on the Larsen report to determine whether practicable alternatives existed is problematic. At one point Larsen fantastically noted that "[a]nalysis of an extreme case shows that alternatives could cost taxpayers up to $25 billion more than Lake Belt rock." AR 582. The discussion above, regarding the balancing of factors under NEPA and the improper influence of a permit applicant's representative, is equally applicable here.

In Hintz, 822 F. 2d at 833, the court approved an agency's reliance on a permit applicant's report because the Corps, along with other concerned state and federal resource agencies, had "considered and evaluated" the report, and received a supplemental report addressing concerns raised by the agencies. The court in Hintz concluded that "the record reflects that the Corps made the proper analysis and weighed the correct factors in making its determination that no feasible alternatives existed. Hintz 800 F.2d 822, 835-36 (9th Cir. 1986) ("The Corps is not a business consulting firm.... Certainly, we would not condone blind acceptance by the Corps of [an applicant's] study of alternative sites. But the record does not show ... that the Corps uncritically accepted [the applicant's] assertions. The Corps justifiably and legally relied primarily upon the study prepared by [the applicant], and its review of that study satisfied regulatory requirements. Further, the Corps sought and obtained the expert views of the resource agencies involved.").

The Defendants rely heavily upon Fund for Animals, Inc. v. Rice, 85 F.3d 535 (11th Cir. 1996), but the case is distinguishable in several respects. In that opinion, the Eleventh Circuit addressed the argument that the Corps had ignored alternative sites for a public landfill, i.e., not a for-profit private enterprise such as rockmining, that would have had a less negative impact on wetlands. Id. at 542-543. The no-action alternative was rejected

because Sarasota County's landfill was projected to reach capacity by 1999.[249] The estimates as to when the miners might run out of limestone is not analogous, nor is there a clear indication in the record that the Corps considered a specific date by which limestone resources available to Miami-Dade County would expire – perhaps because it would be impossible to estimate such a date since limestone reportedly is available from other sources. In the Fund for Animals case, Sarasota County had analyzed several alternative sites in preparing its application for the Corps permit. The court noted that the Corps 'is not bound by an applicant's ranking system" and that the Corps "conducts its own independent evaluation ... [and] balancing of the applicant's needs and environmental concerns."[250]

"The absence of a suitable upland site required the Corps to analyze all suitable alternatives. In this case, each of the alternative sites poses its own environmental problems which led the Corps to determine that it was less suitable for the landfill than the

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[249]"There is no substantial question as to whether Sarasota County needs a new landfill, because the County's current landfill must close in 1999." Id at 544. (The Court rejected an argument that a landfill in another county might be used as a practical alternative, noting that the indicated landfill apparently lacked sufficient capacity to handle the amount of anticipated waste.)

[250]Sarasota County previously had ranked four sites for the landfill, and the one chosen received the score indicating it was least well suited for a landfill (i.e., it received the lowest score). The court determined that the Corps had properly performed its analysis following the sequencing preference described in CWA regulations and discussed above, i.e., first attempt to avoid impacts altogether, then minimize those unavoidable impacts, and require compensation for the minimized unavoidable impacts. 33 C.F.R. 320.4(r), 40 C.F.R. 230.10. Id. at 543. First, none of the four sites would avoid all impacts on wetlands, nor had plaintiffs identified a suitable parcel of contiguous uplands in Sarasota County that would have triggered the 230.10(a)(3) presumption. As the Eleventh Circuit remarked, "such a site would have been entitled to a presumption that it was a practical alternative." Id. at 543. Thus, although the landfill was not water dependent, the rebuttable presumption was not triggered because there was no "practicable alternative" – i.e., avoidance was impossible.

[chosen] tract." After analyzing the four potential sites, the Corps determined that the amount of wetlands to be impacted on each site compared to the total acreage available resulted in a clear winner: the largest site was 6,150 acres, which permitted a substantial buffer around the landfill's required 74 acres of wetlands impact.[251] Having been unable to avoid impacts altogether, the Corps had minimized the impacts by selecting the best site, and then addressed mitigation that could occur directly on the site due to the overall acreage of the selected site. It is difficult to compare the analysis in Fund for Animals with the analysis applied to the miners' applications. Not only was the Corps faced with a public applicant, as compared to the present private applicant, but the necessity of the desired activity (siting a landfill versus siting a private enterprise removing limestone) was not seriously in question. Moreover, the selected site in Fund for Animals was so evidently superior to the other sites that it sheds no light on the analysis applied to the miners' application at issue herein. The Sarasota County site selected for the landfill already included approximately one-half, i.e., approximately 3,000 acres, of its total size designated as a conservation area that would provide a "continuous unit of potentially suitable Florida Panther habitat and serve as a barrier between the Myakka River ecosystem and further development from the west." Id at 544. The other sites did not offer those extra protections. In contrast, here we not only have limited information about the alternative sites – since none were discussed in the ROD – but are left with the Corps's final decision

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[251]The County initially applied for 120 acres of wetlands impact and reduced its request in response to concerns raised by the EPA.) Further, each of the three rejected alternative sites involved either impacts to headwaters for a stream, wetlands that drained into the Myakka River or another waterway, a nesting site for the Bald Eagle (previously listed as an endangered species), presence of the Florida Sandhill Crane (a state listed species), or was within the Myakka River watershed.

to permit mining very close to the boundary of the Everglades National Park and directly on top of South Florida's sole source of freshwater.

As noted above, it is undisputed that the Corps failed to make the required presumption; however, if the record revealed sufficient evidence such that the Court could conclude that the applicants would have overcome the presumption if it had been applied, then a remand might be unnecessary. This record is woefully deficient in terms of the identification and analysis of practicable alternatives and, as such, remand is required. The burden rests on the applicants to rebut the presumption with competent evidence that clearly demonstrates that no practicable alternatives exist, at least none that would be environmentally preferable. See, e.g., 40 C.F.R. 230.10(a)(3) ("unless clearly demonstrated otherwise"). The mining industry applicants have thus far failed to carry that burden – perhaps on remand they will be able to demonstrate conclusively that there are no practicable alternatives for any of the intended mining activity.

The Court must conclude that the Corps made a clear error of judgment in the analysis of practicable alternatives under the CWA due, in part, to the agency's reliance on a study that should have been independently verified.

4. On-site alternatives to mine rock from this source

Adverse impacts to wetlands must be avoided to the extent that practicable alternatives are available which will result in less adverse impacts. If such impacts cannot be avoided, then the guidelines require that the impacts be minimized, and that compensatory mitigation be required for any adverse impacts that cannot be avoided, or

minimized.[252] Mitigation to be accomplished through compensation "may occur on-site or at an off-site location." 33 C.F.R. 320.4(r)(1). The question of on-site alternatives such as re-mining in existing areas or shifting all mining away from the more pristine western wetlands, was not addressed in the EIS or the ROD. Nor were alternative technologies examined, apparently because the mining companies reported that "it is not economically viable to use new mining technologies in old lakes because of the expenses associated with reblasting and dredging." AR423 at 40-41. Based on this record, the Court cannot find that the Corps complied with its CWA duties as to the consideration of on-site mitigation.

Having previously determined, as discussed above, that remand is required because of NEPA-related deficiencies in the EIS, and having now determined that remand is required as to the Corps' failure to conduct a proper analysis of the first CWA factor, i.e., the existence of practicable alternatives, the Court will only briefly address the other two CWA-related substantive requirements in an attempt to facilitate the Corps' proceedings upon remand. The Court also has determined that the Corps disobeyed the procedural directives

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[252]Pursuant to an agreement between the Corps and EPA, the CWA guidelines are interpreted as requiring a progressive analysis, from avoidance of impacts to minimization and then to compensation. Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency, effective February 7, 1990), *reprinted in* Margaret N. Strand, Wetlands Deskbook (2d ed. 1997). Prior to this MOA, the agencies interpreted the role of compensatory mitigation differently; for example, the Corps occasionally considered an applicant's mitigation plan as part of the Corps' initial determination of whether environmentally preferable alternatives were available. If the mitigation compensated entirely for the harm, the Corps immediately concluded its alternatives analysis, since the lack of a net adverse impact eliminated the need to search for other alternatives to the project. Johnson, Stephen M, Avoid, Minimize, Mitigate: The Continuing Constitutionality of Wetlands Mitigation after Dolan v. City of Tigard, 6 Fordham Envtl. Law J. 689, 694-95 (1995).

of the CWA and its regulations by failing to encourage public participation; thus, remand is necessary on that basis as well.

