to minimize the potential adverse impacts of the discharge on wetlands").

The Corps has also adopted regulations, known as the "public interest" factors, to implement its permitting authority.[99]

> "The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity *and its intended use* on the public interest. Evaluation of the probable impact which the proposed activity may have on the public interest requires a careful weighing of all those factors which become relevant in each particular case. The benefits which reasonably may be expected to accrue from the proposal must be balanced against its reasonably foreseeable detriments. The decision whether to authorize a proposal, and if so, the conditions under which it will be allowed to occur, are therefore determined by the outcome of this general balancing process. That decision should reflect the national concern for both protection and utilization of important resources."[100]

The Corps must consider a broad range of potential relevant impacts as part of its public interest review, including "conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people."[101]

The Environmental Protection Agency, in conjunction with the Corps, also developed guidelines to implement the policies expressed by Congress in the CWA.[102] The Corps must follow these guidelines in deciding whether to issue a Section 404 permit.[103] As the Corps' public interest review regulations explain, "[f]or activities involving 404 discharges, a permit will be denied if the discharge that would be authorized by such permit would not comply with the Environmental Protection Agency's 404(b)(1) guidelines."[104]

The Corps reviews all proposed Section 404 permits under both the Corps' public interest factors and EPA's 404(b)(1) Guidelines.[105] A permit must be denied if it is either contrary to the public interest or does not comport with the Section 404(b)(1) Guidelines.[106]

To ensure these mandatory CWA requirements are satisfied, the Corps must fully evaluate the direct, secondary, and cumulative impacts of the activity, including impacts to endangered species, the aquatic environment, fish and wildlife, and human impacts.[107] The

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[99] 33 C.F.R. §§ 320 *et seq*.
[100] *Id*. § 320.4(a)(1) (emphasis added).
[101] *Id*.
[102] *See* 40 C.F.R. § 230.1; 40 C.F.R. § 230.2.
[103] *See* 33 U.S.C. § 1344(b); 40 C.F.R. § 230.2.
[104] 33 C.F.R. §§ 320.4(a)(1).
[105] 33 U.S.C. § 1344(b)(1); 33 C.F.R. § 320.2(f).
[106] 33 C.F.R. §§ 320.4, 323.6; 40 C.F.R. §§ 230.10, 230.12.
[107] *See, e.g*., 33 C.F.R. §§ 320.4(a)(1), 336.1(c)(5) (endangered species), 336.1(c)(8) (fish and wildlife); 40 C.F.R. §§ 230.11(a)- (h), 230.20-23 (aquatic ecosystem), 230.30 (threatened and endangered species), 230.31 (fish and wildlife), 230.51 (recreational and commercial fisheries), 230.52 (water-related recreation), 230.53 (aesthetics).

404(b)(1) Guidelines also set forth particular restrictions on discharges, described more fully below.[108] The Corps must set forth its findings in writing on the short-term and long-term effects of the discharge of dredge or fill activities, as well as compliance or non-compliance with the restrictions on discharge.[109]

The "loss of values" that the Corps must consider in evaluating the impact of a discharge on the biological characteristics of an aquatic ecosystem includes, with respect to threatened and endangered species, "[t]he impairment or destruction of habitat to which these species are limited. . . includ[ing] adequate good quality water, spawning and maturation areas, nesting areas, protective cover, adequate and reliable food supply, and resting areas for migratory species [which] can be adversely affected by changes in either the normal water conditions for clarity, chemical content, nutrient balance, dissolved oxygen, pH, temperature, salinity, current patterns, circulation and fluctuation, or the physical removal of habitat."[110] The Corps must also evaluate whether the discharge could kill individuals of an endangered or threatened species.[111]

EPA's 404(b)(1) Guidelines prohibit the Corps from authorizing an application for dredge and fill activities if, inter alia: (1) the activity "jeopardizes the continued existence" of an endangered species under the ESA;[112] (2) there is a practicable alternative which would have less adverse impact on the aquatic ecosystem and does not have other significant adverse environmental consequences;[113] (3) the discharge will result in significant degradation to waters of the U.S.;[114] or (4) there does not exist sufficient information to make a reasonable judgment as to whether the proposed discharge will comply with the Corps' Guidelines for permit issuance.[115] The Corps must document its findings of compliance or noncompliance with these restrictions.[116]

"Fundamental to [404(b)(1)] Guidelines is the precept that dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern."[117]

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[108] 40 C.F.R. §§ 230.10, 230.12.
[109] 40 C.F.R §§ 230.11, 230.12(b).
[110] 40 C.F.R. § 230.30(b)(2).
[111] 40 C.F.R. § 230.30(b)(1).
[112] 40 C.F.R. §§ 230.10(b)(3), 230.12(a)(3)(ii). The 404(b)(1) Guidelines indicate that the Corps must consider both direct *and indirect* impacts to ESA listed species from the dredge or fill activities. 40 C.F.R. § 230.30(b) ("The major potential impacts on threatened or endangered species from the discharge of dredged or fill material include . . . *[f]acilitating incompatible activities*.") (emphasis added). The 404(b)(1) Guidelines mandate that the Corps' determination of whether an activity "jeopardizes the continued existence" of an ESA endangered species is determined by the outcome of the formal consultation process under the ESA. 40 C.F.R. § 230.30(c).
[113] 40 C.F.R. §§ 230.10(a), 230.12(a)(3)(i).
[114] 40 C.F.R. § 230.10(c), 230.12(a)(3)(ii).
[115] 40 C.F.R. § 230.12(3)(iv).
[116] 40 C.F.R. § 230.12(b).
[117] 40 C.F.R. § 230.1(c).

The burden of proof to demonstrate compliance with the 404(b)(1) Guidelines rests with the applicant.[118] The Corps must deny a permit where the proposed discharge fails to comply with the Guidelines or there is insufficient information to determine compliance.[119]

## I. The Corps Must Prepare an EIS to Examine the Effects of the Kingston Development as Required by NEPA

### A. The Kingston Development Will Have Reasonably Foreseeable Significant Adverse Effects on the Florida Panther Via Increased Vehicle Collisions Caused by Increased Traffic from the Development.

Existing analysis by FWS based on the materials that the applicants submitted to FDEP for their State 404 Program permit application shows reasonably foreseeable panther mortality of an additional 3 to 22 panther deaths *per year* due to vehicle collisions from increased traffic induced by the Kingston Development. In the "Effects Summary and Tracking Take" section of the Technical Assistance Form (TA Form) that FWS prepared in response to the Kingston Development's State 404 Program permit application, FWS described the amount of take anticipated as "[b]etween 4 and 23 individuals at year of buildout due to vehicle collisions, habitat loss and reduction in carrying capacity), and between 3 and 22 individuals a year thereafter."[120] Under "Amount of Take," FWS stated: "the loss of 3,400 acres of panther habitat approximates the loss of habitat carrying capacity for between 0.18 and 0.55 panthers based on varying density estimates of between 1.37 and 4.03 panthers per 100 square kilometers. Therefore, FWS expects no more than one Florida panther to be harmed by this loss in habitat carrying capacity and a potential increase in intraspecific aggression."[121] With regard to take from vehicle collisions, that section states:

> After incorporating reasonable uncertainty in the inputs for the reasons described above, a 99% interval is 3 to 22, and a 95% interval from 4 to 20. Therefore, based on the quantitative analysis and for the purposes of estimating impacts to panthers, we assume the Project could result in the loss of 4 to 23 panthers per year and slightly fewer in each subsequent year once noise and habitat removal has been completed. The large uncertainty suggests additional information about realistic effects of the project-related traffic on mortalities must be taken into account to inform the decision. This is a more responsible approach than taking the point estimate as if it has no uncertainty associated with it, even if deemed conservative. The magnitude of uncertainty also points to places where future information could be collected to help improve precision.[122]

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[118] 40 C.F.R. § 230.1(c); *Utahns v. United States DOT*, 305 F.3d 1152, 1187 (10th Cir. 2002) (citing 61 Fed.Reg. 30,990, 30,998 (June 18, 1996) (citing 40 C.F.R. § 230.12(a)(3)(iv)).
[119] 40 C.F.R §§ 230.10, 230.12(a).
[120] Kingston FWS Technical Assistance Form at 6.
[121] Kingston FWS Technical Assistance Form at 21. As explained below, expert estimates of habitat loss are actually higher than FWS found during the technical assistance process for Kingston.
[122] Kingston FWS Technical Assistance Form at 22.

And again, in describing the amount of take that will be authorized under the programmatic ITS, FWS stated:

> The loss of 3,400 acres of panther habitat is expected to result in the loss of habitat carrying capacity for 0.46 panthers, whereas traffic increases are predicted to increase vehicle collision mortality by 3 to 22 panthers per year (assuming the proportional increase in traffic is equal to that of panther mortalities). Therefore, [FWS] expects no more than between 4 and 23 Florida panthers to be harmed by the combination of this loss in habitat carrying capacity, intraspecific aggression, and vehicle collision in year one, and 3 to 22 panthers each year following.[123]

In short, FWS purported that it would authorize take permanently removing up to 1 panther from the population by permanent habitat loss, *and* up to 22 panthers *per year* in perpetuity due to vehicle collisions. FWS asserted that 99% confidence interval for their estimate of vehicle collisions was 3 to 22 panthers per year, meaning they estimated the vehicle collision deaths was 99% likely to be at least 3 deaths per year, and no more than 22 panther deaths per year. FWS's analysis presented a "point estimate" for the vehicle collisions per year induced by traffic from the Kingston development, of 16 deaths per year. FWS did not present a mean or median estimate, nor did it expressly state what level of estimated panther deaths from vehicle collision would be "likely" or "more likely than not."

The State 404 programmatic BiOp expressly stated that the "tracking" of incidental take will apply only to take that is "reasonably certain to occur."[124] It further asserted that "reasonably certain" requires a greater degree of likelihood than likely or "more than likely."[125] Thus, unless FWS was failing to follow its own dictates in the programmatic BiOp, it ostensibly must have concluded that the take of 3 to 22 panthers per year listed in its "tracking" of take in the TA Form is at the very least "more than likely" to occur. Regardless, for the purposes of complying with NEPA requirements, the Corps must consider what number of vehicle collision deaths meets the even lower probability threshold of being sufficiently likely to occur that a person of ordinary prudence would take it into account. As detailed above, CEQ expressly rejected comments urging it to require that impacts be at least more likely than not.

Notably, the Corps cannot rationally dismiss the TA Form's forecast regarding the impacts of increased traffic on the ground that the TA Form also made a "no jeopardy" conclusion and asserted that take would be "minimized" by mitigation measures. As detailed below in the ESA section of these comments, the TA Form's conclusions regarding jeopardy and mitigation measures were arbitrary and capricious, and failed to reflect the best available scientific information, among other problems.

In sum, the analysis conducted by FWS shows it is reasonably foreseeable that at full build-out the Kingston Development would cause 3 to 22 panther deaths per year indefinitely due to vehicle collisions from increased traffic resulting from the conversion of the site to a mixed-use development. Rather than specifying mitigation measures and estimating the reduction in such effects that could be achieved through mitigation measures based on the best available scientific information, FWS provided only vague and conclusory assertions about the effects of mitigation measures. Thus, the presently available information indicates that a significant amount of panther deaths (3 to 22 per year) is a reasonably foreseeable effect of the

[123] Kingston FWS Technical Assistance Form at 23.
[124] State 404 Programmatic BiOp at 20.
[125] State 404 Programmatic BiOp at 57.

permitting of the Kingston Development, and the available information about mitigation is inadequate to demonstrate to what extent, if any, mitigation measures will reduce that effect.

The best available scientific information also indicates that the Florida panther population is between 120–230 adults and subadults, and that the population has plateaued and may be in decline.[126] Although the TA Form that FWS prepared for the State 404 Program permit application for Kingston presents an exaggerated population size and positive growth rate, the TA Form's assertions contradict the best available scientific information, and FWS's own evaluations of that information. Accordingly, the Corps cannot rely on the arbitrary population size and growth rate when analyzing panther impacts under NEPA.[127]

For example, the TA Form's analysis relies on a population estimate that ignores and irrationally misinterprets the best available scientific information. As former FWS biologist Dr. Robert A. Frakes explains:

> [T]he population baseline analysis included in FWS's Technical Assistance Form is not valid. FWS obtained these population estimates from a vehicle mortality study that produced population estimates with extremely wide confidence intervals. Nevertheless, FWS used the upper limits of the confidence intervals (509 to 773 panthers) to estimate population growth. The science does not support a population estimate this large, because the available habitat cannot currently support that many panthers. If it were correct, Florida would have three times the density of cougars anywhere in North America. The authors of the study themselves recommended against using this ridiculously high estimate because it is well above the carrying capacity of the habitat. The authors also state that the actual number of panthers may have never exceeded 150. The FWS also found in its 2020 species status assessment for the panther that this estimate had a margin of error that was too wide to inform conservation decisions. … the official FWC [Florida Fish and Wildlife Conservation Commission] population estimate is actually between 120–230 adult panthers.[128]

Indeed, the TA Form arbitrarily cited and relied on a modeled panther population estimate that authors of the published model and FWS itself have concluded are unreliable for use in conservation planning. Specifically, FWS cited the 2019 update to McClintock et al. 2015 for a "size point estimate of 407 panthers in 2018, with a 95 percent confidence interval ranging from 222 to 773 panthers" and compared that to the estimated range from McClintock et al. (2015) of between 143 and 509 individuals in 2012 to estimate an "average annual increase of

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[126] USFWS. 2020. Species Status Assessment for the Florida Panther. Version 1.0 September, 2020. Vero Beach, Florida, at v, 76, 88, 93 ("Draft SSA"). We note that we have raised other concerns and criticisms of the species status assessment, as outlined in a November 17, 2021 letter submitted to FWS by CBD, Sierra Club, and the Conservancy of Southwest Florida Re: Request for Reevaluation of the Species Status Assessment for the Florida Panther.

[127] Nor can FWS and the Corps rely on these arbitrary estimates during ESA consultation.

[128] Declaration of Robert Frakes, December 1, 2023, filed in *Center for Biological Diversity et al., v. U.S. Environmental Protection Agency et al*., No. 1:21-cv-00119 (RDM) (D.D.C.), at ¶ 76.

between 11 and 37" panthers per year. [129] FWS's reliance on this estimate is arbitrary for at least two reasons. For one, the authors of the published model have warned:

> [O]ur model-averaged confidence intervals were still too large to conclude there were significant increases in population size from 2000 to 2012. Furthermore, upper confidence interval bounds in later years (e.g. 509 panthers in 2012) exceeded population estimates we believe could be supported within the breeding range of the Florida panther.[130]

Moreover, *FWS itself* found in a 2020 species status assessment for the Florida Panther that the estimate for 2018 "had a margin of error of 222–773 panthers, which *is too wide to inform conservation decisions*."[131] Instead, FWS has consistently found that "[t]he size of the panther population in areas south of the Caloosahatchee River identified as suitable habitat was reported to be 120–230 adults and subadults in 2015."[132] FWS has found that, if anything, McClintock et al. 2015 makes it "apparent that population growth has slowed in the last 4 years and even declined in 2018 for the first time during the study period."[133]

Furthermore, without any explanation of its basis, FWS's jeopardy analysis in the TA Form relied on a population growth rate of "eight panthers per year."[134] As mentioned above, the only other discussion of population growth rate in the Kingston TA Form is the estimate that growth between 2012 and 2018 was "between 11 and 37 panthers per year." In another recent TA form for the Bellmar development, FWS relied on a growth rate of 9 panthers per year, which it derived from a purported population growth between 2000 and 2018 of 222–62 panthers/18 years, which would equal 8.89 panthers /year. Those estimates appear to assume, without any basis or analysis, that past population growth up through 2018 will continue indefinitely. The estimates also fail to acknowledge evidence: (1) estimating that panther population growth would level off in the near term; and (2) indicating that the population has in fact already leveled off since 2016 and may be in decline.[135] The projected populations based on the motor vehicle collision mortalities (MVM) approach generated in van de Kerk et al. (2019) estimated continued growth of the population through approximately 2024, with the population plateauing thereafter.[136] The most recent population trend data indicate the population did not grow between 2016 and 2018, and began to decline from 2017 to 2018.[137] Thus, it is irrational to

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[129] Kingston FWS Technical Assistance Form, Oct. 26, 2023, at 15.
[130] McClintock, B. T., D. P. Onorato, and J. Martin. 2015. Endangered Florida panther population size determined from public reports of motor vehicle collision mortalities. Journal of Applied Ecology 52:893–901, at 900.
[131] Draft SSA at v, 76, 88 (emphasis added).
[132] *Id.* at v, 76, 88, 93.
[133] *Id.* at 88.
[134] Kingston FWS Technical Assistance Form at 23.
[135] USFWS 2020 (Draft SSA) at 76, 88
[136] Van De Kerk M, Onorato DP, Hostetler JA, Bolker BM, Oli MK. 2019. Dynamics, persistence, and genetic management of the endangered Florida panther population. Wildlife Monographs 203: 3– 35, available at https://wildlife.onlinelibrary.wiley.com/doi/pdf/10.1002/wmon.1041; USFWS 2020 (Draft SSA) at 186, Figure 7.1.
[137] *See* USFWS 2020 (Draft SSA) at 88, 90, Figure 6.8.

rely on the assumption of continued growth at the past rate of 8 to 9 panthers per year, and reflects a failure to consider the best available scientific information.

In sum, the impacts of the Kingston Development on the Florida panther alone—notwithstanding other significant environmental impacts[138]—rise to the level of significance requiring an EIS. The Corps cannot rely on the irrational assertions about population size and growth rate in the Kingston TA Form when conducting its NEPA analysis. The best available scientific information indicates that the panther population is approximately 120-230 adults and subadults, and that the population is not growing, but rather has either plateaued or even started to decline. In assessing whether the vehicle collisions deaths of 3 to 22 per year induced by the Kingston Development are a significant adverse effect, the Corps must consider the small population size and that the best available information does not support assumptions of population growth. In light of that information, which indicates that a high degree of adverse effects to the endangered Florida panther is reasonably foreseeable, an EIS is required.

