

11. **OLD BUSINESS**

a. Water Quality Issues

i. Update and status of Lake Okeechobee Releases

3. Letter dated June 4, 2010 to Army Corps of Engineers (ACOE) and NOAA regarding "Petition to Reinstate Section 7 Consultation for Smalltooth Sawfish Critical Habitat Adversely Affected by the Lake Okeechobee Regulation Schedule AND Letter dated June 22, 2010 to the Army Corps of Engineers (ACOE) requesting records under the Freedom of Information Act (Vice Mayor Denham)



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June 4, 2010

VIA FEDEX

FOIA Officer
U.S. Army Corps of Engineers – Jacksonville District
701 San Marco Boulevard
Jacksonville, FL 32207-0019

Re: Freedom of Information Act Request

Dear FOIA Officer:

I am writing pursuant to the Freedom of Information Act, 5 U.S.C. § 552, as amended (“FOIA”), and the Department of the Army’s (“DA”) implementing regulations at 32 C.F.R. Part 518 to request copies of records, as that term is defined in 32 C.F.R. § 518.7(b), in the possession, custody, or control or within the knowledge of the U.S. Army Corps of Engineers. Specifically, I am requesting the following:

- All records related to the designation of critical habitat in Florida for the smalltooth sawfish (*Pristis pectinata*) by the National Marine Fisheries Service (“NMFS”) under the Endangered Species Act (“ESA”). See *Critical Habitat for the Endangered Distinct Population Segment of Smalltooth Sawfish*, 74 Fed. Reg. 45353 (Sept. 2, 2009).
- All records, including correspondence with NMFS, studies, analyses, scientific conclusions, and Section 7 consultation documents, generated from January 1, 2007 to the present, regarding the effects of the Lake Okeechobee Regulation Schedule (“LORS”), other features of the Central and South Florida (“C&SF”) Project, or releases of fresh water on the smalltooth sawfish or its critical habitat.
- All records, including correspondence with NMFS, regarding reinitiating ESA Section 7 consultation with NMFS for the LORS and other features of the C&SF Project due to the designation of critical habitat for the smalltooth sawfish.
- All records, generated from January 1, 2009 to the present, regarding revising or supplementing the Corps’ analyses performed under the National Environmental

FOIA Officer
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Procedure Act on the LORS and other features of the C&SF Project to address the designation of critical habitat for the smalltooth sawfish.

The foregoing request excludes the following records:

- Revised Draft Supplemental Environmental Impact Statement – Lake Okeechobee Regulation Schedule (June 2007)
- Final Supplemental Environmental Impact Statement – Lake Okeechobee Regulation Schedule (Nov. 2007)
- Letter from Roy E. Crabtree (NMFS) to Chief David Hobbie (Jacksonville District – U.S. Army Corps), Re: Draft Supplemental Environmental Impact Statement (DSEIS) for changes to Lake Okeechobee Regulation Schedule (LORS) (Sept. 11, 2007)

If you regard any responsive information as exempt from disclosure under FOIA, please exercise your discretion to disclose it nevertheless. President Obama has directed federal agencies to “adopt a presumption in favor of disclosure” for all decisions under FOIA. President Obama’s Memorandum for the Heads of Executive Departments and Agencies Concerning the Freedom of Information Act 1 (Jan. 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Freedom_of_Information_Act/. “An agency should not withhold records merely because it can demonstrate, as a technical matter, that the records fall within the scope of a FOIA exemption.” Attorney General Holder’s Memorandum for the Heads of Executive Departments and Agencies Concerning the Freedom of Information Act 1 (March 19, 2009), *available at* <http://www.justice.gov/ag/foia-memo-march2009.pdf>. The FOIA requires the release of any non-exempt, reasonably segregable portions of a record or records. 5 U.S.C. § 552(b). Accordingly, in the alternative and as required by FOIA, please provide a redacted version of the record containing all non-exempt portions of responsive records.

Should you elect to invoke an exemption to FOIA, please provide the required full or partial denial letter and sufficient information to appeal the denial. This information should include:

- Basic factual material including the originator, date, length, addresses, and subject matter of the withheld items; and
- Explanations and justifications for the denial, including the identification of the exemption applicable to the withheld document or portions of the withheld document found to be subject to the exemption and how each exemption applies to withheld material.

