

Endangered Species Act

USACE, Jacksonville District



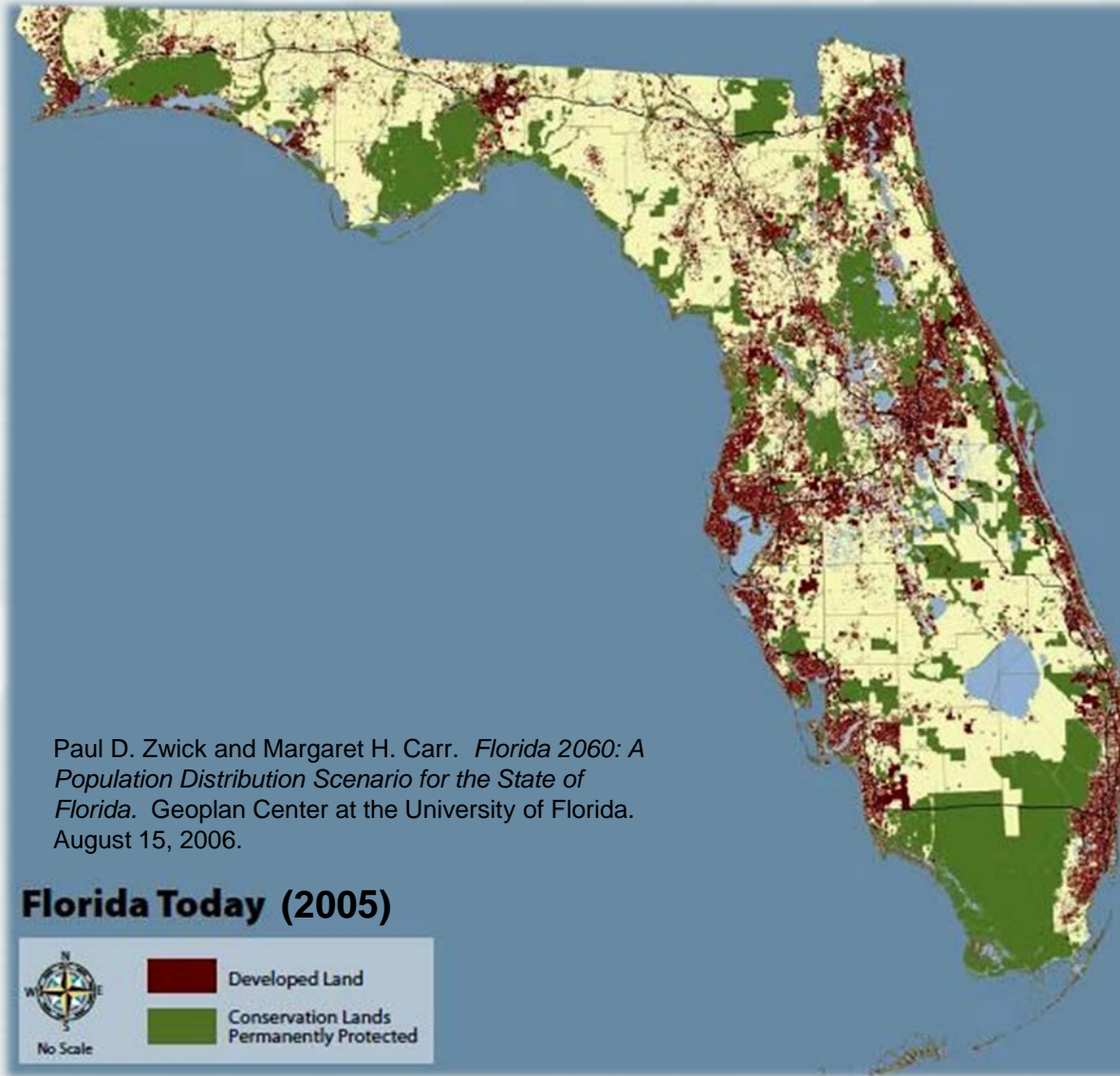
US Army Corps of Engineers
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Topics

- Introduction
- Endangered Species Act
- Types of consultations
- Effect determinations
- Determination tools
- Application information
- Regional issues
- Current initiatives

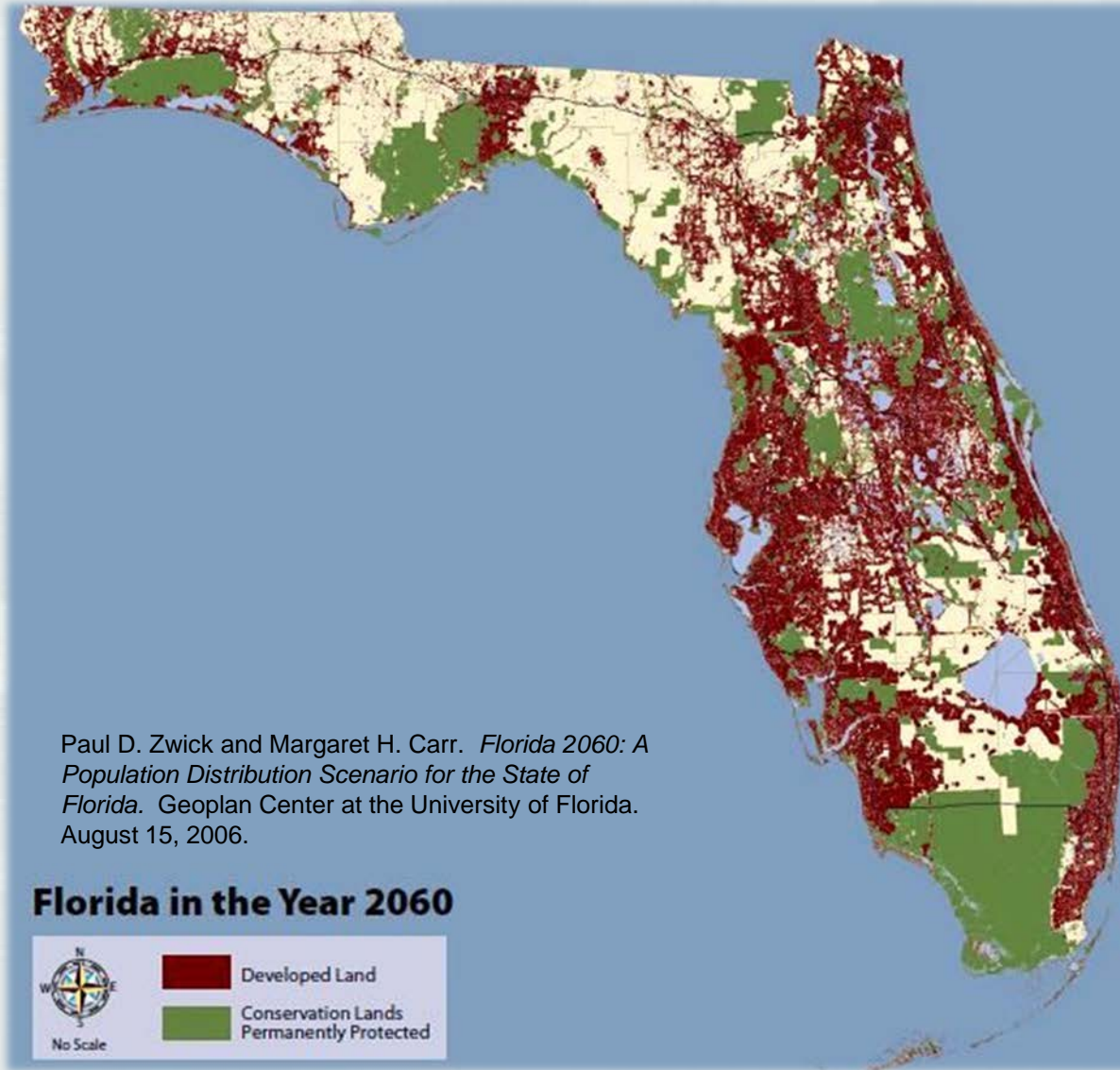


Future of Endangered Species



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Future of Endangered Species



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Endangered Species Act 1973



- Intended to conserve threatened and endangered species and the ecosystems on which they depend
- Provides broad powers for Secretaries of Interior and Commerce to protect species in jeopardy



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Endangered Species Act 1973

- Section 4 - Listing and Recovery
(Designated critical habitat)
- **Section 7 - Interagency Cooperation**
(50 CFR Part 402)
- Section 9 - Prohibited Acts
(Take prohibited - broad definition)



- Section 10 - Permits
(Habitat conservation plans)