## B. The Kingston Development and Other Development Will Have Reasonably Foreseeable Significant Adverse Cumulative Effects on the Florida Panther

### 1. *The Increased Traffic Caused by the Kingston Development and Other Development Will Have Reasonably Foreseeable Significant Adverse Cumulative Effects on the Florida Panther*

The Corps must consider the reasonably foreseeable adverse cumulative effects of increased traffic from future development on wildlife such as the Florida panther. The analysis prepared by FWS in its TA Form for the Kingston project projected substantial, reasonably foreseeable increases in vehicle collisions from the Kingston project that would combine with additional substantial increases caused by other reasonably foreseeable sources. The Corps must undertake a cumulative effects analysis in an EIS taking into account this information and applying NEPA's scope of review.

In the "cumulative effects" analysis for panthers in the TA Form, FWS stated that the effects of increased traffic from other projects in the action area are "reflected by the future background numbers provided in [a Traffic Impact Study]" and "[t]herefore, the cumulative effects of traffic is conservatively estimated as stated in the *Effects of the Action* section above."[139] The Effects of the Action section in turn states that "the forecasted 2045 background traffic without the Project would add 43 [vehicle collision deaths per year], and 2045 background plus project traffic would contribute 59 additional panther deaths."[140] FWS then disputed the certainty of its own estimates, but failed to indicate or evaluate what amount of additional vehicle impacts from background traffic it deemed likely.[141] At no point did FWS provide any

[138] Because of the size and context, the Kingston Development also plainly has significant environmental impacts to the landscape, existing wetlands, and other federally listed species like the eastern indigo snake, Florida bonneted bat, Florida crested caracara, and other imperiled species like the gopher tortoise.

[139] Kingston FWS Technical Assistance Form at 21.

[140] Kingston FWS Technical Assistance Form at 19.

[141] Kingston FWS Technical Assistance Form at 19.

explanation or evaluation of how the likely additional vehicle collision deaths resulting from the Kingston project on top of the additional vehicle collision deaths resulting from cumulative effects will not amount to jeopardy. This failure is arbitrary, capricious, and unlawful and cannot be repeated in the Corps' EIS or consultation on the federal CWA permit. In other words, while the TA Form provides analysis indicating reasonably foreseeable substantial vehicle collision deaths from the proposal and other future development, its "no jeopardy" conclusion cannot rationally be relied upon in a NEPA analysis to conclude that adverse effects from increased traffic are not significant.

Other analysis from FWS similarly indicates that reasonably foreseeable future development will result in substantial increases in panther vehicle mortality that will have cumulative effects with the effects of Kingston for NEPA purposes. In its recent TA Form for the proposed Bellmar project in Collier County, FWS estimated that the Bellmar project, plus background increases in traffic will result in 15 additional panther deaths per year, rounded up from 14.4, and that without Bellmar, there would be 13 additional panther deaths per year, rounded up from 12.19.[142] This makes plain that the cumulative additional vehicle collision mortality that FWS estimated will exceed the purported population growth rate of 8 panthers per year mentioned in the TA Form for Kingston. In the Kingston TA Form, FWS estimated that Kingston is virtually certain (95% to 99% probability) to result in *at least* 3-4 additional deaths annually, and indicated a range suggesting that some higher number between 3 and 22 was likely.

Furthermore, the prior analysis FWS conducted in draft Biological Opinions for the Eastern Collier Property Owners HCP, which covered a massive collection of developments in nearby Collier County, suggests that the cumulative effects of those developments, which include Bellmar, are likely to appreciably diminish the survival and recovery of the Florida panther, which would unquestionably rise to the level of significance under NEPA. As CBD and Sierra Club pointed out in connection with the State 404 permit application for the Bellmar project, FWS previously made draft determinations indicating that the effects of authorizing the Bellmar project in combination with other development in Eastern Collier County, and other reasonably foreseeable impacts, will jeopardize the Florida panther.

The Bellmar project was one of multiple proposed developments from the Eastern Collier Property Owners ("ECPO") seeking an ESA section 10 Incidental Take Permit ("ITP") in reliance on their proposed Eastern Collier Multi-Species Habitat Conservation Plan ("ECPO HCP"). According to a recent statement by FWS:

> The first full draft of the HCP was received on April 22, 2015. Modifications to the original HCP were received by the Service on October 14, 2017, April 6, 2018, April 23, 2018, August 22, 2018, March 8, 2019, March 25, 2019, and September 17, 2019 (HCP Addendum). Also, a modification to the original ITP application was received on September 9, 2019.[143]

[142] Bellmar FWS Technical Assistance Form, Oct. 31. 2023, at 13.

[143] U.S. Fish & Wildlife Service, East Collier Multi-Species ITP/HCP Withdrawal, (posted Sept. 1, 2022) https://www.fws.gov/library/collections/east-collier-multi-species-itphcp-withdrawal (last accessed Sept. 9, 2022).

According to FWS, the ECPO applicants submitted a letter to the Service to withdraw their ITP applications on July 28, 2022.[144] While the letter indicates the ECPO applicants wish to withdraw their ITP application, it confirms that the applicants will "move forward case-by-case on [their] individual projects" within the HCP area through "project-specific reviews," with some already in that process and others "fast approaching."[145] While not explicitly stated in the letter, the project-specific reviews the ECPO applicants were referring to apparently were state-assumed Clean Water Act Section 404 permitting and associated reviews through the technical assistance process, not federal ESA section 7 consultations. Following the ECPO applicants' withdrawal, the Service stated that, "[a]t the time of withdrawal, the Service had not made a final determination regarding jeopardy or non-jeopardy for any of the covered species."[146] Nonetheless, the Service's analyses in publicly available draft biological opinions for the proposed ECPO HCP indicate that the combined effect of the proposed ECPO developments would cause jeopardy to the Florida panther. The Service has publicly released two draft biological opinions (draft BiOps) dated December 2020 and December 2021, respectively.[147] The December 2020 draft BiOp indicates that it is based on a version of the HCP from January 28, 2020, whereas the December 2021 draft BiOp indicates that it is based on the same version of the HCP "plus subsequent addenda."[148]

A February 24, 2021 letter from the ECPO ITP applicants to FWS regarding the December 2020 draft Biological Opinion ("BiOp") makes clear their understanding that the draft BiOp concluded that absent additional commitments from the ITP applicants to "fund public roadway improvement projects (wildlife crossings and fencing) and 'capture' traffic within future community developments," the additional panther mortality from vehicle collisions due to increased traffic induced by the proposed developments "would cause jeopardy."[149]

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[144] *See id*. *See also* Eastern Collier Property Owners Letter to USFWS dated 07/28/2022 Withdrawing their Incidental Take Permit applications, *available at* https://www.fws.gov/media/eastern-collier-property-owners-letter-usfws-dated-07282022-withdrawing-their-incidental-take.

[145] *Id.* at 2–3.

[146] U.S. Fish & Wildlife Service, East Collier Multi-Species ITP/HCP Withdrawal, (posted Sept. 1, 2022) https://www.fws.gov/library/collections/east-collier-multi-species-itphcp-withdrawal (last accessed Sept. 9, 2022).

[147] It is our understanding that there is a 2022 draft of the BiOp, but we do not currently have public access to a copy.

[148] *Compare* Biological Opinion and Conference Opinion, Eastern Collier Multi-Species Habitat Conservation Plan (filename "20201229_draft BO-CO-ECMHCP_for ECPO.pdf") (hereafter "2020 draft HCP BiOp") at 1 [submitted with these comments for inclusion in the administrative record] *to* Biological Opinion and Conference Opinion Eastern Collier Multi-Species Habitat Conservation Plan (filename DRAFT-USFWS-ECPO-full-Biological-Opinion-December-2021.pdf) (hereafter "2021 draft HCP BiOp") at 1 [submitted with these comments for inclusion in the administrative record].

[149] "ECPO's High-Level Comments on Draft BO" at 12, transmitted to Robert Tawes Chief, Environmental Review Division, U.S. Fish and Wildlife Service, Southeast Region by Bruce Johnson, Principal, Senior Scientist, Stantec Consulting Services, as attachment to letter dated February 24, 2021. (Obtained from FWS via FOIA) [submitted with these comments for inclusion in the administrative record]; *see also* Email from Leopoldo Miranda, Regional

Indeed, the December 2020 draft HCP BiOp makes clear that, even taking into account the proposed mitigation measures under the draft ECPO HCP, the proposed ECPO developments would result in a statistically significant increase in the risk of extinction for the Florida panther, with a net loss of 12 panthers per year at full build-out.[150] The December 2020 draft HCP BiOp found that the risk of extinction with the HCP increased to 5.7%, compared to an extinction risk of approximately 1.1% or 1.38% without it.[151] The December 2020 draft HCP BiOp then explained that to sufficiently reduce the increased risk of extinction so that it was no longer a statistically significant increase, additional mitigation measures and/or changes to the proposed developments to increase internal capture rates for traffic or otherwise reduce impacts would be required.[152] The 2020 draft HCP BiOp stated:

> If the Applicants are able to achieve a greater than 50 percent community (internal) capture rate, further reduce the effects of their action, or mitigate them through use of the Marinelli Fund for habitat restoration to the extent that the net effect is a loss of no more than 10 adult panthers (4 female adult panthers)/year above present (from all causes) our analysis finds the probability of extinction falls from 5.7 percent to 1.4 percent. This probability of extinction is within the 95 percent C.I. [confidence interval] of scenarios where no additional panthers are taken above present (i.e., not significantly different from baseline).[153]

The next paragraph in the December 2020 draft HCP BiOp indicated that a "no jeopardy" conclusion is contingent on finding that a "further net reduction of effects to *fewer than* 10 panthers per year at full build-out" will "be accomplished through the maintenance of high community (internal) trip capture, adaptive management, and the mitigative effects of actions facilitated by the Marinelli Fund."[154] In short, the December 2020 draft HCP BiOp shows that the combined impacts of the proposed ECPO developments would cause jeopardy to the Florida panther absent additional changes to the design or additional mitigation measures to reduce the anticipated number of annual panther losses caused by implementing the proposed covered activities. What's more, it underscores that FWS's high-end range of estimated take for Kingston—22 panthers per year—unquestionably would constitute jeopardy by the Service's own measure, as would even mid-range estimates, *before taking into account any cumulative effects and associated take*.

The December 2021 draft HCP BiOp similarly stated:

> [O]ur PVA [population viability analysis] predicts the implementation of the HCP, in the absence of further actions to reduce the impact of the action to the

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Director, FWS, to Jack Arnold, Acting Assistant Regional Director, FWS, regarding a Revised ECPO Information Memorandum (June 5, 2019) (quoting a draft information memorandum stating, "We have also begun frank discussions with ECPO, most recently May 10 and 14, based on the Service's preliminary, internal analyses of traffic volume effects on the continued survival or recovery of the Florida panther.") [submitted with these comments for inclusion in the administrative record].

[150] 2020 draft HCP BiOp at 158–159.

[151] *Id*. at 158–159.

[152] *See id*. at 159.

[153] *Id*. at 159.

[154] 2020 draft HCP BiOp at 159 (emphasis added).

> panthers, could reduce the abundance of panthers across their range such that the probability of extinction is predicted to increase from 1 percent (95 percent C.I. 0.2 to 1.8 percent) to 5.7 percent (95 Percent C.I. 2.2 to 9.2 percent). When cumulative effects are added to the effects of the HCP the probability of extinction further increases to 6.6 percent (95 percent C.I. 2.3 to 10.9 percent). The probability of extinction after implementation of the HCP is statistically significantly different than baseline conditions. If the Applicants are able to achieve a greater than 50 percent community (internal) traffic capture rate, further reduce the effects of their action, or mitigate them through use of the Marinelli Fund for habitat restoration to the extent that the net effect is a loss of no more than 10 adult panthers (4 female adult panthers)/year above present (from all causes) our analysis finds the probability of extinction falls from 5.7 percent to 1.4 percent. This probability of extinction is within the 95 percent C.I. of scenarios where no additional panthers are taken above present (i.e., not significantly different from baseline).[155]

Notably, although the draft HCP BiOps both state that additional panther losses must be limited to "no more than 10" per year over present levels, other portions of the draft HCP BiOps indicate that the number actually must be *fewer than* 10 over present levels to avoid a statistically significant increase in extinction risk.[156]

Just like the 2020 draft HCP BiOp, the modeling in the 2021 draft HCP BiOp found that, even with 8 wildlife crossings *and* assuming a 50% internal capture rate for traffic, implementation of the HCP would cause a total of 12 additional panther deaths per year: 8 from vehicle collisions resulting from increased traffic induced by the HCP developments and 4 from habitat loss and degradation.[157] And both the 2020 and 2021 BiOps found that the cumulative effects of traffic induced by other non-HCP, non-federally authorized actions will cause an additional 2 panther deaths per year, even after accounting for the mitigation provided by 8 proposed wildlife crossings.[158] In sum, both versions concluded that the additional panther deaths associated with implementation of the HCP—i.e., construction of reasonably foreseeable development in the region—will be 12 per year, and that those panther losses needed to be

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[155] 2021 draft HCP BiOp at 148.

[156] *See* 2020 draft HCP BiOp at 146 ("Internal population viability analysis contingency modelling, and statistical comparison of possible thresholds found that the probability of extinction 100 years after ITP expiration of BSLR, BSLR + HCP, and BSLR + HCP + CE scenarios do not differ significantly (1.38 percent Prext versus the 1.1±0.8 percent Prext estimated for BSLR) *if fewer than* 10 adult panthers (4 female panthers) total are taken annually, above present.") (emphasis added); 2021 draft HCP BiOp at 133–134 ("Our analysis of these PVAs found that though there was still a difference in final abundances, the probability of extinction 100 years after ITP expiration does not differ significantly from Baseline + Sea Level Rise (1.38 percent Prext versus the 1.1±0.8 percent Prext estimated for BSLR) *if fewer than* 10 adult panthers (4 female panthers) total are lost annually, above present, from any cause (*e.g.,* habitat loss, roadway mortality, etc.).") (emphasis added).

[157] *See* 2020 draft HCP BiOp at 153, lines 5444-5447; 2021 draft HCP BiOp at 142, lines 5055-5057.

[158] *See* 2020 draft HCP BiOp at 153; 2021 draft HCP BiOp at 142.

limited to fewer than 10 per year to avoid a statistically significant increase in the risk of extinction (i.e. jeopardy). Both versions indicated that additional changes to the proposed HCP, such as commitments to achieve internal capture of traffic greater than 50% and/or additional commitments for mitigation, would be necessary to conclude that the panther losses will be reduced to 10 or fewer.

Consequently, the Service's draft analyses for the ECPO HCP appear to indicate that, absent additional changes to the project designs to increase internal capture above 50% or commitments for additional avoidance or mitigation of impacts, the combined impacts of the Bellmar project and the other projects formerly part of the proposed HCP, will result in total panther losses that are likely to cause jeopardy to the Florida panther.

This result is especially concerning because the 2020 and 2021 draft HCP BiOps reflect multiple assumptions that result in underestimating the risk of extinction, as CBD, the Conservancy, and Sierra Club detailed in prior comments regarding the Bellmar project.[159]

When viewed together, FWS's prior analyses in the ECPO HCP and Kingston TA Form demonstrate a high likelihood that the Kingston Development will contribute to levels of take that are likely to appreciably diminish the survival and recovery of the Florida panther—which clears by leaps and bounds NEPA's lower "significance" threshold requiring an EIS. FWS's own analyses for the proposed ECPO HCP indicate FWS could not reach a "no jeopardy" conclusion where the proposed HCP projects and cumulative effects would collectively cause 14 additional panther deaths per year.

In sum, the information presented in existing publicly available analyses from FWS indicates—and at the very least raises substantial questions about—significant adverse effects on the Florida panther population from increased vehicle collisions due to the cumulative effects of the Kingston Development and other reasonably foreseeable sources of increased traffic. These significant effects must be evaluated carefully in an EIS.

Finally, while the Corps must consider FWS's estimates regarding the cumulative effects of take from vehicle collisions, the Corps cannot rely on the defective "no jeopardy" conclusions in the TA Forms to assert that the effects will not be significant, or will be minimized to insignificant levels. The Kingston TA Form provided no analysis of how even 3–4 additional takes on top of the anticipated cumulative effects from background traffic would not amount to jeopardy. And again, FWS failed to evaluate how the greater number of vehicle collision deaths that are at least likely (i.e. 50% or more likely to occur) does not amount to jeopardy when considered on top of the additional vehicle collision deaths from cumulative effects. Instead of analyzing the likely effects of the Kingston Development, along with likely cumulative effects, FWS's TA Form for Kingston attempted to cast doubt on the certainty of its own estimates, and to rely on unenforceable, uncertain, and non-specific promises about future monitoring and mitigation to address jeopardy caused by increased vehicle collisions. FWS stated that it: "acknowledges that motor vehicle related injuries and mortalities of panther, in concert with other threats to the panther, could collectively threaten the survival and recovery of this species," but then offered only unenforceable and vague promises to monitor and mitigate those impacts.[160] Regardless of whether the forecasted impacts are sufficiently certain for ESA

[159] *See* Comments from Center for Biological Diversity, Conservancy of Southwest Florida, and Sierra Club, Re: Bellmar Development Application (Collier County) and Public Notice, #396364-001, (Sept. 15, 2022).

[160] Kingston FWS Technical Assistance Form at 18.

purposes, that analysis is sufficient to provide the lower threshold of "reasonably foreseeable" required by NEPA, and to demonstrate that the reasonably foreseeable adverse effects are significant, while the vague mitigation promises relied upon in the TA Form are not sufficient for the purposes of reaching a finding that those effects will be reduced to insignificant levels.

