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February 24, 2021
File: Eastern Collier Multiple Species Habitat Conservation Plan

Attention: Robert Tawes
Chief, Environmental Review Division
U.S. Fish and Wildlife Service, Southeast Region
1875 Century Boulevard
Atlanta, Georgia 30345
Robert_Tawes@fws.gov

Reference: Comments on December 30, 2020, Draft Biological Opinion on the Eastern Collier Multi-Species Habitat Conservation Plan

Dear Rob:

I am writing on behalf of the Eastern Collier Property Owners (ECPO), who submitted applications for incidental take permits (ITPs) in June 2010[1] and prepared a Habitat Conservation Plan (HCP) in support of those applications.[2] This letter responds to the draft "Biological Opinion and Conference Opinion, Eastern Collier Multi-Species Habitat Conservation Plan," prepared by the Service's South Florida Ecological Services Field Office and provided to the Applicants on December 30, 2020 (the Draft BO).

The Applicants have prepared the attached outline to summarize their primary concerns with the Draft BO. In particular, the outline focuses on three issues:

> First, the Draft BO does not analyze the ITPs requested by the Applicants. The Applicants requested ITPs for incidental take, only in the form of harassment, for the Florida panther and most of the other covered species. The potential harassment would result from temporary disturbances (such as human presence and activity, noise, vibration, and light) caused by construction and mining activities. Correspondingly, the HCP is designed to offset the impacts of the anticipated harassment by permanently preserving and maintaining over 100,000 acres of valuable habitat. The Applicants do not expect to

[1] At the request of the U.S. Fish and Wildlife Service (FWS or the Service), the Applicants resubmitted their ITP applications in 2018 using the new application form issued by FWS, for the purpose of confirming contact information for the Applicants and providing updated contact information to the extent necessary.

[2] The HCP is the result of a collaborative effort by the Applicants and four leading conservation groups: Defenders of Wildlife, Florida Wildlife Federation, Audubon Florida and Audubon of the Western Everglades. The HCP would permanently preserve over 100,000 acres of private land worth an estimated $1.4 billion that could otherwise be developed, to provide valuable habitat for the Florida panther and eighteen other protected species. As a result of this preservation, wildlife dispersal corridors that provide crucial linkages to public conservation lands would be permanently preserved, and new development within the HCP area would be limited to less than 40,000 acres and clustered in areas with little or no habitat value (such as intensively farmed agricultural areas).

Reference: **Comments on December 30, 2020, Draft Biological Opinion on the Eastern Collier Multi-Species Habitat Conservation Plan**

cause incidental take by harm (*i.e.*, death or injury) for the Florida panther or most of the covered species, and do not request ITPs for harm for those species. But the Draft BO does not analyze ITPs for harassment (as requested by the Applicants), and instead analyzes ITPs only for harm. By analyzing the HCP's ability to offset harm coverage the Applicants do not request, instead of its ability to offset the harassment coverage actually requested by the Applicants, the Draft BO substantially undervalues the HCP and requires mitigation unrelated to the Applicants' requested ITPs.

Second, the Draft BO precludes the incidental take coverage the Applicants requested. Harassment of the Florida panther and other covered species is a form of take resulting from disturbances (such as human presence and activity, noise, vibration, and light) long recognized in biological opinions and court decisions. Yet the BO states that incidental take in the form of harassment will not be authorized, leaving the Applicants potentially liable for the one form of incidental take for which they requested ITPs for the Florida panther and most of the other covered species.

Third, the Draft BO relies on a circuitous chain of causation that is scientifically flawed and legally defective to tie panther-vehicle mortality (PVM) to the ITPs. The Draft BO states that the ITPs will cause take in the form of third-party vehicle collisions with panthers on public roads outside the HCP area. But the Applicants do not control third-party vehicle operations or public roads, and the Service is prohibited from authorizing take that is not directly controlled by the Applicants or that occurs outside of areas controlled by the Applicants. Thus, the BO wrongly attributes take to the Applicants that the Service cannot authorize, creating an inherent disconnect between the action and the Draft BO and resulting legal vulnerabilities.

These fundamental flaws in the Draft BO, unless corrected, undermine the Service's action and leave the Applicants exposed to liability for the exact form of incidental take for which they sought ITPs. The Applicants consider these risks unacceptable, and are unable to move forward with the HCP and ITP applications unless the Draft BO is revised to correct these flaws.