Endangered Species Act 1973

- Section 7 requires that all federal agencies ensure that any **action** they authorize, fund or carry out is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of critical habitat



Service



Terrestrial and freshwater aquatic species



Marine species and most anadromous fish



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Types of Consultations

- Early
- Emergency
- Conference
- Informal
- Formal

USACE makes Effect Determination and initiates consultation with the Service

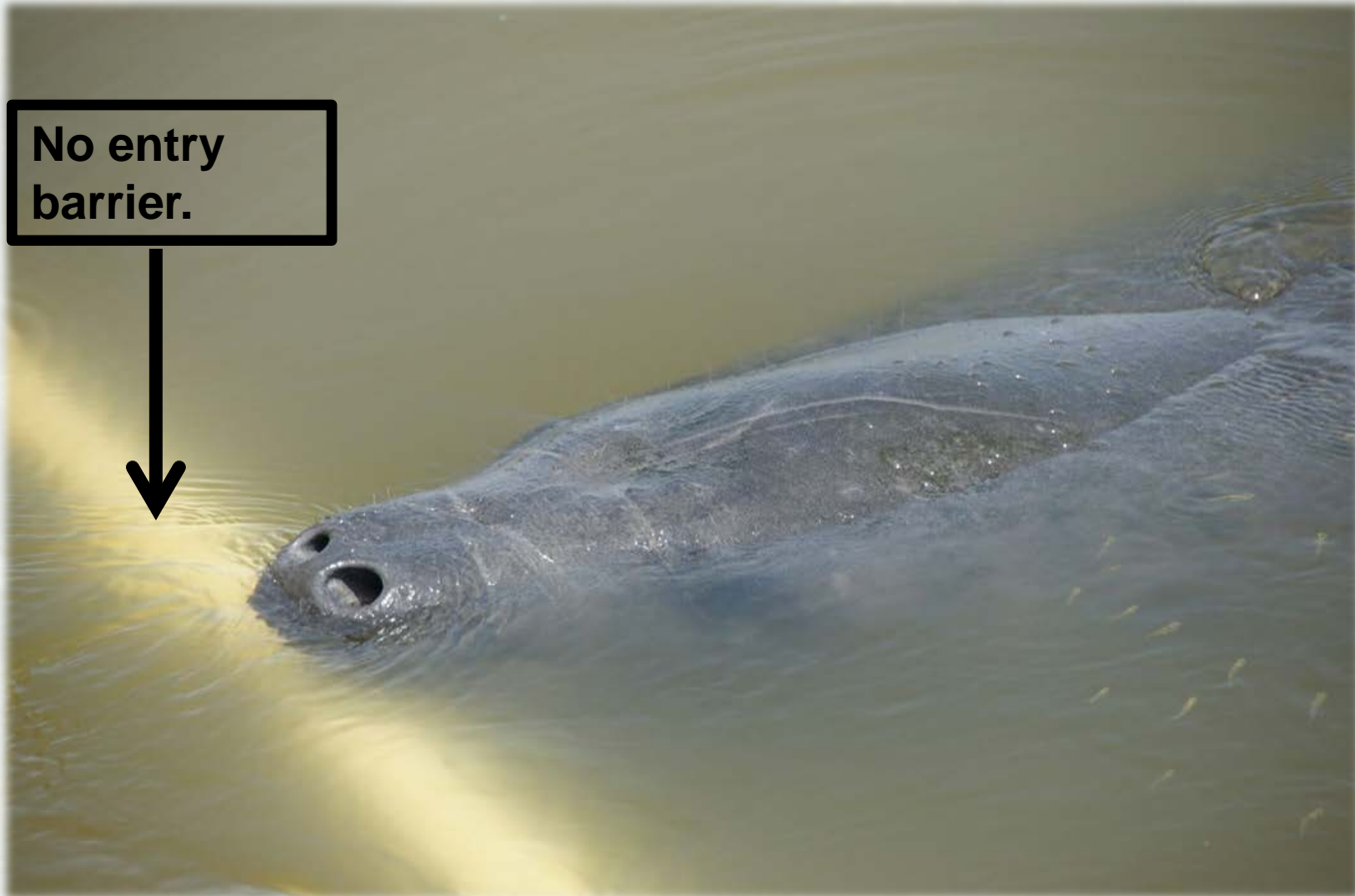


Effect Determinations

- **No effect**
 - No exposure to the environmental impacts resulting from the action or neither the species or Designated Critical Habitat (DCH) will respond in any manner (behavioral, physiological, chemical) upon exposure to the action
 - Difficult to achieve, especially with in-water work
 - No consultation required



Effect Determinations



Effect Determinations



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Effect Determinations



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Effect Determinations



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Effect Determinations



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Effect Determinations

- **May affect,**
 - **Not likely to adversely affect** (NLAA or MANLAA)
 - When effects on listed species are expected to be beneficial, insignificant (never rise to level of take) or discountable (very unlikely to occur)
 - Informal consultation
 - **Likely to adversely affect** (LAA)
 - A direct or indirect effect of the action adversely effects listed species or DCH
 - If incidental take is anticipated to occur, the action is adverse
 - Formal consultation



Informal Consultation

- Informal process
- The Service may recommend project modifications to eliminate the LAA determination
- Ends with
 - **Written** concurrence from Service that the **action is NLAA** listed species or critical habitat, or
 - Initiation of formal consultation



Formal Consultation

- Determines if proposed action will:
 - Jeopardize continued existence of a species
 - Destroy or adversely modify DCH
 - Identify reasonable and prudent alternatives
 - Result in incidental take
 - Establish reasonable and prudent measures to reduce take



Formal Consultation*

- A written request to initiate formal consultation shall:
 - Describe proposed action
 - Describe affected area
 - List affected species or critical habitat
 - Describe the affect on listed species or critical habitat and analyze cumulative effects
 - Include relevant reports, environmental impact statement, environmental assessment or biological assessment
 - Include other relevant available information on the action, the affected listed species or critical habitat



*(50 CFR 402.14)

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Biological Opinion

- The Service prepares a Biological Opinion that identifies:
 - Whether an action is or is not likely to jeopardize the continued existence of a listed species or adversely modify designated critical habitat
 - Any reasonable and prudent alternatives to avoid jeopardy or adverse modification
 - Any incidental take of listed species or adverse modification of critical habitat



Making Effect Determinations

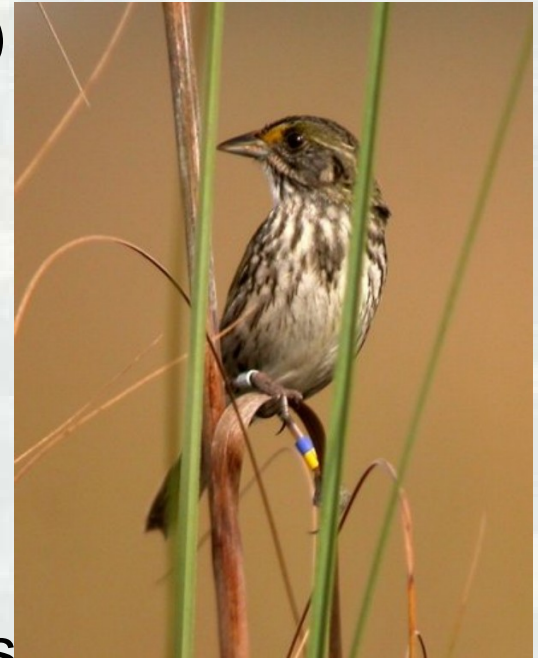
- Be proactive...You can influence the consultation...
 - Consider the federal process in your design/application
 - List the species and DCH you considered
 - Consider direct/indirect effects, survey data, habitat suitability, species consultation areas
 - Use resources to accurately project effects
 - Remember there are limited survey windows for some species

- Ultimately USACE makes the determination and initiates consultation



Determination Tools

- Consultation Handbook (March 1998)
- Section 7 Regs (50 CFR Part 402)
- Technical Support
- Websites
- Standard Local Operating Procedures for Endangered Species (SLOPES)
- Programmatic BOs



Determination Tools

■ Technical Support

- Technical assistance and pre-application meetings
- GIS or web-based applications
 - Florida Geographic Data Library (www.fgdl.org)
 - Florida Fish and Wildlife Research Institute (<http://myfwc.com/research/gis/>)
 - NMFS and FWS websites
 - ▷ FWS beta site: <http://ecos.fws.gov/ipac/>
 - ▷ FWS: <http://www.fws.gov/>
 - ▷ NMFS PRD: <http://sero.nmfs.noaa.gov>



Determinations Tools

- **Websites**

- Sourcebook

- Sourcebook located on Jacksonville District website
 - Contains most of the tools
 - Access these tools to make determinations and submit with your application



Determination Tools

■ SLOPES - Programmatic Effect Determination Keys

- Manatee, wood stork, Florida panther, Eastern indigo snake, Johnson seagrass, etc.
- Pay extra attention to the definitions, footnotes and the scope of the Key
- May require a foraging analysis or survey; submit with the application to save time
- Typically have programmatic concurrence so no need to coordinate; it's already done!