### 2. *The Net Loss of Florida Panther Habitat Due to the Kingston Development Will Have Reasonably Foreseeable Significant Adverse Effects Requiring Analysis in an EIS*

As detailed by expert Dr. Robert Frakes in his analysis of the application previously submitted to FDEP for a State 404 Program permit, the proposed Kingston development will not only directly destroy important panther habitat but will also result in degradation of habitat in adjacent areas, rendering those areas unsuitable for panther use. Whereas FWS acknowledged that approximately 3,400 acres of panther habitat would be directly and permanently lost to the project footprint,[161] Dr. Frakes estimated that a total of 5,189 acres of previously functional panther habitat would become unsuitable for use by adult breeding panthers when taking into account the degradation caused by impacts of proximity to high human density.[162] This extensive habitat destruction and degradation will also impinge on the pathway in the northern portion of Kingston used for east-west panther movements between areas of habitat. Further, the southern portion of Kingston destroys habitat that forms a potential north-south bridge between two arms of primary zone habitat. The conclusions that FWS made in the Kingston TA Form regarding jeopardy failed to rationally address these impacts from permanent habitat degradation and fragmentation; however, it is clear that this substantial loss of habitat rises to the level of significance for the Florida panther, given its relatively limited core breeding range.

The Corps cannot rationally rely on the "no jeopardy" conclusion in the Kingston TA Form to conclude that the effects of Kingston will not be significant because that conclusion is arbitrary and capricious, as detailed below in the ESA section of these comments. Moreover, as detailed in that section, the TA Form's analysis of the proposed mitigation fails to support a conclusion that the mitigation will avoid jeopardy, and cannot rationally be relied upon to show that the net loss of panther habitat, after mitigation, is not a significant adverse effect.

In sum, the publicly available documents evaluating the Kingston Development's State 404 Program permit application provide information indicating—and at the very least raising substantial questions about—significant adverse effects on the Florida panther from the cumulative effects of habitat loss from Kingston and other reasonably foreseeable development. The Corps must analyze these effects in an EIS. Moreover, the Corps should consider the combined impact on the Florida panther from reasonably foreseeable habitat loss *and* increased vehicle collisions together.

[161] Kingston FWS Technical Assistance Form at 23.
[162] Declaration of Robert Frakes at ¶¶ 72-73.

### C. The Mitigation Discussed by the Service in Its TA Form for the Kingston Development State 404 Program Application Is Insufficient to Demonstrate Effects on Florida Panthers Will Be Mitigated to Insignificant Levels

The proposed project plans and mitigation measures described in FWS's TA Form evaluation of the State 404 Program permit application for Kingston do not adequately compensate for the net loss of limited remaining habitat in the core breeding range for the only existing population of Florida panthers. Experts are in general agreement that "further habitat loss in the occupied breeding range for the sole existing population of Florida panthers is not acceptable."[163] And one of the objectives of the Service's Recovery Plan for the Florida panther is to maintain, restore, and expand the panther population and its habitat in south Florida and expand the breeding portion of the population in south Florida to areas north of the Caloosahatchee River.[164] The Recovery Plan calls for three self-sustaining, interconnected populations of 240 adult panthers for the species to be considered fully recovered.[165] As explained by Dr. Frakes, "This goal was established based on population viability analyses that suggest at least 240 panthers are required for genetic health and long-term viability of a population. These populations would also need sufficient habitat to support them, as well as habitat corridors to facilitate movement between populations to maintain natural genetic flow."[166] As the Service stated in the TA Form, "approximately 3,400 acres of panther habitat will be *permanently lost*."[167] Looking at the effects of development at the landscape scale, which is based on the best available science regarding panther use of habitat, Dr. Frakes found that the loss of functional habitat would be much greater—approximately 5,189 acres.[168] Preservation of about 3294 acres of already existing habitat does not compensate for the permanent loss of functional panther habitat across the thousands of acres destroyed, and while the TA Form states that the developers will "restore and protect" that habitat, the Biological Assessment included in the State 404 Program permit application shows that the purported restoration involves only a small amount of habitat creation. As discussed below in the ESA section of these comments, the December 2022 Biological Assessment included with the Kingston project State 404 Program permit application indicates that the mitigation will include approximately 156 acres of habitat creation by restoring agricultural lands to primary zone conditions and 249 acres of habitat

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[163] Declaration of Robert Frakes at ¶¶ 23; Kautz R, Kawula R, Hoctor T, Comiskey J, Jansen D, Jennings D, Kasbohm J, Mazzzotti F, McBride R, Richardson L, Root K (2006) How much is enough? Landscape-scale conservation for the Florida panther. Biol Conserv 130:118–133; Frakes RA, Belden RC, Wood BE, James FE (2015) Landscape Analysis of Adult Florida Panther Habitat. PLoS ONE 10(7): e0133044. https://doi.org/10.1371/journal.pone.0133044; Root, K.V., 2004. Using models to guide recovery efforts for the Florida panther. In: Akc¸akaya, H.R., Burgman, M., Kindvall, O.,Wood, C.C., Sjogren-Gulve, P., Hatfield, J., McCarthy, M. (Eds.),Species Conservation and Management: Case Studies. Oxford University Press, New York, NY, USA, pp. 491–504.

[164] U.S. Fish and Wildlife Service. 2008. Florida Panther Recovery Plan (*Puma concolor coryi*), Third Revision. U.S. Fish and Wildlife Service. Atlanta, Georgia. 217pp.

[165] *Id.*

[166] Declaration of Robert Frakes at ¶ 22.

[167] Kingston FWS Technical Assistance Form at 16 (emphasis added).

[168] Declaration of Robert Frakes at ¶ 72, Figures 10 & 11.

creation by restoring agricultural lands to secondary zone conditions.[169] That Biological Assessment indicates that approximately 513 acres of primary zone habitat will be permanently destroyed, and that 2,890 acres of secondary zone habitat will be permanently destroyed.[170] Thus, even assuming the proposed habitat creation by restoration is successful, it appears there will nonetheless be a net loss of approximately 357 acres of primary zone habitat and 2,641 acres of secondary zone habitat. Simply protecting existing functional habitat does not compensate for the loss of already limited Florida panther habitat,[171] and at most only a fraction of the destroyed habitat will be replaced by habitat creation, even assuming that habitat creation is successful.

Moreover, without additional analysis, the Corps cannot rationally assert that the proposed restoration of the existing habitat in the preserve areas to increase habitat value on the approximately 1,331 acres of primary zone habitat and 1,538 acres of secondary zone habitat that will be preserved, largely by conversion of orchards or groves into pine forests,[172] minimizes the impacts of destroying 3,400 acres of other habitat to insignificant levels. As detailed below in the ESA section of these comments, the Panther Habitat Assessment Methodology (PHAM) is not based on the best available science, and does not ensure that enough habitat will remain to ensure the long-term persistence of the Florida panther.[173] Relying on the PHAM system to assert that these proposed quality changes on other existing habitat will sufficiently minimize the impacts of the taking and habitat destruction is arbitrary and capricious, and a failure to consider the best available scientific information.

Furthermore, while the Service's TA Form for the Kingston project conclusorily asserted that mitigation via wildlife crossings will "minimize" the estimated deaths per year from vehicle collisions, the TA Form does not make any reduction to the amount of anticipated take in reliance on those crossings and does not provide any actual analysis to support the contention that they will meaningfully reduce the estimated take. Thus, the Corps cannot rationally rely on the TA Form's assessment of mitigation provided by the crossings to assert that jeopardy is not likely, nor that the effects are mitigated to insignificant levels by the crossings.

The TA Form relies on a cursory list of potential future mitigation measures to assert that take from vehicle collisions due to Kingston will be reduced sufficiently to ensure against jeopardy. The TA Form provides only a short list of potential measures that (1) lack specificity about how they will be implemented, and by whom, (2) lack specificity about the extent to which such measures can actually be effective, or the extent to which such measures would reduce vehicle collisions, (3) lack specificity about how such measures will be funded, and (4) lack specificity about how and whether such measures will be enforced. The assessment lacks the details required to support a conclusion that effects will be mitigated to insignificant levels.

In sum, currently available information about mitigation measures is not adequate to support either a lawful no jeopardy conclusion, nor a finding that the adverse effects of the project will be mitigated to levels that are not significant.

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[169] *See* Passarella & Associates, Inc., Kingston Biological Assessment (Revised December 2022) ("December 2022 Biological Assessment") at E43-3 (Exhibit 43 "Panther Compensation Calculator").

[170] *Id*. at E43-3.

[171] Declaration of Robert Frakes at ¶¶ 23; 78.

[172] December 2022 Biological Assessment, Exhibit 43 at E43-3.

[173] Robert Frakes Declaration at ¶¶ 64, 79; *supra* n. 49.

The significant adverse effects from Kingston on the Florida panther should be studied in an EIS, and mitigation detailed and evaluated per NEPA requirements set forth in current CEQ regulations implementing NEPA. Moreover, in evaluating the extent to which mitigation reduces adverse effects, the Corps' analysis must consider how the traffic-increasing effects of the Kingston Development undermine the value of the proposed habitat preservation and restoration mitigation. Specifically, the Corps' NEPA analysis should evaluate how the value of the proposed habitat preservation and restoration at the Kingston site is reduced by the reasonably foreseeable reality that the increased traffic drawn to the vicinity of that habit will increase vehicle collision deaths for panthers utilizing that habitat.

### D. The Kingston Development and Other Development Will Have Reasonably Foreseeable Significant Adverse Cumulative Effects on the Florida Crested Caracara

The FWS TA Form for Kingston's State 404 Program permit application characterizes the "take" from the project as: "*Loss* or failed reproduction of one caracara pair; conversion of 3,233,36 acres of foraging habitat."[174] The Service also states that the "take" is "1) the loss of caracara reproductive success for the known breeding pair for the first year of the Project; and 2) loss of 3,233.36 acres of suitable caracara foraging and nesting habitat in the Project footprint."[175] The section of the TA Form titled "*Incidental take resulting from the project*" states: "The Service expects the proposed Project to result in incidental take of one territorial pair of caracara in the form of harm (i.e., the loss of, degradation and fragmentation of 3,233.36 acres of habitat; and the loss of caracara reproductive success for the known breeding pair for the first year of the Project)."[176] In discussing the effects of the project, the TA Form concedes that the permanent habitat destruction will eliminate habitat equivalent to all of the foraging habitat within a breeding territory, and notes that "this habitat loss could result in increased intraspecific aggression with adjacent caracaras as the pair(s) move to neighboring territories in search of forage and nesting sites. This aggression and/or decrease in foraging area could also ultimately result in a lower reproductive potential."[177] The discussion and description of the take in several distinct portions of the TA Form indicate that the permanent habitat loss will have more than merely a temporary impact by impairing the reproduction of at least one breeding pair due to forcing pairs to compete for already limited habitat, resulting in "loss" of the breeding pair.

The baseline condition of the Florida crested caracara has been eroded by extensive habitat destruction and take of breeding pairs already authorized by the Service in recent years. As Florida crested caracara expert Dr. Joan Morrison explains, based on publicly available information alone, from 2019 through 2021, the Service has authorized or reauthorized the destruction of approximately 29,000 acres of caracara habitat, and associated take of at least 15 breeding pairs.[178] Further, as FWS recently acknowledged, Florida crested caracara habitat is

[174] Kingston FWS Technical Assistance Form at 6 (emphasis added).
[175] Kingston FWS Technical Assistance Form at 8.
[176] Kingston FWS Technical Assistance Form at 8.
[177] Kingston FWS Technical Assistance Form at 7.
[178] *See* Joan Morrison Declaration at ¶¶ 27, 47.

"saturated."[179] Losses of habitat that impair breeding territories cause competition between breeding pairs and ultimately contract the breeding population.

As Dr. Morrison explains, habitat saturation means that "all habitat suitable for a species to survive, thrive, and reproduce successfully is already occupied by breeding individuals … In a situation of habitat saturation, individuals experience competition, especially if breeding pairs continue to reproduce, and stress from competition among territorial pairs may preclude those pairs breeding successfully or result in reduced productivity."[180] Thus, when pairs attempt to shift their territory into the breeding territory of other breeding pairs in areas outside of the footprint of Kingston, they will compete with other pairs for resources that are already too limited to support them.[181]

As Dr. Morrison explains, the best available science indicates that the breeding population is relatively small at only 280 pairs, and that its size, isolation, and reduced genetic diversity make it vulnerable to population decline, such that "the currently available evidence provides substantial reasons to believe that habitat loss that reduces the number of breeding pairs likely appreciably diminishes survival and recovery.[182] Further, as Dr. Morrison explains, in the absence of modeling to support a population viability analysis, FWS lacks the information it would need to rationally assert that 280 pairs (or 279 pairs for that matter) is sufficient for long-term persistence.[183]

With regard to cumulative impacts, there are multiple reasonably foreseeable projects in that broader area that will destroy caracara habitat and harm the breeding pairs in nearby breeding territories, such as the Rural Lands West and Bellmar projects.[184] As Dr. Morrison illustrates, the impacts from the displacement of the pair caused by habitat loss within the footprint of Bellmar will extend to areas outside that footprint, into the breeding territories of other breeding pairs.[185] Dr. Morrison also opines that the permanent displacement of the Bellmar pair, and the permanent loss of reproductive potential for that pair, are likely outcomes. [186]

In sum, the available information indicates that the Kingston Development will further shrink Florida crested caracara habitat, and impact breeding for an already small and vulnerable population, and that those impacts will be in addition to cumulative effects from other recently authorized habitat destruction, as well as reasonably foreseeable future developments. In light of the saturation of caracara habitat and its low population, further contraction of the habitat and breeding population is a potentially significant adverse effect that must be evaluated by the Corps in an EIS.

The Corps cannot rationally rely on the Kingston TA Form's "no jeopardy" conclusion or assertions regarding mitigation to conclude that the effects on Florida crested caracara will not be significant. The "no jeopardy" conclusion fails to explain why the loss of a breeding pair

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[179] *See* Joan Morrison Declaration at ¶¶ 19-21, 23, 27.
[180] Joan Morrison Declaration at ¶ 20.
[181] *See* Joan Morrison Declaration at ¶¶ 19-20, 31-35, 38-39, 45, 50.
[182] *See* Joan Morrison Declaration at ¶¶ 22-24.
[183] *See* Joan Morrison Declaration at ¶¶ 25-26.
[184] *See* Joan Morrison Declaration at ¶¶ 49-51.
[185] *See* Joan Morrison Declaration at ¶¶ 31-35, 38-39, 45, 50.
[186] *See* Joan Morrison Declaration at ¶¶ 6, 38, 45.

associated with the permanent habitat loss has only a "minimal effect on the overall population."[187] Indeed, there is no discussion *whatsoever* of the population size, or the number of breeding pairs, and no support at all for the proposition that losing another breeding pair is only a "minimal" impact. There is no discussion at all of the population size or number of breeding pairs required for survival or recovery. The TA Form's assertions are conclusory and unsupported by any facts or analysis at all. Similarly, the "no jeopardy" conclusion's assertion that the permanent habitat loss is only a "small reduction" in the overall range is made without any discussion or analysis whatsoever of how much habitat remains for the species, nor of how much is necessary for survival and recovery. Again, the conclusion is totally conclusory and unsupported by any facts or analysis.

The TA Form's analysis is devoid of any estimate of the population, and fails to mention the best available estimate of the population, which is 280 breeding pairs.[188] Nor does the Service's analysis include any discussion whatsoever of the population size or other parameters, such as a positive population growth rate, required for recovery.

The TA Form's "no jeopardy" conclusion in the Technical Assistance also reflects a failure to consider that the baseline condition of the Florida caracara has been eroded by extensive habitat destruction and take of breeding pairs already authorized by the Service in recent years.

Further, it is notable that in its analysis of impacts on caracara, the TA Form limited the area over which it would consider cumulative effects to the footprint of the Kingston site.[189] This decision was irrational on its face because the Service conceded that the impacts from Kingston would cause breeding pairs to shift into the territory of other breeding pairs and compete with them.[190] In other words, FWS conceded that there would be offsite impacts from the breeding pairs entering the territories of other breeding pairs and competing with them. The harmful impacts of this competition on the other breeding pairs are plainly effects of the Kingston project occurring in areas beyond the footprint.

A rational cumulative effects analysis should consider, at minimum, how the effects of the habitat loss from other reasonably foreseeable projects, combined with the habitat loss and increased competition from displacement of the Kingston breeding pair, will affect those other breeding pairs. It should also take into account the effects from recently authorized habitat loss and take of breeding pairs, as the effects on the population from Kingston and other future development will occur against a baseline that has already been eroded by those recent past authorizations.

In sum, the reasonably foreseeable cumulative effects of habitat loss on the Florida caracara are plainly potentially significant adverse effects that should be considered in an EIS,

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[187] Kingston FWS Technical Assistance Form at 9.

[188] *See* Joan Morrison Declaration at ¶ 22.

[189] *See* Kingston FWS Technical Assistance Form at 8 ("The effects of this action on caracara are not expected to extend beyond the proposed project's footprint; therefore, no additional cumulative effects are included in this analysis.").

[190] *See* Kingston FWS Technical Assistance Form at 7 ("…this habitat loss could result in increased intraspecific aggression with adjacent caracaras as the pair(s) move to neighboring territories in search of forage and nesting sites. This aggression and/or decrease in foraging area could also ultimately result in a lower reproductive potential.").

and the Corps cannot rationally rely on the defective determinations in the Kingston TA Form to assert that the effects are not significant.

### E. The Mitigation Discussed by the Service in Its TA Form for the Kingston Development State 404 Program Application Is Insufficient to Demonstrate Effects on Florida Crested Caracara Will Be Mitigated to Insignificant Levels

The mitigation requirement described in Condition 3 of the TA Form for the Kingston project is inadequate to minimize the impacts from habitat loss and is arbitrary and capricious.[191] As Dr. Morrison explained with regard to the conditions for the Bellmar project, this boilerplate condition fails to require a sufficient amount of habitat replacement (seemingly only requiring replacement of 70 acres even though over 3,000 acres of suitable foraging habitat will be permanently destroyed), and has also failed to include terms that will properly trigger the requirement to replace habitat, because it fails to require any habitat replacement of foraging habitat at all where the habitat destruction is located more than 300 meters from the nest.[192] As a result of these failures, even with that mitigation, the Kingston proposal would destroy an amount of breeding territory equivalent to the territory for a breeding pair. In light of the fact that caracara habitat is "saturated" (meaning there is no more suitable habitat remaining to support breeding pairs), that mitigation is not sufficient to demonstrate that the effects will be reduced to insignificant levels.