C. Significant degradation (significantly adverse effects on water supplies, wildlife habitat)

Under the CWA, the Corps must evaluate the probable impact, including cumulative impacts, of the proposed activity on the public interest -- weighing foreseeable benefits against foreseeable detriments using "[a]ll factors which may be relevant." 33 C.F.R. 320.4(a)(1). A permit will not be granted if contrary to public interest view. At a minimum, the following factors must be addressed: the "relative extent of the public and private need for the proposed structure or work, the practicability of using reasonable alternative locations and methods to accomplish the objective of the proposed structure or work and the extent and permanence of the beneficial and/or detrimental effects which the proposed structure or work is likely to have on the public and private uses to which the area is suited."[253] 33 C.F.R. 320.4(a)(2). Permits should not issue for activities that will cause or contribute to "significant degradation" of the wetlands at issue. 40 C.F.R. part 230.10c). Factors contributing to the analysis of whether an activity will cause or contribute to significant degradation include: "[s]ignificantly adverse effects of the discharge of pollutants on municipal water supplies, ... wildlife, ... wildlife habitat ..., or ... on recreational, aesthetic,

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[253]Additional factors identified in the regulations include "conservation, economics, aesthetics, general environmental concerns, wetlands, historic properties, fish and wildlife values, flood hazards, floodplain values, land use, navigation, shore erosion and accretion, recreation, water supply and conservation, water quality, energy needs, safety, food and fiber production, mineral needs, considerations of property ownership and, in general, the needs and welfare of the people." 33 C.F.R. 320.4(a)(1). The Corps at least listed each of these factors, even though it gave scant analysis to most of them. AR1028 at 76-83.

and economic values." 40 C.F.R. 230.10(c)(1), (3), (4).

The NEPA analysis, above, dictates the result of this review, and is incorporated herein. The Court concludes that the Corps violated its duties under the CWA by not addressing all relevant factors and by concluding, based upon an inadequate record, that this mining would not be contrary to the public interest.

D. Minimization of potential adverse impacts

Permits may issue for activities if "appropriate and practicable steps have been taken which will minimize potential adverse impacts of the discharge." 40 C.F.R. 230.10(d). Although the Supreme Court has held that NEPA does not require that an EIS contain a complete mitigation plan, Robertson v. Methow Valley Citizens Council, 490 U.S. 332, it is unclear whether that holding extends to the CWA and the actual issuance of the mining permits herein. Fund for Animals, Inc. v. Rice at 544 (where filling of wetlands cannot be avoided, the appropriate and practicable steps must be taken to minimize the potential adverse impacts of the discharge on wetlands). The Corps can reduce potential adverse impacts associated with a discharge by requiring mitigation[254] as a condition of a permit, 33 CFR 325.4(a)(3), but must first avoid resource losses to the extent practicable, 33 CFR 320.4(r)(1).

The Court's discussion above regarding the Corps' failure to comply with the procedural safeguards of NEPA as to this issue compels a similar conclusion here, i.e., that

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[254]Mitigation is defined as avoiding the impact altogether by not taking a certain action or parts of an action, rectifying the impact by repairing, rehabilitating, or restoring the affected environment and compensating for the impact by replacing or providing substitute resources or environments. 40 C.F.R. 1508.20.

the Corps did not comply with the CWA. The Court observes that the ROD offers little supplement to the EIS' minimal analysis, as the majority of the ROD's analysis of "minimization" is simply a repeated discussion of the groundwater seepage study found in Appendix A to the EIS. AR1028 at 41 - 53 (Section 8, Alternatives). The discussion reports on the various modeling, all of which can be summarized as simply proving that there is a risk of groundwater seepage from the mining and its remnant quarry pits. The discussion of minimization that is included presumes that mining will occur, which is appropriate for the purposes of minimization analysis, of course, but then fails to offer specific recommendations for minimization. For example, "several new water control structures" proposed by the mining industry are mentioned, AR1028 at 44, but the Corps notes that these structures would "require additional water to be supplied from the regional system" in order to achieve beneficial seepage changes. AR1028 at 45-46.[255] "For north of Tamiami Trail, the miners have described how the seepage could be avoided through addition of structures but these would require additional water from the regional system." AR1028 at 52.

> The need for additional water from the regional system is a difficult issue for the Corps acting under Section 404 of the Clean Water Act to address since the Clean Water Act reserves water supply aspects to the States. This issue is certainly recognized by the State and must be incorporated by the State in its water supply planning. Both resolution of this issue and the design of seepage avoidance/compensatory actions is best done in conjunction with CERP components related to seepage, which as seen above have complete [sic] dates of 2013 and 2014.

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[255]One of the structures proposed by the miners, a structure on the L-31N canal to raise the water level, would be erased by the CERP's proposed filling in of the canal and flooding of the adjacent area, but the CERP project end date is not until 2013. AR1028 at 49.

AR1028 at 52. These minimization plans are not nearly as specific as those examined with approval in Sierra Club v. United States Army Corps of Eng'rs, 2005 U.S. Dist. Lexis 36385 (D.N.J. 2005) (specific minimization steps included design of an efficient stormwater management system, placement of an impervious cap over the contaminated areas, use of "best management practices," prompt grading of fill to reduce risk of dispersion, etc.). The Corps' discussion of mitigation measures does include reference to specific actions which would minimize unwelcome water inputs in the Lake Belt: removal of barriers between existing pits, removal of any existing direct canal connections to pits (and maintenance of a 100-foot distance from canals), construction of a berm around the Lake Belt area to prevent direct entry of surface water runoff. AR614 at 82. None of these were implemented in the ROD or permits[256], however, and as such the Corps' treatment of minimization and mitigation was inadequate.

The Court now turns to the question of whether the Corps complied with the public participation requirements of the CWA.

E. Public participation

Public participation "shall be provided for, encouraged, and assisted" in enforcing the CWA's standards. 33 U.S.C. §1251(e). Although the Court is addressing this as the final aspect of the CWA analysis, the topic is one of great importance. The statute guarantees

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[256]"[T]he 10-year permit allows time to coordinate the construction of seepage management systems with the CERP. There is a risk of contamination to the public wellfield but additional interim restrictions are imposed on the mining and a review is scheduled three years after permit issuance to minimize the potential that the adverse effect will occur." AR1028 at 55.

that the public will have the opportunity to participate in the permitting process, 33 U.S.C. §1344(a), and that implies that the public will receive information in a manner that is useful and supports meaningful engagement by the public. Unfortunately, the public's ability to participate in an informed way in the process of issuing the permits presently under review was compromised by the Corps' inattention to detail, as noted above in the NEPA analysis, incorporated herein.[257] Plaintiffs have complained about the difficulty in gaining complete

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[257]As yet another example of the flawed information distributed to the public regarding the extent of the proposed project and its impact on wetlands, there is a significant difference in the reported numbers of acres to be mined by the single company responsible for the largest number of acres of mining, Rinker Materials. According to Rinker, a total of **1,963.4** acres will be mined by Rinker during the ten year permit period. See Affidavit of Rinker President, Exh. 1 to Docket Entry #34. This amount includes 957.9 acres directly related to Rinker's own permit, #200002369, and 442.68 acres permitted to be mined by Kendall Property and Investments, Permit #200002369, which relate to a quarry that Rinker "operates" -- for a total of 1,400.58 acres under the new permits. Id. It thus appears that 562.82 acres were subject to previously existing permits (i.e., the difference between 1,400.58 acres and the reported total 1963.4 acres).The Public Notice (June 2000) issued shortly after the EIS advised that "the Corps is presenting in this public notice the estimated total extent of renewals and expansions" but did not specify how many acres were to be mined by each company, only that a total 14,300 acres would be covered by the renewals and new permits. AR623A. The Revised Public Notice (March 2001) does not contain a similar statement as to the inclusion of acres covered by renewals, and reports only the new 957.9 acres (Rinker) and 442.68 acres (Kendall), a total of 1,400.58. AR737. A person reviewing the Revised Public Notice, which states that it "supercedes the previous public notice," reasonably might conclude -- and would be entitled to reach such conclusion -- that Rinker's total mining impact during the ten year period will be only 1,400.58 acres. However, the ROD (April 2002) reports that the total impacts for Rinker's first ten years of mining will be **1101.1** (FEC quarry), and **323.6** (SLC quarry) = **1,424.7** acres, and **536.7** (Kendall), for a total of **1,961.4 acres**, AR1028 at 5, 115 -- a figure which corresponds closely with Rinker's report of 1,963.4 acres to be mined during the ten years, but which is 561 acres (40%) more than the public was advised after the EIS. Thus, the public was -- as to just this one company, the company mining the largest amount (36%) of the total 5,400 acres to be mined, misinformed as to its impact. Similarly, White Rock actually will be mining 941.7 acres, AR1928 at 115, compared to the 735.63 acres announced in the Revised Public Notice, AR737, a 28% increase.