Eastern Indigo Snake

Programmatic Effect Determination Key

- Dated January 25, 2010
- Addendum August 13, 2013
- Example project:
 - Subject site contains 12 upland acres and 5 wetland acres
 - Project impacts
 - 7 upland acres and
 - 0.75 wetland acres



Eastern Indigo Snake

Programmatic Effect Determination Key:

- A. Project is not located in open water or salt marsh..... **go to B**
Project is located solely in open water or salt marsh..... "no effect"
- B. Permit will be conditioned for use of the Service's *Standard Protection Measures For The Eastern Indigo Snake* during site preparation and project construction.... **go to C**
Permit will not be conditioned as above for the eastern indigo snake, or it is not known whether an applicant intends to use these measures and consultation with the Service is requested² "may affect"
- C. There are gopher tortoise burrows, holes, cavities, or other refugia where a snake could be buried or trapped and injured during project activities **go to D**
There are no gopher tortoise burrows, holes, cavities, or other refugia where a snake could be buried or trapped and injured during project activities "NLAA"



Eastern Indigo Snake

Programmatic Effect Determination Key:

D. The project will impact less than 25 acres of xeric habitat (scrub, sandhill, or scrubby flatwoods) or less than 25 active and inactive gopher tortoise burrows..... **..go to E**

The project will impact more than 25 acres of xeric habitat (scrub, sandhill, or scrubby flatwoods) or more than 25 active and inactive gopher tortoise burrows and consultation with the Service is requested² "may affect"

E. Any permit will be conditioned such that all gopher tortoise burrows, active or inactive, will be evacuated prior to site manipulation in the vicinity of the burrow³. If an indigo snake is encountered, the snake must be allowed to vacate the area prior to additional site manipulation in the vicinity. Any permit will also be conditioned such that holes, cavities, and snake refugia other than gopher tortoise burrows will be inspected each morning before planned site manipulation of a particular area, and, if occupied by an indigo snake, no work will commence until the snake has vacated the vicinity of proposed work..... **"NLAA"**

Permit will not be conditioned as outlined above and consultation with the Service is requested² "may affect"

Footnote alert!



Eastern Indigo Snake

Programmatic Effect Determination Key:

- Project “keys out” to NLAA if:
 - Using *Standard Protection Measures For The Eastern Indigo Snake* during site preparation and project construction
 - All gopher tortoise burrows, active or inactive, ***will be evacuated prior to site manipulation...*** Any permit will also be conditioned such that ***holes, cavities, and snake refugia other than gopher tortoise burrows will be inspected each morning*** before planned site manipulation



Eastern Indigo Snake

Programmatic Effect Determination Key:

- If burrow excavation is utilized, it should be performed by an experienced member of the excavation team authorized through an incidental take permit issued by the Florida Fish and Wildlife Conservation Commission.



http://myfwc.com/License/Permits_ProtectedWildlife.htm#gophertortoise



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Determination Tools

SLOPES - Conservation Guidelines

- Most commonly use by FWS and available on their websites
- Often include special conditions to reduce impacts on species and guide determinations
- Similar to Keys but don't have programmatic concurrence
- Standard Local Operating Procedures for Endangered Species
- Will vary between FWS offices; look for applicable office location on the document





DRAFT

**Standard Local Operating Procedures for Endangered Species
Audubon's Crested Caracara**

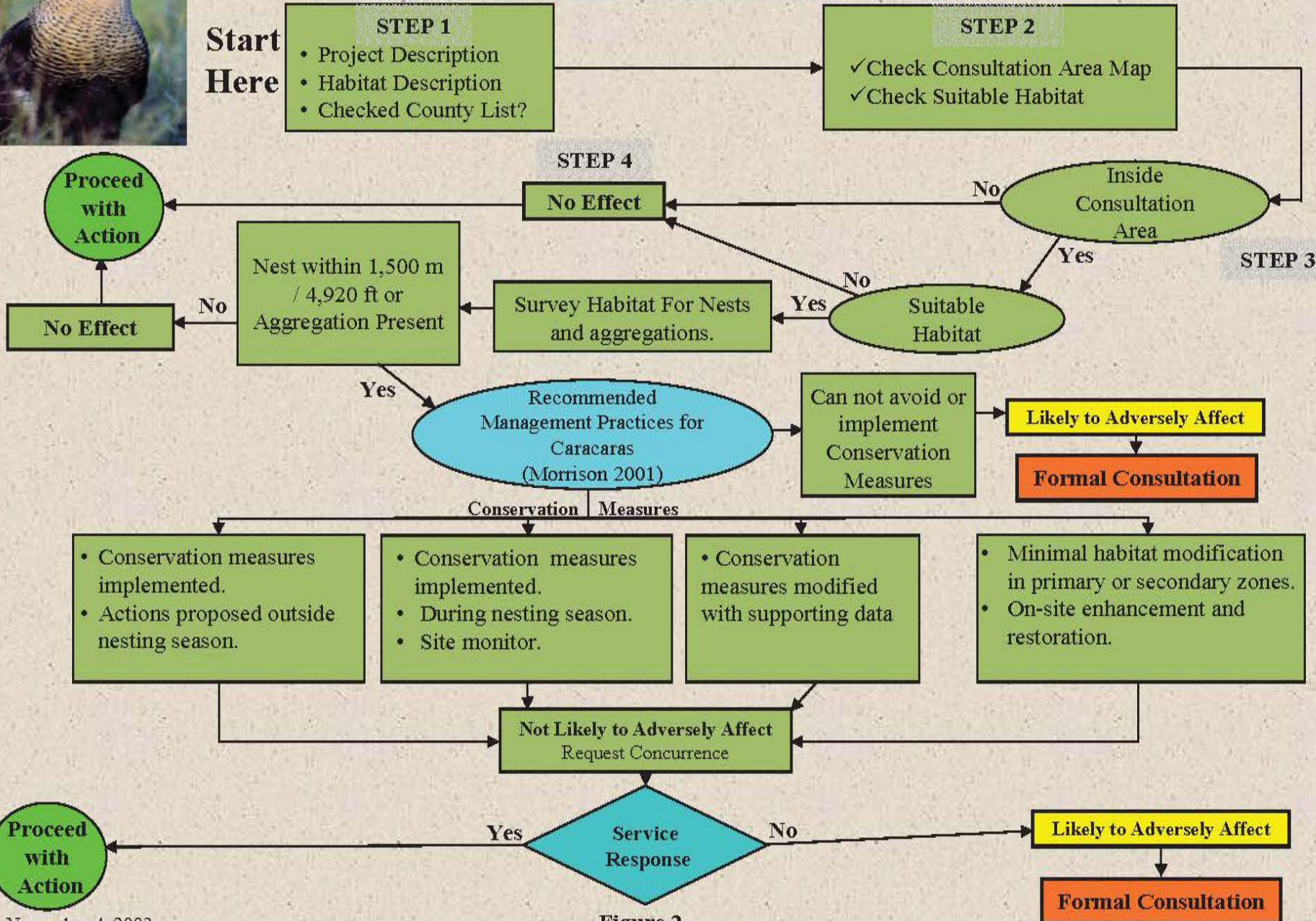
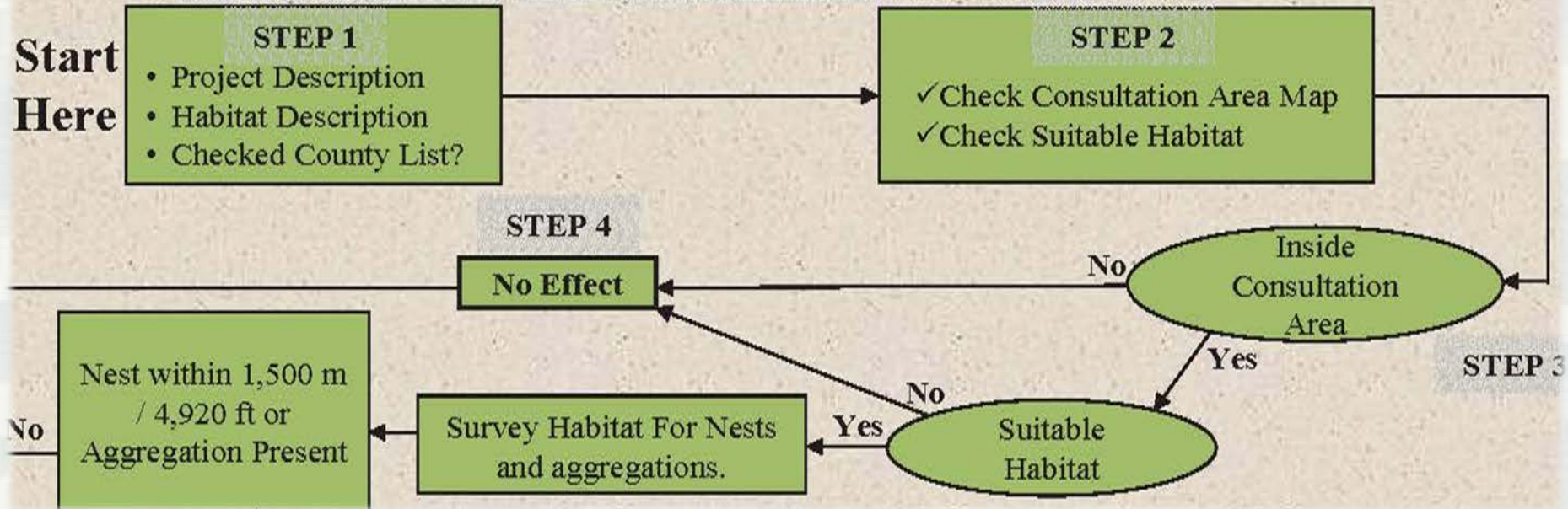


