



**Center for Biological Diversity • ManaSota-88  
People for Protecting Peace River • Suncoast Waterkeeper**

*Sent via Email and Certified Mail Return Receipt*

December 20, 2016

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**Re: Sixty-Day Notice of Endangered Species Act Violations Concerning Threatened and Endangered Species in the Central Florida Phosphate District and South Pasture Phosphate Mine Extension Project Area**

Dear Madams and Sirs:

The Center for Biological Diversity, ManaSota-88, People for Protecting Peace River, and Suncoast Waterkeeper hereby provide their notice of intent to sue the U.S. Fish and Wildlife Service (“FWS”) and the U.S. Army Corps of Engineers (“Corps”) over violations of the Endangered Species Act (“ESA”) with regard to a Final Areawide Environmental Impact Statement (“FAEIS”) for mining projects in the Central Florida Phosphate District and in approving Clean Water Act permit SAJ-1993-01395 for phosphate mining in Central Florida’s Peace River watershed (“South Pasture Extension Mine”).<sup>1</sup> As approved, these projects threaten to harm federally threatened wood storks, Audubon’s crested caracaras, and eastern indigo snakes, as well as numerous other federally listed and candidate species, as well as state-protected species.

As explained in further detail below, the actions and inactions of the Corps and FWS amount to a failure to comply with the ESA in the following ways:

- (1) The Corps’ failed to initiate and complete consultation with FWS and the National Marine Fisheries Service (“NMFS”) on its 2013 AEIS for mining projects in the Central Florida Phosphate District;
- (2) FWS’ June 9, 2014 concurrence letter and biological opinion concerning the Corps’ approval of South Pasture Extension permit no. SAJ-1993-01395 to mine approximately 7,500 acres in central Florida and the South Pasture Extension Mine’s impacts on listed species is unlawfully and legally inadequate;
- (3) FWS’ incidental take statement is arbitrary and capricious;
- (4) The Corps’ reliance on FWS’ June 9, 2014 concurrence letter and biological opinion to satisfy its ESA Section 7(a)(2) obligations is unlawful;
- (5) The Corps’ and FWS’ failure to reinitiate consultation on the proposed project after changes were made to the 2012 proposal and subsequent to the 2014 biological opinion is unlawful;
- (6) The Corps’ and FWS’ failure to reinitiate formal consultation on the basis of the new information that the eastern indigo snake is two distinct species of snake is unlawful;
- (7) The Corps’ and FWS’ failure to reinitiate formal consultation on the basis of the new information regarding sinkholes in phosphogypsum stacks is unlawful; and
- (8) The Corps’ take of listed species in the project area without a valid biological opinion is unlawful and in violation of ESA Section 9.

This letter is provided pursuant to the sixty-day notice requirement of the citizen suit provision of the ESA.<sup>2</sup> The Corps and FWS have sixty days to remedy the violations identified herein; if these violations are not cured within the sixty day notice period, the undersigned parties intend to file suit in federal court.

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<sup>1</sup> 16 U.S.C. §§ 1531 *et seq.*

<sup>2</sup> 16 U.S.C. §§ 1540(g).

## I. Identity of the Organizations Giving Notice

The names, addresses, and phone numbers of the organizations giving notice of intent to sue under the ESA are:

Center for Biological Diversity  
P.O. Box 2155  
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(727) 490-9190

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P.O. Box 155  
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(863) 494-4687

Suncoast Waterkeeper  
P.O. Box 1028  
Sarasota, Florida 34230  
(941) 275-2922

## II. Factual Background

The process of mining phosphate rock aggressively transforms the environment, destroying and displacing species and irreparably changing the character of the habitats on which they rely. In Florida, this process begins in open pit strip mines in which the phosphate mining company, here Mosaic, strips all vegetation and approximately 10 meters - or just about 33 feet - of the existing landscape (so-called “overburden”<sup>3</sup>) to expose and facilitate the removal of the below phosphoric ore deposits, also known as the “matrix.”<sup>4</sup> The matrix is then conveyed via pipes to a beneficiation plant where the phosphoric ore is forcibly separated from the sand and the clay.<sup>5</sup>

The phosphoric ore is then treated with sulfuric acid to produce phosphoric acid, which is principally used in fertilizer.<sup>6</sup> This process also creates phosphogypsum, a radioactive byproduct that the Environmental Protection Agency (“EPA”) allows to be stored in mountainous “stacks” that are hundreds of acres wide and hundreds of feet tall.<sup>7</sup> At present, due in part to their radioactive nature, neither EPA or Mosaic have an anticipated closure plan for these stacks, meaning that their presence - in current and expanding form - will indefinitely remain a continuing and insecure part of Florida’s landscape.

Phosphate mining has already substantially impacted the Peace and Myakka river basins.<sup>8</sup> For example, in some areas of the upper Peace River basin, the surficial aquifer does not even exist

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<sup>3</sup> Overburden: Layers of soil or rock overlaying a deposit of materials or ores.

<sup>4</sup> Matrix: a mixture of phosphate pebbles, sand and clay.

<sup>5</sup> Beneficiation: A mechanical process called washing is used to separate the larger phosphate pebbles from the ore. A process called flotation is used to recover the finer particles of phosphate from sand.

<sup>6</sup> <https://www.epa.gov/radiation/subpart-r-national-emission-standards-radon-emissions-phosphogypsum-stacks>.

<sup>7</sup> It is radioactive due to the presence of naturally occurring, but artificially concentrated and released, uranium, radium-226, and thorium.

<sup>8</sup> The surficial aquifer is a vital component of the groundwater system in which rain recharges the surficial aquifer and then percolates downward to the water table; Metz, P.A. and B.R. Lewelling. 2009. Hydrologic Conditions that Influence Streamflow Losses in a Karst Region of the Upper Peace River, Polk County, Florida: U.S. Geological Survey Scientific Investigations Report 2009-5140, 82 p. at 1, 2, <https://pubs.usgs.gov/sir/2009/5140/>.

because phosphate mining has removed the surface sediments.<sup>9</sup> In addition to scarring the landscape, groundwater pumping for phosphate mining has been implicated in the creation of sinkholes in the upper Peace River, and storage of the acidic, radioactive waste generated by the process has also caused sinkholes.<sup>10</sup>

#### **A. Central Florida Phosphate District Areawide Environmental Impact Statement**

Despite the harm phosphate mining has already caused Florida, Mosaic is now looking to consume an additional 51,755 acres of central Florida. On February 18, 2011, the Corps published a Notice of Intent to Prepare a Draft Areawide Environmental Impact Statement for Phosphate Mining Affecting Waters of the United States in the Central Florida Phosphate District (“DAEIS”), which includes the South Pasture Extension Mine - additionally at issue in this notice letter, the Desoto Mine, Ona Mine, and Wingate Mine. The four proposed projects are in a 1.32 million acre area of Hillsborough, Manatee, Polk, and DeSoto counties called the Central Florida Phosphate District. The South Pasture Extension Mine, as discussed further below, would be a 7,513 acre extension of the existing South Pasture Mine in Hardee County, in the Peace River watershed. In addition, the Desoto Mine would be a new 18,287 acre phosphate mine in northwestern DeSoto County, in the Peace River watershed; the One Mine would be a new 22,320 acre phosphate mine in western Hardee County, in the Peace and Myakka River watersheds; and the Wingate East Mine would be a 3,635 extension of the existing Wingate Creek Mine in eastern Manatee County, in the Myakka and Peace River watersheds. The DAEIS was intended to environmentally assess the impacts of these mining activities.