The mitigation requirement described in Condition 2 of the TA Form is also inadequate to protect newly fledged young, and is arbitrary and capricious.[193] As Dr. Morrison explains, allowing clearing activities to occur within 300 meters of the nest after the young have fledged fails to protect the fledglings and is likely to result in reduced survival for them.[194] Fledglings remain within 1 km of the nest for at least two months, and thus remain vulnerable to impacts during that post-fledging period.[195] This inadequate restriction on construction during the post-fledging period fails to minimize the impacts of the taking and is arbitrary and capricious.

In sum, the Corps cannot rely on the TA Form's assertions that these mitigation measures minimize effects of the taking to support a rational determination that the adverse effects will be mitigated to levels that are not significant.

### F. Publicly Available Information Indicates the Kingston Development May Have Reasonably Foreseeable Significant Adverse Effects on Florida Bonneted Bats

Publicly available information indicates that the Kingston Development may have reasonably foreseeable significant adverse effects, and the Corps cannot rationally rely on the defective analysis in the FWS TA Form for Kingston to assert that effects will be insignificant. The TA Form for the Kingston State 404 Program permit application states that the Kingston

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[191] *See* Kingston FWS Technical Assistance Form at 3-4.
[192] *See* Joan Morrison Declaration at ¶¶ 40-43.
[193] *See* Kingston FWS Technical Assistance Form at 3.
[194] Joan Morrison Declaration at ¶ 44.
[195] Joan Morrison Declaration at ¶ 44.

project is not likely to adversely affect the Florida bonneted bat.[196] This conclusion is arbitrary and capricious and fails to consider the best available scientific information about the species.

The TA Form provides no explanation or analysis at all to support its conclusion that the project is not likely to adversely affect Florida bonneted bats, and does not explain how FWS reached this conclusion despite its own determination key indicating that the project is indeed "likely to adversely affect" Florida bonneted bats.

The Kingston footprint as shown the State 404 Program permit application materials is located within the USFWS consultation area for Florida bonneted bat and appears to be adjacent to designated critical habitat for Florida bonneted bat.[197] The acoustic surveys confirm the presence of FBB at the site, and despite the proposed habitat preservation and protection, there is no indication that those measures will avoid net loss of Florida bonneted bat habitat.

The conditions proposed by FWS in the Kingston TA Form require the applicant to conduct cavity tree and roost surveys, but FWS does not explain how that requirement is expected to actually avoid take in light of the Service's recent statements in another recent TA Form acknowledging that roost sites and tree cavities used for roosting are difficult to identify.[198] Moreover, the conditions appear to allow the destruction of unoccupied roost trees outside the breeding season—allowing destruction of both roosting and foraging habitat, and failing to require any conditions that would prevent net loss of either.

Furthermore, the FWS TA Form appears to have relied on the 2022 Biological Assessment's plainly erroneous assertion that roosting is not likely, when the acoustic survey results shown in that BA actually indicate that roosting *is* likely. The December 2022 Biological Assessment ("BA") for Kingston that was included as part of the State 404 Program permit application states: "the entire Project site (i.e., 6,676.82± acres) can be considered potential habitat for the species."[199] That December 2022 Biological Assessment further states: A Florida bonneted bat acoustic survey was conducted for the Project in September 2022. A total of 67,306 files containing bat calls were recorded. Of those recordings, 12 calls were identified as Florida bonneted bat calls."[200] The December 2022 Biological Assessment asserts that roosting on site is not likely because: "None of the bonneted bat calls recorded were within the 1.5-hour window before sunrise or after sunset, indicating a low probability of roosting activity within the site."[201]

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[196] Kingston FWS Technical Assistance Form at 3, 6.

[197] *See* Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Endangered Florida Bonneted Bat, 89 Fed. Reg. 16,624, 16,675 (Mar. 7, 2024) (figure showing designated Critical Habitat Units for Florida Bonneted Bat Unit 5: Corkscrew Unit, Lee and Collier Counties, Florida); 2022 Biological Assessment Exhibit 21.

[198] *See* Bellmar FWS Technical Assistance Form at 19, 20.

[199] December 2022 Biological Assessment at 12.

[200] December 2022 Biological Assessment at 12.

[201] December 2022 Biological Assessment, Exhibit 23 at 7; see also, December 2022 Biological Assessment at 20 ("However, none of the bonneted bat calls recorded were within the 1.5-hour window before sunrise or after sunset, indicating a low probability of roosting activity within the site.). Notably, aside from the error detailed below, the BA also uses a time window that does not comport with the Service's Florida Bonneted Bat guidelines. Whereas the BA only considered the 1.5-hour window after sunset, the Service's guidelines also require consideration of the 30-minute window before sunset, and detection of calls within that 30-minute window would also indicate that roosting is likely. *See* U.S. Fish and Wildlife Service, South Florida Ecological

First, based on the reported sunset times and times and dates of the recorded Florida bonneted bat calls shown in the acoustic report itself, this statement appears to be plainly erroneous, as multiple FBB calls recorded on September 3, 2022 reportedly occurred within 1.5 hours of the reported sunset time for that date. Appendix G of the acoustic report presented in Exhibit 23 of the December 2022 Biological Assessment, at G-1, shows the following information about the dates and times of the 12 recorded Florida bonneted bat calls:

**Table 2. Summary of Florida Bonneted Bat Calls**

| Acoustic Station | Date | Time | No. of Calls |
|---|---|---|---|
| AS-2 | August 15, 2022 | 2250 | 3 |
| | August 15, 2022 | 0055 | 1 |
| AS-20 | September 3, 2022 | 2055 | 3* |
| | September 3, 2022 | 0015 | 2* |
| AS-22 | September 3, 2022 | 2000 | 3* |

*Call recorded on a night that did not meet USFWS weather criteria.

The acoustic report indicates that on August 15, 2022, sunset occurred at "2005" (i.e. 8:05 pm), and that on September 3, 2022, sunset occurred at "1946" (i.e. 7:46 pm).[202] Thus, the six Florida bonneted bat calls recorded on September 3, 2022 at "2000" and "2055" (i.e., 8:00 pm and 8:55 pm) occurred within the 1.5-hour period following sunset that day, which was reportedly at "1946" (i.e. 7:46 pm). FWS's guidelines state:

> the Service will consider the following evidence indicative that roosting is likely nearby (i.e., reasonably certain to occur) if **ANY** of the following are documented: (a) Florida bonneted bat calls are recorded within 30 minutes before sunset to 1½ hours following sunset or within 1½ hours before sunrise; (b) emergence calls are recorded; (c) human observers see (or hear) Florida bonneted bats flying from or to potential roosts; (d) human observers see and identify Florida bonneted bats within a natural roost or artificial roost; and/or (e) other bat sign (e.g., guano, staining, etc.) is found that is identified to be Florida bonneted bat through additional follow-up.[203]

Consequently, contrary to the assertions in the Biological Assessment, 6 of the 12 Florida bonneted bat calls apparently occurred within the 1.5-hour period after sunset, indicating that roosting is indeed likely and reasonably certain per FWS guidelines. That the calls on September 3, 2022 were recorded on days when the weather conditions did not meet FWS weather criteria does not provide any rational basis to disregard those calls, as the weather criteria requirements

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Services Office, Florida Bonneted Bat Consultation Guidelines, October – 2019, *available at* https://www.fws.gov/sites/default/files/documents/20191023_2019_FBB%20Consultation%20GuidelinesFinal.pdf, at 11.

[202] December 2022 Biological Assessment, Exhibit 23 at 5-6, Table 2.

[203] U.S. Fish and Wildlife Service, South Florida Ecological Services Office, Florida Bonneted Bat Consultation Guidelines, October – 2019, available at https://www.fws.gov/sites/default/files/documents/20191023_2019_FBB%20Consultation%20GuidelinesFinal.pdf, at 11 (emphasis in original).

are intended to ensure against false *negatives* (i.e. failures to detect Florida bonneted bat calls due to unfavorable weather conditions), not false positives.[204] Indeed, the FWS guidelines do not call for discarding positive detections made on such days, but rather require that additional days of monitoring under weather conditions conducive to detection be conducted.[205]

Notably, neither FWS nor FWC appears to have noticed the erroneous assertion that none of the 12 calls occurred within 1.5 hours after sunset. Indeed, FWC's comment letter to FDEP dated November 6, 2023 reiterates the December 2022 Biological Assessment's plainly erroneous assertion, stating: "A total of 12 Florida bonneted bat calls were recorded at 3 survey stations; however, none were recorded within the one-and-a-half-hour window before sunrise or after sunset indicating a low probability of roosting activity within the site."[206]

The acoustic report is also inadequate and fails to comply with FWS guidelines in other ways. The acoustic report states that as a result of an equipment failure, data was not collected at four of the twenty-four stations.[207] The stations affected by that failure appear to be AS-5, AS-8, AS-22, and AS-24 based on the main text of acoustic report,[208] However, Appendix G of the acoustic survey report indicates that the stations for which no data was recorded were AS-5, AS-8, AS-16, and AS-24.[209] Moreover, as both the main text of the acoustic survey report and its Appendix G state that AS-22 was one of the three stations where Florida bonneted bat calls were

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[204] *See, e.g.*, U.S. Fish and Wildlife Service, South Florida Ecological Services Office, Florida Bonneted Bat Consultation Guidelines, October – 2019 at 14 (discussing low likelihood of acoustic detection for the species and noting that while "[p]ositive acoustic detection data are extremely valuable," when instead considering negative detection results, "it is important to recognize that there are issues with false negatives due to limitations of equipment, low detection probabilities, difference in detection due to prey availability and seasonal movement over the landscape, and in some circumstances improperly conducted surveys (i.e., short duration or in unsuitable weather conditions)."). Notably, the 2018 U.S. FWS Range-wide Indiana bat survey guidelines, which the Florida Bonneted Bat Consultation Guidelines cite for the weather criteria, make clear that the weather criteria require surveys to be repeated if conducted on days when the weather conditions would be associated with lower activity by bats, as such lower activity would reduce detection probabilities and lead to false negatives. *See* U.S. Fish and Wildlife Service, South Florida Ecological Services Office, Florida Bonneted Bat Consultation Guidelines, October – 2019 at 20, 22; U.S. Fish and Wildlife Service. 2018. Range-wide Indiana bat survey guidelines, *available at* https://www.nan.usace.army.mil/Portals/37/docs/regulatory/Nationwide%20Permit/2018%20Indiana%20Bat%20and%20NLEB%20Summer%20Survey%20Guidelines.pdf?ver=2019-05-20-123826-203 at 23, 32.

[205] U.S. Fish and Wildlife Service, South Florida Ecological Services Office, Florida Bonneted Bat Consultation Guidelines, October – 2019 at 20, 21.

[206] November 6, 2023 Letter from FWC (Jason Hight) to FDEP (Jonathan Guinn) Re: Kingston, Florida Department of Environmental Protection, State 404 Permit Application (423130-001), Lee County, at 4.

[207] December 2022 Biological Assessment, Exhibit 23 at 4.

[208] December 2022 Biological Assessment, Exhibit 23 at 4-5, Table 1 (listing stations but omitting those four stations where faulty equipment prevented collection).

[209] December 2022 Biological Assessment, Exhibit 23, Appendix G at G-1, Table 1.

recorded,[210] it appears that the failure to collect data occurred at AS-16, not AS-22. Thus, the acoustic report fails to provide any data about one-sixth of the locations where monitoring should have been conducted. Given the failure to survey at a sixth of the required locations, it would be arbitrary to conclude that there is a low probability of roosting or that individuals are not likely to be affected.

In any case, despite these failures, the results shown in the acoustic report do indicate that roosting on site is likely and reasonably certain, yet FWS's TA Form provided no analysis to explain how it reached a "not likely to adversely affect" determination in light of roosting Florida bonneted bats and roost trees being present at the site. The failure to consider the effects of destroying roost trees is arbitrary and capricious in light of the Service's prior recognition that preventing destruction of roost trees is critically important to conservation of the species. For example, the Service has previously stated:

- "Suitable natural roost sites in south Florida appear limited, and competition for available tree cavities among native and non-native wildlife may be greater now than historically (see Factor E, Competition for Tree Cavities, final listing rule (78 FR 61004, October 2, 2013); also Belwood 1992, p. 220; Kern, Jr., in litt. 2012; Ludlow, in litt. 2012). Consequently, retaining suitable roost structures (trees and snags with cavities or loose bark) throughout the species' range is fundamental to this species' conservation (Braun de Torrez et al. 2016, p. 240). Specifically, more roost structures may be needed to support dispersing subadult males (Ober et al. 2016, p. 7)."[211]
- "At least 37 percent of the known natural roosts discovered since 2013 are now uninhabitable (due to decay, hurricanes, and other factors) (Braun de Torrez et al. 2020b, entire). Suitable roost sites are a critical resource, are an ongoing need of the species, and may be limiting population growth and distribution in certain situations. The loss of a roost site may represent a greater impact to this species relative to some other bat species (Ober 2012, in litt.)."[212]
- Though "Florida bonneted bats also roost in artificial structures and bat houses…[artificial roosts] are imperfect surrogates for natural roosting habitat …Therefore, natural roosts (i.e., live or dead trees and tree snags, especially longleaf pine, slash pine, bald cypress, and royal palm, taller than 34 ft (10.4 m) in height and greater than 7.4 in (19 cm) dbh and having unobstructed space for emergence) are important habitat characteristics for this species."[213]

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[210] December 2022 Biological Assessment, Exhibit 23, Appendix G at G-1, Table 2.

[211] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Florida Bonneted Bat, 85 Fed. Reg. 35,510, 35,517 (June 10, 2020). *See also* 89 Fed. Reg. 16,644 ("Natural roosting habitat appears to be limiting, and competition for tree cavities is high (see Competition for Tree Cavities under the Factor E discussion in the final listing rule (78 FR 61004, October 2, 2013, p. 61034)). To help conserve the Florida bonneted bat, efforts should be made to retain tall trees, cavity trees, trees with hollows or other decay, and snags wherever possible to protect habitat, reduce competition for suitable roosts, and bolster or expand populations within the species' known range (Angell and Thompson 2015, p. 187; Braun de Torrez et al. 2016, pp. 235, 240; Ober et al. 2016, p. 7).").

[212] 89 Fed. Reg. 16,640 (Mar. 7. 2024).

[213] 89 Fed. Reg. 16,640 (Mar. 7, 2024).

Furthermore, the recovery outline for the Florida bonneted bat says that survival depends on *preventing further degradation* of occupied habitat *and suitable habitat* and restoring additional habitat within historical range.[214] Yet in the TA Form, FWS has made no effort to estimate how much net loss of occupied or suitable habitat will occur, or to explain why the loss of this suitable habitat is not likely to adversely affect Florida bonneted bats or appreciably reduce survival or recovery in light of the species' recovery needs; and FWS failed to propose conditions that would ensure that occupied or suitable habitat for roosting and foraging will not be destroyed. The proposed conditions seemingly require mature trees and snags to be preserved only within the "Conservation Areas," but not within the construction footprint.[215]

Due to these failures, the Corps cannot rely on the effects assessment and conditions for the Florida bonneted bat in the Kingston TA Form, or any analysis with the same errors, to assert that effects on the species will not be significant.

The available information indicates that Florida bonneted bat roosting habitat is likely to be adversely affected, constituting a potentially significant adverse effect that should be studied in an EIS. The available information and analysis does not rationally support a conclusion that the proposed mitigation will reduce this impact to levels that are not significant.

The Corps should also consider how the artificial lighting associated with the proposed development will affect Florida bonneted bat habitat on site, as well as in nearby critical habitat. In designating critical habitat for the Florida bonneted bat, FWS recognized "excessive alteration of natural lighting" as an "action that would significantly reduce habitat suitability or impact the prey base for the Florida bonneted bat" and therefore be considered in evaluating whether an action is likely to destroy or adversely modify critical habitat.[216] FWS explained:

- "Artificial light aversion has been documented in other species closely related to Florida bonneted bat (i.e., within Molossidae and/or Eumops) (Jung and Kalko 2010, pp. 147–148; Mena et al. 2022, pp. 568–571). Despite increases in research of Florida bonneted bat ecology since the species' listing in 2013, there has been no evidence that Florida bonneted bats exploit artificial light sources, and the highest Florida bonneted bat activity within an urban matrix has been associated with large, dark, open areas with tree cover (Bat Conservation International 2022, p. 18; Ridgley 2023, unpublished data; Ridgley and GambaRios 2023, unpublished data). "
- "Artificial lighting has been demonstrated to also have broadscale negative effects on insects and insect populations (e.g., reduced abundance; altered larval development, reproduction, and other behaviors) (van Grunsven et al. 2020, entire; Boyes et al. 2021, entire; Pennisi 2021, entire), potentially reducing the availability of prey (Mariton et al. 2022, pp. 2, 7) and the quality of foraging habitat for Florida bonneted bats. In addition to effects on foraging habitat,

[214] U.S. FWS (October 2018), Recovery Outline for Florida Bonneted Bat (Eumpos floridanus), *available at* https://ecos.fws.gov/docs/recovery_plan/Final%20FLBB%20recovery%20outline.pdf at 3 (emphasis added).
[215] *See* Kingston FWS Technical Assistance Form at 4-5.
[216] 89 Fed. Reg. 16,625, 16, 653 (Mar. 7, 2024).

artificial lighting can impact roosting habitat quality because light at emergence is thought to disrupt emergence cues and increase predation risk (or perceived predation risk) at emergence for other open-space-foraging and insectivorous bats (Rydell et al. 1996, pp. 249, 251; Mariton et al. 2022, p. 8)."[217]

- "Artificial lighting can impact roosting habitat quality as light at emergence can disrupt emergence cues and may increase predation risk (or perceived predation risk) for other open space foraging and insectivorous bats (Rydell et al. 1996, pp. 249, 251; Mariton et al. 2022, p. 8). Similarly, lighting can restrict habitat connectivity and fragment foraging areas (Voigt et al. 2020, pp. 197–199). Artificial lighting can also affect the abundance and availability of insects (van Grunsven et al. 2020, entire; Boyes et al. 2021, entire; Pennisi 2021, entire; Mariton et al. 2022, pp. 2, 7), thereby reducing the quality of foraging habitat for Florida bonneted bats. Thus, at this time, we consider ecological light pollution a potential threat to the Florida bonneted bat and its habitat. Management actions or activities that could ameliorate ecological light pollution include avoiding and minimizing the use of artificial lighting, retaining natural light conditions, and promoting the use of environmentally friendly lighting practices to minimize impacts to wildlife (e.g., Voigt et al. 2018, entire)."[218]

In the TA form for the Kingston Project, FWS failed to evaluate the impact of artificial lighting on Florida bonneted bat habitat, and merely proposed a vague requirement to "implement International Dark-Sky Association lighting initiatives to minimize use of artificial lighting and retain natural light conditions to the greatest extent practicable."[219] It is not at all clear what is meant by "implementing" those "initiatives," nor whether doing so "to the greatest extent practicable" would nonetheless result in a level of artificial light pollution causing significant adverse impacts to Florida bonneted bats via impairment of their habitat or even adverse modification of critical habitat. The condition FWS previously proposed was vague and unsupported by analysis, and the Corps cannot rely upon it to rationally conclude that light pollution from the Kingston Development will not cause significant effects to Florida bonneted bats, nor to ensure against adverse modification of critical habitat for the species.