Regards,

Stantec Consulting Services Inc.

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Attachment: ECPO's High-Level Comments on Draft BO

Reference: **Comments on December 30, 2020, Draft Biological Opinion on the Eastern Collier Multi-Species Habitat Conservation Plan**

cc (by email only) David Dell
Leopoldo Miranda
John Tirpak
Larry Williams
Roxanna Hinzman

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Attachment
ECPO's High-Level Comments on Draft BO

I. The Draft BO Does Not Analyze the ITPs Requested by the Applicants.

A. The Applicants requested ITPs for incidental take, only in the form of harassment, for the Florida panther and most of the other eighteen covered species. The harassment would be caused by disturbances associated with construction and mining, including human presence and activity, noise, light, and vibrations.

1. The HCP specifies incidental take, only in the form of harassment, for the Florida panther and most other covered species, and take in the form of harassment or harm for certain ground-burrowing species – including gopher tortoise, gopher frog, eastern indigo snake, and eastern diamondback rattlesnake – as well as the Florida bonneted bat.

2. The HCP explains that no injury or death is anticipated for Florida panther or most other covered species as a result of the covered activities, and take in the form of harm is therefore not requested. *See*, *e.g.*, HCP at i; 99.

3. The Service's draft Environmental Impact Statement (DEIS) likewise describes the Service's proposed action as authorizing incidental take in the form of harassment for the Florida panther and most other covered species. *See* DEIS at 79 ("the form of 'take' anticipated to occur would be incidental to otherwise lawful activities and would generally be limited to unintentional "harassment" (*e.g.*, a development activity that unintentionally annoys a species to the extent that normal behavioral patterns are disrupted) or 'harm'").[1]

B. But the Draft BO treats the ITPs as authorizing take in the form of harm (*i.e.*, death or injury) for all covered species, and *not* authorizing harassment for any species.

1. *See* Draft BO at 5 ("harass is not a form of incidental take permitted"); 316 ("All instances of incidental take we predict are in the form of harm, *i.e.*, actual death or injury …").

2. The Applicants do not expect to cause incidental take by harm, except potentially with respect to certain ground-dwelling species (gopher tortoise, gopher frog, eastern indigo snake, eastern diamondback

[1] ECPO agrees that incidental take associated with its covered activities (construction and mining) would generally be limited to harassment (for the Florida panther and most other covered species), and that any harm would occur only to certain ground-dwelling species and potentially the Florida bonneted bat. Based on the Service's October 2019 Florida bonneted bat keys and survey protocols (which post-date ECPO's most recent HCP), the potential to harm the bat (which would occur through unintentional destruction of a roost tree) is minimal.

rattlesnake) and the Florida bonneted bat, and do not request ITPs for harm for the Florida panther or any species other than those noted.

C. The Draft BO treats the ITPs as authorizing "development", but the requested ITPs would authorize only incidental take resulting from covered activities (construction and mining), not the covered activities themselves (much less overall "development").

1. The effects analysis describes the action as "development" and earth mining. *See, e.g.,* Draft BO at 117.

2. But the Applicants are not asking the Service to authorize "development" or earth mining. Rather, the Applicants are requesting authorization only for *incidental take* that results from construction and earth mining.

3. The BO fails to recognize the critical distinction between the requested ITPs' authorization of incidental take (the action subject to section 7 consultation) and the Applicants' underlying private activities (construction and earth mining), despite the HCP Handbook's emphasis of that very distinction at 4-14:

> A basic tenet underlying incidental take permit applications is that the Services are not authorizing the applicant's activities that are causing the take. Instead, the Services are authorizing the incidental take that results from the applicant's covered activities. However, stakeholders often do not understand this concept, at least initially, so we find ourselves spending weeks or months responding to issues and concerns that are associated with an applicant's project for which the Services have no control over via our ESA authority. For these issues and concerns, we must clearly and consistently distinguish between our proposed action (*i.e.*, issuance of an ESA incidental take permit for the purpose of authorizing incidental take for covered activities within the context of an HCP) and the specific activities of the applicant.

D. The Draft BO misperceives and undervalues the HCP by evaluating it in terms of its ability to offset harm (specifically, third-party vehicle strikes), but the HCP is designed to offset the harassment projected to result from the Applicants' covered activities (*e.g.*, construction and mining activities), not harm for the panther or most of the other covered species.