Figure 2.

Species Conservation Guidelines

South Florida Audubon's Crested Caracara

Standard Local Operating Procedures for Endangered Species Audubon's Crested Caracara



Determination Tools

Programmatic Biological Opinions (BOs)

- While determination keys address single species effects, the programmatic BOs consider a defined action's effect on a defined list of species, and provide terms, conditions and parameters for reinitiating consultation



Determination Tools

A few of the Programmatic BOs in SAJ

- BO issued December 19, 2012 for a variety of Regional and Programmatic General Permits
- “Regional Biological Opinion on Hopper Dredging along the South Atlantic Coast” (SARBO)
- “Dredging of Gulf of Mexico Navigation Channels and Sand Mining Areas Using Hopper Dredges by COE Galveston, New Orleans, Mobile and Jacksonville Districts (GRBO)” with NMFS
- 2011 Florida Manatee Key Programmatic Biological Opinion
- April 2011 FWS Statewide Sand Placement BO



Determination Tools

Programmatic Biological Opinions

- December 19, 2012 - 12 USACE, Jacksonville District General Permits Renewal Biological Opinion
- Provides ESA consultation for 12 Regional General Permits
 - Project must meet specific Project Design Criteria
 - Requires a second-tier review including a 10-day comment period for NMFS Protected Resources Division
 - Generally, these minor actions do not require additional consultation (Tier III)



Determination Tools

NMFS Checklist

- Use most recent version (Revised January 28, 2014).
- Send the Corps an editable version (i.e. do not scan it or print it).
- Complete all parts of the question. For example:

2. Methods:

- i. Construction methodology (Please provide detail)
- ii. Demolition/removal of existing structures/debris
- iii. Location of work (barge, upland, or both)

4. Pilings & Sheet piles

- i. Construction methodology (pile driving, vibratory hammer, jetting, etc.)
- ii. Provide piling size, material, and number of pilings (mandatory)
- iii. Have potential impacts to species been adequately addressed (noise impacts, marine vegetation impacts, etc.)?



Application Information Needs

- ESA information *required* for a complete Nationwide Permit application
 - Name(s) of species that might be affected
 - Documentation demonstrating compliance with ESA (surveys, habitat descriptions, etc.)

- FWS
 - List species that may be present
 - Information which supports a determination
 - May require a foraging analysis or surveys



Application Information Needs

- NMFS (in-water work)

- RGP

- Number and size of pilings
- Water depths
- Area of structure overwater
- Statement of compliance with the Sea turtle and Smalltooth Sawfish Construction Conditions (2006) and Manatee Conditions (2013)

- All others

- *Complete* NMFS Checklist



Photo: © [Florida Museum of Natural History](#)



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Regional Issues – Marathon

- NMFS PRD consultation timeframes
- General Permit SAJ-82
- Free-roaming cats



Regional Issues – Marathon

■ Candidate Species

- ▶ 7 species of coral and reclassification of elkhorn and staghorn corals from threatened to endangered
 - Expected August 2014
- ▶ Loggerhead sea turtle critical habitat
 - Both NMFS PRD and FWS components
 - Proposed 36 occupied marine areas within the range of the Northwest Atlantic Ocean
 - Contain one or a combination of nearshore reproductive habitat, winter area, and migratory corridors

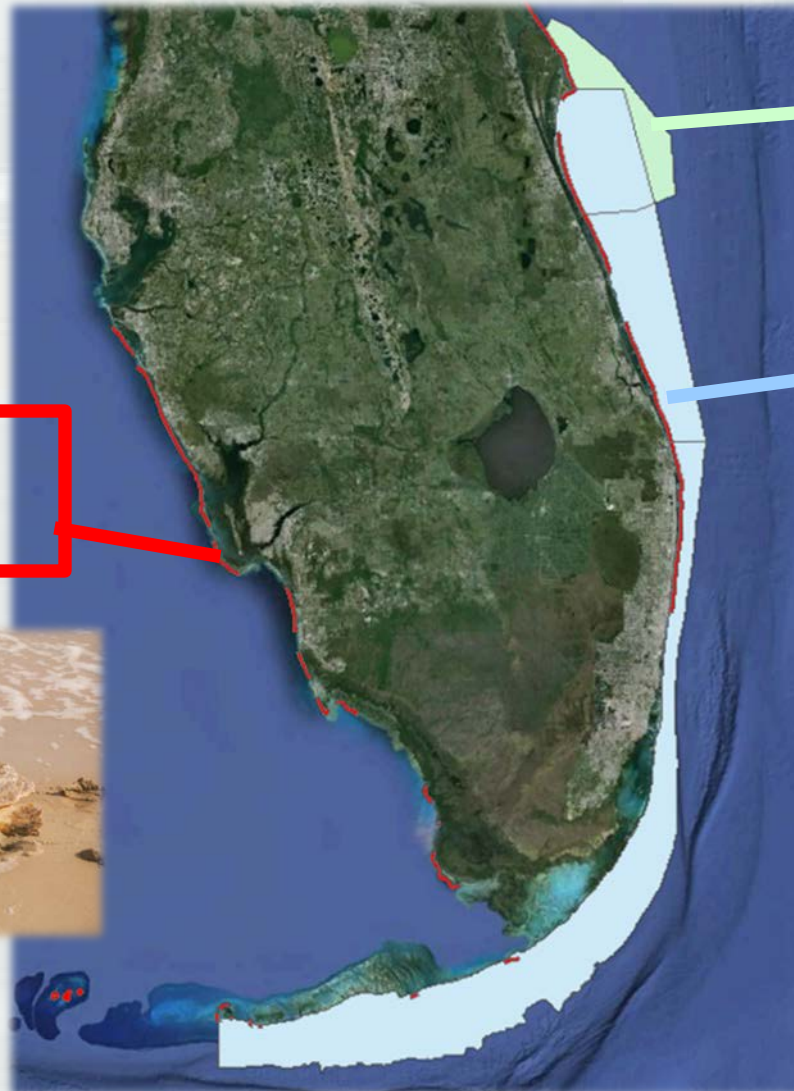


Staghorn Coral
Photo: NOAA's Florida
Keys National Marine
Sanctuary



Regional Issues – Marathon

Loggerhead
Critical
Habitat



Breeding

Migratory

Nearshore
Reproductive



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Regional Issues – Fort Lauderdale

- **Florida bonneted bat**

- ▶ Listed November 2013
- ▶ 2013 FBB Guidelines for Effect Determinations includes Focal Areas and Consultation Areas
- ▶ FWS is developing a full programmatic key, survey protocol, and compensation recommendations in the near future