The Corps should also consider how the Kingston Development will affect land management activities on nearby critical habitat, such as conducting prescribed burns, that are intended to benefit the species.[220]

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[217] 89 Fed. Reg. 16,642 (Mar. 7, 2024).
[218] 89 Fed. Reg. 16, 645 (Mar. 7, 2024).
[219] Kingston Technical Assistance Form at 5.
[220] *See, e.g.*, 89 Fed. Reg. 16,643 ("The Florida bonneted bat not only requires healthy and ecologically diverse habitat, it also needs areas with an appropriate disturbance regime. The Florida bonneted bat's entire range is within the fire-dependent and fireadapted landscape of central and south Florida (Noss 2018, entire). The species uses fire-dependent vegetation communities for roosting (Belwood 1992, pp. 219–220; Angell and Thompson 2015, entire; Braun de Torrez et al. 2016, p. 240) and foraging (Bailey et al. 2017a, entire; Braun de Torrez et al. 2018a–c, entire). Florida bonneted bats appear to be attracted to recently burned areas (Braun de Torrez et al. 2018a, entire); it appears that Florida bonneted bats are fire-adapted and benefit from prescribed burn programs that closely mimic historical fire regimes. Fires during the

### G. The Corps Must Assess Whether Permitting the Kingston Development Conflicts with Other Plans and Policies, Such as Plans and Policies to Protect Wildlife Corridors in Florida

The environmental consequences that must be evaluated to comply with NEPA requirements include possible conflicts between the proposed action and the objectives of Federal, regional, State, Tribal, and local plans, policies, and controls for the area concerned.[221] Further, in assessing whether the effects of a proposal are significant, the Corps must consider whether the proposed action will "be inconsistent with Federal, State, Tribal, or local policies designed for the protection of the environment."[222] Here, the Corps should evaluate whether the Kingston Development will conflict with the "Florida Forever Plan."[223] For example, the Corps should evaluate whether the effects of the Kingston development would undermine the plan's aims to achieve habitat connectivity and wildlife corridors by acquiring private lands to connect public lands. The southern portion of the proposed Kingston Development, including areas in the development footprint, appears to overlap with areas identified as "essential" for acquisition for the Corkscrew Regional Ecosystem Watershed Florida Forever project.[224] The stated purpose

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historical fire season (i.e., early wet season, April through June) at a moderate frequency (more than 3 to 5 years) appear to optimize habitat for bats in both pine flatwoods and prairies (Braun de Torrez et al. 2018b, pp. 6–9). Fire may result in an increase of suitable roosts (i.e., create more snags and cavities), more open flight space, and increased prey availability (Boyles and Aubrey 2006, pp. 111–113; Armitage and Ober 2012, pp. 107–109; O'Keefe and Loeb 2017, p. 271; Braun de Torrez et al. 2018a, p. 1120; 2018b, pp. 8–9)."); *id*. at 16, 643–16,645 ("**Special Management Considerations or Protection**...Forest management can help maintain and improve the Florida bonneted bat's roosting and foraging habitat (see Use of Forests and Other Natural Areas in the final listing rule (78 FR 61004, October 2, 2013, pp. 61007–61010)), and a lack of forest management, including a lack of prescribed fire or invasive plant control, can be detrimental to the species. For example, prescribed burns may benefit Florida bonneted bats by improving habitat structure, enhancing the prey base, and creating openings; restoration of fire to fire-dependent forests may improve foraging habitat for this species and create snags (Carter et al. 2000, p. 139; Boyles and Aubrey 2006, pp. 111–113; Lacki et al. 2009, entire; Armitage and Ober 2012, pp. 107–109; FWC 2013, pp. 9–11; Ober and McCleery 2014, pp. 1–3; Braun de Torrez et al. 2018a–b, entire)."); *id*. at 16, 651 ("The physical or biological features essential to the conservation of the Florida bonneted bat in Unit 5 may require special management considerations or protection due to [among other impacts]… lack of habitat management and/or inadvertent impacts from land management practices (e.g., prescribed fire, snag removal)...(see Special Management Considerations or Protection, above)."

[221] 40 C.F.R. § 1502.16(5).

[222] 40 C.F.R. § 1501.3(d)(2)(iii) (effective July 1, 2024).

[223] Florida Department of Environmental Protection (FDEP), 2024 Florida Forever Plan, Summary of Recommendations and Status as of December 2023, *available at* https://floridadep.gov/sites/default/files/FLDEP-DSL-FF_2024AnnualPlan_0.pdf (hereafter "2024 Florida Forever Plan").

[224] *Id*. at 324; *see also* Florida Department of Environmental Protection (FDEP), 2023. 2023 Florida Forever Plan: Corkscrew Regional Ecosystem Watershed, at 6, *available at*

of the Corkscrew Regional Ecosystem Watershed project is "to create conservation connections between the Florida Panther National Wildlife Refuge, Fakahatchee Strand Preserve State Preserve and the National Audubon Society's Corkscrew Swamp Sanctuary" and "provide critical habitat protection for rare and imperiled wildlife such as the Florida panther" and other species.[225] The project is also intended to "protect the flow of water feeding the Florida Panther National Wildlife Refuge, Fakahatchee Strand and other nearby areas."[226] The Corps must consider the effects of the proposed Kingston Development on those goals.

### H. The Corps Must Consider the Effects on Nearby Protected Lands

The Corps must assess how the Kingston Development will affect the Corkscrew Regional Ecosystem Watershed Wildlife and Environmental Area, Conservation Collier Caracara Prairie Preserve, Audubon Corkscrew Swamp Sanctuary, and Imperial Marsh Preserve. In assessing whether the effects of a proposal are significant, the Corps must consider the degree to which the action may adversely affect unique characteristics of the geographic area such as historic or cultural resources, parks, Tribal sacred sites, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.[227]

Kingston is directly adjacent to the Corkscrew Regional Ecosystem Watershed (CREW) Wildlife and Environment Area (WEA), the Conservation Collier Caracara Prairie Preserve, and Audubon Corkscrew Swamp Sanctuary. Based on plans included with prior applications related to the project, the development footprint will be close to the boundaries of these critical natural lands.[228] With over 60,000 acres, the CREW area is the largest still-intact watershed in southwest Florida, and it spans Lee and Collier counties.[229] In its intact state, this watershed recharges drinking water, provides flood protection, purifies water resources, offers habitat and space to roam for wildlife, and offers an aesthetically pleasing area for recreation by the public.[230] Recreational trials and natural resources at CREW connect to Conservation Collier's Caracara Prairie Preserve.[231] This preserve is owned by Collier County under their conservation land program, and was named for the threatened raptor whose habitat can be found there and in

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https://floridadep.gov/system/files/FLDEP_DSL_OES_FF_CorkscrewRegionalEcosystemWatershed_2.pdf.

[225] 2024 Florida Forever Plan at 319.

[226] 2024 Florida Forever Plan at 319.

[227] 40 C.F.R. § 1501.3(d)(2)(ii) (effective July 1, 2024).

[228] *See* Exhibits A and B below – Figures prepared by Conservancy of Southwest Florida. Exhibit A shows the locations of state managed lands. Figure B shows the locations of the protected and conservation lands discussed here.

[229] CREW Land and Water Trust. Who We Are. <https://crewtrust.org/>.

[230] South Florida Water Management District (SFWMD). Corkscrew Regional Ecosystem Watershed (CREW). <https://www.sfwmd.gov/recreation-site/corkscrew-regional-ecosystem-watershed-crew>.

[231] CREW Land and Water Trust. Who We Are. <https://crewtrust.org/>.

the surrounding agricultural and preserve lands.[232] This 360 acre site was acquired for the purpose of not only protecting habitat for wildlife, but also to provide aquifer storage.[233]

Adjacent to the proposed Kingston Development at its south end is the world-famous Corkscrew Swamp Sanctuary, which is a designated Ramsar wetland of international importance.[234] As a designated Ramsar site, the Sanctuary is recognized as significant not just at the local level, or even the national level, but rather "for humanity as a whole."[235] There are only about 2,400 Ramsar sites in the entire world, and Corkscrew is one of those significant wetlands. The Sanctuary is over 13,000 acres in size.

On its western side, the proposed Kingston Development neighbors the Lee County Conservation 20/20 conservation property called Imperial Marsh Preserve. This local conservation land is over 1,050 acres in size, and also was acquired for its ecological benefits (such as habitat for wildlife) and its groundwater recharge values.

Together, these lands make up a substantial part of the Western Everglades wetland ecosystem. These four preserves total over 74,000 acres of environmentally-sensitive lands that are directly surrounding the proposed Kingston site. These four preserves are 82% wetland land covers, and support wetland-dependent species.

In evaluating the effects of the proposal, and the significance of those effects, the Corps must consider how the proposed Kingston Development will affect these neighboring conservation lands of high ecological importance. For example, the Corps should evaluate the effect of the proposed development's proximity to the conservation lands on management programs on those conservation lands, including prescribed burning, hydrologic restoration, and invasive exotic plant management. The Corps should also consider the effects of the proposed stormwater management on the adjacent conservation lands, and the potential nutrient pollution impacts on the conservation lands.

Moreover, as described above, portions of the proposed Kingston project overlap with areas identified by the Florida Forever plan as being important to maintaining connectivity with other high-value conservation lands, and protecting water flow to high-value conservation lands such as the Florida Panther National Wildlife Refuge, Fakahatchee Strand and other nearby areas.[236] Thus, in evaluating the effects of the proposal and the significance of those effects, the Corps must consider the effects on wildlife connectivity with those protected areas, and on maintaining water flow to those areas.

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[232] Collier County. Caracara Prairie Preserve. < https://www.colliercountyfl.gov/government/public-services/divisions/conservation-collier/preserve-information/caracara-prairie-preserve>.

[233] *Id*.

[234] Ramsar Sites Information Service. Corkscrew Swamp Sanctuary. Last Publication Date October 22, 2021. <https://rsis.ramsar.org/ris/1888>.

[235] Ramsar, the Convention on Wetlands. Wetlands of International Importance.

[236] *See* Exhibit C, below, prepared by the Conservancy of Southwest Florida, which shows the Kingston site relative to "Florida Wildlife Corridor" areas; *see also*, Exhibit D, prepared by the Conservancy of Southwest Florida, which shows the site relative to Florida panther primary and secondary habitat.

## II. The Corps must comply with the ESA's Consultation Requirements when evaluating the Kingston Application and it Cannot Rely on FWS's Arbitrary and Unlawful Technical Assistance Analysis for the Kingston Project's State 404 Program Permit Application to Do So.

As detailed above, permitting the Kingston Development is likely to adversely affect species that are federally protected under the ESA, including the Florida panther, Florida crested caracara, and Florida bonneted bat. The Corps cannot rely on the Service's TA Form to carry out its ESA section 7 obligations because: (1) the Biological Opinion that authorized the process that produced the TA Form was invalidated in federal district court for violating the ESA; and (2) for the reasons specified in this letter, the Service's effects assessments and analysis with regard to the Kingston State 404 permit are arbitrary and capricious, and violate the ESA and APA, and therefore cannot rationally or lawfully be relied upon to comply with the agencies duties to ensure against jeopardy.[237]

As detailed above:

- FWS's "no jeopardy" conclusion in the Kingston TA Form relies on an extreme and baseless exaggeration of the Florida panther population size, and on irrational assumptions about the population growth rate that fail to address the best available scientific information indicating flat or declining trends.
- FWS's "no jeopardy" conclusion in the Kingston TA Form failed to assess the impacts on Florida crested caracara in light of the best available information about the small population size and saturation of habitat, failed to consider the effects of prior recent authorizations of habitat destruction and breeding pair losses, and failed to consider cumulative effects by ignoring the offsite effects associated with competition between breeding pairs.
- FWS's "not likely to adversely affect" conclusion for Florida bonneted bat in the Kingston TA Form failed to accurately assess information indicating that roosting was indeed occurring on site based on acoustic surveys, failed to evaluate the effects of losing roosting trees, and does not evaluate how artificial lighting and constraints on land management activities would affect critical habitat adjacent to the site.

In addition to the issues already discussed above, the TA Form suffers from the following defects:

- *The TA Form Failed to Lawfully Assess the Effects of Take from Vehicle Collisions on the Florida Panther*

The TA Form failed to provide a lawful explanation of how the amount of take that would be authorized (via the State 404 Programmatic Biological Opinion) would not result in jeopardy. Despite purporting to shield from ESA liability 22 panther deaths per year from vehicle collisions induced by the Kingston development, FWS's jeopardy analysis did not

[237] Furthermore, the TA Form was made as part of an unlawful process for purportedly authorizing ESA take under a programmatic Biological Opinion that was subsequently set aside by the District Court for the District of Columbia. *See Ctr. for Biological Diversity v. Regan*, No. CV 21-119 (RDM), 2024 WL 1602457, at *28 (D.D.C. Apr. 12, 2024), *judgment entered*, No. CV 21-119 (RDM), 2024 WL 1591671 (D.D.C. Apr. 12, 2024). (Appeals are pending.)

explain how allowing take of 22 panthers per year in perpetuity would not amount to jeopardy.[238] Instead, FWS unlawfully and arbitrarily asserted that the authorized level of take would not occur, and relied on vague promises as to mitigation measures to prevent it.[239] While the jeopardy analysis also conclusorily asserted that mitigation via wildlife crossings will "minimize" the estimated deaths per year, FWS did not make any reduction to the amount of anticipated (and therefore authorized) take in reliance on those crossings and did not provide any actual analysis to support the contention that they will meaningfully reduce the estimated take.

[238] A further defect is that the TA Form's "no jeopardy" conclusion relies on an analysis of impacts that extends only through the year 2045, yet plainly the impacts of the action—permanent loss of habitat and more panther road deaths from increased traffic—will continue beyond 2045, and FWS was poised to authorize take that would continue beyond 2045. Via the programmatic ITS for the State 404 BiOp, the Service would have purported to authorize take of 22 panthers per year *every year* due to traffic induced by the Kingston Project, *with no end date* for that authorization. Moreover, the effects of the habitat loss caused by the Kingston development are permanent losses that will continue beyond 2045, but the cumulative impacts analysis arbitrarily considered the impact only up to the year 2042. These defects render the "no jeopardy" conclusion in the TA Form arbitrary and capricious.

[239] Instead, FWS (1) asserted that its estimate is uncertain and that it does not expect the actual number to reach 22 panthers per year, and (2) asserted that FWS will monitor the collisions and "take steps to reduce the number if it exceeds the current average of 16 panthers per year in the action area. These steps can include construction of additional fencing, recommending installation of additional crossings, reducing speed limits, adding signage or other methods to increase driver awareness." Kingston FWS Technical Assistance Form at 23–24. But the Technical Assistance Form provided no specificity about who would actually implement such measures, nor how they would be funded or enforced. In other words, FWS asserted that the authorized level will not occur, and relied on uncertain and vague promises about future mitigation measures to claim that it would "take steps to reduce" any collisions above the current level. This approach is unlawful because it violates the fundamental principle that the Service must evaluate the impacts of the amount of take that it is purporting to authorize, not some lesser amount. *Conservation Council for Hawaii v. Nat'l Marine Fisheries Serv*., 97 F. Supp. 3d 1210, 1233 (D. Haw. 2015) (in making jeopardy determination "NMFS was required to focus on what it was authorizing the Navy to take, not on what the Navy said it anticipated it would actually take."). The Service cannot lawfully rely on the assertion that the amount of take it is authorizing is not going to occur anyway to avoid analyzing its impacts in the jeopardy analysis. Nor can the Service lawfully rely on uncertain and vague mitigation measures to ensure jeopardy is not likely. *See e.g*., *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv*., 524 F.3d 917, 935–36 (9th Cir. 2008) (requiring that mitigation relied on for no-jeopardy conclusion reflect "specific and binding plans" and "a clear, definite commitment of resources"). The Service provided only a short list of potential measures that (1) lack specificity about how they will be implemented, and by whom; (2) lack specificity about the extent to which such measures can actually be effective, or the extent to which such measures would reduce vehicle collisions; (3) lack specificity about how such measures will be funded; and (4) lack specificity about how and whether such measures will be enforced.

Furthermore, the TA Form provided no analysis of how even 3–4 additional takes on top of the anticipated cumulative effects from background traffic would not amount to jeopardy. And FWS failed to evaluate how the greater number of vehicle collision deaths that are at least likely (i.e. 50% or more likely to occur) does not amount to jeopardy when considered on top of the additional vehicle collision deaths from cumulative effects.