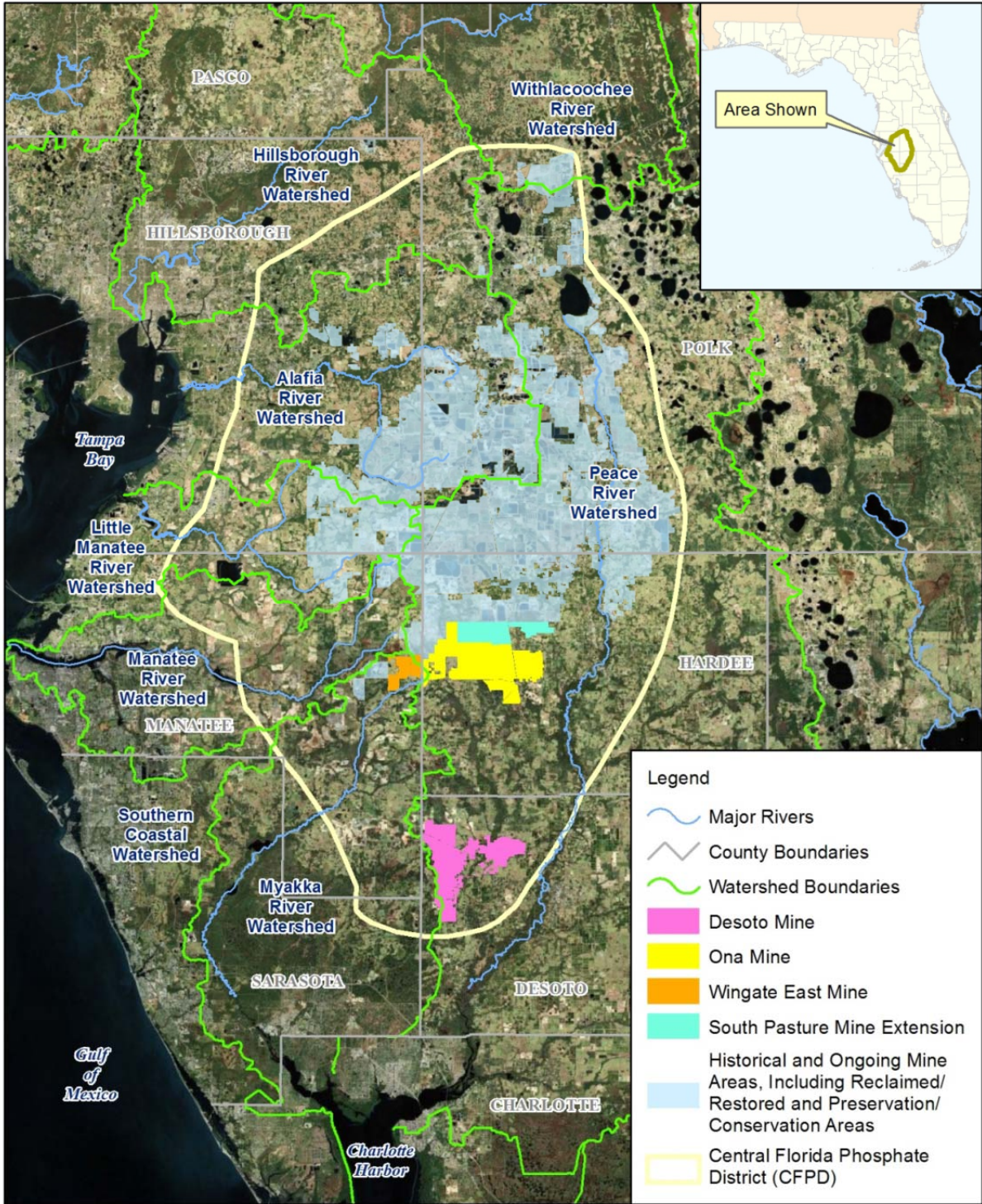
On May 3, 2013, the Corps published a notice of availability for the Final Areawide Environmental Impact Statement on Phosphate Mining in the Central Florida Phosphate District (“FAEIS”). On July 13, 2013, the Corps released an Addendum to the FAEIS that corrected its surface water hydrology analysis, included public comments received during the comment period for the DAEIS but not responded to in the FAEIS, and included a Spanish language translation of the Executive Summary. The FAEIS provides that rather than produce a Record of Decision on the FAEIS, it will prepare individual, project-specific Records of Decision-Statements of Findings for each of the four projects that were the focus of the FAEIS.<sup>11</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> Bernard, P. 2016. *Massive sinkhole drains contaminated water into Floridan aquifer*, WFLA News Channel 8 (Sept. 15, 2016), <http://wfla.com/2016/09/15/contaminated-water-flows-into-floridan-aquifer-after-sinkhole-opens-at-mosaic-facility/>.

<sup>11</sup> Chapter 1, pages 1-34.



The FAEIS identifies 17 federally listed species that have the potential to occur in the FAEIS study area.

Table 3-20. Federally Listed Species with the Potential to Occur in the AEIS Study Area			
Scientific Name	Common Name	Federal Legal Status (USFWS)	Preferred Habitat in and around CFPD
<b>Plants</b>			
<i>Bonania grandiflora</i>	Florida bonamia	LT	White sand scrub
<i>Chrysopsis floridana</i>	Florida goldenaster	LE	Sand pine scrub; low sand ridges
<i>Cladonia perforata</i>	Perforate reindeer lichen	LE	Rosemary scrub
<i>Deeringothamnus pulchellus</i>	Beautiful pawpaw	LE	Open flatwoods
<b>Fish</b>			
<i>Pristis pectinata</i>	Smalltooth sawfish	LE	Charlotte Harbor
<b>Reptiles</b>			
<i>Alligator mississippiensis</i>	American alligator	SAT	Bodies of freshwater including marshes, swamps, lakes, and rivers
<i>Drymarchon couperi</i>	Eastern indigo snake	LT	Broad range of wetland and upland habitats; often utilizes gopher tortoise burrows
<i>Eumeces egregius ilvidus</i>	Bluetail mole skink	LT	Scrub; sandhill; xeric hammock; well drained sandy uplands
<i>Neoseps reynoldsi</i>	Sand skink	LT	Scrub; sand pine; scrubby flatwoods
<b>Birds</b>			
<i>Ammodramus savannarum floridanus</i>	Florida grasshopper sparrow	LE	Large areas of frequently burned dry prairie habitat with patchy open areas
<i>Aphelocoma coerulescens</i>	Florida scrub jay	LT	Fire-dominated oak scrub
<i>Mycteria americana</i>	Woodstork	LE	Nests primarily in inundated forested wetlands; forages primarily in shallow water habitats
<i>Picoides borealis</i>	Red-cockaded woodpecker	LE	Longleaf and slash pine flatwoods
<i>Polyborus plancus auduboni</i>	Audubon's crested caracara	LT	Dry prairie and pasturelands; preferred nest trees are cabbage palm followed by live oaks
<i>Rostrhamus sociabilis plumbeus</i>	Snail kite	LE	Large open freshwater marshes and lakes with shallow water and a low density of emergent vegetation; forages primarily on apple snails
<b>Mammals</b>			
<i>Puma concolor coryi</i>	Florida panther	LE	Requires extensive areas of mostly forested communities; large remote wetlands are important for diurnal refuge
<i>Trichechus manatus</i>	Manatee	LE	Charlotte Harbor
<b>Federal Legal Status</b>			
LE Endangered: species in danger of extinction throughout all or a significant portion of its range.			
LT Threatened: species likely to become Endangered within the foreseeable future throughout all or a significant portion of its range.			
SAT Treated as threatened due to similarity of appearance to a species that is federally listed such that enforcement personnel have difficulty in attempting to differentiate between the listed and unlisted species.			
N Not currently listed, nor currently being considered for listed as Endangered or Threatened.			
<b>Plants</b>			
Species identified are those documented to occur in counties within the Myakka and Peace River watersheds.			
<b>Agencies/Organizations</b>			
USFWS U.S. Fish & Wildlife Service			
<b>Sources</b>			
USFWS AEIS public scoping comments			
FDEP, 2011c			
Florida Natural Areas Inventory			