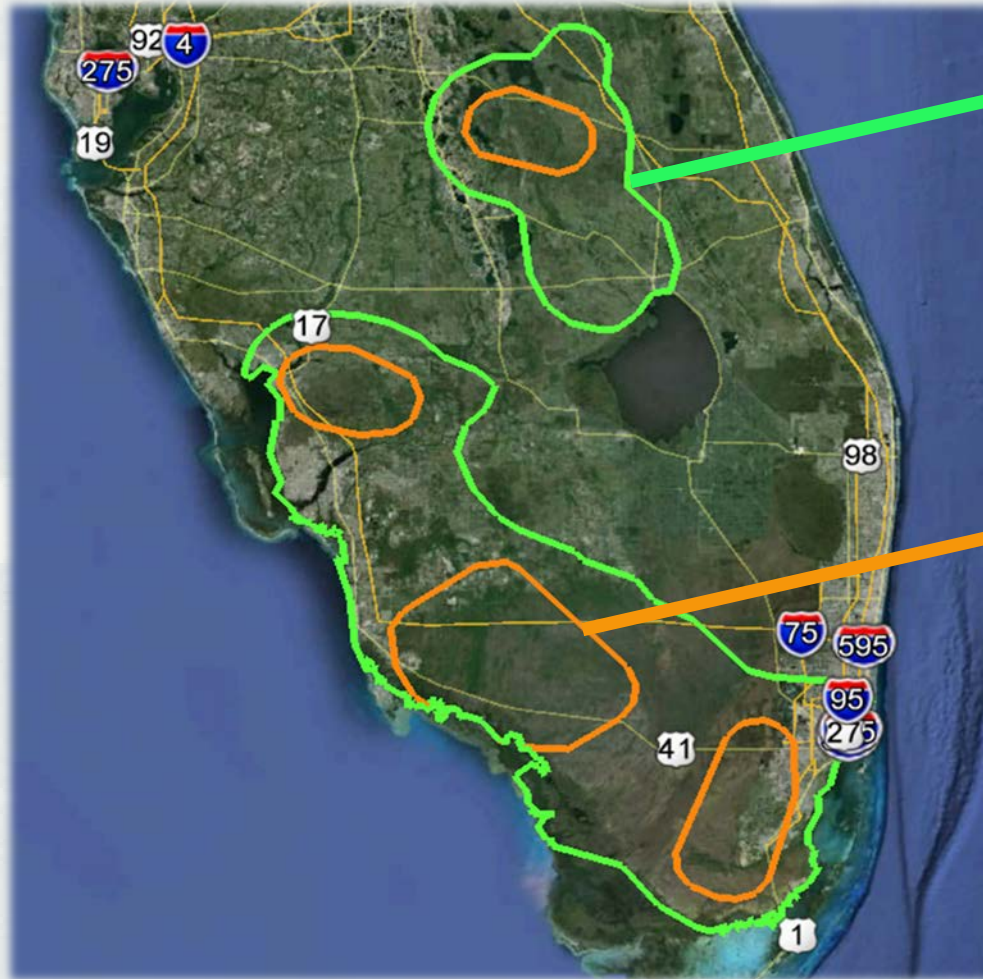


Florida Bonneted Bat (Photo by Kathleen Smith, FFWCC)



Regional Issues – Fort Lauderdale

Florida
Bonneted
Bat



Consultation
Area - NLAA

Focal
Area - LAA



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Regional Issues – Fort Lauderdale

■ Candidate Species

- ▶ 7 species of coral and reclassification of elkhorn and staghorn corals from threatened to endangered.
 - Expected August 2014
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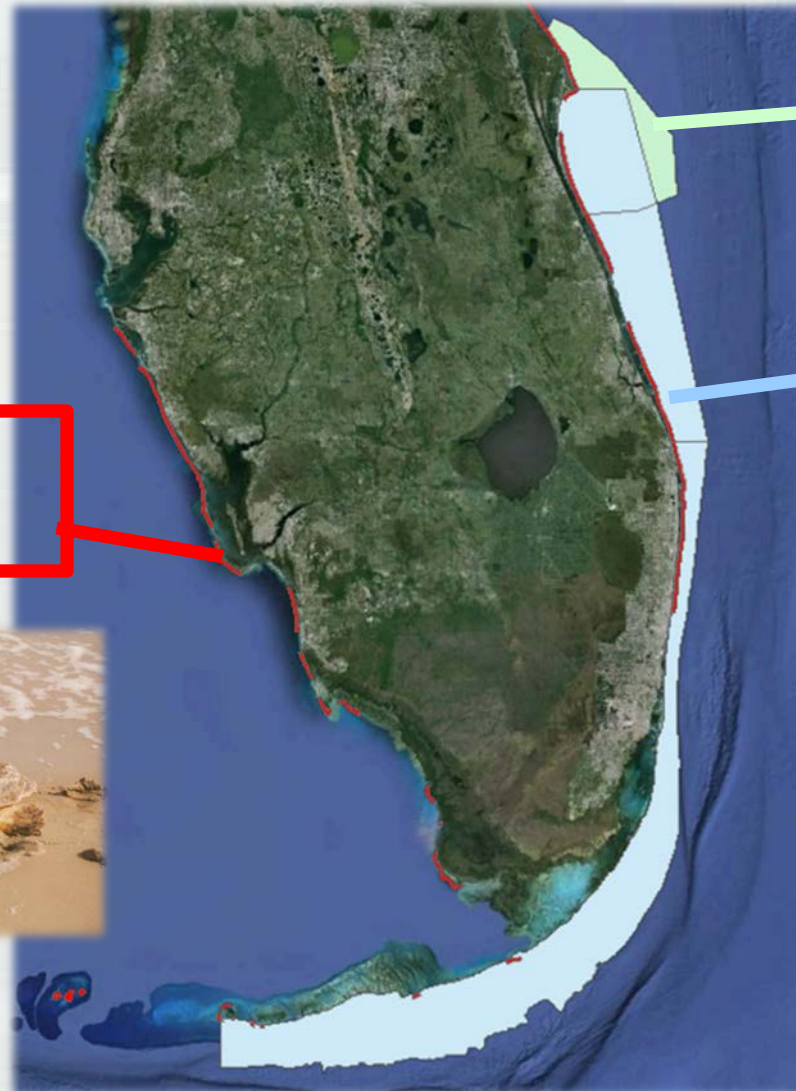


Staghorn Coral
Photo: NOAA's Florida
Keys National Marine
Sanctuary



Regional Issues – Fort Lauderdale

Loggerhead
Critical
Habitat



Nearshore
Reproductive

Breeding

Migratory



Regional Issues – Fort Lauderdale

▪ Candidate Species

▶ Red Knot

- Migrates annually between Canadian Arctic and several wintering regions, including the southeast United States
- Occurs primarily along the coasts, but can be more than 25 miles from any ocean coast
- Sand placement in beach nourishment projects and off-road vehicle use main issues



Red Knot
Photo: www.mit.edu



Regional Issues – Fort Lauderdale

- **Candidate Species**

- ▶ Talk to your Corps project manager if you have a project in consultation that may affect a candidate species! May be able to include the candidate species in the Service's Biological Opinion.