Instead of analyzing the likely effects of the Kingston Development, along with likely cumulative effects, as required by the ESA and the obligations it has assumed under the programmatic BiOp, FWS's TA Form for Kingston attempted to cast doubt on the certainty of its own estimates, and to rely on unenforceable, uncertain, and non-specific promises about future monitoring and mitigation to address jeopardy caused by increased vehicle collisions. FWS's attempts to cast doubt on its estimates are arbitrary because the burden is on FWS to show that the impacts are *not* likely to cause jeopardy.[240] Further, FWS stated that it: "acknowledges that motor vehicle related injuries and mortalities of panther, in concert with other threats to the panther, could collectively threaten the survival and recovery of this species," but then offered only unenforceable and vague promises to monitor and mitigate those impacts.[241] A valid "no jeopardy" conclusion cannot depend on such vague and unenforceable promises.[242]

- *The TA Form Failed to Lawfully Analyze the Effects of Habitat Loss on the Florida Panther*

Although the TA Form evaluates the impact of 3,400 acres of habitat loss in terms of what percentage of the remaining habitat for the panther it represents, this approach fails to consider that the panther population is already not large enough to survive long-term on its own without intensive management, and there is simply not enough remaining habitat available in the region to justify having even less.[243] Without *any* analysis of how much habitat the Florida panther needs to ensure survival and recovery, FWS stated in the TA Form "that many thousands of acres of panther habitat remain in Florida" and "[t]herefore, [FWS] do[es] not expect that this

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[240] The Services cannot lawfully conclude that no jeopardy will occur where there is a lack of information to ascertain whether or not jeopardy will occur; rather, the evidence must affirmatively support a conclusion that no jeopardy will occur. *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin*., 99 F. Supp. 3d 1033, 1059 (N.D. Cal. 2015)( "If NMFS does not have the information to satisfy this duty [to ensure against jeopardy or adverse modification], then it simply cannot issue a finding of no jeopardy."); *see also Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv*., 184 F. Supp. 3d at 873 (no jeopardy conclusion relying on benefits from habitat improvement violated ESA requirement to give "benefit of the doubt" to species where data showed decline, but was statistically too uncertain to establish whether improvement or decline actually occurred).

[241] Kingston FWS Technical Assistance Form at 18.

[242] *See, e.g*., *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 935-36 (9th Cir. 2008). As the Supreme Court has recognized in construing section 7(a)(2), "To 'insure' something…means '[t]o make certain, to secure, to guarantee (some thing, event, etc.).'" *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 667 (2007) (quoting appellate court, in turn quoting Oxford English Dictionary 1059 (2d ed.1989)). The plain text of the Act therefore requires that the Service cannot issue a no jeopardy conclusion unless the action agency has indeed made it certain, secured, or guaranteed that mitigation relied upon to avoid jeopardy will actually occur.

[243] *See* Robert Frakes Declaration at ¶¶ 44, 78.

minor loss of habitat resulting from the project to substantially affect the range-wide population size of this species."[244] However, this analysis fails to acknowledge that most of the sole remaining breeding population of panthers remains restricted to south Florida, below the Caloosahatchee River.[245]

The TA Form's conclusions regarding overall impacts and jeopardy for the panther also rely on the applicants protecting other habitat from destruction.[246] But, notably, the Panther Habitat Assessment Methodology ("PHAM") system was not designed to ensure no net loss of habitat – or even to ensure large enough viable panther populations to support the species' survival and recovery.[247] Thus, stating that the applicant has provided Panther Habitat Units ("PHUs") for the destroyed acres neither ensures that there will be no net loss nor provides a substitute for a rational analysis of whether the net loss due to the project is likely to cause jeopardy. While the applicants proposed to protect and restore other areas of habitat, that cannot be a substitute for meaningful analysis of how allowing the permanent loss of approximately 3,400 acres of habitat does not appreciably diminish survival and recovery for a species that already does not have enough habitat to ensure the population numbers sufficient for long-term survival in the wild absent management interventions to supplement the gene pool.

Moreover, relying on the PHAM system does not reflect a rational approach to ensuring that habitat loss will not impair panther survival or recovery. As Dr. Frakes explained, the key factors underlying that analysis reflect scientific information that can no longer be considered the best available, and among other things, it overestimates the amount of land available for use by panthers.[248] As such, neither the Corps nor FWS can rationally or lawfully rely on mitigation calculated using the PHAM to assert that habitat loss is not likely to appreciably reduce survival and recovery of the Florida panther. The applicant's plans to "restore and protect" about 3,294

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[244] Kingston TA Form at 24.

[245] *See, e.g.*, Florida Fish and Wildlife Conservation Commission (FWC), Wildlife Conservation, Florida Panther Program, Description of Range, https://myfwc.com/wildlifehabitats/wildlife/panther/description/#:~:text=Today%20only%20about%20120%2D230,Florida%2C%20below%20the%20Caloosahatchee%20River (last accessed Jan. 14, 2024).

[246] Kingston TA Form at 23.

[247] *See* U.S. FWS, Panther Habitat Assessment Methodology, September 24, 2012 *available at* https://ipac.ecosphere.fws.gov/guideline/assessment/population/8/office/41420.pdf. The 2012 PHAM is aimed at preserving the amount of habitat needed to support a population of 90 panthers, and presumes that a portion of the remaining privately-owned habitat may be destroyed as long as the rest of the privately-owned habitat is preserved. It is therefore predicated on allowing net loss, and on the presumption that there is a "cushion" of habitat that can be permanently lost without undercutting the goal of supporting a population of 90 panthers. Critically, 90 panthers fall short of the U.S. Fish and Wildlife Service's own recovery plan goals, which requires populations of *at least 240* adults and subadults—and sufficient habitat to support them—to downlist and delist the species. U.S. Fish and Wildlife Service. 2008. Florida Panther Recovery Plan (*Puma concolor coryi*), Third Revision. U.S. Fish and Wildlife Service. Atlanta, Georgia. 217pp; *see also* Robert Frakes Declaration at ¶ 64.

[248] Robert Frakes Declaration at ¶¶ 64, 79.

acres of existing habitat does not compensate for the permanent loss associated with the development.[249]

The December 2022 Biological Assessment for the Kingston project that was included with its State 404 Program permit application indicates that the mitigation will include approximately 156 acres of primary habitat creation by restoring agricultural lands to primary zone conditions and 249 acres of secondary habitat creation by restoring agricultural lands to secondary zone conditions.[250] That Biological Assessment indicates that approximately 513 acres of primary zone habitat will be permanently destroyed and that 2,890 acres of secondary zone habitat will be permanently destroyed.[251] Thus, even assuming the proposed habitat creation by restoration is successful, it appears there will nonetheless be a net loss of approximately 357 acres of primary zone habitat and 2,641 acres of secondary zone habitat.

That Biological Assessment also indicates that approximately 1,331 acres of primary zone habitat and 1,538 acres of secondary zone habitat will be preserved, and its habitat value increased in the long term, largely by conversion of orchards or groves into pine forests.[252] But again, because the PHAM is not based on the best available science and does not ensure that enough habitat will remain to ensure the long-term persistence of the Florida panther,[253] relying on the PHAM system to assert that this restoration of other existing habitat will sufficiently mitigate the impacts to ensure against jeopardy would be arbitrary and capricious and fail to consider the best available scientific information. Further, the TA Form's conclusions for the Kingston application cursorily dismiss the impacts of the proposed habitat destruction on connectivity and usability of adjacent habitat areas, baldly concluding this area is not important for broader north-south connectivity. But FWS utterly failed to consider how fragmenting the additional habitat areas adjacent to the site amounts to additional habitat loss beyond the 3,400 acres it acknowledges.

Furthermore, the TA Form did not consider how the value of the proposed habitat preservation and restoration would be undermined by the Kingston Development's reasonably foreseeable traffic-inducing effects. It is plain that the Kingston Development will draw increased traffic to the vicinity of that habit, and increase vehicle collision deaths for panthers utilizing that habitat. In assessing the effects of the action and the impacts of proposed mitigation on those effects, the agencies must consider how increasing vehicle collisions in the vicinity of the habitat that will be protected and restored reduces the value of that habitat.

The TA Form for Kingston also failed to analyze the impacts of habitat loss from the project in light of reasonably foreseeable habitat loss from cumulative effects. There is no analysis or explanation of how the net loss from Kingston combined with net losses from many

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[249] Whereas the State 404 Program permit application for Kingston indicated that about 3,273 acres of land would be in conservation areas, and 3,403 acres developed, the current application to the Corps is slightly different on the order of about 10 to 20 acres—proposing instead that about 3,294 acres will be in conservation areas, and about 3,394 acres developed.

[250] *See* Passarella & Associates, Inc., Kingston Biological Assessment (Revised December 2022) ("December 2022 Biological Assessment") at E43-3 (Exhibit 43 "Panther Compensation Calculator").

[251] *Id*. at E43-3.

[252] *Id*. at E43-3.

[253] Robert Frakes Declaration at ¶¶ 64, 79; *supra* n. 49.

other reasonably foreseeable developments does not amount to jeopardy—despite a finding that cumulative effects from *some* reasonably foreseeable nonfederal projects would destroy "55,531 acres or 2.83 percent of the estimated 1,962,294 acres of non-urban private lands at risk of development in the Service's panther core area by 2042."[254] With regard to cumulative effects, the TA Form for Kingston acknowledges that "collectively over time, habitat loss could threaten the survival and recovery of this species."[255] But rather than engage in any analysis of cumulative effects of habitat loss, FWS provided only the vague promise that it "will continue to monitor the effects of habitat loss to the panther throughout its range."[256] This vague promise of monitoring does not in any manner satisfy the obligation to evaluate whether the proposed habitat loss, on top of reasonably foreseeable loss from other sources in the action area not subject to ESA section 7 consultations, will appreciably diminish survival and recovery. In relying on this vague assertion rather than the analysis required by the ESA, FWS abandoned its duty to ensure against jeopardy. [257]

Finally, lands within the Kingston project site have also been designated as "Adult Breeding Habitat."[258] Scientists modeled Adult Breeding Habitat for the species and have stated that protecting this remaining breeding habitat in south Florida is essential to the survival and recovery of the Florida panther.[259] Further loss of adult panther breeding habitat is likely to

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[254] Kingston FWS Technical Assistance Form at 20. This estimate does not include many reasonably foreseeable Section 404 permits issued by the State of Florida. The Service only considered three—Bellmar, FFD, and Rural Lands West. *Id.* at 21.

[255] Kingston Technical Assistance Form at 24.

[256] Kingston Technical Assistance Form at 24.

[257] An additional defect in the TA Form's analysis is that the cumulative impacts analysis fails to account for the impacts of the Supreme Court's 2023 Decision in *Sackett v. EPA.* The Technical Assistance Form purports that the Service has taken into account the cumulative impacts from habitat destruction from individual projects too small to be subject to 404 permitting review either by the Corps or via the State 404 permitting program. *See* Kingston FWS Technical Assistance Form at 20-21. The approach turns on estimates of habitat destruction associated with projects from 2018 through 2021 that were exempt from Clean Water Act 404 requirements. Problematically, there is no indication that the Service has considered at all how the Supreme Court's decision in *Sackett v. EPA*, 598 U.S. 651 (2023) will affect the areal extent of habitat destruction no longer triggering permitting requirements under section 404. The Service should have provided a rational analysis to explain why the acreage of projects not subject to section 404 will not increase due to *Sackett*, compared to the estimates based on 2017-2020. The Trump Administration's "WOTUS" rule interpreting the scope of section 404, and rescinding the 2015 rule from the Obama Administration, was not finalized until October 22, 2019, and the Trump Administration's Navigable Waters WOTUS rule was not finalized until April 21, 2020. Consequently, estimates based on 2018 through most of 2019 will reflect a substantially broader definition of the wetlands subject to section 404 compared to after *Sackett v. EPA* (2023), and therefore will underestimate the cumulative effects from future projects not subject to review by either the Corps or State 404 program.

[258] Frakes RA, Belden RC, Wood BE, James FE (2015) Landscape Analysis of Adult Florida Panther Habitat. PLoS ONE 10(7): e0133044. https://doi.org/10.1371/journal.pone.0133044

[259] *Id.*

reduce the prospects for survival of the existing population, and decrease the probability of natural expansion of the population into south-central Florida.[260] Approximately 4,774 acres of the Kingston site is considered Adult Breeding Habitat.[261] In evaluating whether the Kingston proposal is likely to cause jeopardy, the Corps and Service must consider the impacts on Adult Breeding Habitat.

- *The Kingston TA Form Arbitrarily Asserts that Kingston is Not Likely to Adversely Affect the Florida Bonneted Bat*

In addition to the reasons described above, the Kingston TA Form's "Not Likely to Adversely Affect" conclusion for Florida bonneted bat fails to comply with the ESA because it contradicts the results of applying the Service's own Determination Key and appears to be based on the 2022 BA for Kingston, which applies an incorrect standard. The BA states: "the October 2019 Florida Bonneted Bat Effect Determination Key was used to conduct a sequential effect determination. Use of the key resulted in the following determination for the Florida bonneted bat: 1a > 2a > 3b >6b>7b>10b>12a '**Likely to Adversely Affect**.'"[262] Despite this, the BA then asserts that:

> the Project's site design proposes to preserve and enhance 3,273.62 ± acres of on-site habitats that will provide potential roosting and foraging habitat for the Florida bonneted bat. Given the proposed preservation and enhancement activities, the voluntary conservation measures proposed, and a small number of bonneted bats recorded during the acoustic survey, the Project is 'Not Likely to *Significantly* Adversely Affect' the *range-wide* population of the species.[263]

In addition to the conclusory nature of this statement, which makes reliance on it by FWS arbitrary and capricious, it is also not the relevant standard for ESA purposes. If take of even one individual is anticipated, then the Service cannot conclude the action is "not likely to adversely affect the species," and must instead provide its evaluation of whether the action is likely to cause jeopardy by appreciably diminishing survival or recovery.[264] In the first instance, FWS was required to evaluate whether the project was likely to take or adversely affect any member of the species, and then, if FWS could not conclude that the evidence showed the project was not likely to take or adversely affect any member of the species, then FWS should have evaluated whether the effects

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[260] *Id.*

[261] *See* Exhibit E below, prepared by the Conservancy of Southwest Florida.

[262] December 2022 Biological Assessment at 20 (emphasis added).

[263] December 2022 Biological Assessment at 20 (emphasis added).

[264] *See, e.g.*, U.S. Fish and Wildlife Service, South Florida Ecological Services Office, Florida Bonneted Bat Consultation Guidelines, October – 2019, *available at* https://www.fws.gov/sites/default/files/documents/20191023_2019_FBB%20Consultation%20GuidelinesFinal.pdf, at 10 ("If incidental take is anticipated to occur as a result of the proposed action, an 'is likely to adversely affect' (**LAA**) determination should be made."); *see also* NOAA Fisheries, Frequent Questions - Section 7 and the Cooperative Interagency Process in the Greater Atlantic Region, https://www.fisheries.noaa.gov/new-england-mid-atlantic/consultations/frequent-questions-section-7-and-cooperative-interagency, last accessed Jan. 14, 2024 ("An action that is likely to result in the take of an ESA-listed species is never considered to have insignificant effects" for the purposes of making a not-likely-to-adversely affect determination during informal consultation).

on the species were not likely to appreciably reduce survival or recovery of the species. The Service's Determination Key indicated that Kingston was *likely* to adversely affect Florida bonneted bats, and there is no explanation in the TA Form to indicate that the proposed mitigation measures will make take unlikely, nor that the adverse effect is not likely to amount to harm or harassment.

In complying with its duty to ensure against jeopardy under ESA section 7, the Corps cannot rationally rely on a Biological Opinion or other document from FWS that fails to address the many defects identified above in the Service's TA Form for Kingston.

## III. The Corps Should Deny the Kingston Application.

### A. Kingston is Contrary to the Public Interest.

When evaluating a permit application, the Corps must evaluate the probable impacts of the proposed activity and its intended use on the public interest.[265] This public interest review requires weighing all relevant factors in a general balancing process, including conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, energy needs, safety, and the broader "needs and welfare of the people."[266] The Corps must deny a permit application if it is "contrary to the public interest."[267] To perform this public interest review, the permit application must contain a complete description of the proposed activity, including information on the location, purpose, and need for the activity.[268] The Corps must consider the applicant's stated purpose and need for the proposed project, as well as the "underlying purpose and need from a public interest perspective" when conducting its public interest review.[269] Then the Corps evaluates the following general criteria: (1) The relative extent of the public and private need for the proposed structure or work; (2) Where there are unresolved conflicts as to resource use, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work; and (3) The extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited."[270] The weight of each criterion is "determined by its importance and relevance to the particular proposal."[271]

Here, the public interest factors weigh against the Kingston Development. The Corps has defined two stated purposes: a "basic purpose," which is "to construct a mixed-use development" and an "overall purpose," which is "to construct a mixed-use development in southeastern Lee County, Florida. As a preliminary matter, the "relative extent of the public and private need for

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[265] 33 C.F.R. § 320.4(a)(1).
[266] *Id.*
[267] *Id.*
[268] *Id.* § 325.1(d).
[269] *Id.* Pt. 325, App. B, §§ (9)(b)(4). The Corps "will in all cases, exercise independent judgment in defining the purpose and need for the project from both the applicant's and the public's perspective." *Id.*
[270] *Id.* § 320.4(a)(2).
[271] *Id.* § 320.4(a)(3).

the proposed work" is low, as "the housing supply on the west coast of Florida is surging" due to an "influx of new homes."[272] Indeed, this factor "is rising at a faster rate in western Florida than anywhere else in the U.S."[273] Data analysts have described Florida as "'the epicenter' of a mismatch between supply and demand," with two of the top five Florida markets with the greatest supply and demand divergence in southwest Florida.[274]

On the other hand, the detrimental effects on the public interest are extensive and irreversible. As described above, the Kingston Development will have significant negative impacts on the survival and recovery of the Florida panther from habitat destruction and degradation, and from attracting drivers into Florida panther habitat, resulting in increased vehicle collision deaths.[275] It is also likely to negatively impact the federally protected Florida crested caracara and the Florida bonneted bat, as explained above.

