UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 17-CV-24444-UNGARO/TURNOFF

CENTER FOR BIOLOGICAL DIVERSITY;
TROPICAL AUDUBON SOCIETY;
MIAMI PINE ROCKLANDS COALITION; and
SOUTH FLORIDA WILDLANDS ASSOCIATION,

Plaintiffs,

vs.

RYAN ZINKE, in his official capacity as Secretary of the U.S. DEPARTMENT OF THE INTERIOR; U.S. FISH AND WILDLIFE SERVICE; GREG SHEEHAN, in his official capacity as Principal Deputy Director of the U.S. Fish and Wildlife Service; and JIM KURTH, in his official capacity as Deputy Director for Operations and Acting Director of U.S. Fish and Wildlife Service,

Defendants.
_____/

REPORT AND RECOMMENDATION ON
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

THIS CAUSE is before the Court upon Plaintiffs' Motion for Preliminary Injunction. (ECF No. 4). This matter was referred to the undersigned by the Honorable Ursula Ungaro, United States District Court Judge for the Southern District of Florida. (ECF No. 9, 14, 18). A hearing on this motion was held on January 5, 2018. (ECF No. 69). Upon review of the written and oral arguments, the extensive record, the applicable law, and being otherwise duly advised in the premises, the undersigned **RESPECTFULLY RECOMMENDS** that the Motion be **DENIED**.

INTRODUCTION

This case involves a challenge to the biological opinion and incidental take permit issued by the United States Fish and Wildlife Service ("FWS"), pursuant to the Endangered Species Act, ("ESA") regarding development of a multi-acre tract of land in Miami-Dade County, Florida, containing pine rockland habitat and various attendant protected species.[1] In connection therewith, Plaintiffs seek the entry of a preliminary injunction against various Defendants to stop the continued clearing and construction of the parcel of land.

Specifically, Plaintiffs argued that the Habitat Conservation Plan (HCP) submitted to the FWS, as well as the Incidental Take Permit (ITP), Biological Opinion (BO), and Environmental Assessment (EA), associated with Permit Number TE15009C-0 issued by the FWS, were in violation of the National Environmental Policy Act (NEPA), and the Administrative Procedure Act (APA).

At issue are approximately 33 acres of pine rockland. Thirty-one of those acres have been cleared already under permits issued to the Developers. (ECF No. 75) at p. 109-10; 125. Remaining at issue here are 2 acres of pine rockland.

PROCEDURAL BACKGROUND

On December 8, 2017, Plaintiffs Center for Biological Diversity, Miami Pine Rocklands Coalition, Tropical Audubon Society, and South Florida Wildlands Association filed a Complaint for Declaratory and Injunctive Relief against Defendants Ryan Zinke, Secretary of the Department of the Interior, the U.S. Department of the Interior, the U.S. Fish and Wildlife Service, Greg Sheehan, Principal Deputy of U.S. Fish and Wildlife Service, and Jim Kurth, Acting Director of U.S. Fish and Wildlife Service, challenging the issuance of an Incidental Take Permit ("ITP"), claiming

[1]There are 22 protected species.

it would result in the destruction of pine rocklands habitat, home to various protected species and plants. Plaintiffs also moved for a temporary restraining order and/or preliminary injunction. (ECF No. 4). Judge Ungaro issued a temporary restraining order on December 8, 2017 (ECF No. 10), and referred the motion for preliminary injunction to the undersigned. (ECF No. 9, 18).

On December 15, 2017, the undersigned held a status conference at which a Motion to Intervene filed by Coral Reef Retail, LLC, Coral Reef RESI PH 1, LLC, and RAMDEV, LLC, the real estate developers (hereinafter, the "Developers") was granted, and a final preliminary injunction hearing was scheduled for January 3, 2018. (ECF No. 44, 45). At the preliminary injunction hearing, the undersigned granted a Motion to Intervene filed by the University of Miami (hereinafter, "UM"), owner of the off-site mitigation parcel of land. (ECF No. 69).