In addition to federally listed species, the gopher tortoise (*Gopherus Polyphemus*), a candidate for listing under the federal Endangered Species Act, is commonly found in the study area, as are bald eagles (*Haliaeetus leucocephalus*), which are protected under the federal Bald and Golden Eagle Protection Act. Additionally, several state listed species have consistently been observed in the study area, including southeastern kestrel (*Falco sparverius paulus*), Florida sandhill crane (*Grus Canadensis pratensis*), gopher frog (*Rana capito*), burrowing owl (*Athene cunicularia*), little blue heron (*Egretta caerulea*), snowy egret (*Egretta thula*), tricolored heron (*Egretta tricolor*), white ibis (*Eudocimus albus*), Florida mouse (*Podomys floridanus*), and Sherman's fox squirrel (*Sciurus niger shermani*).

The Corps offers identical language regarding the four projects' impacts to wildlife:<sup>12</sup>

- Wildlife species that occur on the mine site would be temporarily impacted by loss of habitat and by noise generated during mining activities;
- During land clearing, mobile wildlife species would relocate to undisturbed lands;
- Some slow-moving wildlife species may not be able to relocate to undisturbed areas and, therefore, may be injured or killed during land clearing;
- The potential for incidental animal mortality occurring during land clearing exists but is considered to be relatively low and any losses would have a negligible effect on regional wildlife populations; but
- Based on expected, required consideration and reclamation of lost wildlife habitat during the USACE and FDEP permit review processes, the [mines] would have no impact to a minor impact on wildlife habitat. This impact would not be significant.

However, the Corps does not further explain how species would relocate themselves or acknowledge the fact that in some instances disturbed mined lands would border other proposed projects or that some of the proposed projects are scheduled to be mined at the exact same time as each other, amplifying the harm and leaving nowhere for species to relocate to.<sup>13</sup> The FAEIS also states that species that are displaced by land clearing are expected to re-occupy mined areas after they are reclaimed. This assertion is made without regard to the fact that in all four projects the time from mining to reclamation spans decades, or scientific studies that prove that reclamation will indeed restore habitat for the affected wildlife.<sup>14</sup>

## **B. South Pasture Extension**

On November 15, 2016, the Corps issued a Clean Water Act (“CWA”) Section 404 permit to Mosaic,<sup>15</sup> for dredging and filling activities at the South Pasture Extension. The South Pasture Extension Mine would extend the existing South Pasture Mine southward, giving Mosaic 20 years to mine 7,513 acres in Hardee County, hydraulically transporting the matrix to the existing South Pasture Mine beneficiation plant, and return sand and clay residuals to the tract. Mosaic claims that upon completion of mining operations, all lands disturbed by mining will be reclaimed.

The South Pasture Extension is located in the Peace River Watershed, which drains into the Peace River and its adjoining waterways. The project site contains 5,550.5 acres of

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<sup>12</sup> FAEIS 4-152-53 (Desoto Mine); 4-155 (Ona Mine); 4-157-58 (Wingate Mine); 4-159-160 (South Pasture Extension).

<sup>13</sup> FAEIS at 4-160.

<sup>14</sup> The FAEIS references a Kale 1992 study on birds, which was not published in a scientific journal and could not be found online. It also references Mushinsky 1996, another study that was not published in a scientific journal that found that species were notably less present at mined sites than at unmined sites.

<sup>15</sup> At the time CF Industries, Inc. was the project applicant. Mosaic acquired CF Industries' Florida phosphate operations on March 17, 2014, including the proposed South Pasture Extension. Applicant Press Release, “The Mosaic Company Completes Acquisition of CF Industries' Phosphate Business” (Mar. 17, 2014), <http://mosaicinhardee.com/2014/03/17/the-mosaic-company-completes-acquisition-of-cf-industries-phosphate-business/>.

uplands and 2,555.6 acres of wetlands (jurisdictional and non-jurisdictional). Uplands include forests, pastureland, and rangeland. Wetlands on the site include forested wetlands, herbaceous wetlands, intermittent streams, and surface waters such as ditches and cattle ponds. The South Pasture Extension is bordered on the north by historic and ongoing mining, and on the west and south by the proposed Ona Mine, a project proposed by Mosaic for the same time frame

The Corps issued a Public Notice for the South Pasture Extension application on June 1, 2012. Also on June 1, 2012, the Corps published a notice of availability for the DAEIS, evaluating environmental impacts for the four proposed phosphate mines, including the South Pasture Expansion. Based on surveys from 1998-2007, the Corps in the FAEIS lists the following species as occurring in the South Pasture Mine Extension site:

Table 3-24. State and Federally Listed Plant and Animal Species Observed on South Pasture Mine Extension Site			
Scientific Name	Common Name	Federal Legal Status (USFWS)	State Legal Status (FFWCC or FDACS)
<b>Plants</b>			
<i>Calopogon multiflorus</i>	Many-flowered grass-pink	N	LE
<i>Tillandsia fasciculata</i>	Common wild pine	N	LE
<i>Tillandsia utriculata</i>	Giant wild pine	N	LE
<b>Reptiles</b>			
<i>Alligator mississippiensis</i>	American alligator	SAT	FT(S/A)
<i>Drymarchon couperi</i>	Eastern indigo snake	LT	FT
<i>Gopherus polyphemus</i>	Gopher tortoise	N	ST
<b>Birds</b>			
<i>Athene cunicularia</i>	Burrowing owl	N	SSC
<i>Egretta caerulea</i>	Little blue heron	N	SSC
<i>Egretta thula</i>	Snowy egret	N	SSC
<i>Egretta tricolor</i>	Tricolored heron	N	SSC
<i>Eudocimus albus</i>	White ibis	N	SSC
<i>Grus canadensis pratensis</i>	Florida sandhill crane	N	ST
<i>Mycteria americana</i>	Woodstork	LE	FE
<i>Polyborus plancus audubonii</i>	Audubon's crested caracara	LT	FT
<b>Mammals</b>			
<i>Podomys floridanus</i>	Florida mouse	N	SSC
<i>Sciurus niger shermani</i>	Sherman's fox squirrel	N	SSC
<b>Federal Legal Status</b>			
LE	Endangered: species in danger of extinction throughout all or a significant portion of its range.		
LT	Threatened: species likely to become Endangered within the foreseeable future throughout all or a significant portion of its range.		
SAT	Treated as threatened due to similarity of appearance to a species that is federally listed such that enforcement personnel have difficulty in attempting to differentiate between the listed and unlisted species.		
N	Not currently listed, nor currently being considered for listed as Endangered or Threatened.		
<b>State Legal Status</b>			
<b>Animals:</b>			
FE	Listed as Endangered Species at the Federal level by USFWS		
F	Listed as Threatened Species at the Federal level by USFWS		
ST	State Threatened: species, subspecies, or isolated population which is acutely vulnerable to environmental alteration, declining in number at a rapid rate, or whose range or habitat is decreasing in area at a rapid rate and as a consequence is destined or very likely to become an endangered species in the foreseeable future.		
SSC	Species of Special Concern: a population which warrants special protection, recognition, or consideration because it has an inherent significant vulnerability to habitat modification, environmental alteration, human disturbance, or substantial human exploitation which, in the foreseeable future, may result in its becoming a threatened species.		
FT(S/A)	Federal Threatened due to similarity of appearance.		
N	Not currently listed, nor currently being considered for listing.		
<b>Plants:</b>			
LE	Endangered: species of plants native to Florida that are in imminent danger of extinction within the state, the survival of which is unlikely if the causes of a decline in the number of plants continue; includes all species determined to be endangered or threatened pursuant to the U.S. Endangered Species Act.		
LT	Threatened: species native to the state that are in rapid decline in the number of plants within the state, but which have not so decreased in number as to cause them to be Endangered.		
N	Not currently listed, nor currently being considered for listing.		
<b>Agencies/Organizations</b>			
FDACS	Florida Department of Agriculture & Consumer Services		
FFWCC	Florida Fish & Wildlife Conservation Commission		
USFWS	U.S. Fish & Wildlife Service		
<b>Sources</b>			
BRA, 2007			
Quest Ecology, 2000			
FDEP, 2011c			



However, it must be noted that a Florida panther and red-cockaded woodpeckers have been observed on the directly adjacent Ona Mine site.

As it did for the other projects in the FAEIS, the Corps states that during land clearing for the South Pasture Extension, “mobile wildlife species would relocate to undisturbed areas” without further explanation of how that would occur or acknowledging the fact that disturbed mined lands flank the northern border of the narrow strip of land that makes up the South Pasture Extension Mine, or that the proposed Ona Mine makes up the entire eastern and southern boundary of the mine and is scheduled to be mined at the exact same time as the mine.<sup>16</sup> The FAEIS also states that “[w]ildlife species that are displaced by land clearing are expected to re-occupy mined areas after they are reclaimed” despite the anticipated 23 year lag time between mining and reclamation and the paucity of evidence suggesting that reclamation will indeed restore habitat for the affected wildlife.<sup>17</sup> The Corps also concludes that “[s]ome slow-moving wildlife species may not be able to relocate to undisturbed areas and, therefore, may be injured or killed during land clearing,” but then discounts that mortality by summarily concluding that “any losses would have a negligible effect on regional wildlife populations.”<sup>18</sup>

On June 9, 2014, FWS transmitted a letter to the Corps stating it was a biological opinion on the effects of the South Pasture Mine Extension on Audubon’ crested caracara, eastern indigo snake, and wood stork, and appearing to also be a concurrence letter on the Corps’ determination that the South Pasture Extension Mine may affect, but is not likely to adversely affect the Florida panther, Florida scrub jay, or Florida grasshopper sparrow.

The 2014 biological opinion defines the action area as the project area, 7,512.8 acres, plus some off-site areas for certain species. The 2014 biological opinion states that the project’s direct impacts include: 4,930 upland acres and 1,487 wetland acres; and 0.9 acres of temporary wetland and surface water impacts. To mitigate these impacts, the biological opinion reports that the applicant will:

- Conduct 400 acres of on-site mitigation;
- Create 1,568 acres of wetlands;
- Restore 122 acres of wetlands;
- Provide a conservation easement on 1,094 acres within the proposed preservation area where all mining disturbance will be avoided;
- Create an additional 1,789 acre conservation easement on mitigation wetlands;
- Grant conservation easements to 435 acres of offsite wetlands and 481 acres of off-site uplands; and
- Donate \$150,000 to the Wildlife Foundation of Florida to finance surveys and monitoring for crested caracaras.

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<sup>16</sup> FAEIS at 4-160.

<sup>17</sup> The FAEIS references a Kale 1992 study on birds, which was not published in a scientific journal and could not be found online. It also references Mushinsky 1996, another study that was not published in a scientific journal that found that species were notably less present at mined sites than at unmined sites. Finally, it references Durbin et al. 2008, a non-peer-reviewed study of reclaimed land that found eastern indigo snakes at 3 of the 62 survey sites, in support of its assertion that the snakes are “likely to recolonize” reclaimed land.

<sup>18</sup> FAEIS at 4-160.

The 2014 biological opinion concluded that the Corps' issuance of a Section 404 permit for the South Pasture Extension Mine "may affect, but [is] not likely to adversely affect" the endangered Florida panther, the threatened Florida scrub jay, and the endangered grasshopper sparrow, and that it "may affect" the threatened Audubon's crested caracara, eastern indigo snake, and wood stork.

In the Incidental Take Statement of the 2014 biological opinion, FWS authorized take in the form of harassment of two caracara pairs, four (4) caracaras total, and take in the form of injury or death due to vehicle collision of one (1) caracara.<sup>19</sup> FWS also authorized take of six (6) eastern indigo snakes over a rolling five-year period.<sup>20</sup> This authorization appears to cover death or injury to eastern indigo snakes.<sup>21</sup> Although the 2014 biological opinion acknowledged that take in the form of harassment would occur, it did not specifically authorize allowable take in the form of harassment. FWS also authorized take in the form of injury or death to one wood stork from vehicular collision over the course of the mining activities.<sup>22</sup> Although FWS acknowledged impacts to wood stork foraging habitat that could equate to harm or harassment, it did not set a cap on take in the form of harassment because "the loss/reduction of foraging value to the wood storks associated with these systems will be temporary."<sup>23</sup>

FWS included the following "reasonable and prudent measures" in the 2014 biological opinion: 1) minimize disturbance and injury that may result from vehicular traffic and other mining activities; 2) reduce habitat fragmentation after reclamation; 3) fund surveys and monitoring of caracaras; 4) report progress of the action and its impact on species to FWS as specified in the Incidental Take Statement.<sup>24</sup> FWS also set out non-discretionary Terms and Conditions of the permit, including: 1) a requirement that the Corps ensure the Applicant abides by the permit conditions; 2) a mandatory speed limit of no more than 35 mile per hour at the mine site, briefing of mining employees on listed species; 3) implementation of FWS' Standard Protection Measures for the Indigo Snake; 4) creation of a reclamation plan for the mine site; 5) a donation from the Applicant to Wildlife Foundation of Florida in the amount of \$150,000 to finance surveys, monitoring, and "other associated activities"; and 6) reporting of dead, injured, or sick threatened or endangered species.<sup>25</sup>

On June 16, 2016, the Corps released a Supplemental Environmental Assessment, draft public interest review, and draft CWA 404(b)(1) Guidelines analysis for the South Pasture Extension (collectively Supplemental Environmental Assessment or "SEA"). On November 14, 2016 the Corps issued a permit for the South Pasture Extension, authorizing impacts to 1,198.17 acres of wetlands, 3.75 acres of streams, 16,58 acres of surface waters, and 32,161 linear feet of streams. The permit calls for the creation of 1,259.58 acres of on-site wetlands, and 44.7 acres of off-site forested wetlands; the preservation of 396.23 acres of on-site wetlands; the enhancement of 123.52 acres of on-

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<sup>19</sup> *Id.* at 42.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 42–43 ("CF Industries, Inc. will report any detected dead or injured indigo snake to the Service and FWC within one business day of occurrence.")