- **NMFS PRD consultation timeframes**

- ▶ Extensive backlog of consultations



Regional Issues – Sarasota

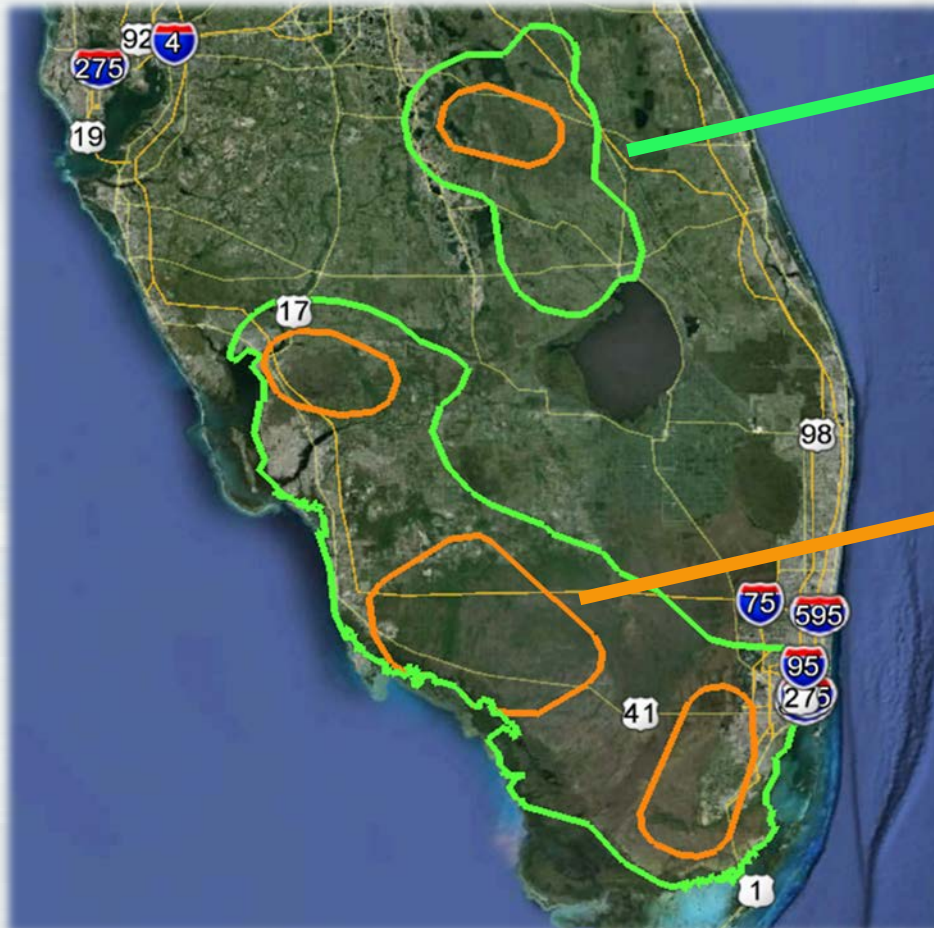
Florida Bonneted Bat (FBB)

- Listed November 2013
- 2013 FBB Guidelines for Effect Determinations includes Focal Areas and Consultation Areas
- FWS is developing a full programmatic key, survey protocol, and compensation recommendations



Regional Issues – Sarasota

Florida Bonneted Bat



Consultation
Area

Focal
Area



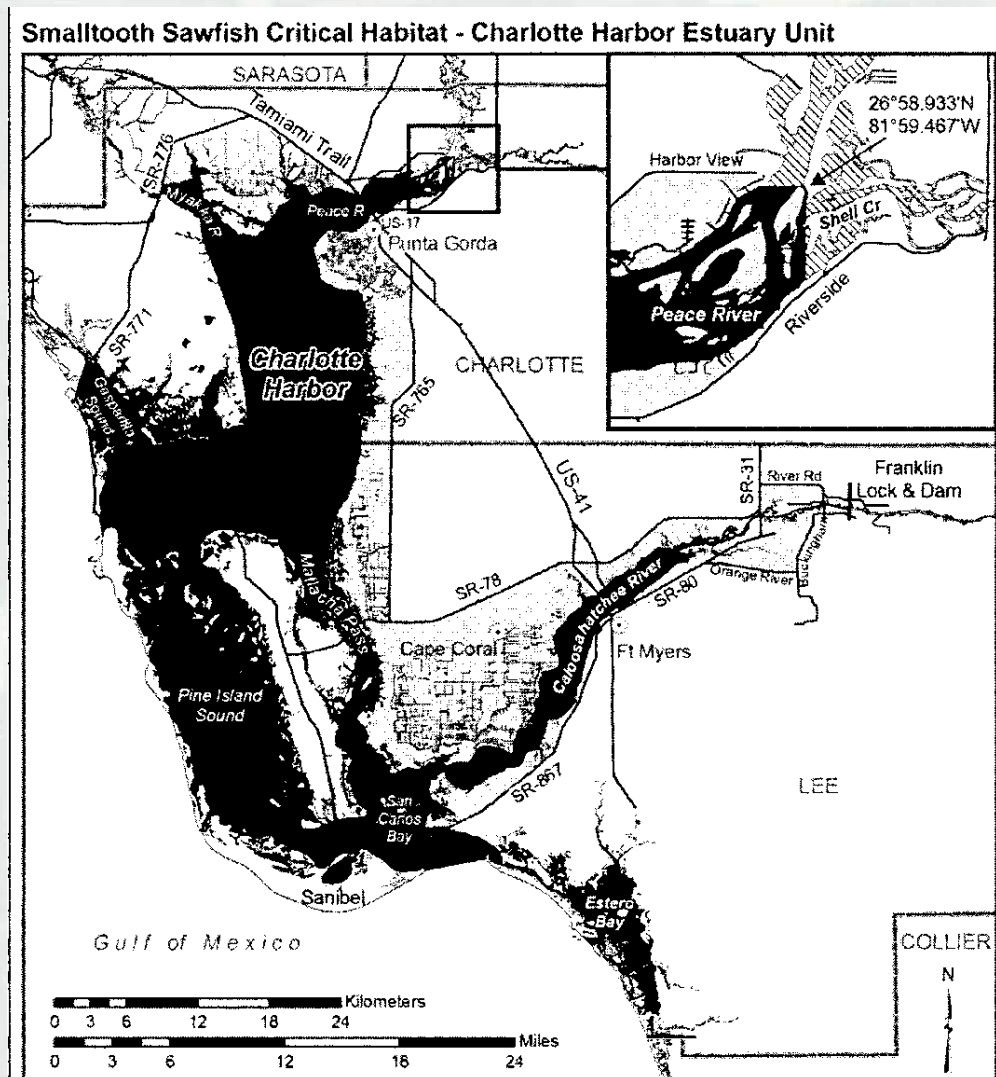
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Regional Issues – Sarasota

- **Smalltooth sawfish critical habitat**
 - Effective on October 2, 2009
 - Two designated smalltooth sawfish critical habitat areas
 - Charlotte Harbor Estuary Unit: 221,459 acres
 - Ten Thousand Islands/Everglades Unit: 619,013 acres

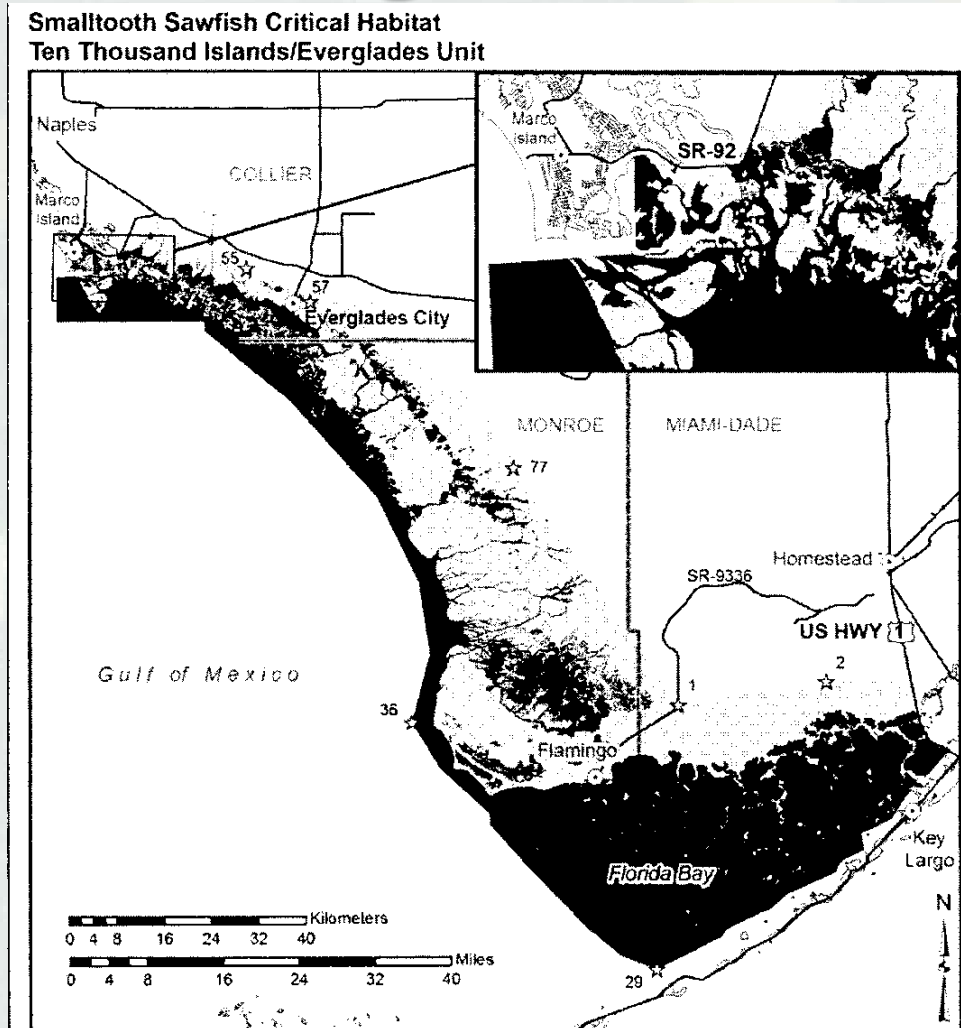


Charlotte Harbor Estuary Unit



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Ten Thousand Islands/ Everglades Unit



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Regional Issues – Sarasota

- Designated sawfish critical habitat is located within those geographic areas and has at least one of the essential features present
- Essential features are:
 - Euryhaline (fluctuating salinity) habitats with water depths shallower than -3 feet Mean Lower Low Water
 - Red mangroves



Activities that May Affect the Sawfish or its Critical Habitat

- Dredging and/or filling in tidal waters
 - Especially in areas less than -3 feet Mean Lower Low Water or areas with red mangroves (e.g., rip rap placement, seawall construction, boat ramp and marina construction)
- Activities that can change salinity levels
 - Installation of weirs or new freshwater discharges
- Removal of red mangroves
 - Including construction of seawalls or docks that would require removal (but not trimming) of red mangroves



What can I do to avoid and minimize impacts to sawfish?