FOIA Officer
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FOIA imposes a deadline of twenty (20) business days for your response. Consistent with the applicable regulations and policies, I authorize costs up to \$500 associated with copying and review time to prepare the response to this request. Please contact me in advance if the costs will, or are anticipated to, exceed that amount. Please forward all responsive records in hard copy to the following address:

W. Parker Moore, Esq.
Beveridge & Diamond, P.C.
1350 I Street, NW, Suite 700
Washington, DC 20005-3311

If you have any questions, you can contact me at (202) 789-6028. Thank you for your attention to this request.

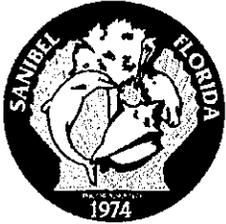
Sincerely yours,

A handwritten signature in black ink, appearing to read "W. Parker Moore". The signature is fluid and cursive, with the first name "W." and last name "Moore" clearly distinguishable.

W. Parker Moore

cc: Ken Cuyler – City of Sanibel

June 22, 2010



City of Sanibel

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VIA FEDEX

Mr. Eric Summa, Chief
Environmental Branch – Planning Division
U.S. Army Corps of Engineers
Jacksonville District Office
Attn.: CESAJ-PD-E
701 San Marco Blvd.
Jacksonville, FL 32207

Dr. Roy E. Crabtree, Regional Administrator
NOAA Fisheries Service
Southeast Regional Office
263 13th Avenue South
Saint Petersburg, Florida 33701

Re: Petition to Reinitiate Section 7 Consultation for Smalltooth
Sawfish Critical Habitat Adversely Affected by the Lake
Okeechobee Regulation Schedule

Dear Mr. Summa and Dr. Crabtree:

In November 2007, the U.S. Army Corps of Engineers – Jacksonville District issued its Final Supplemental Environmental Impact Statement (“FSEIS”) for the Lake Okeechobee Regulation Schedule (“LORS”) – the schedule governing freshwater releases from Lake Okeechobee. Before issuing the FSEIS, the Corps consulted with the National Marine Fisheries Service (“NMFS” or “the Service”) as required by Section 7 of the Endangered Species Act (“ESA”) to evaluate the impacts of the LORS on threatened and endangered species and their critical habitat. One of the species the agencies analyzed during this consultation was the endangered smalltooth sawfish (*Pristis pectinata*). That consultation focused entirely on the LORS’s impacts on the smalltooth sawfish itself because NMFS had not yet designated critical habitat for the species. Nevertheless, the Service directed the Corps to reinitiate consultation if critical habitat subsequently was designated for the sawfish.

In September 2009, NMFS designated critical habitat for the smalltooth sawfish. That habitat is located downstream of Lake Okeechobee and is adversely affected by the continual freshwater releases into the Caloosahatchee River and Estuary that occur under the LORS. Based on available information, we believe the Corps has not reinitiated consultation with NMFS. Accordingly, the City of Sanibel hereby petitions the Corps and NMFS to reinitiate Section 7 consultation on the LORS to determine the extent of the Lake schedule's destruction or adverse modification to the critical habitat of the smalltooth sawfish and to institute reasonable and prudent alternatives to minimize these impacts.

Background

Lake Okeechobee and the Okeechobee Waterway are part of the vast water management system known as the Central and South Florida ("C&SF") Project, which is managed by the Corps, in conjunction with the South Florida Water Management District ("SFWMD") and other federal, tribal and state agencies. The C&SF Project is intended to provide flood control, water supply for municipal, industrial, and agricultural uses, prevention of saltwater intrusion, water supply for Everglades National Park, and protection of fish and wildlife resources. The Okeechobee Waterway runs through Lake Okeechobee – a 730 square mile freshwater lake. From the Lake, freshwater is discharged through manmade structures to the south to the Everglades Agricultural Area, to the east to the St. Lucie Canal, and to the west to the Caloosahatchee River and Estuary. The Caloosahatchee bears the brunt of these discharges under the LORS.