1. The permanent preservation and maintenance of over 100,000 acres of valuable habitat, including important wildlife dispersal corridors that interconnect key public lands, is more than sufficient to offset the harassment anticipated by the HCP.

a. The HCP also provides extensive value relative to conditions that would exist in the absence of the HCP. Without the HCP, nearly

all lands within the 151,000-acre HCP area would be subject to development.

b. Absent the HCP, these lands could proceed under base zoning of 1 house per 5 acres; the sprawling 58,000-acre Golden Gate Estates, which sits alongside the HCP area and is the fastest growing development in the County, is an example of how development could proceed without the HCP.

c. Alternatively, or in addition to 1-house per 5-acre development, higher density development could proceed one-project-at-a-time under the county Rural Lands Stewardship Program (RLSP).

    i. Without the HCP, nearly the entire HCP area could be developed under 1-house per 5-acre base zoning; alternatively, 71,000 acres of the HCP area could be developed (through a combination of higher-density development on up to 45,000 acres under the RLSP and 1-house per 5-acre development on up to an additional 26,000 acres) within areas designated as "Open" under the RLSP.

    ii. Accordingly, the permanent preservation and maintenance of over 100,000 acres of land under the HCP would result in the Applicants foregoing development on an extensive amount of private land open to development, and instead permanently preserving those portions of the HCP area that have the highest habitat values.

d. No matter how development proceeds in the future, without the HCP more land will be subject to development with none of the regional-scale conservation planning or funding provided by the HCP.

e. The negative implications of the no-HCP scenario for species and habitat are considerable, yet are largely ignored by the Draft BO.

a. The Draft BO fails to provide a quantitative assessment of habitat and species impacts if HCP was not implemented and Golden Gate Estates-type development occurred within the HCP area instead (1 dwelling unit per 5 acres).

    i. Under that scenario, the encroachment of single-family residential development along and within the regional wildlife corridors (Camp Keais Strand and Okaloacoochee Slough) would result in habitat losses and fragmentation that would be permanently prevented by implementing the HCP, potentially resulting in 1 house per 5 acre development throughout the HCP area (including within

the highest habitat value areas that are preserved under the HCP).

ii. The Service could readily calculate the habitat and species impacts of this development, including the homes, driveways and yards as well as the miles of new roads (on a grid pattern) that would occur under that scenario, based on the existing property and road pattern within the 58,000-acre Golden Gate Estates.

iii. Notably, while the HCP does not propose the need for any new roads external to the developments within the Covered Activities land use designation, all of the roads within Golden Gate Estates are essentially external to residential development, and residents must travel considerable distances to procure goods and services (in contrast to master-planned communities proposed under the HCP, where much of the travel is internal to developments and all internal roadways have low speed limits that do not pose a risk of PVM).

iv. Additionally, for purposes of a cumulative effects analysis that considers the effects of future private activities (including third-party vehicle operations on public roads), the FWC panther mortality database currently contains 28 PVM records for the Golden Gate Estates area, which the Draft BO does not acknowledge.

2. By analyzing harm rather than harassment, the Draft BO misses the value of the HCP in offsetting the harassment coverage requested by the Applicants, and instead focuses on imposing costly mitigation to offset harm the Applicants do not expect to occur and for which the Applicants do not seek coverage.

3. To mitigate the harm it ascribes to the Applicants, the Draft BO directs the use of funds from the Marinelli Fund in a manner contrary to the original purpose of the Fund.

a. The Marinelli Fund was designed as an additional benefit to be employed by ECPO's conservation partners for species and habitat, not as a form of mitigation for the requested ITPs.

b. While it was drafting the BO, the Service urged the Applicants to reduce their conservation partners' discretion over use of the

Marinelli Fund, and instead commit its funds to offsite roadway fencing and underpasses to address PVM.[2]

4. The Draft BO would alter both the requested ITPs and the Applicants' HCP, contrary to the Service's own guidance recognizing that Applicants choose whether to apply for ITPs and how to design their HCPs to offset the requested take authorization. *See*, *e.g.*, HCP Handbook at 2-7 ("the HCP is the applicant's document, we cannot force requirements into the HCP that applicants are not willing to undertake"); 3-2 to 3-3 ("seeking an incidental take permit is a voluntary action by an applicant … landowners or project proponents need to assess whether take is reasonably certain to occur as a result of their activities to inform their decision whether to seek incidental take coverage").[3]

E. The requirements in the Draft BO are based on ITPs authorizing harm to all covered species, which the Applicants do not request.