FACTUAL BACKGROUND

Pine rocklands are found exclusively in Florida, the Bahamas, and Cuba. [HCP at 2]. In Florida, there are approximately 24,800 acres of pine rockland habitat. [HCP at 2]. About 87% of the pine rocklands in Miami-Dade County (hereinafter, "MDC" or the "County") are found from North Miami Beach south and west to the Everglades National Preserve. [HCP at 2]. The remaining habitats are located in urbanized areas and are owned mostly by governmental agencies, affording them protection. [HCP at 2]. However, about 680 acres are privately owned. [HCP at 2]. These areas are regulated and partially restricted by county laws and conservation agreements with property owners. [HCP at 2].

In 2011, the Developers purchased from UM a 137.90-acre tract of land [HCP at 15], with the intention of developing a mixed-use project, known as Coral Reef Commons, including commercial and residential components. Although the land contained pine rocklands, it was located

in an area that was already partially developed. The County had designated 49.44 acres of the land in question as pine rockland Natural Forest Communities (NFC), protected under MDC § 24-5. [HCP at 15]. In connection therewith, after holding public hearings and sending notices, MDC approved a re-zoning application on September 17, 2013. [HCP at 15]. The Developers also obtained a land use permit from MDC, which required the preservation of approximately 39.64 acres of NFC Pine Rockland habitat and 3.72 acres of Hardwood Hammock habitat and authorized site-clearing in the area. [HCP at 15]. Relying on the County permit, the Developers entered into leases with various national retailers and closed on a loan with Wells Fargo to begin the first phase of the project. [HCP at 15].

On July 15, 2014, FWS sent a letter to the Developers regarding the possible presence of listed wildlife species and plants in the area and requesting that the Developers conduct wildlife surveys. [HCP at 15]. In response, the Developers agreed to secure an Incidental Take Permit and develop a habitat conservation plan covering both construction and mitigation activities. [HCP at 3]. Thus, to comply with § 7(a)(2) of the ESA, the Developers prepared an HCP and initiated formal consultation with the FWS. In May 2015, the Developers submitted the draft HCP. [HCP at 16]. A revised draft was submitted in May 2016. [HCP at 16].

On March 23, 2017, the FWS made the proposed HCP available for public review in the Federal Register and solicited comments for the period from March 23 through May 22, 2017. [BO at vii]. More than 3,000 comments were submitted, including comments from experts in the species and habitats at issue. [BO at vii]. In addition, the FWS hosted a webinar (internet seminar) on April 27, 2017, in which the ITP application process was explained and information on the project was supplied. [BO at vii]. Comments received at the webinar were combined with the previous comments

and were used in making changes to the HCP. The final draft of the HCP was submitted on October 16, 2017. [BO at vii].

The FWS issued a biological opinion on November 30, 2017, concluding that for each of the covered species, the proposed action–the construction project–was not likely to jeopardize continued existence, was not likely to destroy or adversely modify critical habitat, and in actuality, would cause a net increase in conservation value. [BO at vi; 172]. The FWS noted that, in its current condition, the project area provided relatively low quality habitat for the species dependent upon the pine rockland. [SOF at 2].

The FWS issued the incidental take permit on December 5, 2017. [ITP at p. 1]. Plaintiffs received an email on that day, time stamped 3:13 p.m., indicating that the permit had issued. (ECF No. 5-17). However, at the hearing, Plaintiffs argued that the Developers had prior notice of the permit and had begun work early on December 5, 2017. Wilson Declaration (ECF No. 34-2) at ¶ 17.

STATUTORY FRAMEWORK

1. THE ENDANGERED SPECIES ACT (ESA), 16 U.S.C. §§ 1531, *et seq*.

The ESA was enacted by Congress in 1973 "to halt and reverse the trend toward species extinction, whatever the cost," by prohibiting the taking of endangered and threatened species. Tenn. Valley Auth. v. Hill, 437 U.S. 153, 184, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978); 16 U.S.C. § 1538(a)(1)(B).