- Avoid removing or filling red mangroves
- Limit dredging to areas that have been dredged previously to deeper than - 3 feet Mean Lower Low Water
- Only dredge to the minimum depth necessary
- Limit access walkways through red mangroves to 4 feet wide or less
- Design docks to be compliant with NMFS' Dock Construction Guidelines
- Comply with NMFS' Sea Turtle and Smalltooth Sawfish Construction Conditions



Regional Issues – Sarasota

- **Candidate Species**

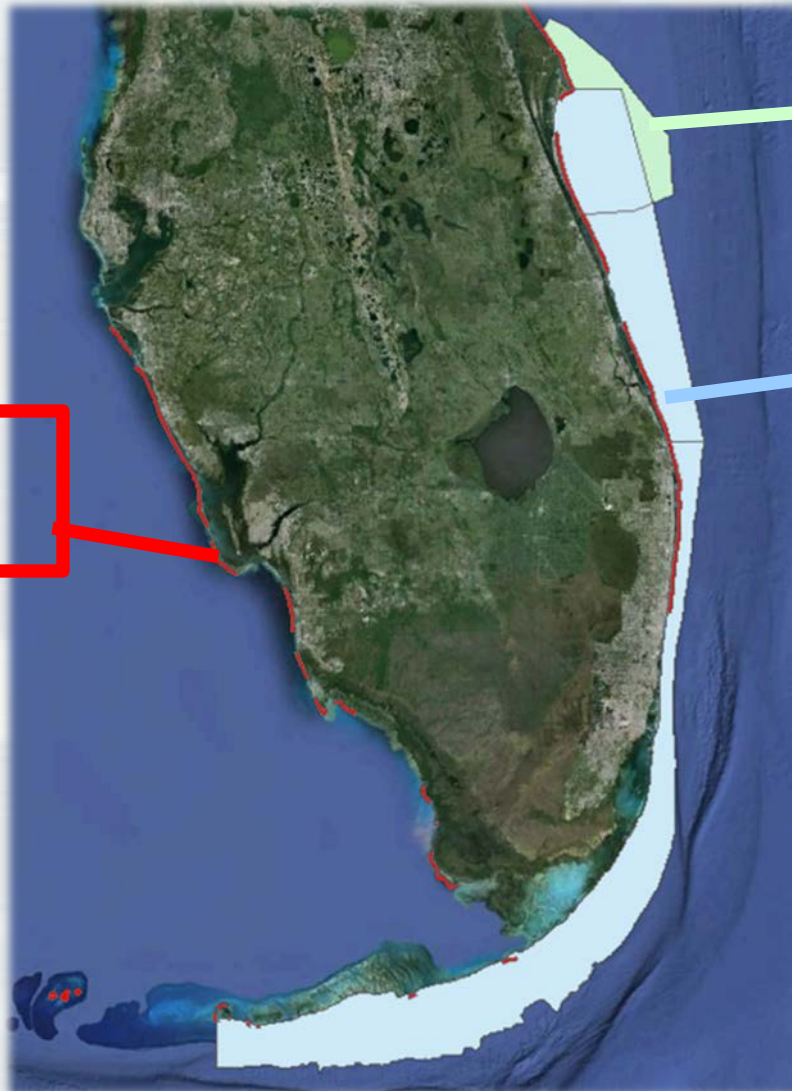
- Loggerhead sea turtle critical habitat
 - Both NMFS Protected Resources Division and FWS components
 - Proposed 36 occupied marine areas within the range of the Northwest Atlantic Ocean
 - Contain one or a combination of nearshore reproductive habitat, winter area, breeding areas, and migratory corridors



Regional Issues – Sarasota

Loggerhead
Critical
Habitat

Nearshore
Reproductive



Breeding

Migratory



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Regional Issues – Sarasota

- **Candidate Species**

- Red Knot

- Migrates annually between Canadian Arctic and several wintering regions, including the southeast United States
 - Occurs primarily along the coasts, but can be more than 25 miles from any ocean coast
 - Sand placement in beach nourishment projects and off-road vehicle use main issues



Regional Issues – Sarasota

- **Candidate Species**

- Talk to your USACE project manager if you have a project in consultation that may affect a candidate species; may be able to include the candidate species in the Service's Biological Opinion.

- **NMFS Protected Resources Division consultation timeframes**

- Extensive backlog of consultations



Regional Issues – Jacksonville

- **Candidate Species**
 - ▶ Loggerhead sea turtle critical habitat
 - Both NMFS PRD and FWS components
 - ▶ Red Knot
- NMFS PRD consultation timeframes
 - ▶ Extensive backlog of consultations
- Northern Long-eared Bat?



Regional Issues – Jacksonville



Loggerhead
Critical
Habitat

Nearshore
Reproductive

Breeding

Migratory



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Regional Issues – Jacksonville

- Consistency between Vero Beach FWS and North Florida FWS – less flexibility?
- Eastern Indigo Snake Standard Conditions
 - ▶ Conflict with vested Gopher Tortoise “take” permits
 - ▶ Formal Consultation
- Atlantic and Shortnose Sturgeon DPS



Regional Issues – Panama City

- 5 year review for Perdido Key Beach Mouse and monitoring of Choctawhatchee Beach Mouse
- Freshwater Mussel Conservation Guidelines
- Okaloosa Darter



Regional Issues – Panama City

- RFP for HCP for Gulf County
- Gulf Sturgeon Critical Habitat



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Regional Issues – Panama City

■ Candidate Species

- ▶ Loggerhead sea turtle critical habitat
 - Both NMFS PRD and FWS components
 - Proposed 36 occupied marine areas within the range of the Northwest Atlantic Ocean
 - Contain one or a combination of nearshore reproductive habitat, winter area, breeding areas, and migratory corridors



Regional Issues – Panama City



Loggerhead
Critical
Habitat

Nearshore
Reproductive

Breeding

Migratory



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Regional Issues – Panama City

▪ Candidate Species

▶ Red Knot

- Migrates annually between Canadian Arctic and several wintering regions, including the southeast United States
- Occurs primarily along the coasts, but can be more than 25 miles from any ocean coast
- Sand placement in beach nourishment projects and off-road vehicle use main issues



Red Knot
Photo: www.mit.edu



Regional Issues – Orlando

■ Candidate Species

▶ Loggerhead sea turtle critical habitat

- Both NMFS PRD and FWS components
- Proposed 36 occupied marine areas within the range of the Northwest Atlantic Ocean
- Contain one or a combination of nearshore reproductive habitat, winter area, breeding areas, and migratory corridors