On September 2, 2009, NMFS issued a final rule designating critical habitat for the smalltooth sawfish. *Critical Habitat for the Endangered Distinct Population Segment of Smalltooth Sawfish*, 74 Fed. Reg. 45353 (Sept. 2, 2009). The final rule, which took effect October 2, 2009, identifies two "units" in southwestern Florida, totaling 840,472 acres, as sawfish critical habitat. The Charlotte Harbor Estuary Unit, comprising 221,459 acres, includes all of the Caloosahatchee River up to the Franklin Lock and Dam and extends through the Caloosahatchee Estuary to the northern edge of Sanibel Island. *See id.* at 45376-77.

In the final rule, NMFS stated that the key conservation objective for the sawfish is "the need to facilitate recruitment into the adult sawfish population by protecting juvenile nursery areas." *Id.* at 45353. To accomplish this, NMFS determined that two habitat features must be protected: red mangroves and "shallow euryhaline habitats" (habitats of varying salinity) characterized by water depths between the Mean High Water line and three feet. *Id.* These features, which occur throughout the Charlotte Harbor Estuary Unit, are essential to sawfish conservation because they "provide for predator avoidance

and habitat for prey in the areas currently being used as juvenile nursery areas.”
Id. As a result, NMFS concluded, these features “may require special management considerations or protections due to human and natural impacts.”
Id.

The Corps and NMFS Must Reinitiate Section 7 Consultation on the LORS

Section 7(a)(2) of the ESA requires each federal agency to consult with NMFS when any action it carries out, funds, or authorizes may affect a listed species or its habitat to ensure that the action “is not likely to jeopardize the continued existence of” the species “or result in the destruction or adverse modification” of its critical habitat. 16 U.S.C. § 1536(a)(2).

In 2006, the Corps initiated Section 7 consultation with NMFS on its proposal for the LORS. It pursued informal consultation with NMFS to determine the potential effects of the LORS on the sawfish and ultimately whether formal consultation would be necessary. At that time, the agencies concluded that the proposed Lake schedule “may affect” but was “not likely to adversely affect” the sawfish, and terminated their consultation with no further analysis. But because NMFS had not yet designated critical habitat for the sawfish when this informal consultation took place, the agencies evaluated only the potential effects on the sawfish itself, not its habitat.

NMFS’s regulations require a federal agency to reinitiate Section 7 consultation on an action “where discretionary Federal involvement or control over the action has been retained or is authorized by law and . . . a new species is listed or critical habitat designated that may be affected by the identified action.” 50 C.F.R. § 402.16. The LORS meets these criteria. First, the Corps continues to maintain involvement or control over freshwater releases from Lake Okeechobee under the LORS through its control over the locks and dams along the Okeechobee Waterway. NMFS recognized as much when it directed the Corps to reinitiate consultation if critical habitat is designated that may be affected by the LORS. *See* Letter from Roy E. Crabtree – NMFS to David Hobbie – U.S. Army Corps of Engineers (Sept. 11, 2007).

Second, all available information shows that the LORS is adversely affecting the smalltooth sawfish’s newly-designated critical habitat. According to NMFS, red mangroves and adjacent shallow euryhaline habitats – the two habitat features necessary for sawfish survival – are particularly susceptible to impacts from human activities because they tend to occur in areas where urbanization is taking place. 74 Fed. Reg. at 45367. Sawfish nursery areas routinely are affected by dredging and disposal activities, runoff from land development, and “alteration of natural freshwater discharges to coastal

habitats,” which “can alter salinity regimes downstream.” *Id.* When combined with natural factors, such as major storm events, impacts from these activities “can significantly affect the quality and quantity” of the red mangroves and shallow euryhaline habitats “and their ability to provide nursery area functions (*i.e.*, refuge from predators and abundant food resources) to juvenile smalltooth sawfish.” *Id.* Moreover, NMFS concluded that these impacts are expected to continue, as salinity regimes in the two critical habitat units “may be altered in the future by projects implemented under the Comprehensive Everglades Restoration Project” (“CERP”). *Id.* The LORS causes precisely these same effects.