and accurate information about this important environmental permitting process,[258] and the Court agrees that clarity and candor seem to have been casualties of the agencies' rushed process. For example, the Corps' explanation, at AR1028 at 5, for some of the differences in the EIS' estimates[259] of acres of impact -- that it is "the result of the long time that this project has undergone review" -- does not address the differences between the expected acres of impact disclosed to the public and those actually accounted for in the ROD.

In addition to the factors discussed earlier in the NEPA analysis of public participation, the Court notes that no public hearing was held by the Corps at any time in this ten year administrative process. The level of interest in a public hearing was high, as demonstrated by the number of people (250) who attended each time that the Lake Belt Committee held public meetings. The CWA grants the Corps discretion to determine whether public hearings are held, and the Corps may decide not to hold a hearing if there is "no valid interest to be served by a hearing." 33 U.S.C. §1344(a), 33 C.F.R. 327.4(b), Fund for Animals, Inc. v. Rice, 85 F.3d 535 (11th Cir. 1996) (no public hearings required); Hough v. Marsh, 557 F. Supp. 74, 80 (D. Mass. 1982) (remanded for failure to consider local requirements, court directed that a public hearing should be conducted). Here, the Corps received several requests for a public hearing, but "concluded that substantive

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[258]Plaintiffs submitted comments to the Corps on March 30, 2001, noting the Corps' failure to provide the public with relevant documents and information on pending applications before the close of the comment period, despite a timely request by Sierra Club for such information. "By denying access to site-specific information and refusing to provide sufficient time to consider relevant information and submit meaningful comments, the Corps has reduced the public participation process required under the Clear Water Act to nothing more than a hollow, make-work exercise." AR793B.

[259]Biological Resource Associates (BRA), and Fortin, Leavy, Skiles, Inc. (FLS) had different estimates.

additional information would not be received and that a public hearing would not benefit the decision-making process on this permit application." AR1028 at 113-14.

In light of the fact that there had been no meaningful comment period on, *inter alia*, the terms and special conditions of permits, and the Corps itself had not conducted a single hearing during the ten years spent in consideration of these permits, it was an abuse of discretion to not have conducted at least one hearing. Indeed, the burden of conducting one public hearing seems relatively light when weighed against the Corps' obligations to the public as to these highly controversial permits, and the Court concludes that the agency abused its discretion in this instance.[260]

F. APA

As with the NEPA analysis above, the Court's conclusion that the Corps violated the CWA controls the determination of whether there was a violation of §706(2) of the APA. Specifically, in addition to all of the findings identified above, the Court holds that the Corps'

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[260]"[T]he CWA does not state that the Corps itself must hold its own public hearings regardless of how many other hearings have been held on a project." Fund for Animals, Inc. v. Rice, 85 F.3d 535 (11th Cir. 1996). In that case, the Eleventh Circuit noted that the Corps had received voluminous written information and that two public hearings had been conducted by other entities (i.e., the state process), and observed that the objectors had not pointed to any new information that was likely to have been generated by the public hearing. In the present case, the Plaintiffs have not specifically suggested what information would have been presented by Miami-Dade County elected officials, or anyone else who had requested the public hearing on the ROD. Presumably the County and members of the public would have provided comments on those items that had never been disclosed in the EIS and, thus, never subjected to public scrutiny. As noted by the Eleventh Circuit, "[i]f the Corps determines that it has the information necessary to reach a decision and that there is 'no valid interest to be served by a hearing,' the Corps has the discretion not to hold one." Fund for Animals at 545, citing 33 C.F.R. 327.4(b).

failure to apply the rebuttable presumption to this non-water-dependent activity resulted in a permitting decision that was "without observance of procedure required by law," 5 U.S.C. §706(2)(D).

VI. DID THE CORPS' FAILURE TO ENGAGE IN THE FORMAL CONSULTATION PROCESS PRIOR TO ISSUING THE PERMITS VIOLATE THE ESA? (COUNT III)

Plaintiffs allege that the Corps violated the ESA by failing to complete the formal consultation process as to the endangered wood stork[261] and other species (Cape Sable seaside sparrow, snail kite, and American crocodile). Plaintiffs also claim that the Corps' decision to issue the permits for mining violated its duty to use its authority to conserve the above named species, as required by 16 U.S.C. §1536(a)(1).

Analysis of whether there has been a violation of the ESA follows a similar path to the Court's analysis of Plaintiffs' NEPA claims regarding the Corps' preparation of the EIS. "The procedural requirements of the ESA correspond, and overlap with, [sic] the procedural requirements of NEPA." Sierra Club v. Corps, 295 F.3d 1209, 1216 (11th Cir. 2002) (court will not reverse agency action which was consistent with applicable regulations).[262]

The ESA provides that each agency shall "in consultation with and with the assistance of the Secretary [of the Interior, acting through the FWS], insure that any

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[261]The wood stork has been on the endangered list since February 28, 1984. AR568 at 11.

[262]For example, both statutes require that an agency's assessment of environmental factors be updated in the event that new and relevant information is introduced.

[agency action] is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species .... [using] the best scientific and commercial data available." 16 U.S.C. §1526(a)(2). The agency's process begins with a determination of whether there may be an endangered/threatened species in the area to be impacted by the proposed activity, i.e., the "action area." If species are present in the action area, then the Corps is required to prepare a Biological Assessment (BA).[263] 16 U.S.C. §1536(c)(1). The action area is defined as "all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action." 50 C.F.R. 402.02(d).

In April 1996 the FWS provided the Corps with a list of protected species which might be in the vicinity of the Lake Belt area, and provided specific details about certain of the species. FAR134.[264]

> A woodstork (Mycteria americana) rookery has been documented approximately one mile west of the northwest project boundary (off site). Woodstorks have also been documented within the project boundaries. Apple snails, a primary food source for Everglades snail kites (Rostrhamus sociabilis plumbeus), have also been

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[263]A BA may include, *inter alia*, the results of on-site inspections, the views of recognized experts on the species at issue, a review of the literature, an analysis of the effects of the action on the species and its habitat, and an analysis of alternate actions. 50 C.F.R. 402.12(f). And, "[i]f new information regarding endangered species [becomes] available, or if environmental consequences not already evaluated [come] to light," then the Corps must prepare either a new BA or an SEIS. Sierra Club v. Corps, 295 F.3d at 1219-20 (11th Cir. 2002).

[264]It should be observed that the Court occasionally has relied upon correspondence that was addressed to the Corps, but which the Court has located only in the FWS administrative record. Because it may be that the Court overlooked the item in the Corps' record, the question whether the items were omitted from the Corps' record will not be raised; rather, the Court has determined that the existence of signed copies of memoranda or correspondence addressed to the Corps can be assumed to have been available to the Corps for its timely review.

> documented on site.... Additional surveys by the FWS or the project proponent may reveal the presence of other listed species in the vicinity. Formal consultation ... may be required prior to any habitat alteration associated with this project.