Section 7 of the ESA provides that each agency shall "in consultation with and with the assistance of the Secretary [of the Interior, acting through the FWS],[2] insure that any [agency action]

[2]The FWS is authorized by Congress to issue regulations that have the force of law in implementing the ESA. Babbitt v. Sweet Home Chapter of Cmt. for a Great Or., 515 U.S. 687, 708, 115 S.Ct. 2407, 2418, 132 L.Ed.2d 597 (1995) ("When it enacted the ESA, Congress delegated broad

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. § 1536(a)(2).

Notwithstanding, the ESA allows for the taking of species that is incidental to activities not intended to kill or injure protected species. 16 U.S.C. § 1539(a)(1)(B). To do so, the entity effecting the take, in this case the Developers, must first obtain an incidental take permit (ITP) from the FWS, pursuant to § 10(a)(1)(B) of the ESA.[3] 16 U.S.C. § 1339(a)(1)(B). In soliciting such a permit, applicants must submit, among other things, a habitat conservation plan (HCP) and the steps the applicant will take to minimize and mitigate the impact to the species or its habitat. 50 C.F.R. § 17.22(b)(1). An HCP must specify:

> (i) the impact which will likely result from such taking;
>
> (ii) what steps the applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps;
>
> (iii) what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized; and
>
> (iv) such other measures that the Secretary may require as being necessary or appropriate for purposes of the plan.

16 U.S.C.A. § 1539(2)(A)(i)-(iv).

The FWS must then review the HCP in light of four statutory factors: (1) the taking will be incidental; (2) the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of such taking; (3) the applicant will ensure that adequate funding is provided; and (4) the

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administrative and interpretative power to the Secretary"); see also 16 U.S.C. §§ 1533, 1536.

[3]Under 16 U.S.C. § 1539, a private party may apply for an incidental take permit.

taking will "not appreciably reduce the likelihood of the survival and recovery of the species in the wild." 16 U.S.C. § 1539(a)(2)(B)(i)-(v); 50 C.F.R. § 17.22(b)(2).

If an agency determines that the area may contain protected species, as the FWS did here, then it must conduct a biological assessment (BA), pursuant to § 7(b)(3)(4) of the ESA. 50 C.F.R. § 402.14(h)-(i). The BA must discuss the effects of the action on the affected species and the FWS' opinion as to whether the action is likely to jeopardize continued existence or result in the destruction or adverse modification of critical habitat. 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.02. If the BA finds no potential impact on the covered species, then the project may proceed, so long as the FWS approves. If a potential impact on protected species is revealed, then the agency must initiate a formal consultation with the FWS.[4] 50 C.F.R. § 402.14.

If, upon consultation, the FWS determines that the proposed action will "jeopardize the continued existence of any [listed] species or threatened species or result in the destruction or adverse modification of [critical habitat]," § 1536(a)(2), then it must prepare a Biological Opinion (BO), 16 U.S.C. § 1536(b)(3)(A), 50 C.F.R. § 402.14(g). The BO must contain a "detailed discussion of the effects of the action on listed species or critical habitat," in addition to the expert agency's ultimate opinion on jeopardy. 50 C.F.R. § 402.14(h)(2). In preparing the BO, the FWS is tasked with employing "the best scientific and commercial data available." 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(g)(8). Sierra Club v. Flowers, 423 F.Supp. 2d 1273, 1377 (S.D. Fla. 2006). The determination of what data is used entails the exercise of discretion. See Loggerhead Turtle v. County Council of Volusia County, Fla., 120 F.Supp.2d 1005, 1023 (M.D. Fla. 2000) (finding that

[4]Here, the FWS had to consult with itself. Thus, the southern office of the FWS consulted with the northern office in order to meet this requirement.

"an agency must have discretion to rely upon reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive") (citation omitted).

If the BO concludes that the proposed action is likely to jeopardize the continued existence of covered species, it must include "reasonable and prudent alternatives" that do not jeopardize the covered species. 16 U.S.C. § 1536(b)(3)(A). If the BO concludes that the proposed action is not likely to jeopardize the continued existence of covered species, then it must include an incidental take statement specifying the amount or extent of anticipated take. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).