Moreover, authorizing wetland destruction to enable use of the site for a mixed-use development threatens to impair wildlife connectivity, recreational values, and other values for numerous protected lands adjacent to the proposed construction. For example, Kingston is directly adjacent to the Corkscrew Regional Ecosystem Watershed (CREW) Wildlife and Environment Area (WEA), the Conservation Collier Caracara Prairie Preserve, and Audubon Corkscrew Swamp Sanctuary. The developer has proposed intense urban development all the way up to the boundary of these critical natural lands (see Exhibit B). With over 60,000 acres, the CREW area is the largest still-intact watershed in southwest Florida, and it spans Lee and Collier counties.[276] In its intact state, this watershed recharges drinking water, provides flood protection, purifies water resources, offers habitat and space to roam for wildlife, and offers an aesthetically pleasing area for recreation by the public.[277] Recreational trails and natural resources at CREW connect to Conservation Collier's Caracara Prairie Preserve.[278] This preserve is owned by Collier County under their conservation land program, and was named for the threatened raptor whose habitat can be found there and in the surrounding agricultural and

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[272] Sydney Lake, *Now might be the time to move to Florida as inventory levels surge and sellers slash prices*, Fortune, Apr. 25, 2024, https://fortune.com/2024/04/25/florida-inventory-levels-home-prices-redfin-report/?_ptid=%7Bkpdx%7DAAAAzr-RscLygQoKY2ZRajJmTTN6ahIQbHc%E2%80%A6.

[273] *Id.*

[274] Giulia Carbonaro, *Florida Housing Market 'at Risk' in 13 Different Cities*, US News Reporter, Jul. 1, 2024, https://www.newsweek.com/florida-housing-market-risk-13-different-cities-1919331.

[275] Notably, even if the Service concludes that the proposal is not likely to cause jeopardy under the ESA and applicable ESA-implementing regulations, the Corps should nonetheless consider whether the reasonably foreseeable and substantial adverse impacts on wildlife from the proposal, alone or cumulatively with other reasonably foreseeable development, outweigh the benefits of the proposal, thereby warranting denial of the permit as contrary to the public interest. *See* 33 C.F.R. § 320.4.

[276] CREW Land and Water Trust. Who We Are. <https://crewtrust.org/>.

[277] South Florida Water Management District (SFWMD). Corkscrew Regional Ecosystem Watershed (CREW). <https://www.sfwmd.gov/recreation-site/corkscrew-regional-ecosystem-watershed-crew>.

[278] CREW Land and Water Trust. Who We Are. <https://crewtrust.org/>.

preserve lands.[279] This 360 acre site was acquired for the purpose of not only protecting habitat for wildlife, but also to provide aquifer storage.[280]

Adjacent to Kingston at its south end is the world-famous Corkscrew Swamp Sanctuary, which is a designated Ramsar wetland of international importance.[281] As a designated Ramsar site, the Sanctuary is recognized as significant not just at the local level, or even the national level, but rather "for humanity as a whole."[282] There are only about 2,400 Ramsar sites in the entire world, and Corkscrew is one of those significant wetlands. The Sanctuary is over 13,000 acres in size. On its western side, the Kingston property is neighboring the Lee County Conservation 20/20 conservation property called Imperial Marsh Preserve. This local conservation land is over 1,050 acres in size, and also was acquired for its ecological benefits (such as habitat for wildlife) and its groundwater recharge values. Together, these lands make up a substantial part of the Western Everglades wetland ecosystem. These four preserves total over 74,000 acres of environmentally sensitive lands that are directly surrounding the Kingston site. These four preserves are 82% wetland land covers, and support wetland-dependent species. The Corkscrew-area conservation lands, support at least 540 taxa of plants,[283] over 260 species of birds,[284] 49 threatened or endangered species,[285] and a myriad of other wildlife. The project site has been designated Florida Wildlife Corridor (see Exhibit C), and contains high priority Florida panther habitats, described by the best available science as key to its continued survival and recovery (see Exhibits D and E).

Further, according to the Corps prior jurisdictional determination, there are nearly 1,100 acres of wetlands within the subject property. These onsite wetlands have been documented to support listed species, such as the threatened Florida crested caracara and endangered Florida panther.[286] Portions of this proposed project—the entire southern portion—were identified as essential acquisition for the CREW Florida Forever project.[287]

The Corps' regulations state that "the unnecessary alteration or destruction of [wetlands] should be discouraged as contrary to the public interest."[288] Wetlands considered to perform

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[279] Collier County. Caracara Prairie Preserve. < https://www.colliercountyfl.gov/government/public-services/divisions/conservation-collier/preserve-information/caracara-prairie-preserve>.

[280] *Id*.

[281] Ramsar Sites Information Service. Corkscrew Swamp Sanctuary. Last Publication Date October 22, 2021. <https://rsis.ramsar.org/ris/1888>.

[282] Ramsar, the Convention on Wetlands. Wetlands of International Importance.

[283] Floristic Inventory of South Florida. Corkscrew Regional Ecosystem Watershed (CREW). Last Updated 2020, https://regionalconservation.org/ircs/database/plants/ByConsArea.asp?SiteID=221&SN=Corkscrew%20Regional%20Ecosystem%20Watershed%20(CREW).

[284] eBird, Audubon Corkscrew Swamp Sanctuary, https://ebird.org/hotspots?hs=L1061691.

[285] CREW Land and Water Trust, 2022. 2022 Annual Report, https://crewtrust.org/wp-content/uploads/2023/02/FY22-CREW-Trust-Annual-Report_Final-1.pdf.

[286] Passarella & Associates, 2023. Kingston Aerial with Conservation Areas and Caracara Nest Locations. Exhibit 3.11 for SFWMD Environmental Resource Permit.

[287] Florida Department of Environmental Protection (FDEP), 2023. 2023 Florida Forever Plan: Corkscrew Regional Ecosystem Watershed.

[288] 33 C.F.R. 320.4(b)(1).

functions important to the public interest include, but are not limited to: (1) "Wetlands which serve significant natural biological functions, including food chain production, general habitat and nesting, spawning, rearing and resting sites for aquatic or land species"; (2) "Wetlands set aside for study of the aquatic environment or as sanctuaries or refuges"; (3) "Wetlands the destruction of alteration of which would affect detrimentally natural drainage characteristics, sedimentation patterns, salinity distribution, flushing characteristics, current patterns, or other environmental characteristics"; (4) "Wetlands which serve as valuable storage areas for storm and flood waters"; (5) "Wetlands which serve significant water purification functions"; and (6) "Wetlands which are unique in nature or scarce in quantity to the region or local area."[289] The regulations further provide that "[n]o permit will be granted which involves the alteration of wetlands identified as important by paragraph (b)(2) of this section . . . unless the district engineer concludes . . . that the benefits of the proposed alteration outweigh the damage to the wetlands resource."[290] Courts have upheld permit denials based on findings that wetlands were important within the meaning of 33 C.F.R. § 320.4(b)(2).[291]

Here, the wetlands within and surrounding the Kingston site are important possess special characteristics that significantly contribute to the health of the regional Western Everglades ecosystem; provide habitat, nesting, rearing, and resting sites for species like the Florida panther, wood stork, and crested caracara; and provide significant water purification and storage functions that contribute to the overall health of the region. A significant portion of these wetlands are set aside as sanctuaries, as described above. Accordingly, they should also be considered "special aquatic sites" and "sanctuaries" as defined in the Act.[292]

Finally, in view of the minimal public need and the significant environmental harms, using "reasonable alternative locations" for the Kingston Development is practicable within the scope of the general stated purpose—to construct a mixed-use development—and the more specific purpose—to construct a mixed-use development in southeastern Lee County. There are arguably alternative sites for mixed-use development that are in less environmentally sensitive areas, including for example, sites that are not within the Florida panther primary and secondary zone, and sites that are not near enough to ecologically sensitive preserves. For example, one alternative that should be considered is an area directly north of the project site known as Lehigh Acres. Lehigh Acres is a pre-platted residential community that is still on well and septic.[293] This area could be used for infill development and redevelopment with the goal of extending central water and sewer in the future. This area is not largely a panther habitat zone or containing panther breeding habitat.

For all of the above-described reasons, the permit is contrary to the public interest and should be denied. Moreover, as detailed below, a discharge permit for the Kingston Development would not comply with the EPA's 404(b)(1) guidelines and therefore, should and "will be denied."[294]

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[289] *Id.* 320.4(b)(2)(i)-(viii).
[290] 33 C.F.R. § 320.4(b)(4).
[291] *See, e.g., Shoreline Assoc. v. Marsh*, 555 F.Supp. 169, 179 (4th Cir. 1984).
[292] 40 C.F.R. §§ 230.3 (Definitions), 230.40 (Sanctuaries and refuges).
[293] *See* Lee County, Community Planning, Lehigh Acres, https://www.leegov.com/dcd/planning/cp/lehighacres.
[294] 33 C.F.R. § 320.4(a)(1).

### B. The Corps Must Deny a Permit Absent Compliance with the 404(b)(1) Guideline Requirements to Avoid, Minimize, and Select the Least Environmentally Damaging Practicable Alternative.

Under the Clean Water Act the Corps has the responsibility of evaluating permit applications for the discharge of fill into waters of the United States. The CWA gave the EPA the task of developing the 404 (b)(1) Guidelines (Guidelines) with the specific goal of providing the environmental criteria and framework by which the Corps evaluates dredge and fill applications. The Guidelines state that "dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that such a discharge will not have an unacceptable adverse impact either individually or in combination with known and/or probable impacts of other activities affecting the ecosystems of concern."[295] Furthermore, "from a national perspective, the degradation or destruction of special aquatic sites, such as filling operations in wetlands, is considered to be among the most severe environmental impacts covered by these Guidelines. The guiding principle should be that degradation or destruction of special sites may represent an irreversible loss of valuable aquatic resources."[296]

For special aquatic sites such as wetlands, however, the Guidelines propose a more difficult test for avoidance with two presumptions. For proposed discharges to special aquatic sites there is a presumption that an alternative site that is not a special aquatic site exists and a presumption that such a site will result in less adverse environmental impacts on the aquatic ecosystem. These rebuttable presumptions clarify how to determine if discharges proposed for special aquatic sites meet the requirement that the practicable alternatives have less significant adverse impact on the environment and do not have other significant environmental impacts.[297]

First, the Corps should not permit the discharge of dredged and fill material because "there is a practicable alternative to the proposed discharge [that] would have less adverse impact on the aquatic ecosystem" and fewer "significant adverse environmental consequences." 40 C.F.R. § 230.10(a). Under the 404(b)(1) guidelines, practicable alternatives can include "[a]ctivities which do not involve a discharge of dredged or fill material into the waters of the United States or ocean waters" and "[d]ischarges of dredged or fill material at other locations in waters of the United States." *Id.* § 230.10(a)(1)(i). In considering alternatives, the Corps may consider practicable alternatives in "an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity." *Id.* § 230.10(a)(2). Here, it would be practicable and less environmentally damaging to either: (1) consider a less environmentally sensitive site in Lee County for the mixed-use development; or (2) adjust the development footprint to avoid the dredge and fill of aquatic ecosystems and habitat for endangered species.

Because this discharge in furtherance of constructing a mixed-use development is "proposed for a special aquatic site"—wetlands—and "does not require access or proximity to or siting within the special aquatic site to fulfill its basic purpose (i.e., is not 'water dependent'), practicable alternatives that do not involve special aquatic sites *are presumed* to be available, unless clearly demonstrated otherwise." *Id.* § 230.10(a)(3) (emphasis added). It is the burden of the applicant and the Corps to overcome this presumption, and to date, the presumption has not

[295] 40 C.F.R. § 230.1(c).
[296] *Id.* § 230.1(d).
[297] *Id.* §§ 230.10(a)(3); 230.5.

been overcome. Indeed, there are other "practicable alternatives to the proposed discharge which do not involve a discharge into a special aquatic site [and which] are presumed to have less adverse impact on the aquatic ecosystem, unless clearly demonstrated otherwise." *Id.*

Furthermore, "[n]o discharge of dredged or fill material shall be permitted if it . . . [j]eopardizes the continued existence of species listed as endangered or threatened under the Endangered Species Act . . . or results in likelihood of the destruction or adverse modification of a [critical] habitat." *Id.* § 230.10 (b)(3). Here, as described in detail above, the permit the applicant seeks will cause significant take of Florida panthers via habitat destruction and increased vehicle collisions. The Corps cannot lawfully rely on defective determinations from the Service to satisfy its ESA obligation to ensure against jeopardy. As detailed above, the Service's TA Form for Kingston's State 404 Program permit failed to adequately assess the effects of the proposal on listed species, and similarly defective analysis cannot support a lawful conclusion that the action will not be likely to cause jeopardy nor result in destruction or adverse modification of critical habitat.

Likewise, the Corps shall not permit a discharge of dredged or fill material that "will cause or contribute to significant degradation of the waters of the United States," including "effects contributing to significant degradation" such as "[s]ignificantly adverse effects of the discharge of pollutants on human health or welfare, including but not limited to effects on municipal water supplies, plankton, fish, shellfish, *wildlife*, and *special aquatic sites*." *Id.* § 230.10(c) (emphasis added). Here, as described above, the permit would have significant adverse effects on human health or welfare, specifically including the destruction of special aquatic sites and harm to species and their habitat.

Furthermore, "no discharge of dredged or fill material shall be permitted" because the applicant has failed to take "appropriate and practicable steps . . . which will minimize potential adverse impacts of the discharge on the aquatic ecosystem." *Id.* § 230.10(d). For actions affecting plant and animal populations, "minimization" can be achieved by, inter alia, … "avoiding sites having unique habitat or other value, including habitat of threatened or endangered species" and habitat restoration.[298] As detailed above, rather than avoid Florida panther habitat, and even with the proposed mitigation indicated by publicly available documents, the proposal will result in substantial net loss of Florida panther habitat, as well as substantial net loss of habitat for the Florida crested caracara. The available information regarding the proposed mitigation indicates that it is not adequate to minimize potential adverse impacts to those species.

Finally, in evaluating the extent to which mitigation reduces adverse effects, the Corps' analysis must consider how the traffic-increasing effects of the Kingston Development undermine the value of the proposed habitat preservation and restoration mitigation. Specifically, the Corps' analysis should evaluate how the value of the proposed habitat preservation and restoration at the Kingston site is reduced by the reasonably foreseeable reality that the increased traffic drawn to the vicinity of that habit will increase vehicle collision deaths for panthers utilizing that habitat, or otherwise undermine the use of the area by panthers.[299]

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[298] 40 C.F.R. § 230.75(c)–(d).

[299] *Cf. Bersani v. U.S. E.P.A.*, 674 F.Supp. 405, 420 (N.D. NY 1987) (upholding EPA veto where record supporting decision included evaluation of how use of site for mall would undermine proposed onsite habitat creation by impairing resettlement of species).

## REQUEST FOR PUBLIC HEARING AND ADDITIONAL OPPORTUNITIES FOR PUBLIC PARTICIPATION

Our organizations request that the Corps hold a public hearing regarding this application. There is substantial public interest in the community regarding the Kingston Development and its impacts. As explained above, the available information indicates that the destruction of wetlands and habitats to create a mixed-use development will cause significant harm to the environment, including significant impacts to federally listed wildlife. Moreover, the available information indicates that the project conflicts with Florida Forever state goals to maintain wildlife connectivity. The public should have the opportunity to weigh in on environmental impacts to the area and the public interest factors that the Corps must consider.

Furthermore, our organizations request that the Corps provide additional opportunities for public participation. Specifically, to the extent that the Corps decides to prepare an Environmental Assessment for its decision, we request that the Corps make its draft Environmental Assessment available and provide opportunities for public comment on that draft.

## CONCLUSION

As detailed above, the available information indicates that the proposed Kingston Development will have significant adverse environmental effects that should be examined in an EIS. Furthermore, based on the available information indicating there will be significant adverse environmental effects, including significant adverse effects on the Florida panther, the Corps should deny the permit.

If you have any questions about these comments, please contact Sierra Club, the Center for Biological Diversity, and the Conservancy of Southwest Florida at the email addresses or phone numbers provided below.