<sup>22</sup> *Id.* at 43.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.* at 43–44.

<sup>25</sup> *Id.* at 44.

site wetlands; establishing 18,402 linear feet of on-site streams; and preserving 55,501 lf of on-site streams.

### III. Requirements of the Endangered Species Act

Congress enacted the ESA to provide a “means whereby the ecosystems upon which endangered species and threatened species depend may be conserved . . . [and to implement] a program for the conservation of such endangered species and threatened species.”<sup>26</sup> To fulfill the substantive purpose of the ESA, federal agencies are required 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 adverse modification of [the critical] habitat of such species.”<sup>27</sup>

Section 7 of the ESA requires consultation for “any action [that] may affect listed species or critical habitat.”<sup>28</sup> The ESA’s implementing regulations broadly define an “action” to include “actions directly or indirectly causing modifications to the land, water, or air.”<sup>29</sup> The “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.”<sup>30</sup> ESA regulations further provide that “any request for formal consultation may encompass . . . a number of similar individual actions within a given geographical area” or “a segment of a comprehensive plan.”<sup>31</sup> No matter how broad the agency action under consideration, FWS must consider its effects “as a whole.”<sup>32</sup>

The U.S. Supreme Court has declared that Congress clearly intended for a broad reading of “agency action” under the ESA.<sup>33</sup> It held that “[o]ne would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies ‘to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence’ of an endangered species or ‘result in the destruction or modification of habitat of such species . . . .’[] This language admits of no exception.”<sup>34</sup> Additionally, where a federal agency action is deemed “major” for National Environmental Policy Act (“NEPA”) purposes, it is presumptively sufficient to be “agency action” for ESA purposes as well.<sup>35</sup>

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<sup>26</sup> 16 U.S.C. § 1531(b).

<sup>27</sup> 16 U.S.C. § 1536(a)(2).

<sup>28</sup> 50 C.F.R. § 402.14(a).

<sup>29</sup> 50 C.F. R. § 402.02.

<sup>30</sup> *Id.*

<sup>31</sup> 50 C.F. R. § 402.14(c).

<sup>32</sup> *Nat’l Wildlife Fed’n v. Brownlee*, 402 F. Supp. 2d 1, 10 (D.D.C. 2005); see also *Lane County Audubon v. Jamison*, 958 F.2d 290, 294 (9th Cir. 1992) (programmatic timber management strategy was an “action” under 50 C.F.R. § 402.02 that “may affect” the spotted owl).

<sup>33</sup> See *TVA v. Hill*, 437 U.S. 153 (1978).

<sup>34</sup> *Id.* at 173 (emphasis by Court).

<sup>35</sup> See *Forest Service Employees for Environmental Ethics v. U.S. Forest Service*, 397 F. Supp. 2d 1241, 1256 (D.Mont. 2005) (“Just as the USFS’s authorization, funding, and use of chemical fire retardant to fight fires on national forests is ‘major federal action’ for purposes of NEPA, it is an ‘action’ under the ESA”). For a discussion of agency actions sufficient in scope to demand NEPA analysis, see *Friends of Earth, Inc. v. Mosbacher*, 488 F. Supp. 2d 889, 912 (N.D. Cal. 2007) (“to determine whether a particular project qualifies as a major federal action for NEPA purposes, a court should consider both the nature of the federal funds used and the extent of federal

If the action agency determines its action “may affect” a listed species, the agency must initiate formal consultation with the expert wildlife agency, unless certain exceptions are satisfied.<sup>36</sup> Once the action agency has initiated formal consultation, FWS is required to complete a biological opinion for that proposed action.<sup>37</sup> The biological opinion summarizes FWS’ findings and determines whether the proposed agency action will jeopardize the continued existence of any species or result in adverse modification of critical habitat.<sup>38</sup> If FWS determines the agency action is likely to jeopardize the continued existence of a listed species or result in adverse modification of critical habitat, the biological opinion must suggest “reasonable and prudent alternatives” (“RPAs”), which would reduce action-related impacts such that the agency action may avoid jeopardizing listed species.<sup>39</sup> If FWS determines the agency action is not likely to jeopardize listed species or adversely modify their habitat, it issues an incidental take statement authorizing take that is consistent with the terms and conditions of the biological opinion.

Pervading the Section 7 consultation process is the mandate for “each agency [to] use the best scientific and commercial data available.”<sup>40</sup> Importantly, each federal agency has an independent duty to “use the best scientific and commercial data available” to ensure any action it authorizes “is not likely to jeopardize the continued existence . . . or result in the destruction or adverse modification of [the critical] habitat” of any listed species.<sup>41</sup> Federal agencies have an independent and substantive obligation to insure that their actions are not likely to jeopardize the continued existence of endangered or threatened species or adversely modify critical habitat.<sup>42</sup> Indeed, a “no jeopardy” biological opinion or concurrence letter does not absolve the action agency of its duty to insure that its actions comply with the ESA.<sup>43</sup>

Compliance with the biological opinion and its incidental take statement protects federal agencies, and others acting under the biological opinion from enforcement action under Section 9’s prohibition against take.<sup>44</sup> However, take not in compliance with a biological opinion or absent a take statement or take permit is in violation of Section 9 of the ESA.

Furthermore, because an agency’s duty to avoid jeopardy is continuing, “where discretionary Federal involvement or control over the action has been retained or is authorized by law,” the agency must reinitiate formal consultation in certain circumstances, including:

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;

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involvement.”) (citations omitted).

<sup>36</sup> 50 C.F.R. § 402.14(a)-(b); U.S. Fish and Wildlife Service and National Marine Fisheries Service. 1998. Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act, at 2-6.

<sup>37</sup> 16 U.S.C. § 1536(b)(3)(A).

<sup>38</sup> 50 C.F.R. § 402.14(h).

<sup>39</sup> 16 U.S.C. § 1536(b)(3)(A).

<sup>40</sup> *Id.*

<sup>41</sup> 16 U.S.C. § 1536(a)(2).

<sup>42</sup> *Id.*; see *Pyramid Lake Paiute Tribe of Indians v. United States Dep’t of the Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990).

<sup>43</sup> *Res. Ltd., Inc. v. Robertson*, 35 F.3d 1300, 1304 (9th Cir. 1994).