FAR134. The reported presence of the Wood stork was enough to trigger the Corps' duty to prepare a BA,[265] or to get a written concurrence from FWS that the proposed mining activities were "not likely to adversely affect" protected species, 50 C.F.R. 402.13(a), but the Corps did neither for the next two years.[266]

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[265]There is further evidence that the Corps was aware of the presence of at least one protected species in the Lake Belt area. In June 1996, Everglades Research Group (private consultants) submitted a "Wildlife Study-Final Report" to DERM, noting that "[t]welve listed species were observed in the [Lake Belt].... the [Lake Belt] serves as a critical peripheral wetland for wading bird foraging.... Both juvenile and adult Wood storks were observed." FAR132. This report was included in the EIS as Appendix D, see AR614 at 40.

[266]Instead of preparing a BA or initiating formal consultation with FWS, it appears that the Corps lobbied the FWS to agree to a proposed mitigation ratio that was lower than FWS preferred. A senior Corps staff member made observations about the lack of cooperation that was forthcoming from FWS, while at the same time agreeing with DEP that FWS should be excluded from a March 20, 1997, meeting scheduled to brief EPA regarding the Lake Belt mitigation plans and ratio, since it would be "unwise (and unfair to the rest of us) to have them [FWS] pop up uninformed and express a negative opinion at this briefing." AR436, AR437. Frustration with FWS apparently lingered, however, and on April 7, 1997, the Corps' District Engineer advised others outside the Corps that "we have done all in our power to get ... someone from FWS to the [Lake Belt Team] meetings." AR453. On April 8, a senior Corps staff member exclaimed:"I do not know where [FWS and NPS] are coming from," AR455, and shortly thereafter asks FWS to define its precise reservations on the 2.5:1 mitigation ratio but to keep in mind that the mining consortium is "pretty fragile" -- to which FWS responds that it still has concerns about seepage problems, AR464. On May 21, 1997, FWS submits its formal criticisms regarding the EIS to the Corps, and also submits comments jointly with ENP on October 1, 1997. AR512.The Corps perhaps expected FWS to agree, based upon FWS' prior agreements as to earlier permit applications (in 1994, from Rinker Materials, was "not likely to adversely affect" species or habitat, FAR127; Rinker sought to modify that permit, in 1998, and FWS criticized the littoral shelf plans described at that time, and recommended against approval of that permit until a mitigation plan was solidified. FAR127. When Rinker sought to modify another permit in 2000, FWS agreed with the Corps that the modification created no effects that had not been previously considered. FAR38. It is unclear whether FWS ever saw a BA regarding

When conducting a BA, it must be determined whether the action at issue "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species" -- if the answer is yes, then species "jeopardy" has been indicated. 50 C.F.R. 402.02.[267] If the BA reveals no potential "jeopardy" to listed species, and the FWS agrees, then the proposed project may proceed. 50 C.F.R. 402.12(k)(1). However, if a BA reveals that the action "***may*** affect listed species or critical habitat" then the agency must initiate "formal consultation" with FWS, 50 C.F.R. 402.14(a) (emphasis added), and FWS must prepare a Biological Opinion (BO), 16 U.S.C. §1536(b)(3)(A), 50 C.F.R. 402.14(g).[268]

In April 1998 the Corps requested[269] and received written concurrence from FWS, dated May 19, 1998, that the proposed mining activities "will not adversely affect" Federally

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these permits.

[267]If FWS determines that the proposed action will place any protected species in jeopardy, FWS must suggest reasonable and prudent alternatives to the proposed activity. 16 U.S.C. §1536(b)(3)(A), 50 C.F.R. 402.14(h).

[268]For example, on February 19, 1999, the FWS delivered a BO to the Corps regarding major projects surrounding the Lake Belt area (the Modified Water Deliveries to Everglades National Park project, Experimental Water Deliveries Program, and the C-111 project, hereinafter collectively referred to as "Mod Waters"), specifically noting alternatives that related to protecting the Cape Sable seaside sparrow. AR1162. Although the Industry Defendants have noted the existence of the BO as to the C&SF Project, see Reply brief, Docket Entry #44, p. 22 fn18 (citing AR1153), apparently to suggest that FWS already had performed the legally required analysis as to the general geographic area, the Court will not infer that the C&SF BO, originally submitted in 1998 and finalized in March 1999, nor the Mod Waters BO which was finalized in February 1999, answers the questions presented by the permits at issue – particularly when FWS has not even argued such a point.

[269]As noted by the Plaintiffs, AR1336 at 2375, the Corps' letter (reportedly dated April 14, 1998) requesting the concurrence was not produced.

listed species. AR568. The Corps had not prepared a BA at the time (nor did it ever prepare one) and, thus, no BA had been reviewed by FWS before it gave its approval; instead, it appears that the Corps sought to obtain FWS' written concurrence in order to end the consultation process quickly.

The May 1998 letter from FWS that provides the concurrence specifically states that the letter itself "does not constitute a Biological Opinion" according to the ESA, although it did "fulfill the requirements of ESA, and no further action is required [unless modifications are made to the project or additional information involving potential impacts to listed species becomes available]." AR568. FWS noted that an endangered wood stork nesting colony had been identified within one mile of the Lake Belt in 1989 and that the colony "may utilize the Lakebelt area as a feeding and/or roosting area." AR568. The Habitat Management Guidelines provided to the Corps along with the concurrence letter state that wood storks "are especially sensitive to any manipulation of a wetland site that results in either reduced amounts or changes in the timing of availability of food" and "[a] major reason for the wood stork decline has been the loss and degradation of feeding habitat." The Guidelines also reported that "nesting wood storks do most of their feeding in wetlands between 5 and 40 miles from the colony." AR568 at 4-5.[270]

Even though FWS specifically stated that its letter was not a BO, and it is clear from the record that no BA had yet been prepared, the Corps stated in the February 1999 draft

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[270]FWS' concurrence would have satisfied the Corps' responsibility under the ESA if there had been a rational basis for FWS' position -- but having determined that an endangered species was in the area, a BA should have been done, and the offering of a concurrence without such study was error on FWS' part, as discussed in greater detail below.

EIS that it had engaged in a "[f]ormal" consultation[271] with FWS. AR578 at 100. On May 26, 1999, the regional office of the Department of the Interior complained that the Department was not consulted during the preparation and review of the EIS prior to its public release, and that it disagreed with the Corps' conclusion that the Fish and Wildlife Coordination Act did not apply to the proposed project. AR605 at 24. The Department reminded the Corps that FWS' May 1998 letter recommended several measures to help the recovery of federally listed species, and that "these recommendations [should] be further expanded upon in the Final PEIS by including fish and wildlife enhancement features, including descriptions, conceptual maps and drawings of the recommended features." AR605 at 20. Despite this reminder from a regional agency official of the need to coordinate with FWS, the Corps did nothing to change its statement and the final EIS still claimed that "formal consultation" was completed, AR614 at 101, and that the Corps had obtained FWS' concurrence that there would be "no effect" on listed species, AR614 at 83.[272]

Clearly, the interaction between the Corps and FWS had not constituted a "formal

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[271]The FWS Handbook on ESA consultations, available at http://www.fws.gov/endangered/consultations/s7hndbk/s7hndbk.htm, describes a "formal consultation" as a process that "begins with a Federal agency's written request and submittal of a complete initiation package" and "concludes with the issuance of a biological opinion and incidental take statement." FWS Handbook, xiv.

[272]The publication of the misstatement in the EIS apparently prompted the Office of the Secretary of the Department of the Interior to send a letter to the Corps dated September 20, 2000, noting that the May 1998 letter had only been provided by FWS as "very general technical assistance on the concept of the Lake Belt Project" and reminding the Corps that it was "required to consult with [FWS] concerning potential effects to federally listed species .... [and that after] an analysis of potential effects to listed species conducted by the applicant or the Corps, formal consultation may be necessary." AR712.

consultation" at the time that the Corps reported in the EIS that it had. While it is correct that the "informal consultation" process legally could have been discontinued after the Corps received FWS' written concurrence, that did not alter the nature of the (minimal) consultation which had occurred until that time and it was a significant error, and misleading to the public, for the Corps to describe it as having been more substantial, i.e., a "formal consultation."