2. National Environmental Policy Act (NEPA).

"The procedural requirements of the ESA correspond, and overlap with, the procedural requirements of NEPA." Sierra Club v. U.S. Army Corps of Engineers, 295 F.3d 1209, 1216 (11th Cir. 2002) (court will not reverse agency action which was consistent with applicable regulations). NEPA's requirements are implemented by regulations issued by the Council on Environmental Quality (CEQ), 40 C.F.R. § 1501.1, *et seq*.

NEPA is concerned with environmental protection. 42 U.S.C. § 4231 (stating that among the Congressional purposes for enacting NEPA is "promot[ing] efforts which will prevent or eliminate damage to the environment"); 40 C.F.R. § 1500.1(c) (noting that NEPA is intended to help public officials "take actions that protect, restore, and enhance the environment"). It is "designed to prevent agencies from acting on incomplete information and to 'ensure[ ] that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.'" Sierra Club, 295 F.3d at 1214 (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989)).

Under NEPA, an agency must first determine whether a proposed action, such as issuance of a permit, is a "major" action having a "significant effect." Sierra Club, 295 F.3d at 1214-15. Toward that end, the agency must prepare an environmental assessment (EA). Hill v. Boy, 144 F.3d 1446, 1450 (11th Cir. 1998); 40 C.F.R. § 1501.3.

In determining whether a proposed action will likely have a significant impact, under the CEQ regulations an agency is required to consider the following factors: (1) the unique characteristics of the geographic area such as proximity to ... ecologically critical areas; (2) the degree to which the environmental effects of the proposed actions are highly controversial; (3) the degree to which the action may adversely affect an endangered or threatened species or its critical habitat; and (4) the cumulative impacts of its action. 40 C .F.R. § 1508.27. An agency must consider both context and intensity. 40 C.F.R. § 1508.27.

Context entails a wide range of considerations, from "society as a whole" to the "affected region, the affected interests, and the locality," 40 C.F.R. § 1508.27(a), while intensity refers to "the severity of the impact." Id. at § 1508.27(b). The CEQ regulations list ten "intensity factors" that must be considered in the evaluation of the intensity of an impact in determining whether it is "significant." 40 C.F.R. at § 1508.27(b)(1)-(10).

If the EA reveals that the effects of the proposed action are likely to be significant, the agency must issue a more detailed Environmental Impact Statement ("EIS").[5] See Id. § 1501.4(c). The purpose of the EIS is to examine the environmental impact of the proposed action, compare the

[5]If the EIS must be generated, first, the agency prepares a draft and solicits public comments, 40 C.F.R. § 1503.1, any of which must be assessed and considered in preparing the final EIS. 40 C.F.R. § 1503.4. Then, the agency must publish a notice of availability of the final EIS in the Federal Register. 40 C.F.R. § 1506.10(b).

action to alternatives, and discuss mitigation of adverse environmental impacts. 42 U.S.C. § 4332(C). Otherwise, the agency issues a Finding of No Significant Impact ("FONSI"), "briefly presenting the reasons why an action . . . will not have a significant effect on the human environment." 40 C.F.R. § 1508.13; Id. at § 1501.4(e).

Challenges under NEPA are governed by the arbitrary-and-capricious standard, as set forth in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). Marsh v. Oregon Natural Res. Council, 490 U.S. 360, 375-76, 109 S.Ct. 1851, 104 L.Ed.2d 377 (1989); North Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1538 (11th Cir. 1990). This review standard is deferential. Wildlaw vs. U.S. Forest Serv., 471 F.Supp.2d 1221, 1231 (M.D. Ala. 2007) (citing Fund for Animals, Inc. v. Rice, 85 F.3d 535, 541 (11th Cir. 1996)). The court's only role is to determine whether the agency adequately considered the environmental impact of the proposed action based on the relevant data. Balt. Gas & Elec. Co. v. Natural Resources Defense Council, Inc., 462 U.S. 87, 97-98, 103 S.Ct. 2246, 76 L.Ed.2d 437 (1983); Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers, 781 F.3d 1271 (11th Cir. 2015). In so doing, the Court must refrain from substituting its own judgment for that of the agency." Sierra Club, 295 F.3d at 1216. The Court "cannot interject itself within the area of discretion of the [agency]. . . ." Strycker's Bay Neighborhood Council, Inc. v. Karlen, 444 U.S. 223, 227, (1980) (internal quotation marks and citations omitted). Thus, the Court may not "call into question any reasonable agency methodologies used in arriving at its conclusion." Id. (quoting Protect Key West, Inc. v. Cheney, 795 F.Supp. 1552, 1559 (S.D. Fla. 1992)). Absent a showing of arbitrary action, a court must assume that an agency has exercised its discretion appropriately. Kleppe v. Sierra Club, 427 U.S. 390, 412, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976).