<sup>44</sup> 16 U.S.C. § 1536(o)(2); 16 U.S.C. § 1538(a); 50 C.F.R. § 17.31(a).

- (b) If new information reveals effects on the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or
- (d) If a new species is listed or critical habitat designated that may be affected by the identified action.<sup>45</sup>

During reinitiation of consultation, an agency also must comply with the mandate under Section 7(d) of the ESA that the agency, as well as any applicant for a federal permit, “shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.”<sup>46</sup> Congress enacted Section 7(d) “to ensure that the status quo would be maintained during the consultation process, to prevent agencies from sinking resources into a project in order to ensure its completion regardless of its impacts on endangered species.”<sup>47</sup>

#### **IV. Violations of the Endangered Species Act and the Administrative Procedure Act**

##### **A. The Corps failed to initiate and complete consultation with FWS and NMFS on the Areawide Environmental Impact Statement**

The Corps’ review of the four proposed projects in its Areawide Environmental Impact Statement is an “action” for the purposes of the ESA, and therefore, the Corps should have initiated and completed consultation with FWS and NMFS. Upon information and belief, the Corps did not initiate or complete consultation with FWS or NMFS on the AEIS. In Chapter 6 of the FAEIS on Compliance with Environmental Requirements, the Corps states that surveys have been conducted and that coordination with FWS is an ongoing activity by the Applicant, Mosaic, and that FWS has provided comments on the Draft AEIS as part of its coordination role in the FAEIS. It does not, however, state that the Corps initiated or completed consultation with FWS or NMFS on the AEIS. There are no biological opinions on the AEIS in the decision documents made available online.<sup>48</sup> Likewise, the 2014 biological opinion does not reference a biological opinion on the AEIS.

##### **B. FWS’ June 9, 2014 Concurrence Letter and Biological Opinion on the South Pasture Extension are Arbitrary and Capricious and Violate the APA and the ESA**

FWS’ June 9, 2014 concurrence letter and biological opinion are arbitrary and capricious and violate the ESA, 16 U.S.C. § 1536, and the APA, 5 U.S.C. § 706, for a number of reasons including, but not limited to,:

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<sup>45</sup> 50 C.F.R. § 402.16.

<sup>46</sup> 16 U.S.C. § 1536(d).

<sup>47</sup> *Washington Toxics Coal. v. EPA*, 413 F.3d 1024, 1034-35 (9th Cir. 2005).

<sup>48</sup> <http://www.saj.usace.army.mil/Missions/Regulatory/Items-of-Interest/>.

- 1) FWS failed to consider the entire scope of the proposed proposal, including all direct, indirect, and cumulative impacts of phosphate mining.

FWS failed to analyze and evaluate the full scope of South Pasture Extension's impact on species habitat. FWS' effects analyses for Audubon's crested caracara, eastern indigo snake, and wood stork entirely omitted reference to habitat destruction and instead referred to these impacts as "temporary change," "temporary impacts," or "temporary disturbance."<sup>49</sup> Thus, FWS avoided considering habitat destruction by relying on unspecified and unproven future reclamation and restoration plans, which are not analyzed in the 2014 biological opinion itself or required as conditions of the permit. Furthermore, FWS failed to detail with sufficient specificity what effect the permanent loss of the original habitat will have, or the effect the modified land will have once it is "reclaimed" more than 20 years after it was destroyed. Moreover, it completely failed to analyze the effect of the transport and processing of phosphoric ore at Mosaic's nearby fertilizer plants and the effects of storing the byproduct of that process – phosphogypsum – in stacks throughout Florida.

FWS also failed to consider the full scope of the South Pasture Extension's impact on species habitat when it failed to consider habitat loss caused by the mine in the context of future human population growth, other regional development, and displacement of human and wildlife populations due to climate change and sea-level rise. While generally acknowledging that climate change in south Florida could exacerbate habitat impacts such as fragmentation and degradation, FWS failed to analyze the specific impact climate change and sea-level rise will have on species and habitat on the mine site. Likewise, it entirely failed to consider impacts to Florida panthers, including the long-term destruction of potentially suitable dispersal habitat and wildlife corridor. FWS also failed to consider the environmental baseline, accounting for the fact that there is not currently enough suitable habitat for panthers, or the scope and scale of habitat that has already been lost to phosphate mining in the region.

FWS failed to consider the full scope of the South Pasture Extension's impact on species habitat when it failed to analyze the cumulative effects of habitat loss either at the environmental baseline or cumulative effects analysis, which ignores the threat of "death by a thousand cuts" when FWS, in the current or future analyses, does not account for past habitat loss, however segmented and individually minor at the time. Moreover, the 2014 biological opinion does not consider the impacts of the project on the recovery of the species.

- 2) FWS failed to articulate a rational connection between the facts found and the choice made for the listed species.

FWS failed to provide sufficient information regarding the specific impact the proposed activities in the South Pasture Extension will have on listed species. For example, FWS failed to calculate the loss of wetlands and other surface waters that will result from the project and analyze with specificity the effect it will have on the wood stork; consider whether the loss of wetlands in the site will result in failed nesting attempts by wood storks at other sites outside the site due to lack of suitable foraging areas; resurvey the site to determine relevant location and

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<sup>49</sup> Biological Opinion at 3, 29, 34, 35, 37, 43.

habitat uses of eastern indigo snakes on the site; and analyze the amount and types of prey that will be available for wood storks during the mining process and before reclamation occurs.

FWS failed to articulate a rational connection between the facts found and the choice made for many of the listed species, particularly for listed species that are expected to abandon the site during the 20-year permit duration and then return following reclamation. For example, FWS concluded that the activities at the mine are not likely to jeopardize the continued existence of Audubon's crested caracara, finding long-term effects will be minor and site abandonment will be temporary because of future reclamation activities that, if successful, will benefit the caracara. However, the 2014 biological opinion also conceded that FWS does not know if disturbance from mining activities on the mine "will cause temporary or permanent abandonment of the nesting territory on the SPE or other territories in the action area." FWS also disclosed that "[i]t is difficult to estimate how many caracaras will use the site following construction and reclamation." Furthermore, FWS states that newly reclaimed land to the north of the mine "may provide alternate habitat for caracaras displaced" during the mining process; however, it offers no specific information about what the reclaimed habitat will be and whether it would have features caracaras require for essential behaviors such as feeding, breeding, and sheltering. FWS also makes unsubstantiated assumptions, with no further analysis, that degradation and loss of foraging habitat "may be offset somewhat if prey items for the caracara become available at sufficient densities inside the ditches, mine pits, and created littoral shelves within them, and adjoining created uplands and wetlands."

With regard to the eastern indigo snake, FWS failed to consider how the destruction of underground refugia and the translocation of gopher tortoises "and other commensals" would impact the snake's ability to survive in the surrounding areas and eventually return to the mine following mining and reclamation. Although FWS acknowledged that declines in gopher tortoise populations are harmful to maintaining suitable eastern indigo snake microhabitat, it did not discuss how removing gopher tortoises would impact the suitability of undeveloped habitat in the mine and surrounding areas. Furthermore, although FWS stated that indigo snakes will leave the mine and seek shelter in surrounding areas, it did not specify whether sufficient sheltering habitat exists in the surrounding areas. FWS also failed to sufficiently analyze the impact to eastern indigo snakes from take in the form of harm and harassment. FWS also failed to articulate a rational connection between the known information about eastern indigo snakes in the action area, the conclusion that 38.6-62.6 snakes have home ranges within the action area, and the decision to allow lethal take of six snakes over a rolling 5-year period during the life of the project.