As the Corps explained in the FSEIS for the LORS, Lake Okeechobee is a primary source of freshwater for the Caloosahatchee River and Estuary. LORS FSEIS, at 108. Caloosahatchee River water quality “varies as a function of freshwater discharge” from upstream sources. *Id.* at 141. As a result, “the timing, distribution, quality, and volume of freshwater entering the estuary from the watershed and Lake Okeechobee ha[ve] resulted in negative ecological impacts.” *Id.* at 108. In particular, “[t]he volume, duration and timing of freshwater inflow to estuaries is extremely important for the optimal balance of salinity,” which is needed to maintain saltwater fish spawning areas. *Id.* at 161. By upsetting the balance of salinity in the smalltooth sawfish’s critical habitat throughout the Caloosahatchee River and Estuary, the LORS plainly affects this habitat. As a result, the Corps and NMFS must reinitiate Section 7 consultation on the LORS.

The Corps and NMFS Should Complete Formal Consultation

Now that critical habitat for the sawfish has been designated, it is incumbent on NMFS and the Corps to undertake formal consultation under Section 7(a)(2) when they reinitiate the consultation process. As discussed above, the agencies limited their initial ESA review of the LORS’s effect on the smalltooth sawfish to informal consultation. From this consultation, NMFS concurred with the Corps’ determination that the LORS “may affect” but was not likely to adversely affect the sawfish because individual sawfish could move upstream or downstream in the Caloosahatchee to areas with more tolerable salinity regimes that were less degraded by the freshwater releases from Lake Okeechobee. *See* Letter from Roy E. Crabtree – NMFS to David Hobbie – U.S. Army Corps of Engineers (Sept. 11, 2007). At the time, however, no critical habitat for the sawfish had been designated, and the LORS was intended to be in place only until 2010, at which point the Corps was supposed to institute a more balanced schedule for releasing freshwater from Lake Okeechobee.

The current situation is vastly different than it was when the agencies first consulted in 2007. NMFS has designated critical habitat for the sawfish, and – unlike the fish itself – this habitat is sessile. It cannot relocate to healthier areas of the Caloosahatchee when destructive freshwater flows are released from Lake Okeechobee under the LORS. Moreover, it has become clear that the Corps will not replace the LORS in 2010 or at any time in the near future. See LORS FSEIS, Appx. H (responding to the City of Sanibel’s comments on the LORS Draft SEIS and explaining that the 2010 timetable has been replaced with a System Operation Manual (“SOM”) review for numerous CERP projects). Because any revisions to the LORS now are linked to completion of other CERP projects, progress on which has been particularly slow, the LORS is destined to be in place and adversely affecting smalltooth sawfish critical habitat for a minimum of several more years. Consequently, the Corps and NMFS must engage in formal consultation when they reinitiate Section 7 consultation on the LORS. See, e.g., Endangered Species Consultation Handbook at 3-7 (requiring formal consultation “if any adverse effect to the listed species or critical habitat may occur as a direct or indirect result of the proposed action or its interrelated or interdependent actions”); *Bensman v. U.S. Forest Service*, 984 F. Supp. 1242, 1249 (W.D. Mo. 1997) (enjoining a logging project where the U.S. Forest Service and the U.S. Fish and Wildlife Service inappropriately relied on informal consultation where formal consultation was required).

NMFS Should Require Modifications to the LORS to Minimize Impacts to Sawfish Habitat

When a federal action, such as the LORS, likely will “result in the destruction or adverse modification” of critical habitat, the ESA and its implementing regulations require NMFS to provide written requirements for minimizing the impact in the form of “reasonable and prudent alternatives.” 16 U.S.C. § 1536(a); 50 C.F.R. § 402.14(i)(2). The most straightforward way to accomplish this would be for NMFS to require the Corps to modify the current LORS to establish stable freshwater flow levels, and thus acceptable salinity regimes, in the waters that serve as critical habitat for the smalltooth sawfish.

NMFS contemplated the possibility of such a modification of the LORS when it designated the sawfish’s critical habitat. Specifically, the Service highlighted “limitations/ restrictions on modifying freshwater flow” as one type of project modification that may be required under future Section 7 consultations involving the new critical habitat designation. 74 Fed. Reg. at 45370. Requiring such a modification is particularly appropriate here given that the Corps no longer plans to develop and institute a Revised LORS by 2010, thus prolonging its use of the current Lake schedule indefinitely. See LORS

FSEIS, Appx. H (discussing the Corps' substitution of the SOM for the 2010 Revised LORS).