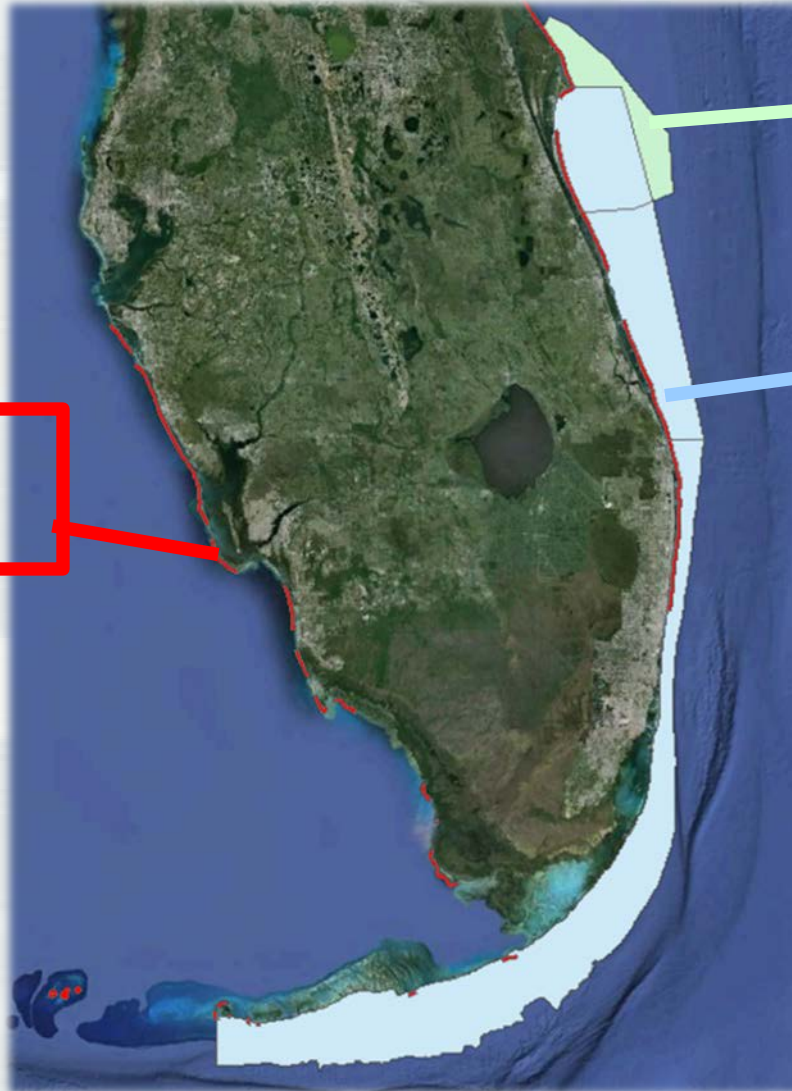
Regional Issues – Orlando

Loggerhead
Critical
Habitat

Nearshore
Reproductive

Breeding

Migratory



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Regional Issues – Orlando

▪ Candidate Species

▶ Red Knot

- Migrates annually between Canadian Arctic and several wintering regions, including the southeast United States
- Occurs primarily along the coasts, but can be more than 25 miles from any ocean coast
- Sand placement in beach nourishment projects and off-road vehicle use main issues



Red Knot
Photo: www.mit.edu



Regional Issues – Orlando

- **Florida bonneted bat**
 - ▶ Listed November 2013
 - ▶ 2013 FBB Guidelines for Effect Determinations includes Focal Areas and Consultation Areas
 - ▶ FWS is developing a full programmatic key, survey protocol, and compensation recommendations in the near future

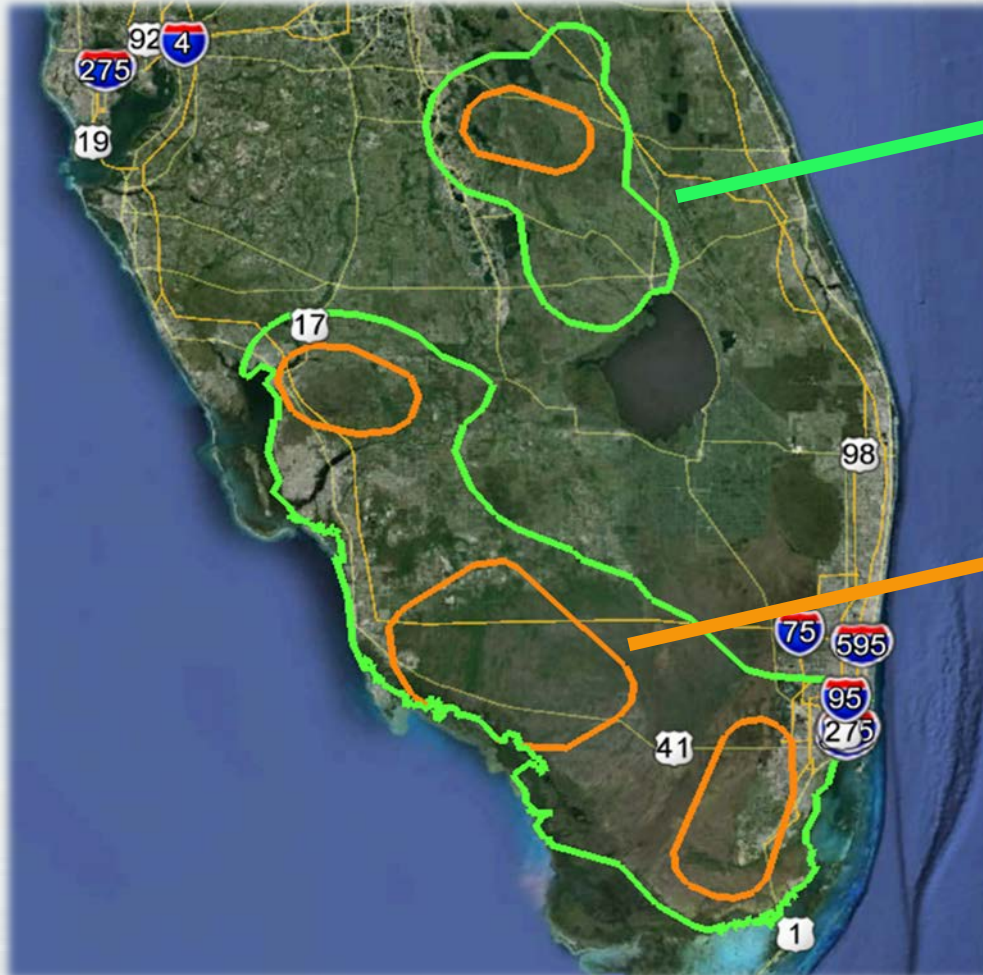


Florida Bonneted Bat (Photo by Kathleen Smith, FFWCC)



Regional Issues – Orlando

Florida Bonneted Bat



Consultation
Area

Focal
Area



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Regional Issues – Orlando

- Consistency between Vero Beach FWS and North Florida FWS – less flexibility?
- Grasshopper Sparrow
- Eastern Indigo Snake Standard Conditions
 - ▶ Conflict with vested Gopher Tortoise “take” permits
 - ▶ Formal Consultation



Regional Issues – Orlando

- Atlantic and Shortnose Sturgeon DPS
- Limited survey timeframes for various FWS species
- NMFS PRD consultation timeframes
 - ▶ Extensive backlog of consultations



Regional Issues – Puerto Rico

- NMFS PRD Consultation Timeframes
 - Extensive backlog and delay in consultations
 - Monthly meetings between USACE and NMFS
- Critical Habitat for *Acropora* spp.
 - Identify presence of essential features
- Seven new proposed coral species – September 2014
- Pre-application consultations and Interagency Meetings
 - Limited use
 - Monthly interagency meetings
 - Not to fill application form
 - Corps cannot design project
 - Identify challenges and offer guidance



Regional Issues - US Virgin Islands

- NMFS PRD Consultation Timeframes
 - Extensive backlog and delay in consultations
 - Monthly meetings between USACE and NMFS
- Critical Habitat for *Acropora* spp.
 - Identify presence of essential features
- Seven new proposed coral species – September 2014
- Pre-application consultations and Interagency Meetings
 - Limited use
 - Monthly interagency meetings
 - Not to fill application form
 - Corps cannot design project
 - Identify challenges and offer guidance



What about ATF?

- No ESA Section 7 Consultation on ATF
- Because all federal agencies must ensure that any **action** they authorize, fund or carry out is not likely to jeopardize.... That cannot be done if the action has already occurred prior to authorization.
- Be sure you obtain a permit or obtain an NPR prior to construction



Recent and Current Initiatives

- Expansion of Indigo and Stork Keys to northwest Florida
- NMFS Statewide Programmatic Biological Opinion
 - ~11 specific activities that are covered by Nationwide Permits and Letters of Permission
 - Will cover approximately 70 percent of pending consultations
 - Will require a second tier notification to NMFS, followed by a 10 day comment period; similar to Regional General Permit process



Summary

- Listed species issues will continue to be challenging
- Be proactive:
 - Consider the federal process with your joint application.
 - Use resources.
 - Limited survey windows for some species.
- The more you submit with the application, the faster the process
- USACE makes the effect determination and initiates consultation