FWS signaled a retraction of its concurrence on August 21, 2000, when it advised the Corps that "we will not begin the consultation process for the proposed project" until receiving further information – thus indicating the agency's desire to re-initiate consultation. AR671. On March 8, 2001, FWS requested to participate in a site survey and then, on April 30, 2001, reported that it could not concur with the Corps' announcement (Public Notice, June 21, 2000) that the proposed mining activities would have "no effect," or that the activities were "not likely to adversely affect" (as announced by the Corps in the Revised Public Notice, March 1, 2001) federally listed species. AR824.

At the same time that FWS requested a site survey, consultants hired by the mining industry were preparing a BA. The only BA ever reviewed by either the Corps or FWS was the one prepared by Biological Research Associates (consultants who were retained by attorneys representing the mining permit applicants) [273] on the potential impacts of the ten-

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[273]The Court has found no precedent that forbids the preparation of the BA by an applicant's agent, but cautions that this does not seem consistent with the language of the statute or the regulations: "agency shall conduct" a BA, 16 U.S.C. §1536(c)(1); BA should be "prepared under the direction of [agency]," 50 C.F.R. 402.02; any person may prepare BA "under supervision of [agency] and in cooperation with [FWS]," 50 C.F.R. 402.12(b) -- particularly where, as in the instant case, it appears that the BA was prepared independently of FWS with the exception of perhaps one joint site visit.

year mining plan on the wood stork).[274] The consultants announced that they concurred with the Corps' opinion that the project was not likely to adversely affect the wood stork, because Lake Belt wetlands do not "play a significant role" as foraging grounds or habitat for wood storks. AR821B. They did not deny that wood storks had been found in and near the Lake Belt area, nor that hundreds of acres of foraging habitat would be destroyed and that wood storks have been observed to have to travel as far as twelve miles or more in order to forage for food -- instead, they claimed, not surprisingly, that the mining activities would not adversely affect the species. Their conclusion is based on their claim that "over 90% of the resources that will be impacted are not high quality wood stork foraging habitat." AR821B at 8, 11. Not only is this statement patently absurd – for the acknowledged destruction of several hundred acres of wetlands foraging habitat clearly presents an "adverse" impact on a species which is known to be "especially sensitive to any manipulation of a wetland site that results in ... reduced amounts ... of food," but a closer examination of their derivation of the 90% figure reveals a significant flaw in their reasoning. That flawed reasoning infects the FWS' reliance on the BA and the Corps' reliance on both the BA and FWS' related opinion, and, consequently, renders a fatal blow to the ROD. AR1028 at 79.

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[274]Arguably, the Court could interpret the EIS as a proxy for a BA. "When an agency prepares an EIS, it is complying with the BA requirement, provided that one of the environmental impacts discussed is the impact on threatened and endangered species." Sierra Club v. Corps, 295 F.3d at 1219 (11th Cir. 2002). However, the lack of detailed analysis regarding the wood stork, and the absence of meaningful analysis as to other protected species potentially affected by the proposed mining, prohibits this particular EIS from satisfying the requirements of a BA. Even if this EIS were to be viewed as a BA, it nevertheless should have resulted in a formal consultation and, because it did not, remand is necessary.

The consultants noted that since only 499.8 acres of the 5,400 total acres (i.e., 9.3%) of wetlands to be impacted in the first ten years of mining were the "open canopied wetlands" favored by wood storks as foraging sites, AR821B at 7, then "more than 90%" of the impacted area should be considered as "not high quality wood stork foraging habitat." This "conclusion" fails to account for the fact that wood storks have been observed in other wetlands -- even those with some melaleuca infestation -- and to have counted only the "open canopied wetlands" misrepresented the extent of habitat destruction. FWS' letter to the Corps in August 2000 noted that the wood stork "is dependent on "wet prairies and other wetlands including those habitats invaded by melaleuca ... for forage habitat." AR671. The EIS indicates that at least one wood stork was noted in a wetlands area that was 50% - 75% covered with melaleuca, AR614 at 49, 90. Including these melaleuca-infested areas in a proper calculation of potential habitat destruction reveals that as much as 1,234.3 acres of prairie (both disturbed and undisturbed, all with no more than 75% melaleuca coverage) foraging habitat would be lost -- a total of 23% of the 5,400 acres within the 10-year mining plan. AR1028 at115.[275] Moreover, the mining industry, and the Corps, used similar logic

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[275]Again, as discussed earlier, the mining industry and its agents have attempted to receive favorable review of their permit applications by referring to degraded environmental conditions to justify continued degradation -- essentially arguing here that since the wood stork already has been pushed out by melaleuca infestation and changes in the hydroperiods of wetlands (events which are caused at least in some part by mining that already has occurred and is ongoing), the values of this degraded habitat to the wood stork are lower and mining should be allowed to continue to occur in this area. Similarly, the Industry Defendants highlight that the number of wood storks using the Tamiami West colony "significantly declined after 2001." Intervening Defendants' brief, Docket Entry #36 at p. 45. The offered explanation is that rookeries move every year, but it may be simply that the destruction of surrounding habitat has decimated the population. This Court is unable to approve further destruction of wetlands in this area -- potentially important foraging habitat for the endangered wood stork -- until the agencies have done the full investigation required by the ESA. Interestingly, the mining

to justify further destruction of endangered wood stork foraging habitat, by claiming that the majority of the Lake Belt habitat already was compromised by melaleuca and, thus, of little value to the wood stork. AR1028 at 79. "The Corps is aware of ... wood stork nests [near the mining area] and the fact that the nesting birds forage in the open canopy areas of the Lake Belt and the nearby Pennsuco wetlands. Without the melaleuca removal required by the plan, and funded by the mitigation fees these open areas would be overrun by vegetation and unavailable to the storks for forage." AR1144 at 15 (Corps' FAQs). See, also, discussion *supra* regarding Corps' compliance with NEPA. The Court need not (nor should it) become an expert ornithologist to recognize that the only BA in this file revealed that the mining in the Lake Belt area "may affect listed species or critical habitat" such that the Corps should have initiated "formal consultation" with the FWS, 50 C.F.R. 402.14(a), and FWS should have prepared a full Biological Opinion (BO), 16 U.S.C. §1536(b)(3)(A), 50 C.F.R. 402.14(g).[276] Unfortunately, the Corps never proposed and FWS never insisted

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industry has argued, and the Corps has agreed, that the melaleuca-infested character of portions of the Lake Belt wetlands justifies their further degradation -- indeed, destruction -- by mining. AR614 at 383, 420. "The majority of this [mining] impact would occur to melaleuca infested wetlands, which would have a positive benefit of removing a potential seed source of this highly invasive exotic species." AR614 at 83. "The 41,000 acres mining area [referencing a longer term mining plan] is virtually all a seriously degraded wetland." AR22 at 5. It seems at least odd that an industry gains permission to engage in further environmental destruction due, in part, to the destruction already attributable at least in part to that industry's prior actions.

[276]This conclusion is buttressed by review of the EIS itself, which reported that as many as 53 wood storks were observed in one day, in April 1995, in the Lake Belt area and that, according to 1989 data, a breeding rookery including 125 nesting pairs of wood storks was located only 9 miles west of the Lake Belt area. AR614 at 49. Further support is found in the record: an October 2001 Wading Bird Report prepared by the South Florida Water Management District indicated that 1400 wood stork nests in Everglades National Park in 2001 were located in a single colony (Tamiami West) within a few miles from the Lake Belt project area border. AR944 at 3, 14.

upon the formal consultation required, even after FWS had rescinded (in April 2001) from its statement of concurrence with the Corps' determination of "not likely to adversely affect." The Corps was in direct violation of the ESA by relying on less than "the best scientific and commercial data available" and violated the regulations by refusing to initiate the "formal consultation" process.

