



United States Department of the Interior

FISH AND WILDLIFE SERVICE

1875 Century Boulevard
Atlanta, Georgia 30345

In Reply Refer To:
FWS/R4/ES

DEC 14 2010

Mr. W. Craig Fugate, Administrator
Federal Emergency Management Agency
500 C Street, S.W.
Washington, D.C. 20472

Dear Mr. Fugate:

This letter constitutes an amendment to the U.S. Fish and Wildlife Service's (Service) April 30, 2010, jeopardy Biological Opinion (BO), for the Department of Homeland Security's Federal Emergency Management Agency's (FEMA) administration, of the National Flood Insurance Program (NFIP) in participating communities in Monroe County, Florida. The BO was provided by the Service in response to the District Court of South Florida (District Court) Court Order dated February 26, 2009. This case has a litigation history dating back to the early 1990s, which required FEMA to consult under section 7 of the Endangered Species Act. The Plaintiffs have reviewed the April 30, 2010, BO and identified areas of concern with components of the Reasonable and Prudent Alternative (RPA) developed by the Service. The Plaintiffs, FEMA, U.S. Department of Justice, and the Service through negotiations have resolved the issues in the April 30, 2010, jeopardy BO and have entered a Settlement Agreement.

The Settlement Agreement requires, among other stipulations, the Service to provide a final amended biological opinion within 14 days after entry of the Settlement Agreement. The Settlement Agreement was provided to the District Court on December 3, 2010. The Settlement Agreement also requires FEMA to issue a written decision whether to adopt the RPA set forth in the final amended biological opinion within 30 days after the Service issues the final revised biological opinion.

Accordingly, the Service is providing a final amended biological opinion in compliance with the Settlement Agreement. The areas of challenge noted by the Plaintiffs in the April 30, 2010, jeopardy BO were specific to the RPA. No other challenges were noted. Accordingly, the following RPA replaces in its entirety the original RPA in the April 30, 2010, jeopardy BO and is the same RPA as filed with the Court on December 3, 2010. The RPA is referenced as Case 4:90-cv-10037-KMM, Document 482-1, Entered on FLSD Docket 12/03/2010. All other components, information, and assessment in the April 30, 2010, BO remain in effect.

Amended RPA

In situations where the Service has determined that the action as proposed by the action agency may result in jeopardy to a listed species, the Service can provide an alternate action that if implemented can avoid jeopardy to the listed species. The alternative recommended action needs to meet four specific criteria for implementation by the action agency. For the proposed action, as determined by FEMA, the Service provides the following alternative recommended action.

REASONABLE AND PRUDENT ALTERNATIVE

Regulations (50 CFR §402.02) implementing section 7 of the Act define reasonable and prudent alternatives (RPAs) as alternative actions, identified during formal consultation, that:

- (1) can be implemented in a manner consistent with the intended purpose of the action;
- (2) can be implemented consistent with the scope of the action agency's legal authority and jurisdiction;
- (3) are economically and technologically feasible; and
- (4) would, the Service believes, avoid the likelihood of jeopardizing the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

Because this opinion has found jeopardy, FEMA is required to notify the Service of its final decision on the implementation of the RPA.

The Court's March 2005 Order criticized the 2003 RPA for (1) relying on voluntary measures and (2) not protecting against habitat loss and fragmentation or otherwise accounting for the cumulative effects of the permitted projects. These two points have been addressed in the revised RPA below. First, FEMA has more clearly described the steps that will be taken if the RPA is not followed. Second, the revised RPA will result in a review process that will allow the Service to consider the cumulative impacts of a series of permit proposals at clear points in time, rather than on a piecemeal basis.

Our jeopardy determinations were based on habitat loss and indirect effects from floodplain development expected to occur over a 13-year period of implementation of the NFIP. Therefore, we base this RPA on habitat loss and indirect effects from floodplain development. The indirect effects from floodplain development apply to free roaming cat predation of the Key Largo cotton mouse, Key Largo woodrat, and Lower Keys marsh rabbit and traffic impacts associated with Key deer.