FWS also failed to consider specific impacts to wood storks during the life of the project and following reclamation. FWS did not analyze with specificity the types and quantities of prey items that would be available in alternative sites once foraging areas in the mine are destroyed for mining. It also failed to analyze the suitability of the site for wood stork foraging following reclamation.

In that regard, FWS also failed to specify detailed permit conditions that mitigate impacts to listed species in the mine and surrounding areas. For example, FWS failed to provide specific measures that could be taken to conserve wood stork habitat, including but not limited to the

affirmative acts set out in the species' action plan,<sup>50</sup> such as restoring and enhancing habitat features that are beneficial to the stork and providing protection for nesting sites. FWS wholly failed to include avoidance measures for the eastern indigo snake, and the minimization and mitigation measures are weak, if not entirely ineffective. For example, allowing eastern indigo snakes "to move out of harm's way without being handled or relocated" after excavating potential refugia does not avoid take in the form of harassment, which already occurred during the excavation process. The 2014 biological opinion also provides no way for the agency to monitor take, including how many snakes are harassed and how many times each snake endures harassment.

3) FWS improperly relied on vague and unproven mitigation measures.

FWS failed to articulate a rational connection between the facts found and the choice made with regard to the mitigation value of future reclamation activities. FWS failed to analyze specific aspects of future reclamation activities that it concluded will offset impacts caused by mining activities in the mine. Furthermore, FWS failed to analyze or provide any factual basis for its conclusion that habitat destruction is "temporary." First, the 2014 biological opinion contains no facts that support FWS' conclusion that species displaced from the mine will return after the significant, 20-year period during which mining and reclamation activities will be completed. Second, the 2014 biological opinion fails to analyze specific reclamation measures that will benefit the species and restore ecological function to the extent that impacts from mining could be considered temporary. Moreover, it fails to analyze whether it is even feasible to restore habitat to its original structure and function following mining activities.

**C. FWS' Incidental Take Statement in the 2014 Biological Opinion on the South Pasture Extension is Arbitrary and Capricious and Violates the APA and Section 7 of the ESA**

The incidental take statement in FWS' 2014 Biological Opinion is arbitrary and capricious and does not meet the requirements of Section 7 of the ESA, 16 U.S.C. § 1536, its implementing regulations, 50 C.F.R. § 402.14(i), and the APA, 5 U.S.C. § 706, for a number of reasons.

First, FWS estimated that the take of one wood stork from vehicle collision over the course of the project, but no take from the loss or reduction of foraging habitat because any reduction in habitat is "temporary." The project would impact 1,472 acres of Corps jurisdictional wetlands that likely provide foraging habitat for the wood stork. Nothing in the 2014 biological opinion indicates that a temporary loss is not a take under the Endangered Species Act. Furthermore, nothing in the biological opinion demonstrates that the land will be reclaimed adequately and the prey base restored. In fact, the 2014 biological opinion indicates in its Terms and Condition that a reclamation plan has not yet been provided and will be evaluated at some unspecified future time prior to implementation. Such a reclamation plan should be evaluated in the biological opinion itself if FWS intends to rely on it to offset take. Finally, although FWS recognized mining activities will cause take in the form of harassment, it failed to provide in the incidental take statement a numerical limit or rational surrogate to determine when take in the form of

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<sup>50</sup> U.S. Fish and Wildlife Service, Wood Stork Recovery Plan: Revised Recovery Plan for the U.S. Breeding Population of the Wood Stork, 19–22 (Jan. 27, 1997), [http://ecos.fws.gov/docs/recovery\\_plan/970127.pdf](http://ecos.fws.gov/docs/recovery_plan/970127.pdf).



harassment has exceeded allowable levels. Consequently, the incidental take statement fails to provide a meaningful trigger to reinitiate consultation for the wood stork and is in violation of Section 7 of the ESA.

Next, although FWS set a numerical cap on take in the form of harassment of Audubon's crested caracara (up to four adults), it did not provide any specific monitoring and reporting requirements to determine whether a caracara has been harassed and when the allowable take has been exceeded. Consequently, the incidental take statement fails to provide a meaningful trigger to reinitiate consultation for Audubon's crested caracara and is in violation of Section 7 of the ESA.

Finally, while FWS recognized that the proposed actions in the mine will cause take of the eastern indigo snake in the form of harassment, it failed to include in the incidental take statement a numerical limit or rational surrogate to determine when this type of take has exceeded allowable levels. Additionally, the incidental take statement sets a numerical limit of six dead or injured eastern indigo snakes over a rolling five-year period, yet it does not provide a realistic monitoring plan that would lead to the discovery and reporting of such take. In fact, FWS conceded that there are no practical methods of survey for the eastern indigo snake. Consequently, the incidental take statement fails to provide a meaningful trigger to reinitiate consultation for the eastern indigo snake and is in violation of Section 7 of the ESA.

#### **D. The Corps' Reliance on FWS' Concurrence Letter and Biological Opinion on the South Pasture Extension is Arbitrary and Capricious in Violation of the APA and the ESA**

The Corps has an independent, substantive duty under Section 7 of the ESA to ensure that its actions are not likely to jeopardize listed species or adversely modify their critical habitat.<sup>51</sup> FWS' concurrence letter and biological opinion for the South Pasture Extension violates the ESA and the APA and is unlawful, and therefore the Corps' reliance on FWS' concurrence letter to fulfill its Section 7 procedural and substantive obligations is also arbitrary, capricious, and in violation of the ESA.<sup>52</sup> Furthermore, without a biological opinion from FWS and accompanying "incidental take statement" including "reasonable and prudent measures" and "terms and conditions" to minimize impacts and incidental take, the Corps does not have incidental take authorization, and both the Corps and Mosaic and any other third party that relies upon it are in violation of Section 9 of the ESA if any take occurs in the course of the proposed activities.<sup>53</sup>

#### **E. The Corps' and FWS' Failure to Reinitiate Consultation Regarding the Revised South Pasture Extension Mine Violates the ESA**

Upon information and belief, the details of the South Pasture Extension Mine have changed since the 2012 public notice and 2014 biological opinion. The Corps and FWS were required to

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<sup>51</sup> 16 U.S.C. § 1536(a)(2).

<sup>52</sup> *Id.*; see, e.g., *Center for Biological Diversity v. Salazar*, 804 F. Supp. 2d 987, 1010 (D. Ariz. 2011) (an action agency's reliance on a legally flawed biological opinion is arbitrary and capricious).

<sup>53</sup> 16 U.S.C. § 1536(b)(4); 16 U.S.C. § 1538.

reinitiate consultation when the proposal changed.<sup>54</sup> The Corps' and FWS' failure to do so violates Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2), and 50 C.F.R. § 402.16(c).