In a marked change of direction, on June 22, 2001, FWS announced that, based upon its review of the consultants' BA on wood storks and its own review of maps of the project area -- and having "conducted aerial reconnaissance" -- the agency "concurs that the proposed project is not likely to adversely affect the wood stork." AR838.[277] Recall that FWS had stated in April 2001 that its reason for not being able to concur with the Corps' previous or current determinations of "not likely to adversely affect" was because of "the large scope of this project [which already had been reduced to ten years], and the fact that the federally endangered wood stork ... has been observed foraging in the vicinity." AR824. The regional FWS office also had commented, noting in May 2001 that "the proposed work will have substantial and unacceptable impacts on aquatic resources of national importance if permitted ... without incorporating our recommendations .... I strongly encourage a mutual resolution of the identified wetland/wildlife concerns at the field level prior to your decision to issue the permit." AR828. Then, just a few weeks later and without offering a reasonable explanation for its change in perspective, FWS concluded that the loss of foraging habitat

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[277]Several months later, in December 2001, FWS announced that it had decided not to request higher level review of the projects and stated that "all unresolved concerns regarding [protected] species have been adequately addressed" -- despite the agency's continuing questions about the adequacy of the project's mitigation plan. AR948.

over the ten year life of the project would not result in harm to wood storks, and the "likelihood of potential adverse effects to the species are further diminished through the acquisition and enhancement of lands within the Pennsuco mitigation area and the creation of littoral shelves."AR838.[278] It is FWS' responsibility to explain its decision and -- particularly when changing course -- to do so with a reasoned analysis. See, e.g., Sierra Club v. Leavitt, 368 F.3d 1300, 1306 (11th Cir. 2004) (granting power plant permit was arbitrary and capricious when agency failed to explain differing interpretations of similar terms or to justify decision); Panhandle Eastern Pipe Line Co. v. F.E.R.C., 196 F.3d 1273, 1275 (D.C. Cir. 1999) (remand required when agency fails to explain change in policy regarding pipeline construction).

The agency's change in position is irrational, not supported by the record, and otherwise violates the ESA and its regulations, such that the Corps should not have relied on FWS' new/renewed concurrence. For example, FWS adopts the BA's statements that "wetlands at the project site are used by wood storks," and that there will be a "loss of foraging habitat," but then concludes that this "will not result in harm to wood storks" because the wetlands to be destroyed "are not measurably limiting to this species for foraging due to their close proximity to [a] greater expanse of Everglades and other

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[278]The FWS Handbook provides that "[i]n the event the overall effect of the proposed action is beneficial to the listed species, but is also likely to cause some adverse effects, then the proposed action 'is likely to adversely effect' the listed species." Handbook, xv. It is not clear from the record that FWS relied on the mitigation plan in deciding to concur with the Corps' "no adverse effect" decision. However, even if the long-range mitigative restoration, including the heavily-criticized "littoral shelves," included in the Lake Belt mining plan will be beneficial to the wood stork, it is undeniable (from evidence in the agencies' own records) that there will be some adverse effects; thus, the agencies' conclusions to the contrary were erroneous.

protected wetlands" AR838. In other words, the wood storks simply can relocate to other areas since the mining will destroy wetlands presently used as the birds' food source. This reveals that, at a minimum, there is an effect on the species and formal consultation should have been initiated by the Corps, 50 C.F.R. 402.14(a). Further, FWS' conclusion that the wood storks readily can go to other "adjacent protected wetlands" is unsupported by the record and/or irrational for at least three reasons. The mining plan itself will have an effect, through groundwater flow and seepage, on these adjacent wetlands which may affect their use as foraging habitat.[279] The "adjacent wetlands" -- which presumably are located on Everglades National Park property and the Pennsuco mitigation site -- are located several miles from many of the wetland acres slated to be destroyed during the first ten years of mining (even though those mining sites are within the foraging range of wood storks nesting in the protected wetlands) and this distance may negatively impact the birds' successful breeding.[280] And, finally, it is unclear from the record why wood storks would choose to leave otherwise productive foraging sites currently being used and instead travel to "adjacent protected wetlands" -- other than because their preferred foraging sites were being destroyed by mining. If the Court were to follow FWS' reasoning, every project

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[279]"The increased mined area had a direct impact on the groundwater flow and levee seepage [in the Lake Belt area] and its vicinities. Eastward groundwater flow and seepage from WCA3B and the Pennsuco Wetlands ... significantly increased." AR618 at121 (SFWMD August 21, 2000, reports that Pennsuco would have 13% to 19% shorter hydro-period).

[280]There is no explanation in the record as to why this forced shift to another feeding location, i.e., in "adjacent protected wetlands," which is not being used by the wood storks presently foraging in the Lake Belt and presumably would not occur but for the imposition of the mining activities and consequent destruction of wetlands, is not considered to be an adverse effect on the species, or at least an effect which should trigger a formal consultation.

proposed near the Everglades National Park could simply point to the existence of "adjacent protected wetlands" as a refuge for species being driven out by habitat destruction.

FWS also notes that the 499.8 acres of open-canopied wetlands -- used as wood stork foraging habitat for the majority of observed wood storks, as referenced in the BA – "are at risk of transition to forested wetlands dominated by melaleuca as a result of hydrological degradation in the area," AR838, implying that even without the mining activities this habitat would be lost. This implication fails to account for successful melaleuca eradication efforts that are outlined in the record and which might be employed in the absence of mining,[281] or the fact that wood storks probably could forage in these wetlands for several years until they became overly infested with melaleuca.[282] In summary, the Corps should not have relied on FWS' quick change in position, particularly in the absence of a healthy BA and more substantive consultation, because it clearly was not supported by the record before either the Corps or FWS.

Shortly before the permits were to be issued, the Corps forwarded a copy of the above-mentioned October 2001 South Florida Wading Bird Report, and stated its belief that information in that report, i.e., "that 90% of all Wood storks in Everglades National Park are located at the Tamiami West colony .... located 4.6 miles from the southwestern corner of

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[281]Obviously, the complete destruction of the wetlands by mining is not the only method of successfully eradicating melaleuca. (Indeed, the edges of the quarry pits may be subject to melaleuca infestation after the mining has been completed. "Melaleuca will invade those [shelves around the quarry pits] just as it does in any wetland community in southern Florida where water levels can fluctuate." SAR1336 at 2472.)

[282]Recall that wood storks were observed in areas with as much as 50% to 75% melaleuca coverage.

the Lake Belt study area ... [within] primary foraging radius [of] at least 12 miles" did not, in the Corps' view, provide additional information that "requires re-initiation of consultation." AR985. The presentation of new information triggers a re-initiation of formal consultation when such information "reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered," or if the 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." Either the Corps or the FWS may request re-initiation. 50 C.F.R. 402.16. Sierra Club v. Marsh, 816 F.2d 1376 (9th Cir. 1987) (Corps was arbitrary and capricious by not re-initiating consultation after it was requested by FWS). Neither agency did so in this case. The Corps relied on a supplemental report prepared by the same private consultants who prepared the BA, which explained that the information in the Wading Bird Report was all previously available, and that the particular colony identified in that report was "not highly dependent on the lands within the 10-year mining footprint."[283] AR985. Similarly to the Court's conclusion, above, that the Corps' failure to prepare a SEIS presents less of an issue in light of the necessary remand for correction of significant flaws in the original EIS, the Court finds that a decision about the agencies' failure to re-initiate the ESA consultation is less pertinent because of the remand that must be ordered to permit the agencies to remedy the problems in their minimal original consultation.

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[283]It is not clear from the record whether either of the agencies attempted to evaluate whether the longer range, i.e., 50-year, mining plan would adversely affect any protected species – a question which seems somewhat relevant in light of the acknowledged nature of the current permits as "bridging permits" and the Corps' apparent intention to approve the full mining plan in the near future.

This Court is refraining, as required, from substituting its own judgment for that of the agency, but based upon the clear evidence of the flawed logic in FWS' opinion, the Court must find that the agency's "written concurrence" conclusion lacks a rational basis and the Corps erred when it chose to rely on that concurrence. At a minimum, the evidence of an "effect" on the wood stork required the initiation of "formal consultation" by the Corps which would have lead to the preparation of a BO by FWS in accord with the ESA and its related regulations. "Agency actions must be reversed as arbitrary and capricious when the agency fails to 'examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" Sierra Club v. Martin, 168 F.3d 1, 5 (11th Cir. 1999) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)).