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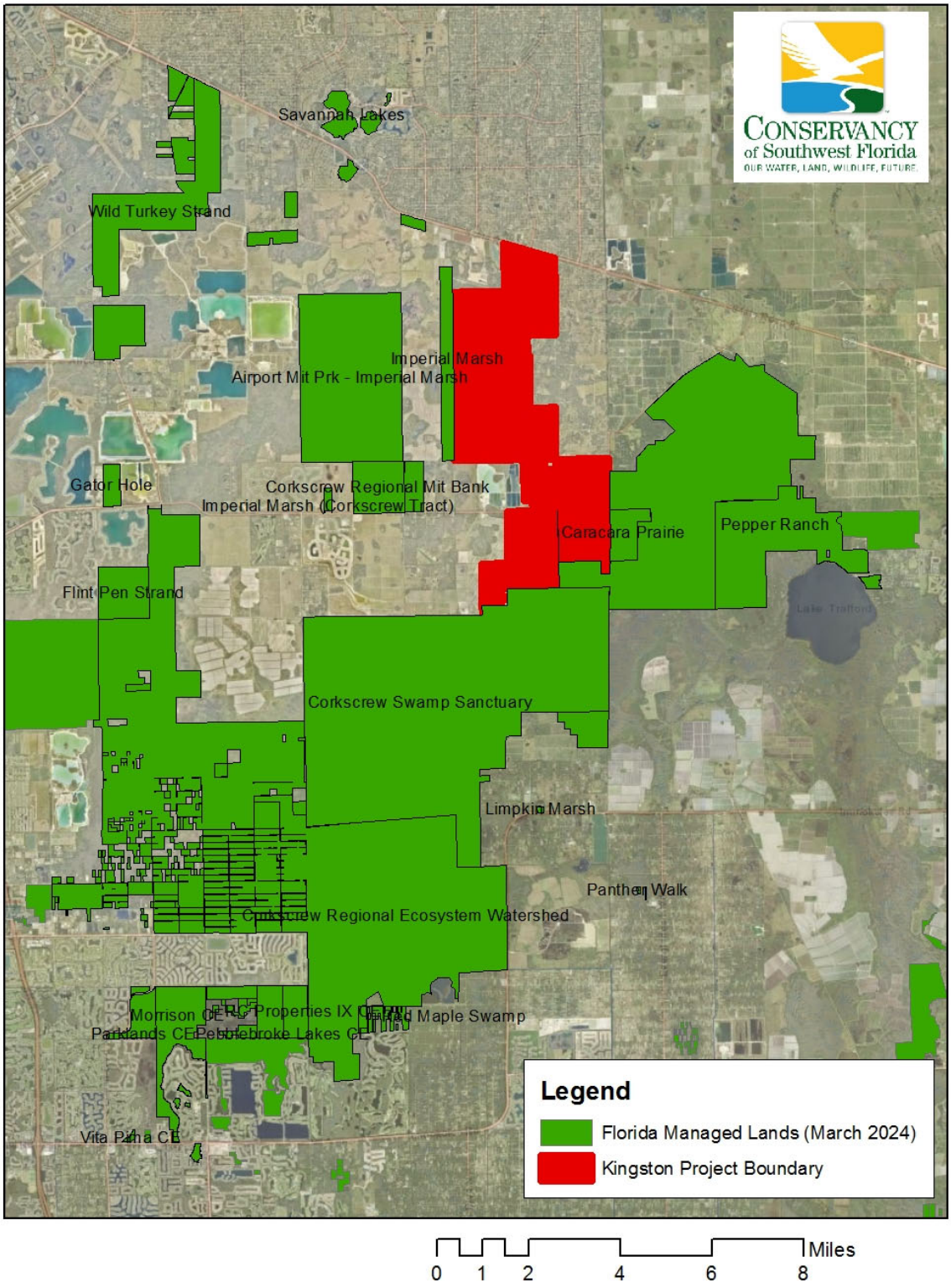
# EXHIBITS

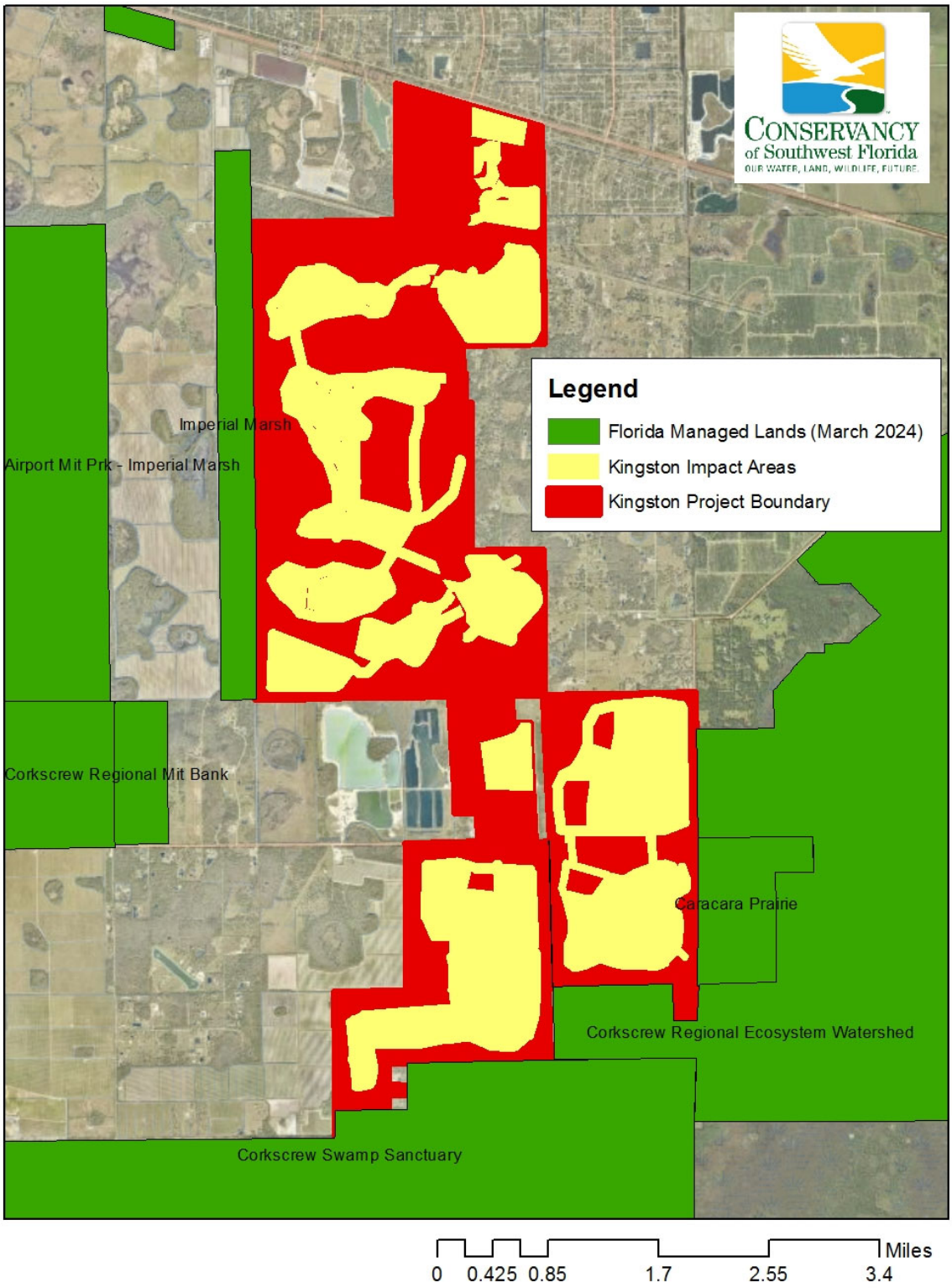
# Exhibit A

Date: 6/28/2024



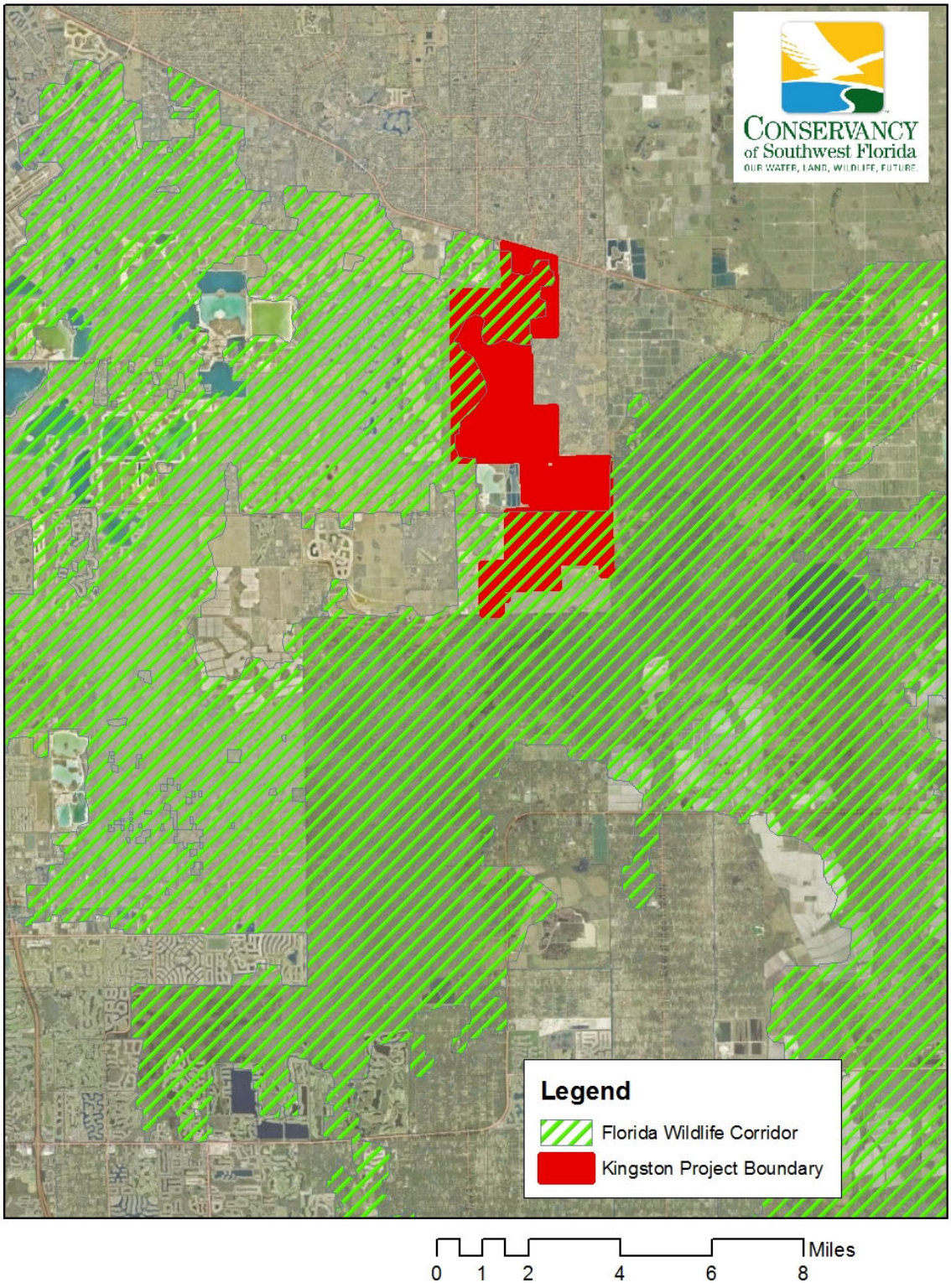
# Exhibit B

Date: 7/1/2024



# Exhibit C

Date: 6/28/2024



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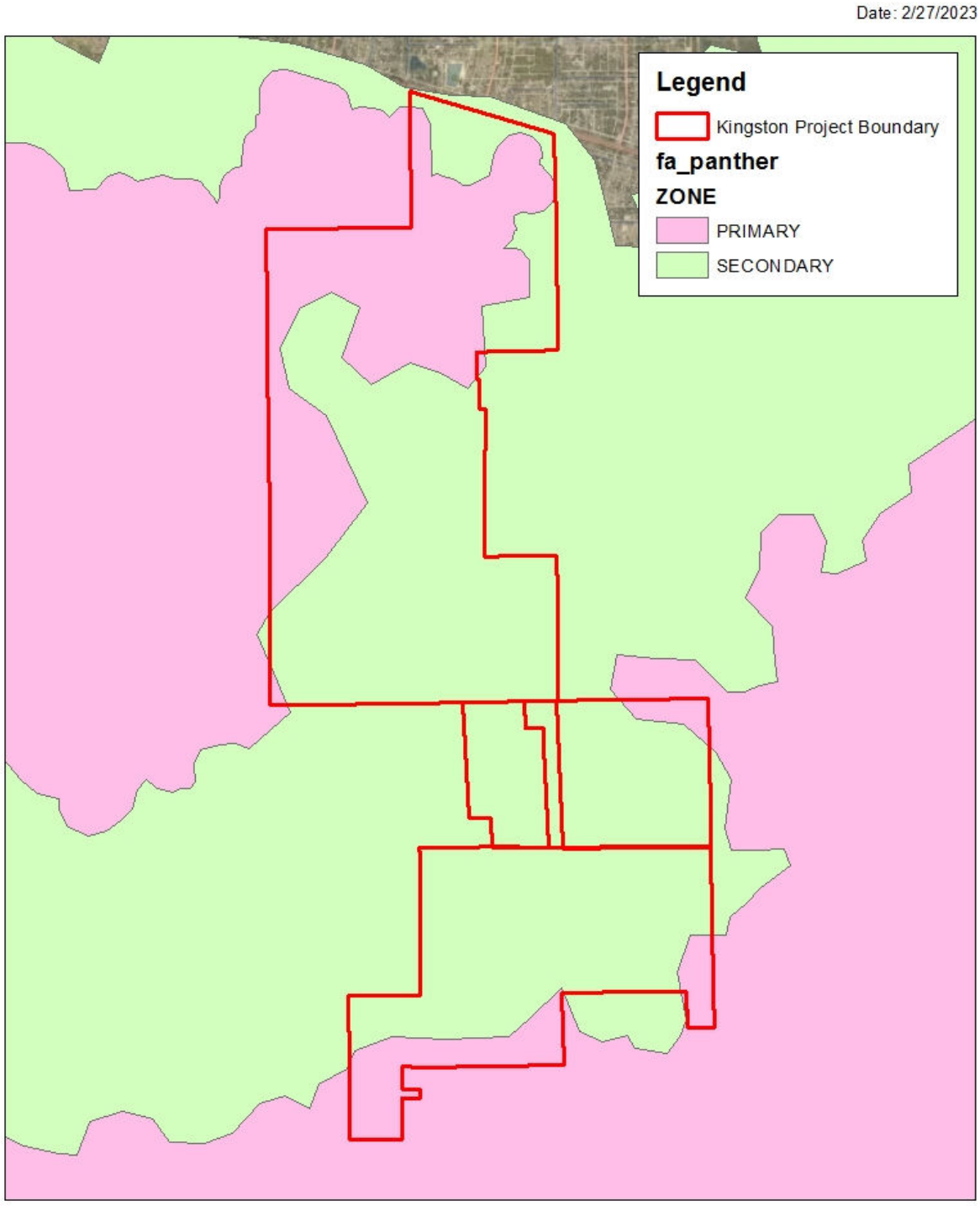
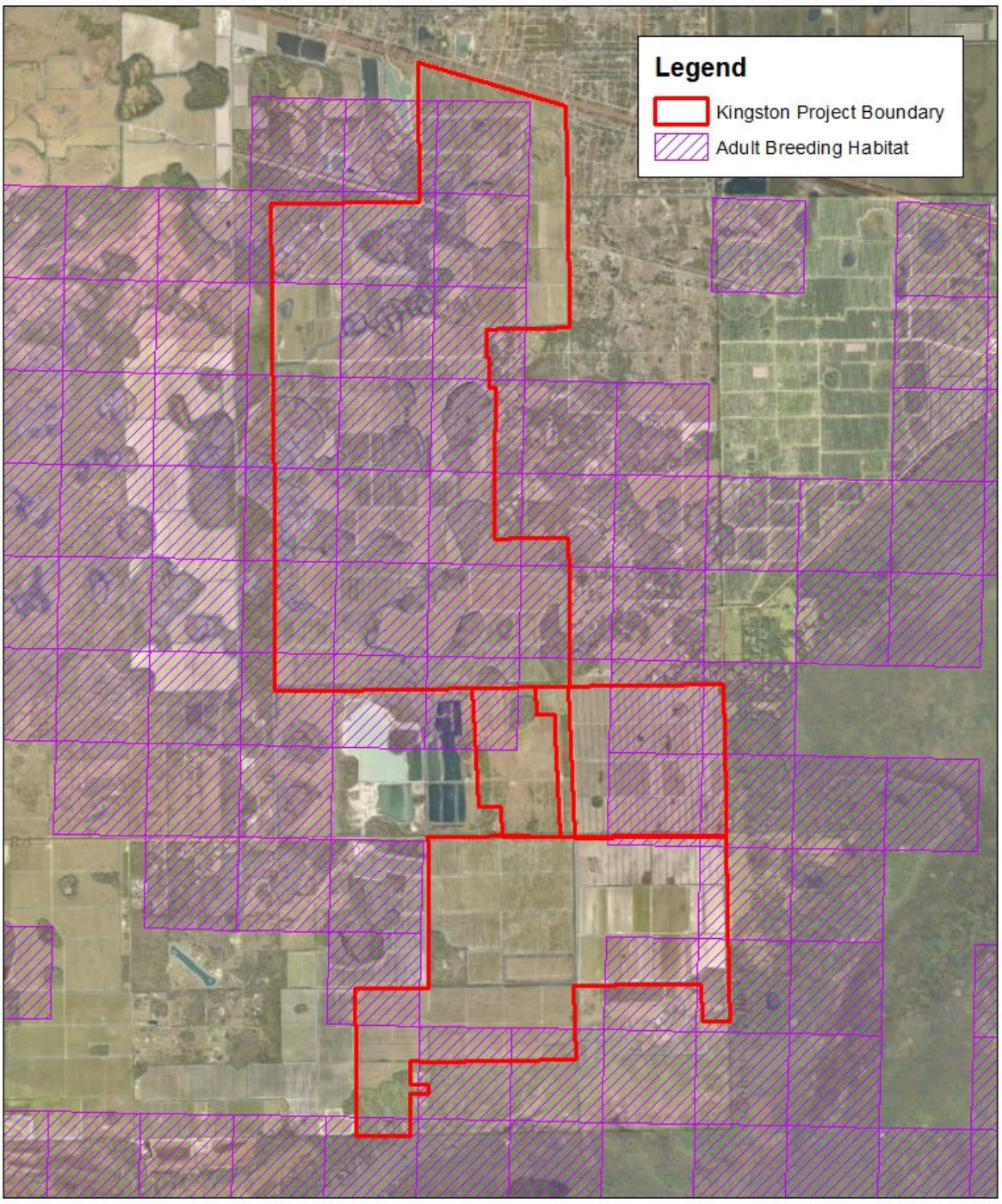

Date: 2/27/2023
Legend
Kingston Project Boundary
fa_panther
ZONE
PRIMARY
SECONDARY
CONSERVANCY of Southwest Florida
OUR WATER, LAND, WILDLIFE, FUTURE.
0 0.275 0.55 1.1 1.65 2.2
Miles

# Exhibit E

Date: 2/27/2023




CONSERVANCY of Southwest Florida
OUR WATER, LAND, WILDLIFE, FUTURE.