Because NEPA does not mandate particular results, "but simply prescribes the necessary

process," Robertson, 490 U.S. at 350, review of such claims is limited to procedural, rather than substantive, compliance. Fla. Keys Citizens Coal., Inc. v. U.S. Army Corps of Eng'rs, 374 F.Supp.2d 1116, 1144 (S.D. Fla. 2005); Sierra Club v. Van Antwerp, 526 F.3d 1353, 1361 (11th Cir. 2008) (citation omitted). In short, whether an agency approves a proposed action is irrelevant to NEPA compliance. "Substantive issues like whether to grant the permits and what mitigation conditions to adopt are irrelevant to NEPA compliance." Id.

The established procedures require agencies to take a "hard look" at environmental consequences prior to reaching a decision. Robertson, 490 U.S. at 350; Kern v. United States Bureau of Land Mgmt, 284 F.3d 1062, 1066 (9th Cir. 2002). A "hard look" entails an examination of the relevant data and articulation of a satisfactory explanation for the action, including a "rational connection between the facts found and the choice made." Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 2866-67, 77 L.Ed.2d 443 (1983) (quoting Burlington Truck Lines v. United States, 371 U.S. 156, 168, 83 S.Ct. 239, 245-46, 9 L.Ed.2d 207 (1962)). "[S]o long as an agency has taken a 'hard look' at the environmental consequences, a reviewing court may not impose its preferred outcome on the agency." Wilderness Watch and Public Employees for Environmental Responsibility v. Mainella, 375 F.3d 1085, 1094 (11th Cir. 2004) (citing Rice, 85 F.3d at 546); Robertson, 490 U.S. at 333 (noting that NEPA merely prevents "uninformed–rather than unwise–agency action").

In the Eleventh Circuit, an agency decision will be overturned as arbitrary and capricious where: "(1) the decision does not rely on the factors that Congress intended the agency to consider; (2) the agency failed entirely to consider an important aspect of the problem; (3) the agency offers an explanation which runs counter to the evidence; or (4) the decision is so implausible that it cannot

be the result of differing viewpoints or the result of agency expertise." Sierra Club, 295 F.3d at 1216 (citations omitted).

3. Administrative Procedures Act (APA).

Under the APA, the standard of review is whether the agency's action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." Id. at § 706(2)(A). The primary consideration is whether the agency has examined the relevant data and articulated a satisfactory explanation for its action "including a 'rational connection between the facts found and the choice made.'" Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43. Indeed, "[t]he court's role is to ensure that the agency came to a rational conclusion, not to conduct its own investigation and substitute its own judgment for the administrative agency's decision." Van Antwerp, 526 F.3d at 1360 (citation and internal quotation marks omitted); see also Fund for Animals, 85 F.3d at 542 ("The reviewing court is not authorized to substitute its judgment for that of the agency concerning the wisdom or prudence of the proposed action.") (citations omitted); Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43 (courts are not permitted to substitute own judgment for that of the agency). However, the court must also "look beyond the scope of the decision itself to the relevant factors that the agency considered." Sierra Club, 295 F.3d at 1216 (citing State Farm, 463 U.S. at 43, 103 S.Ct. 2856). In so doing, the court must consider the entire administrative record. Id.

PRELIMINARY INJUNCTION STANDARD

Before the Court is Plaintiffs' request for the entry of a preliminary injunction pending resolution of the merits of this case. (ECF No. 4). The purpose of a preliminary injunction is "to preserve the court's ability to render a meaningful decision on the merits." United States v. Stinson, 661 Fed. App'x 945, 951 (11th Cir. 2016) (quoting Canal Auth. of State of Fla. v. Callaway, 489

F.2d 567, 576 (5th Cir. 1974)).