The Corps also erred in its general duty to provide accurate information to the public. On at least two occasions (the publication of the EIS in May 2000, and the issuance of the Public Notice in June 2000), the public was informed that there would be no effects on endangered or threatened species, in addition to being assured that the Corps had engaged in "formal consultation" and that the proposed mining project "was in full compliance with the [ESA]." AR614 at 92. As late as March 2001, when the Corps issued its Revised Public Notice, the public was informed only that the proposed project was "not likely to adversely affect" protected species or their critical habitat. The Corps' "Frequently Asked Questions" document, posted on its website at www.saj.usace.army.mil (dated April 10, 2002), and included in the administrative record, contains the following statement:

> The Lake Belt wetlands currently host predominantly exotic, invasive plants (Melaleuca); resulting in degraded wildlife habitat. Melaleuca eradication and other restoration efforts on lands acquired for mitigation will encourage reestablishment

> of native plant and animal species and communities. Mining will degrade some wetlands, but the resulting decrease in wildlife habitat is compensated for by increased habitat values in the mitigated areas. Additional ecological benefits are provided from small areas of marsh that will be created around each completed mine pit.

AR 1144 at 9.[284] The Corps informed the public only that the mining will degrade "some" of the wetlands (when actually thousands of acres of wetlands will be destroyed -- including hundreds of acres that might have been foraging habitat for the wood stork), and reports nothing about the presence of the endangered wood stork in the area.

In summary, the ESA requires that the Corps consult with the FWS about a proposed action's impact on protected species, and the FWS has a duty -- when such impacts are identified -- to arrive at a BO based upon the best scientific data available. Fund for Animals, Inc. v. Rice, 85 F.3d 535, 547 (11th Cir. 1996). Here, the Court finds that the Corps was arbitrary and capricious in several ways: not preparing, or supervising the preparation of, a BA; failing to initiate formal consultation with FWS on a number of occasions, particularly after FWS' April 2001 letter; relying on FWS' determination in June 2001 that the wood stork would not be adversely affected by the destruction of thousands of acres of wetlands, particularly in light of the limited analysis in the BA and FWS' failure

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[284]The Court deliberately has quoted extensively from the Corps' News Release and website information contained in the record. The federal environmental laws embrace the principles of transparency and public involvement in the decision-making process. Thus, those public materials that are most accessible, e.g., a news release or information stored on a website, may be the primary source of information for the public, and represent the first level of information that may be relied upon by those who would otherwise choose to seek further engagement in the process. If the Corps' public information is not sufficiently revealing of the actual harms to the public that are being considered, or does not accurately portray the alleged benefits of the permitting approval, there is a risk that potential objectors might rely on this flawed information and unnecessarily abandon their efforts to participate in the process – thereby limiting the benefits that public participation is designed to achieve.

to prepare a BO;[285] and misrepresenting in several public documents the nature of its consultation with FWS.[286]

To be clear, the Court is not announcing a conclusion that the proposed mining will be so damaging to the wood stork's habitat that it must not be approved; rather, the Court is finding that the Corps (and FWS) should have conducted the formal consultation process required by the ESA and 50 C.F.R. 402.14(a) because it was clear from the record before the agencies that the proposed mining, at a minimum, "may affect" the wood stork.[287] Based upon the decision documents before the Court, the Court simply is unable to conclude that the Corps or FWS relied on the "best scientific and commercial evidence available" regarding the wood stork, and this raises the Court's concern about whether other species were ignored. Upon remand, the formal consultation process should comply with all governing regulations and also address any other protected species as required by the ESA.

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[285]The present case is easily distinguishable from the appellate court's opinion in Sierra Club, 295 F.3d at 1222, in that case none of the wildlife surveys conducted between the dates of the EIS and the issuance of the permits found any of the species that were the subject of the objections (i.e., Florida panther and three protected plant species) in or near the action area; in contrast, in the present case the Corps had uncontroverted evidence that wood storks were frequenting the Lake Belt area. Also, neither the FWS nor its administrative record was before the appellate court in Sierra Club, unlike in the present case. Sierra Club, at 1222.

[286]It is irrelevant, and not even argued by Defendants, whether such misrepresentations were simply mistakes, for the public is entitled to accurate information and the Corps' failure to provide correct statements on important issues -- even after having been notified of the error -- is inexcusable.

[287]The fault for this situation lies primarily with the Corps, for it must request the formal consultation -- FWS cannot force an agency to engage therein. FWS Handbook, 2-10.

VII. DID FWS' DECISION TO CONCUR IN THE CORPS' CONCLUSIONS REGARDING PROTECTED SPECIES COMPLY WITH THE APA 706(2)? (COUNT IV)

Plaintiffs claim that the FWS failed to discharge its duties in at least four ways: FWS should not have concurred with the Corps' decision that there would be no adverse effect upon any species, FWS should have insisted on formal consultation as to the wood stork, FWS should have pushed for a re-initiation of informal consultation after receiving the October 2001 report on the presence of wood storks in the area, and FWS should have pushed for at least informal consultation on the Cape Sable seaside sparrow. The Court must determine whether, consistent with the standards of the APA, Bennett v. Spear, 520 U.S. 154 (1997), FWS properly performed its duties. As long as there is a rational connection between the FWS decisions and the record facts, the Court will not find a violation. The Court's duty is "to ensure that the agency took a 'hard look' at the environmental consequences of the proposed action." 295 F.3d at 1216 (citing North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1541 (11th Cir. 1990).

As described in the preceding section, FWS should engage in formal consultation whenever a BA reveals that a protected species "may" be affected, 50 C.F.R. 402.14(a). FWS must review the available data and evidence, evaluate the status of the species and the potential effects of the agency action, and formulate a Biological Opinion (BO), which states whether the action and its cumulative effects[288] are likely to jeopardize the continued existence of the species. Id. 295 F.3d at 1213-14; 16 U.S.C. §1536(b)(3)(A), 50 C.F.R.

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[288]According to the Handbook, cumulative effects are those effects of future State or private activities not involving Federal activities, that are reasonably certain to occur within the action area [that is the subject of the consultation].... This definition ... should not be confused with the broader use of this term in [NEPA]." Handbook, xiii.

402.14(g). When FWS reviewed the limited BA submitted by the permit applicants' consultant, it should have triggered the agency to push for formal consultation with the Corps and, subsequently, to prepare a BO that complied with the agency's own regulations. It did not, and therefore FWS' actions were arbitrary and capricious. Sierra Club v. Johnson, 2006 U.S. App. LEXIS 1380 (11th Cir. Jan. 20, 2006) (EPA was arbitrary and capricious when it failed to comply with unambiguous regulatory requirement); Sierra Club v.Martin, 168 F.3d 1 (11th Cir. 1999) (agency decision not entitled to deference since decision violated National Forest Management Act and regulations).

The FWS' failings were compounded by the Corps' non-compliance, resulting in agency decisions in which there is no confidence -- remand for the "hard look" required by Marsh v. Oregon Nat'l Resources Council, 490 U.S. 360 (1989), is the only conclusion that can be supported upon a review of these administrative records. In the final analysis, the Court finds that the record does not reveal a rational basis for the FWS' decision in May 1998 to concur in the Corps' conclusion that the mining activity "is not likely to adversely affect the wood stork," AR838; nor was there a satisfactory explanation for the change in FWS' position between April 2001 and June 2001. Remand to FWS is necessary, to permit the agency to consult formally with the Corps, and to develop a BO that addresses all of the relevant factors as to all of the pertinent species.

CONCLUSION

In finding deficiencies in the agency procedures followed up to and including the issuance of the ROD in April 2002, the Court is mindful of the events of subsequent years, as reported by the parties. Mining has occurred with its attendant capital expenditures and

profits. Mitigation fees have been collected. Additional studies have been conducted. Most importantly, wetlands have been permanently destroyed. Regardless, however, of whether new studies may soon indicate that the Aquifer is not being harmed by the mining activities, or that the groundwater seepage effects can be minimized, or even if a more probing analysis reveals that there truly are no practicable and environmentally preferable alternatives to mining in this precious resource, the Court's conclusion would be unchanged. Based upon the record presented by these two federal agencies, they failed to carry out their duty to protect the federal wetlands and protected species -- placed in their care by Congress -- from private exploitation to the detriment of the public interest. The law is clear that statutory and regulatory duties cannot be ignored. In this case, the consequences of the agencies' disregard for their own regulations may be significant, harmful, irreversible effects.