1. For example, the Draft BO directs use of the Marinelli Fund to pay for activities such as installation of wildlife crossings and fencing.

2. The Draft BO also requires the Applicants to "capture" specific levels of vehicle traffic within future developments in the HCP area.

F. **Proposed Solution**: The Draft BO should be revised to recognize the requested form of take and the structure of the HCP as an analytical starting point.

1. The requested action is issuance of ITPs covering take in the form of harassment for the panther and most other covered species, and in the form of harm for a few specified ground-burrowing species and the Florida bonneted bat.

a. The requested ITPs must be the focus of the BO.

i. The Applicants have understood that FWS would process the applications based on the requested ITPs.

ii. The DEIS and HCP recognize take coverage for panther and most species is harassment.

[2] The Applicants (and their conservation partners) agreed in good faith to the requested change, but it appears that agreement is now being used as a predicate for interpreting the HCP to take responsibility for third-party PVM and as a basis for redirecting of even more of the Marinelli Fund to offset third-party PVM.

[3] ESA section 10 is equally plain that it is the applicant's role to prepare an HCP in support of its ITP application, and to specify within the HCP "the impact which will likely result from such taking" and the "steps the applicant will take to minimize and mitigate such impacts." 16 U.S.C. § 1539(a)(2)(A). The Service's role is to determine whether the application and HCP meet the statutory criteria and, if so, issue the permit. 16 U.S.C. § 1539(a)(2)(B). The Service should not change the application or consult on ITPs not requested by the Applicants.

b. ITPs not requested by or acceptable to the Applicants must not be the focus of the BO.

2. The proposed habitat conservation plan permanently preserves and maintains over 100,000 acres of habitat to offset harassment impacts, and the HCP must be analyzed based on its value in mitigating the impacts of the requested authorization of harassment.

II. The Draft BO Precludes the Incidental Take Coverage the Applicants Requested.

A. The Applicants requested coverage for incidental take, only in the form of harassment, for the Florida panther and most other covered species, as noted above.

1. The Applicants have been clear and consistent from the start of this administrative process that harassment is the type of take coverage sought.

2. The Applicants have understood from the Service, for the better part of the last decade, that their ITP applications and HCP would be processed as submitted (ITPs authorizing and an HCP offsetting harassment). To this day the DEIS reflects this understanding. *See* DEIS at 79.

B. Decades of harassment liability and coverage support the Applicants' request.

1. Harassment is a recognized form of take that can result from disturbance of species caused by light, noise, or other human activity. *See Loggerhead Turtle v. Council of Volusia Cty., Fla.,* 148 F.3d 1231, 1238 n.5 (11th Cir. 1998) (noting that district court found that beachfront lighting harasses sea turtles).[4]

2. Harassment is a frequently authorized form of incidental take. The recent incidental take statement (ITS) for Ave Maria (Aug. 2018), which is within the HCP area, authorizes incidental take in the form of harassment. The recent ITP for the Coral Reef Commons Development in Miami-Dade County also authorizes harassment. Indeed, case law establishes that harassment can – and often must – be an authorized form of incidental take. *See, e.g., Ctr. for Biological Diversity v. Salazar,* 695 F.3d 893, 910 (9th Cir. 2012) (holding that incidental take statement is required where

[4] *See also Defs. of Wildlife v. Martin*, 454 F. Supp. 2d 1085, 1098–99 (E.D. Wash. 2006)("Court also finds particularly instructive the direct evidence of harassment in 2004 [in which] snowmobile activities directly affected the selection of habitat and the movement of caribou in or near the IPNF"); *Cascadia Wildlands v. Kitzhaber*, 911 F. Supp. 2d 1075, 1086 (D. Or. 2012)(although "habitat modification does not constitute harm unless it actually kills or injures wildlife, it is at least conceivable that significant logging operations may nonetheless cause take by harassing wildlife whether or not wildlife is killed or injured"); *Marbled Murrelet v. Pac. Lumber Co.*, 880 F. Supp. 1343, 1367 (N.D. Cal. 1995)("Implementing the proposed timber harvest plan during the breeding season creates the likelihood of injury to marbled murrelets by annoying them to such an extent that it will significantly disrupt their normal behavioral patterns").