A party requesting preliminary injunctive relief must show: "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury; (3) its own injury outweighs the injury to the non-movant; and (4) the injunction would not disserve the public interest." Haitian Refugee Ctr., Inc. v. Baker, 949 F.2d 1109, 1110 (11th Cir. 1991). Failure to show a "substantial likelihood of success on the merits" may defeat a party's claim even if the other factors can be established. Church v. City of Huntsville, 30 F.3d 1332, 1342 (11th Cir. 1994). Moreover, "the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper." Siegel v. Lepore, 234 F.3d 1163, 1176 (11th Cir. 2000).

We turn to the four factors that guide the court's consideration regarding whether to issue a preliminary injunction in this case.

I. LIKELIHOOD OF SUCCESS.

The first factor, and arguably of prime importance, is likelihood of success. Plaintiffs have advanced two sets of claims–one set under the APA challenging the merits of the BO, and another under NEPA challenging the merits of the EA and FONSI.[6] Both sets of claims are evaluated under the APA, 5 U.S.C. §§ 701-06. Thus, both sets of claims are subject to a deferential standard of review requiring a finding that the FWS acted in an arbitrary and capricious manner.

A. APA Claims.

Plaintiffs argued that they were likely to succeed on the merits of their APA claims because: (1) in approving the BO, the FWS arbitrarily and capriciously relied on unprecedented and

[6]Plaintiffs' Complaint did not contain a claim under the ESA due to the 60-day notice requirement for citizen suits under the Act.

scientifically unsupported "Habitat Functional Assessment" (HFA) to measure species impacts and mitigation; (2) the FWS arbitrarily and capriciously relied on an off-site mitigation area owned by a third party and subject to land use restrictions; (3) the FWS approved inadequate funding for the conservation plan; and (4) the FWS failed to specify take and unlawfully used a surrogate measure in the BO.

1. Habitat Functional Assessment.

With respect to the insufficiency of the habitat functional assessment, Plaintiffs raised various arguments. First, Plaintiffs complained that, when determining the effects of the proposed action and potential mitigation, the FWS created a habitat functional assessment that measured the habitat value for all of the species based on six generic factors rather than consider the individual habitat needs of each listed species.[7] According to Plaintiffs, because none of the broad generic factors directly tied back to the specific needs of the affected species, the HFA failed to consider the individualized needs and the impacts the proposed project would have on the affected species. Thus, Plaintiffs argued that the HFA was a "black box," because it was not possible to determine what information the FWS actually considered in rendering the numerical outputs. (ECF No. 75) at p. 35.

Plaintiffs made much of the fact that the methodology employed in this case had never been used previously by the FWS and was created for the project at issue. (ECF No. 75). at p. 28. While acknowledging that the choice of methodology was within the discretion of the FWS, Plaintiffs argued that, in making its choice, the FWS could not draw a rational connection between the facts and its decision. The Developers argued that Section 5 of the HCP, as well as Appendices D and G,

[7]The six factors considered by the FWS were: canopy cover, presence or absence of non-native plants, fire frequency, soil condition, presence of native plants, and habitat connectivity.

contained the relevant information that Plaintiffs' claimed was missing. [HCP at p. 82-90]. A review of this section reveals that, indeed, the FWS assessed the habitat needs of the covered species in determining the impact the proposed project would have on them. Moreover, the Developers argued that the FWS did not issue its BO and ITP based solely on the HFA the Developers provided. The FWS relied on its own experts and independent valuations with respect to each affected species. The FWS responded to the arguments concerning polygons,[8] prescribed fire, and double-dipping in response to public comments. See SOF at p. 18, 19, 31-32.