1. The Service will create and maintain an updated list of all real estate numbers of parcels (either vacant lots or built upon lots) that are within the Species Focus Area Maps. The Species Focus Area Maps identify all potential suitable habitat parcels for all nine species on Table 17, including both "jeopardy" and "no jeopardy" species including all potential

suitable habitat, public and private, whether or not in an existing HCP. The Species Focus Area Maps identify which parcels must be referred to the Service for review as outlined in RPA 4. The Species Focus Area Maps were developed by the Service, based on the best available science, and indicate potentially suitable, federally threatened or endangered species habitat for the species subject to the prohibitions of this RPA. Companion buffer zone maps were also created and maintained for the Key Largo cotton mouse, Key Largo woodrat, and Lower Keys marsh rabbit. The Service will provide these maps to FEMA for distribution to all participating communities in the Florida Keys portion of Monroe County. The updated real estate parcel list will be completed within 60 days of acceptance of this BO by the Court, and then updated as needed by the Service. We do not anticipate that updates would occur frequently, but may be needed as habitat changes or new information (habitat or species) becomes available.

2. Pursuant to 44 CFR 60.3(a)(2), FEMA will require Monroe County and other participating communities in the Florida Keys to revise their Flood Damage Prevention Ordinance(s) to reference and use the updated real estate list and Species Focus Area Maps (referenced in RPA paragraph 1) to implement and enforce the procedures required in paragraph 4 within 12 months of acceptance of this BO by the Court. In the event that the real estate list and/or Species Focus Area Maps are updated by the Service, the new list and/or maps will be used. FEMA will also require the county and participating communities as per 44 CFR 60.3(a)(2) to incorporate Service review recommendations (or Reasonable and Prudent Measures resulting from formal consultation) under section 7 and section 10 incidental take exemption and implementing terms and conditions as enforceable conditions in their floodplain development permits.
3. In areas mapped as containing unsuitable habitat, participating communities in Monroe County will place a form letter in their permit file that indicates:
 - a. the individual that made the determination,
 - b. the date of the determination; and
 - c. the date of the Species Focus Area Map and real estate parcel list used to make the determination.

After this form letter is completed, participating communities in Monroe County may take action on the proposed floodplain development permits without further concerns for threatened and endangered species (or their critical habitat).

4. Any issuance of floodplain development permits for all development, including those activities that will remove vegetation, will require further consultation for the real estate parcels within the Species Focus Area Maps. Specifically, participating communities in Monroe County will forward weekly to the Service those applications proposing floodplain development of lot(s) or floodplain development on vacant parcels and floodplain development on parcels with a structure within the Species Focus Area Maps that will: 1) expand the footprint of the structure; or 2) expand associated clearing of, or

placement of fencing into native habitat. The Service will then determine either of the following:

- a) Determine that a proposed action would not adversely affect federally threatened or endangered species or designated critical habitat either individually or cumulatively. If the Service determines that the action would not adversely affect threatened or endangered species or designated critical habitat, they will notify FEMA, the participating community, and the applicant of the not likely to adversely affect determination. The Service may condition a finding of “may affect, not likely to adversely affect” on the implementation of specific modifications to a proposed action to avoid possible impacts on species. The determination and its specific project modifications are binding conditions that must be incorporated into the participating community’s floodplain development permit(s) for the development on the parcel, and must be enforced by the participating community. This action may be achieved by the Service through the development of an assessment key. The assessment key would provide a step-wise process for applicants, the county and NFIP participating communities, and FEMA to follow that may result in Service concurrence determinations through acceptance of the key’s requirements. An applicant signed and community co-signed copy of the acceptance form will be maintained in the floodplain development permit file. FEMA will provide a yearly report of how many floodplain development permits were issued by NFIP participating jurisdictions that were assessed through the use of the assessment key and species affected.
- b) Determine that a proposed action may adversely affect threatened or endangered species or designated critical habitat either individually or cumulatively. In this event, the Service would notify FEMA, the participating community, and the applicant by letter of the “may affect” determination and the need for conditions, modifications, or other additional actions to insure the protection required under section 7 or section 10 of the Act. The “may affect” determination letter and any specific project modifications required upon further review are binding conditions that must be incorporated into the participating community’s floodplain development permit(s) for the development on the parcel and must be enforced by the participating community. The required modifications will be designed to ensure compliance with either section 7 or section 10 of the Act and that the amount of incidental take exempted through compliance with section 7 or section 10 of the Act does not exceed the levels of incidental take individually or cumulatively exempted in this BO. FEMA will provide a yearly report of how many floodplain development permits were issued by NFIP participating jurisdictions and the amount of incidental take exempted under the incidental take provision in this BO.
- c) FEMA will request that each participating community which proposes a change in ROGO or the Tier classifications provide notice of the proposed change to FEMA

and the Service at the time the proposal is presented in writing to the staff of the participating community. In addition, notwithstanding any changes to ROGO and/or the Tier classification, proposed actions within the properties designated in the Species Focus Area Maps will continue to receive additional review as outlined in this RPA. In the event that current HCPs designated in the Florida Keys under section 10 of the Act expire, all properties addressed by these HCPs that fall within the Species Focus Area Maps will be referred to the Service for review per the guidelines in this RPA.

5. Pursuant to 44 CFR 60.3(a)(2), FEMA will require participating communities to establish written procedures within 14 months of acceptance of this BO by the Court for referring floodplain development permit applicants to the Service for review, inclusion of any conditions or modifications into the floodplain development permits involved, and enforcement of those conditions or modifications, as outlined in RPA paragraph 4.

The participating community will exercise its enforcement authority to require the permittee to comply with the Service's conditions that are incorporated as conditions of the participating community's floodplain development permit. In the event of non-compliance with the floodplain development permit conditions by the applicant, the participating community will request, as outlined in RPA paragraph 8(b), that FEMA deny individual flood insurance for the subject property.

6. Free-Roaming Cats: FEMA will coordinate with participating communities in Monroe County in their development of a brochure, information on a website, and other materials for addressing predation by domestic and feral cats in areas within endangered and threatened species habitat and buffer zones in the Special Flood Hazard Area. Participating communities will be required to provide this brochure to all floodplain development permit applicants seeking a floodplain development permit, to build a structure, or expand an existing structure. This brochure will describe how to protect threatened and endangered species by keeping pets indoors. FEMA will provide a yearly report and a list by parcel of how many floodplain development permits were issued by NFIP participating communities for each of the buffer zones by species affected in the Special Flood Hazard Area.
7. Pursuant to 44 CFR 59.24, FEMA will monitor the participating communities' compliance with the conditions of any "not likely to adversely affect" effect determination or any section 7 or section 10 incidental take authorizations and their implementing terms and conditions. FEMA will coordinate with the Service every 6 months to evaluate the extent of compliance with the Act for proposed floodplain development in participating communities in Monroe County. FEMA will require the communities to maintain, whichever is obtained, either the Section 10(a)(1)(B) permit or the completed section 7 consultation in the administrative record for the floodplain development permit file for future review by FEMA during their community assistance

visits. FEMA will visit participating communities in Monroe County every 6 months. During community visits to participating communities in Monroe County, FEMA will evaluate the administrative records maintained by the participating community on floodplain development permits issued for proposed actions described in this RPA to ensure compliance with the RPA requirements. FEMA will use information provided by the Service or other Federal, State, or local agencies to achieve this purpose. FEMA will treat any violation of the procedures established under the RPA as a substantive program deficiency or violation under 44 CFR 60.3.