#### **F. The Corps' and FWS' Failure to Reinitiate Formal Consultation on the Proposed Project Because of New Information about the Eastern Indigo Snake Violates the Endangered Species Act**

The Corps and FWS are required to reinitiate formal consultation regarding the proposed project because there is new information proving that the eastern indigo snake analyzed in the 2014 biological opinion is actually the Gulf Coast indigo snake. The Corps' and FWS' failure to reinitiate consultation violates the ESA and 50 C.F.R. § 402.16(d).

On July 18, 2016, Krysko et al. published a peer-reviewed article identifying a new, cryptic species of indigo snake in the United States, the Gulf Coast indigo snake (*Drymarchon kolpobasileus*).<sup>55</sup> The study distinguishes the new species from the federally threatened eastern indigo snake (*Drymarchon couperi*) using morphological and molecular analyses, and it identifies new distributions for each discrete species based on their observed morphological and genetic differences.<sup>56</sup>

This study has several implications for the conservation of the species as a whole, the Central Florida Phosphate District, and in the South Pasture Extension project area. On a broad scale, this study takes an already rare and imperiled species of snake and effectively splits it into two separate species that inhabit even smaller ranges. With the apparent increased rarity of these two species, any proposed impact on "eastern indigo snakes" will need to be reassessed based on the ecology and conservation status of each distinct species. Locally, the study reveals that the species in Hardee County is not the eastern indigo snake, as it is identified in the 2014 Biological Opinion, but rather the cryptic Gulf Coast indigo snake. This constitutes new information for the purposes of requiring the Corps and FWS reinitiate consultation. FWS will need to reassess how this project will impact the snake and whether the authorized take and habitat loss will jeopardize the species.

#### **G. The Corps' and FWS' Failure to Reinitiate Formal Consultation on the Proposed Project Regarding a Sinkhole in the New Wales Phosphogypsum Stack Violates the Endangered Species Act**

On September 15, 2016, news broke that a sinkhole had opened up below and in a phosphogypsum stack at Mosaic's New Wales plant. The sinkhole had allowed at least 215 million gallons of contaminated water to pour into the Floridan aquifer. The Corps and FWS are required to reinitiate formal consultation regarding the proposed project because the sinkhole in the New Wales phosphogypsum stack constitutes new information. The Corps' and FWS' failure to re-initiate consultation violates the Endangered Species Act and 50 C.F.R. § 402.16(d).

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<sup>54</sup> The requirement to reinitiate consultation pursuant to 50 C.F.R. § 401.16 "applies to both formal and informal consultation." *Conservation Cong. v. Finley*, 774 F.3d 611, 619 (9th Cir. 2014).

<sup>55</sup> See Krysko, K.L., M.C. Granatosky, L.P. Nuñez & D.J. Smith. 2016. A cryptic new species of Indigo Snake (genus *Drymarchon*) from the Florida Platform of the United States. *Zootaxa* 4138(3): 549–569 (enclosed).

<sup>56</sup> *Id.* (entire).

Phosphogypsum stacks are located in the broader study area of the AEIS and their number and extent are directly a result of past and future phosphate mining. The proposed mines, South Pasture Extension Mine included, will increase the need for such facilities.

There are 22 gypsum stacks in the Central Florida Phosphate District, including the New Wales stack that recently caused at least 215 million gallons of radioactive hazardous waste to spill into the Floridan aquifer.<sup>57</sup> This is not the first time a sinkhole has opened up below a radioactive phosphogypsum stack, it's not even the first time a sinkhole has opened up at this site. In 1994, a sinkhole formed under the north stack, and in 2004 and 2013, two other "anomalies" were remediated.<sup>58</sup>

Furthermore, in 2009 a sinkhole at the PCS White Springs facility released more than 90 million gallons of hazardous wastewaters into the Floridan aquifer.<sup>59</sup> In October 2015, EPA and Mosaic settled a lawsuit regarding a series of alleged violations of how Mosaic handles and stores its hazardous waste.

The Southwest Florida Water Management District believes that sinkholes may form when "industrial phosphate run-off and materials settlement storage ponds are created..... The substantial weight of the new material can trigger an underground collapse of supporting material, thus creating a sinkhole."<sup>60</sup>

More than 95 percent of phosphate rock production domestically is used to produce wet-process phosphoric acid for fertilizer application.<sup>61</sup> As of 2014, the U.S. was the leading importer of phosphate rock in the world, and reported no phosphate rock exports in 2013, 2014, or 2015.<sup>62</sup> A 2016 report by USGS found that all phosphate rock mining companies are vertically integrated, having one or more fertilizer plants, usually located near the mine.<sup>63</sup> Therefore, the creation of phosphogypsum in Florida is the unavoidable, predictable, and necessary result of phosphate mining in Florida that should have been evaluated in the 2014 biological opinion and serves as the basis for the reinitiation of consultation.

## V. Additional Violations

In addition to the violations alleged above, the Corps offended NEPA, 42 U.S.C. §§ 4321 *et seq.*, and the CWA, 33 U.S.C. §§ 1251 *et seq.*, in approving the proposed project. Unless the Corps voluntarily rescinds its approval of the South Pasture Extension and undertakes a comprehensive Environmental Impact Statement to evaluate the full effects of the project, the organizations providing ESA notice herein maintain the right to file suit under NEPA and the CWA, and to

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<sup>57</sup> FAEIS at 3-6.

<sup>58</sup> Fuleihan, N.F. 2013. Investigation of 2013 Anomaly New Wales Plan Closed North Gypstack.

<sup>59</sup> [www.sinkhole.org/facts10.php](http://www.sinkhole.org/facts10.php).

<sup>60</sup> <https://www.flmines.com/sinkHoles.html>.

<sup>61</sup> Jasinski, S.M. 2016. 2014 Minerals Yearbook. Phosphate Rock [Advanced Release]. Accessed: [http://minerals.usgs.gov/minerals/pubs/commodity/phosphate\\_rock/myb1-2014-phosp.pdf](http://minerals.usgs.gov/minerals/pubs/commodity/phosphate_rock/myb1-2014-phosp.pdf).

<sup>62</sup> USGS National Minerals Information Center. 2015. Mineral Industries Survey. Accessed: [http://minerals.usgs.gov/minerals/pubs/commodity/phosphate\\_rock/mis-2015cy-phosp-potas.pdf](http://minerals.usgs.gov/minerals/pubs/commodity/phosphate_rock/mis-2015cy-phosp-potas.pdf).

<sup>63</sup> Jasinski 2016.

seek a preliminary injunction preventing the proposed project from moving forward. Neither NEPA nor the CWA provisions to which the Corps is in violation requires a notice of intent to sue. The undersigned organizations may seek relief under NEPA and/or the CWA before the ESA claims described in this letter become ripe.

## VI. Conclusion

For the above stated reasons, FWS and the Corps have violated and remain in ongoing violation of Sections 7 and 9 the ESA. If these violations are not cured within sixty days, the Center for Biological Diversity, Manasota-88, People for Protecting Peace River, and Suncoast Waterkeeper intend to file suit for declaratory and injunctive relief, as well as attorney and expert witness fees and costs. This notice letter was prepared based on good faith information and belief after reasonably diligent investigation. If you believe that any of the foregoing is factually erroneous or inaccurate, please notify us promptly.

Sincerely,



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enclosure: Kysko et al. 2016

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