There are several available options for modifying the LORS to minimize the destruction or adverse modification of sawfish critical habitat attributed to freshwater releases under the current Lake schedule. First, NMFS should impose as a reasonable and prudent alternative to the current LORS a modified Lake schedule that reduces the number and frequency of freshwater flows greater than 2800 cfs and minimizes prolonged flows of 4500 cfs or greater in the Caloosahatchee. As the Corps recognized in the LORS FSEIS, freshwater discharges between 450 cfs and 2800 cfs "sustain an ecologically appropriate range of salinity conditions" in the Caloosahatchee Estuary:

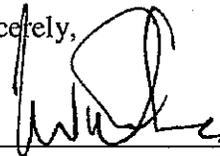
Flows greater than 2800 cfs are considered by estuarine scientists as being high for the Caloosahatchee Estuary. High flows in this range can cause salinity to fall below the tolerance range of many organisms living in the more marine lower estuary. Prolonged flows of 4500 cfs are considered more undesirable as salinity is depressed in San Carlos Bay which may cause adverse effects to seagrasses and other organisms in this region. High flows greater than (>) 2800 cfs in the Caloosahatchee Estuary may prevent the early life stages of fish, shellfish and other commercially and recreationally important species from utilizing estuarine habitat. Alternatives with the fewest number of mean monthly flows exceeding 2800 cfs are preferred.

Id. at 92. Notwithstanding this conclusion, the Corps' modeling for the current LORS projects that the Caloosahatchee will suffer from 35 months of mean monthly freshwater flows of 2800-4500 cfs and 29 months of mean monthly freshwater flows above 4500 cfs during the 36-year simulation period. *Id.* at 148. Moreover, the Corps anticipates that, at least 65 times during the same time period, the Caloosahatchee will be flooded with long-duration, extreme high volume freshwater flows (>4500 cfs) lasting 6-12 weeks. *Id.* at 149. If these high volume freshwater flows are allowed to continue with the same frequency and duration under the LORS, the critical habitat for the smalltooth sawfish will be destroyed or adversely modified. *See id.* at 147-148 (discussing the significant adverse effects of freshwater releases on salinity levels and thus the ecological health of the estuary). Accordingly, the LORS should be modified to redistribute Lake Okeechobee's freshwater releases away from the Caloosahatchee River and Estuary to reduce its impacts on smalltooth sawfish critical habitat.

Second, NMFS should require the Corps to incorporate into the LORS the storage of water from Lake Okeechobee on public and private lands. As the Corps explained in the FSEIS for the LORS, the SFWMD Governing Board passed a resolution in January 2007 requesting the Corps to consider increased water storage capacity on public and private lands in the Okeechobee Watershed to receive water releases from Lake Okeechobee. *Id.* at 102. The Corps added that “[t]he SFWMD lands for water storage would be utilized to achieve a more refined balance between the competing needs of Lake Okeechobee and estuarine ecosystems, flood control, and water supply” and stated that “[t]he Corps is strongly supportive of this initiative and continues to work with SFWMD on ways to proceed with the action.” *Id.* Yet, despite that the SFWMD notified the Corps in 2007 that it already had identified 150,000 acres of land for water storage in areas south of the Lake and planned to identify an additional 300,000 acres, the Corps still has not taken any action on the initiative beyond performing preliminary modeling that confirms the ecological benefits to be gained from incorporating these storage areas into the LORS. *Id.* at 102-106. As part of the consultation process, NMFS should require the Corps to act on its commitment to advance the storage of water from the Lake on public and private lands and to incorporate such water storage into the LORS. As part of this process, the Corps should coordinate with SFWMD to ensure that their efforts are aligned and productive.

Thank you for considering this petition to reinitiate ESA Section 7 consultation on the LORS in light of the designation of critical habitat for the smalltooth sawfish. If you have any questions, you may contact our City Attorney, Ken Cuyler, at (239) 472-4359.

Sincerely,



Mick Denham, Vice-Mayor
City of Sanibel

Cc: Beveridge & Diamond, PC
Sanibel City Council
Judith A. Zimomra, City Manager
Kenneth B. Cuyler, City Attorney