Second, Plaintiffs argued that neither the BO nor the HCP contained any explanation of how the Developers had delineated or scored the polygons that were applied to assess habitat values at the project site. A related argument was that the habitat value assessment allowed "double accrediting" for removal of exotic vegetation, leading to the artificial inflation of the value of some polygons. At the hearing, Plaintiffs' counsel explained that the permit applicants divided the area in question into specific sections that were assigned different scores. Plaintiffs pointed to numerical inconsistencies in the scoring of the polygons and complained that no explanation was provided. The Developers argued that the Court's role in determining likelihood of success on the merits did not entail a deep dive into minutiae. See Loggerhead Turtle, 120 F. Supp. 2d at 1013 ("Where, as here, an agency's special scientific expertise is involved, the Court must be 'most deferential'") (citations omitted).

Third, Plaintiffs argued that the habitat value assessment and the HCP relied heavily on the assumption that prescribed fire would be possible, despite the presence of factors to the contrary. The

[8]Polygons, in this context, are based on a landscape concept of spatial area representative of species distribution across a particular landscape. Such polygons serve to summarize the relationship between species and the local environment.

parties agreed that the fires necessary to maintain the habitat in a healthy state had not been occurring at the property. Plaintiffs argued that, if the area was commercially and residentially developed it would be that much harder to conduct a prescribed fire. Plaintiffs argued that the absence of fires so far denoted how difficult it was to accomplish even when the land was uninhabited. As the Developers argued, Plaintiffs have not produced any evidence supporting their argument that the prescribed fires under the HCP will not occur once the area is developed. See Roberts Declaration at ¶¶ 58-59 (opining that prescribed burning is achievable).

The FWS is only tasked with using the "best scientific and commercial data available" in preparing a BO. 16 U.S.C. § 1536(a)(2); 50 C.F.R. §§ 402.14(d) and (g)(8). When looking at the FWS' decision, the Court operates under a deferential standard of review in determining whether same should be set aside as arbitrary and capricious. Rice, 85 F.3d at 542. Neither Plaintiffs nor the Court has to agree with the FWS' decision. See Defs. of Wildlife v. Bureau of Ocean Energy Mgmt., 684 F.3d 1242, 1250 (11th Cir. 2012) (finding that it is not the duty of the court to determine the propriety of the methodology used by an agency); See Marsh, 490 U.S. at 377-78, 109 S.Ct. at 1861 ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, the court might find contrary views more persuasive."). In fact, the Court must be at its most deferential "when an agency's decision rests on the evaluation of complex scientific data within the agency's technical expertise." Miami-Dade Cnty. v. U.S. EPA, 529 F.3d 1049, 1065 (11th Cir. 2008) (*per curiam*).

2. Off-Site Mitigation.

Second, Plaintiffs argued that the FWS arbitrarily and capriciously relied on off-site mitigation on property owned by a third party and subject to prior land use restrictions. Plaintiffs

argued further that some of the conditions could not be considered minimization or mitigation, because they existed prior to the issuance of the permit. They argued that the Developers were receiving credit for conditions that they were already obligated to comply with.

Plaintiffs have not provided any authority indicating that the County could not memorialize pre-existing measures in the permit. The FWS found that management of the property was going to improve with respect to the existing requirements. (ECF No. Ex. 32-4). Moreover, the existing requirements pertained to only one species, whereas the HCP would provide increased protections for 22 species. Indeed, the HCP and ITP are more strenuous than what is required by the County.

3. Inadequate Funding.

Third, Plaintiffs argued that the FWS failed to ensure adequate funding for the conservation plan, because its reliance on the Developers' financial assurances was arbitrary and capricious.

The ESA merely requires "adequate funding" for permit approval. See 16 U.S.C. § 1539(a)(2)(B)(iii). The HCP provides that the Developers would establish an escrow account for Year 1 costs, as well as a letter of credit for Years 2 through 5. [HCP at § 11.2.1]. Thereafter, perpetual maintenance costs would be funded through a Master Association established for the property. [HCP at § 11.2.2]. There is no evidence here that the funding approved by the FWS was not reasonable.

4. Take and Surrogate.

Fourth, Plaintiffs argued that the FWS failed to specify take, or any limit thereon, and unlawfully used a surrogate measure in the BO.

Here, the HCP sets forth that loss of habitat is being used as a surrogate for individual takes because it is not practical to detect or monitor individual species and these are heavily dependent

upon the occurrence of a specific biological feature. [HCP at § 5]. Using a habitat to assess harm to a species is not a novel concept; it is codified in the ESA. 50 C.F.R. § 402.14(i)(1)(i) (four factors for use of "habitat or ecological conditions" in lieu of "take" of individual species).