"oil and gas exploration activities are reasonably certain to result in at least some nonlethal harassment" of threatened polar bears).[5]

3. Naturally, the Services' HCP Handbook states that ITPs can and generally do cover incidental take in the form of harassment. HCP Handbook (2016) at 3-2 ("Among the forms of take, HCPs generally involve 'harm' and 'harass' situations").

4. The Services' history of authorizing incidental take in the form of harassment is supported by case law and the Handbook, and by the text of the ESA, which authorizes ITPs for "any taking otherwise prohibited" by section 9 if that taking is incidental to an otherwise lawful activity. 16 U.S.C. § 1539(a)(1)(B). Congress could have, but did not exclude forms of incidental take, including harassment.

C. But the Draft BO states the ITPs will not cover take in the form of harassment.

1. The Draft BO specifies that all incidental take coverage issued will instead be in the form of harm (*i.e.*, death or injury), not harassment. Draft BO at 5, 316.[6]

2. This is inconsistent with past representations from the Service, which consistently indicated that incidental take authorization would be in the form of harassment (including Service statements to this day in the DEIS).

3. The issuance of a Draft BO many years into an ITP application is not the time or place to change the requested ITP.

D. The Draft BO's statement that the Service will not issue coverage for incidental take in the form of harassment creates a potential liability for the Applicants for the one form of take coverage they requested for the Florida panther and most of the other covered species, and a vulnerability for the Service for failing to authorize that traditional form of take coverage.

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[5] *See also Wild Equity Inst. v. City and County of San Francisco*, 2012 WL 6082665, at *1–*4 (N.D. Cal 2012)(dismissing as moot ESA citizen suit that alleged golf course caused take of listed frog and snake after USFWS issued incidental take statement that authorized, *inter alia*, harassment caused by "golf course maintenance and operations" and "restoration" activities); *Pub. Emps. For Envtl. Responsibility v. Beaudreau*, 25 F. Supp. 3d 67, 113-16 (D.C.D. 2014) (upholding incidental take statement's authorization of acoustic harassment of ESA-listed sea turtles during pile driving, but overturning ITS for failing to address incidental take of endangered whales).

[6] The BO references a statement in an April 2018 FWS Guidance document which asserts that harassment is not a "permissible" form of incidental take. But the guidance document was not issued through notice and comment rulemaking and does not have binding legal effect, and its assertion as to harassment is contradicted by the ESA, governing case law, and the HCP Handbook. The Applicants asked the Service about the Guidance document when it was issued, and understood from the Service that the Service would continue to process their applications for harassment coverage as submitted because the document was simply guidance and the applications predated the guidance. The subsequent August 2018 DEIS, which describes the action as authorizing harassment, confirmed this understanding.

E. **Proposed Solution**: The Service should:

1. determine whether it will process ECPO's applications for incidental take in the form of harassment only (for most species), provided the Service finds the applications and HCP comply with ESA section 10;

2. if so, the BO should be corrected to reflect the proposed federal action: issuance of ITPs which authorize incidental take only in the form of harassment (for the Florida panther and most other covered species).

III. The Draft BO wrongly attributes take to the ITPs that the Service cannot authorize.

A. The Service's jeopardy analysis improperly attributes PVM to the ITPs and to the Applicants.

1. The Draft BO relies on a lengthy and circuitous chain of causation to link the Service's issuance of ITPs to future PVM. Draft BO at 125 to 127.

a. The Service's regulations are plain that the causation analysis must focus on effects actually caused by the federal action – issuance of the requested ITPs. 50 C.F.R. § 402.02 ("A consequence is caused by the proposed action if it would not occur but for the proposed action and it is reasonably certain to occur.")

b. The Draft BO provides no basis (and none exists) for concluding that future instances or levels of PVM would not occur but for issuance of the ITPs.

c. The Applicants do not expect that the vehicles they operate during construction and mining activities will strike panthers, given the slow speeds at which those vehicles will operate and the proposed restriction of such activities to daylight hours when panthers are least active, and the Draft BO's PVM analysis does not focus on use of vehicles during construction and mining. Rather, the Draft BO focuses on the potential for panthers to be struck by vehicles operated by third parties on public roads.