8. Within 15 days of determining non-compliance with the procedures established under the RPA, FEMA will notify the participating community in writing that substantial progress must be made to correct the program deficiencies or remedy any violation within 60 days. The community must provide FEMA with a written response within 60 days of FEMA's notice, of the actions being taken to correct the program deficiencies and any violation. If the community cannot resolve all of the program deficiencies or remedy the violation within 60 days, the community must describe in its response the actions it will take and a schedule for resolving the deficiencies and remedying the violation.

Correcting deficiencies and remedying violations can take a variety of forms depending upon their type and nature. The following are examples of possible actions that FEMA would expect the community to undertake within 60 days or to include as part of a remediation plan to correct any remaining program deficiencies and violations remaining after 60 days:

- (a). Demonstrate that the community has initiated an enforcement action against the property owner who did not apply for a floodplain development permit and provide a description of the enforcement action being taken. If the community has not initiated some type of enforcement action against the property owner, the community should issue a stop work order or take other action to stop further floodplain development impacts. The enforcement action can include, through coordination with the Service, restoration of the site to pre-impact conditions.
- (b). Should enforcement actions proposed by the participating community not be complied with by the applicant, the participating community will submit a request for a declaration of denial of flood insurance following 44 CFR Part 73 (Section 1316 of the National Flood Insurance Act of 1968) to FEMA for construction of an insurable structure that has occurred without receipt of the necessary section 7 or section 10 incidental take exemption by the Service. Upon submission of a valid declaration, FEMA then will deny the flood insurance to that property.
- (c). If corrective actions referenced in RPA paragraph 8(a) are not possible, then FEMA will continue to deny the individual flood insurance policy. Insurance availability will be restored to a property only if the community has submitted a

valid rescission to FEMA correcting the deficiencies referenced in RPA paragraph 8 (a). A valid rescission from the community shall consist of a description of, and supporting documentation for, the measures taken to bring the structure into compliance with the local floodplain management ordinance and this RPA along with other requirements in accordance with 44 CFR 73.3 (Section 1316).

- (d). Rescission of the floodplain development permit for any floodplain development action if the participating community issued a floodplain development permit in contravention to the Service's technical assistance recommendations or the Service's section 7 or section 10 incidental take authorizations and implementing terms and conditions.
 - (e). Seek civil or criminal penalties or other appropriate legal action against the property owner as provided for in the participating community's ordinance or code.
- 9. If FEMA determines the participating community's non-compliance with the procedures established under the RPA has caused take of threatened or endangered species that cannot be corrected or offset, FEMA will initiate procedures outlined in 44 CFR 59.24 for probation and suspension of community eligibility for flood insurance. In addition, if the community is not responsive to FEMA's initial notice or it has not made substantial progress within 60 days to correct the program deficiencies and remedy the violation, FEMA will initiate the probation and suspension procedures outlined in 44 CFR 59.24 that allows FEMA to place participating communities on probation or suspend them from the NFIP. If the community fails to adhere to the agreed upon remediation plan and schedule or fails to demonstrate why the schedule for resolving any remaining program deficiencies or violation cannot be adhered to, FEMA will also initiate procedures outlined in 44 CFR 59.24 for probation and suspension.
 - 10. FEMA, in conjunction with the Service, will conduct training sessions with public officials and local building officials on the requirements of these RPAs.
 - 11. FEMA will require participating communities to provide to floodplain development permit applicants a brochure or similar written material about the floodplain development permit referral process and post this information on the community's website and otherwise make it generally available. FEMA and the participating communities will coordinate with the Service in developing this communication to the public.

If you have any question, please contact Paul Souza, Field Supervisor, for our South Florida Office at 772-562-3909 extension 285 or Patrick Leonard, Assistant Regional Director for Ecological Services, of this office at 404-679-7085.

Sincerely yours,

A handwritten signature in cursive script, reading "Mark J. Musaus".

"for" Cynthia K. Dohner
Regional Director