The Corps' and FWS' decisions apparently were overly influenced by factors that are not as important as the protection of the natural environment. For example, the Corps gave too much weight to the pressure from the state legislature not to lose a mitigation funding mechanism. They also were swayed by the momentum of decades of mining having taken place in the area -- despite the obvious destruction of wetlands that it had caused, as well as the menacing threat of takings litigation being raised very effectively by the permit applicants. There are a multitude of defects evidenced in the issuance of these permits. Some of the problems may be classified as small or insignificant, but some are vitally important, such as the question of groundwater seepage and potential contamination of the Aquifer. In total, the Court sees a maze of human failures in the issuance of these permits and the process that lead to this result. Even if one or two of the defects were not enough

on their own to require remand of this matter, the cumulative effect of these irregularities makes it clear that further environmental analysis should have been conducted and a remand is necessary. The Court cannot ignore the dangers presented by this case. The Corps' apparent disregard for those seeking answers to questions -- including the Corps' failure to grant, or even to respond timely, to the request for a public hearing submitted by the Miami-Dade County Manager on behalf of the County Commission -- is another item which, in connection with the maze of irregularities referred to, is additional impetus for my conclusion that the permits should not have been issued on this record.

Not the least of the problems is the destruction of the wetlands. Wetlands play an important role, not only in the areas in which they lie, but also to the entire Everglades and South Florida ecosystem. As the Corps' own regulations state, wetlands are a "productive and valuable public resource, the unnecessary alteration or destruction of which should be discouraged." 33 C.F.R. 320.4(b)(1). The absence of the wetlands already eliminated by the limestone mining will prove very harmful to the Everglades when, e.g., the seepage now occurring continues to increase with additional mining. "From a national perspective, the degradation or destruction of special aquatic sites ... is considered to be among the most severe environmental impacts." 40 C.F.R. 230.1(d).[289] The Court has no alternative but to remand this permitting process to the Corps and FWS so that they may make better decisions, not simply to prepare an even more exhaustive administrative record, but rather

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[289]The EPA regulations are specifically applicable to the Corps as stated in 33 C.F.R. 320.4(a).

to engage in the meaningful analysis required by the APA, NEPA, CWA, and ESA.[290]

The Court has not yet determined an appropriate remedy in this case. For example, whether all mining being conducted pursuant to these "bridging permits" should cease while the Corps and FWS are reviewing these issues on remand, or just that portion of mining that is attributable to the new permits. The parties shall brief this issue for the Court, i.e., the nature of the injunction, if any, which should issue, and the Court will hold a hearing on the question of remedies after review of the parties' briefs. The briefs shall be submitted no later than April 19, 2006. All response briefs shall be filed no later than April 26, and a hearing will be held at 11:00 a.m. on May 10, 2006.

The Court cannot resist these final observations. The Corps was, and I am, faced with a most difficult decision: to balance the rights and interests of these particular mining companies with the rights and welfare of the public. In the last analysis, the Court finds that the record in this case compels the conclusion that the permits should not have been issued. Not only have I, and the Corps should have, considered the condition of the wetlands environment at the time that the permits were issued, but I also have looked directly into the future of fifty years of mining in this area – a point clearly implied by the Corps' "bridging permits" and vague "special conditions" thereon – and I find that, based upon application of the factors identified by Congress to the record before me, the Corps should not have issued these permits authorizing this mining.

To summarize the above, it is hereby

ORDERED AND ADJUDGED that judgment be entered for Plaintiffs as to Counts

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[290]Ironically, if the Corps had decided to deny these permits, the record contains ample evidence to support confirmation of such a decision.

I, III, IV, and V. Further, as stated above, the Plaintiffs' motion to dismiss Counts II and VI without prejudice is GRANTED, and the Plaintiffs' motion to strike is DENIED.

This matter is REMANDED to the United States Army Corps of Engineers for further development, consistent with the above discussion. The Court retains jurisdiction for the purpose of determining an appropriate remedy, and for all other necessary purposes.

DONE AND ORDERED in Chambers in Miami this 22nd day of March 2006.

WILLIAM M. HOEVELER
SENIOR UNITED STATES DISTRICT JUDGE

Copies furnished:
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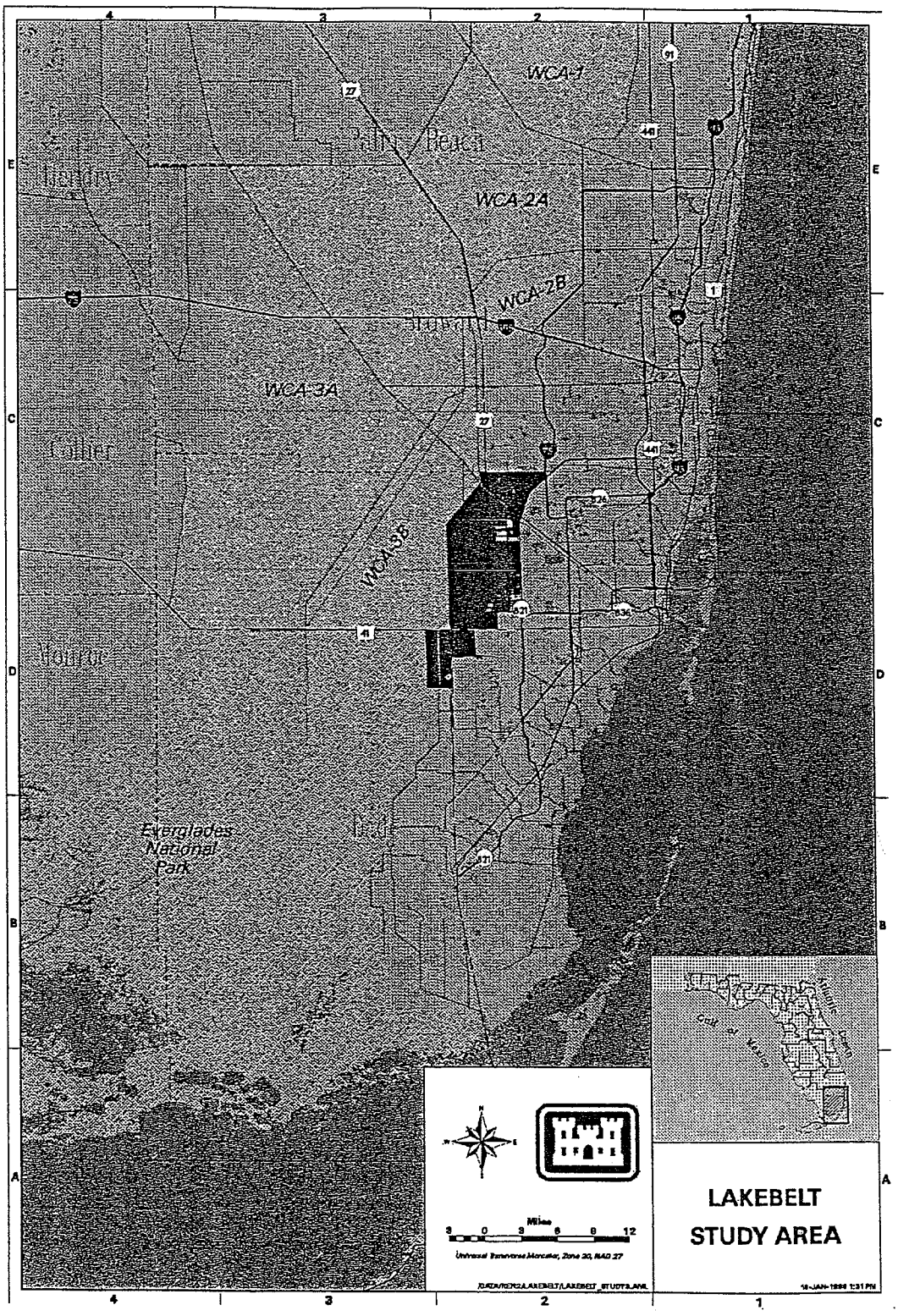
WCA-1
WCA-2A
WCA-2B
WCA-3A
WCA-3B
Everglades National Park
LAKEBELT STUDY AREA
Miles
Universal Transverse Mercator, Zone 20, NAD 27

APPENDIX A