d. Neither the Applicants nor the ITPs control the conditions that determine whether panthers are likely to be struck by vehicles operated by third parties on external public roads (such as speed limits, driver behavior, roadway lighting, or measures that limit panther access to roads such as fencing and underpasses). In fact, the Service's DEIS recognizes that "the applicants and the Service do not control external roadway conditions (such as speed limits, driver behavior, or the installation of wildlife fending or wildlife underpasses)." DEIS at 91.

e. Yet the Draft BO fails to account for variables that could significantly alter the potential for future PVM regardless of traffic levels, such as vehicle speeds and operation, land cover patterns alongside roads (such as the presence of development or native habitat), and measures to prevent panther access to roadways such as wildlife fencing and underpasses.

f. The Service's PVM estimate assumes, without a proper scientific basis, that PVM levels are fixed relative to traffic volume, that implementation of the HCP will generate traffic, and thus future PVM can be apportioned to HCP. Draft BO at 126.

i. The Service has not provided a scientifically valid statistical analysis that demonstrates a linear relationship between PVM and traffic volumes, either by individual road segments or in aggregate (regional transportation network as a whole).

ii. The fundamental premise of the Draft BO's chain of causation is refuted by the Alligator Alley portion of I-75, where PVM was virtually eliminated by installation of roadway fencing and wildlife underpasses *despite* several-fold increases in traffic levels – demonstrating traffic levels are not independent determinants of PVM (and indeed can be inversely correlated with PVM).

g. The Draft BO would require the Applicants to attempt to prevent projected future PVM levels (numbers of panthers struck by third-party vehicle operators on external public roads) that the Draft BO asserts would cause jeopardy; specifically, the Draft BO imposes on the Applicants requirements to fund public roadway improvement projects (wildlife crossings and fencing) and "capture" traffic within future community developments. Draft BO at 158-159.

2. The model used in the Draft BO to project future PVM is technically flawed and the Service's causation theory is legally unsound. *See* "Statistical review of Future Roadkill Estimation Method (FREM) used by US FWS South Florida Ecological Field Office staff" (November 10, 2020) prepared by Megan D. Higgs, Ph.D. and submitted to USFWS on November 11, 2020.

a. Details of how the FREM equation was developed, validated, and statistically assessed are omitted from the Draft BO, and discussions of sources of uncertainty are missing.

b. FWS objectivity standards in the *Information Quality Guidelines and Peer Review* (2012) require that information related to the FREM equation development, validation and application be presented "accurately, clearly, and completely, and in an unbiased manner." This information has not been presented in the Draft BO or to the Applicants, despite the FREM's foundation for the Service's PVM analyses.

c. Important analytical shortcomings, including the strong statistical correlation between PVM levels and panther population levels, are ignored in the Draft BO.

d. PVM levels have been shown to be determined by human variables that are subject to change and third-party control (*e.g.*, speed limits, panther roadway access, driver behavior), yet the ITPs and the Applicants are held solely responsible in the Service's jeopardy analysis.

e. Ironically, while the Draft BO is willing to rely on unsupported correlations between projected future traffic levels and PVM, the Draft BO is *unwilling* to consider planned future panther fencing and crossings that are expected to further reduce PVM. *See, e.g.,* Draft BO at 122 ("though local, state, and Federal partners are in various phases of pre-planning for an additional 4 crossings, the Service has not yet consulted on these, so we cannot assume they are reasonably certain to occur.").

f. The Service's flawed analysis unlawfully shifts responsibility to the Applicants for third-party PVM they do not control, and places an improper burden on the Applicants to offset those effects through costly and burdensome requirements never contemplated by the original HCP.

g. These flaws trace to the Service's misstatement of the action and render the Draft BO vulnerable to judicial challenges.

B. The Draft BO's ITS wrongly asserts that the Applicants cause and control future incidental take in the form of PVM.

1. The ITS expressly (and incorrectly) states that the Applicants control take in the form of PVM. Draft BO at 317 (ITS Table 21-1).

a. The ITS attributes take of 10 to 12 panthers via PVM to the Applicants. Draft BO at 317 (ITS Table 21-1).

b. The ITS states that this take will be complete (at an end) once habitat impacts are complete. Draft BO at 316.

2. But the Applicants do not control PVM (as explained above), and the Service is not authorized to issue an ITP for incidental take that is not directly controlled by the Applicants or that does not occur on lands controlled by the Applicants within the HCP area. *See* HCP Handbook (2016) at 5-1, 6-3, 16-10 ("[t]o be eligible for incidental take authorization, covered activities must be … under the direct control of the permittee"; the "permit area" is the "area under the permittee's control where take may occur" and which "must be within the plan area and under the control of the permittee"); *see also* 50 C.F.R. § 1325(d) (incidental take authorization extends to activities by employees, contractors and other persons "under the direct control of the permittee").

    a. Furthermore, while not controlled by the Applicants or the ITPs, any future levels of PVM are likely to continue beyond the geographic area and 50 year time period covered by the ITPs, creating yet another inconsistency in the Draft BO, which asserts that all take will be complete once habitat impacts are complete. Draft BO at 316.

3. The ITS's also creates a legally flawed framework that would *assume without evidence* that a percentage of future third party PVM can be attributed to the ITPs or Applicants as take.

    a. Under the ESA section 7 regulations, one of the reasons for specifying a limit on take is to establish a trigger for reinitiating consultation.[7] A determination that the authorized take limit has been exceeded must be based on evidence that the take was caused by the covered activity. 50 C.F.R. §§ 402.14(i)(1)(i), 402.16(a)(1). Thus, to determine whether an authorized level of take has been exceeded, the Service must determine whether the permittee, as opposed to some other actor, caused the exceedance.[8]

    b. The BO would fundamentally alter that basic framework by *assuming* that future levels of PVM associated with vehicles operated by third parties are caused by the Applicants without any evidence that the vehicles which struck the panthers had any

[7] *Ariz. Cattle Growers v. U.S. Fish and Wildlife Service*, 273 F.3d 1229 (9th Cir. 2001) (ITSs "set forth a 'trigger' that, when reached, results in an unacceptable level of incidental take, invalidating the safe harbor provision, and requiring the parties to re-initiate consultation").

[8] *See, e.g., City of Santa Clarita v. U.S. Dep't of the Interio*r, No. 02-cv-00697, 2006 WL 4743970, at *14 (C.D. Cal. 2006), aff'd, 249 F. App'x 502 (9th Cir. 2007) (upholding ITS which allowed activity to continue while Service determined "cause of death or injury" to listed toads, noting that such a provision is "not unusual … particularly in situations like this in which there could be other causes for animal mortalities"); *see also Cal. River Watch v. PG&E*, no. 3:17-cv-05874 at 4 (N.D. Cal Feb. 21, 2018) (dismissing ESA citizen suit that alleged company exceeded amount of incidental take authorized in ITS based on plaintiffs' failure to allege "specific facts regarding any actual taking of fish, *facts showing that any actions by PG&E actually caused any such taking*, or facts showing that any such taking exceeded that authorized by the 2002 ITS") (emphasis added).

relationship to the Applicants or the ITPs, much less that the Applicants or the ITPs caused the vehicles to strike the panthers.

4. The flaws in the Service's treatment of the ITS and PVM trace to the Service's misstatement of the action and improper attribution of PVM, and render both the BO and the ITPs legally unsupportable and vulnerable to challenge.

C. **Proposed Solution**: The Draft BO should be revised to correct the technical and legal flaws in the PVM analysis and reflect the proper scope of take authorization.

1. The PVM analysis should be revised to correct the flaws identified above. The BO should analyze PVM to provide full consideration of potential future impacts to panthers (*e.g.*, as part of a cumulative effects analysis), but should not improperly attribute PVM as take to the Applicants or caused by the ITPs.[9]

2. The requested incidental take authorization and the Applicants' related covered activities are not the cause of future PVM.

3. The Applicants do not control external third-party PVM, and the Service cannot issue an ITP for PVM.

4. The FREM should be evaluated via independent peer review per the guidelines specified in the *Information Quality Guidelines and Peer Review* (2012). If the peer review determines that the FREM methodology is insufficiently accurate to estimate PVM projections (with associated error estimates), another method should be used to characterize PVM projections and their effects on PVA results.

[9] The Services' consultation regulations at 50 C.F.R. 402.02 define "cumulative effects" as "those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation." The requested ITPs will not authorize future third-party vehicle operations on public roads. Accordingly, the effects of third-party vehicle operations (to the extent such effects can be reliably determined and are reasonably certain to occur within the action area) are appropriately analyzed as "cumulative effects" rather than "effects of the action." *Id*.