An incidental take statement must include a trigger for reconsultation at the point when there is a risk of jeopardizing the species. 50 C.F.R. § 402.14(i)(1)(i). A trigger must be numerical, tied to specific population data, unless doing so would be impractical. Miccosukee v. United States, 566 F.3d 1257, 1275 (11th Cir. 2009); Or. Natural Resources Council v. Allen, 476 F.3d 1031, 1038 (9th Cir. 2007) (stating that "Congress has clearly declared a preference for expressing take in numerical form, and an Incidental Take Statement that utilizes a surrogate instead of a numerical cap on take must explain why it was impracticable to express a numerical measure of take").

If an ecological surrogate is used as a trigger instead of a numerical figure, then certain factors need to be established: (1) "no such numerical value could be practically obtained," and (2) that the "use of ecological conditions as a surrogate for defining incidental take ... [is] linked to the take of the protected species." Ariz. Cattle Growers' Ass'n v. U.S. Fish and Wildlife, 273 F.3d 1229, 1250 (9th Cir. 2001). Thus, the FWS must show a reasonable nexus between the surrogate (also referred to as a habitat marker or habitat proxy) and the take. See Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1066 (9th Cir. 2004) (stating that the "test for whether a habitat proxy is permissible ... is whether it reasonably ensures that the proxy results mirror reality") (internal quotation marks omitted).

To show that a surrogate was necessary, the agency must show that it was not possible to use a numerical population count. Miccosukee, 566 F.3d at 1275 (citing the legislative history of the ESA in support of the requirement that numerical population counts should be used where possible);

see also Mausolf v. Babbitt, 125 F.3d 661, 666 (8th Cir. 1997) (incidental take of gray wolves due to snowmobiling activities set at two wolves per year); Rice, 85 F.3d at 540 n. 8 (incidental take of eastern indigo snake set at fifty two snakes within the footprint of landfill and two per year on access roads for the life of the project); Ramsey v. Kantor, 96 F.3d 434, 441 n. 12 (9th Cir. 1996) (incidental take trigger established as the number of fish caught as a percentage of the estimated population). Factors employed in assessing practicality are: "(1) the availability and quality of actual or estimated population figures; (2) the ability to measure incidental take; and (3) the ability to determine the extent to which incidental take is attributable to the action prompting the biological opinion and incidental take statement, as opposed to other environmental factors." Miccosukee Tribe of Indians of Florida v. United States, 697 F. Supp. 2d 1324, 1331 (S.D. Fla. 2010).

The Developers argued that there is no separate obligation to quantify incidental take or have a trigger for reinitiating consultation in the BO because the incidental take comes from § 10, not the § 7 of the ESA.

B. NEPA

Plaintiffs argued that they were likely to succeed on their NEPA claims because the FWS failed to make the FONSI available for 30 days for public review; the FWS failed to consider a reasonable range of alternatives; the FWS failed to prepare an EIS; and the FWS thwarted meaningful public participation.

1. Review of FONSI.

First, Plaintiffs argued that the FWS violated NEPA by not making the FONSI available for public review for 30 days. The Developers argued that this review period was not required except under exceptional circumstances not present here. An agency must subject a FONSI to such review

only in "limited circumstances." 40 C.F.R. § 1501.4(e)(2)(i)-(ii). However, Plaintiffs do not specify how this case falls within an exception.

2. Consideration of Alternatives.

Second, Plaintiffs argued that the FWS failed to consider a reasonable range of alternatives in the EA and HCP. Defendants presented ample evidence of FWS' consideration of alternatives in relation to the project at issue, noting that between six and eight alternatives were considered. [EA at p. 39-119].

NEPA does not require consideration of any particular number of alternatives. Ctr. for Biological Diversity v. Animal & Plant Health Inspection Serv., No. 10-14175-CIV, 2011 WL 4737405, at *3 (S.D. Fla. Oct. 6, 2011); see N. Buckhead Civic Ass'n v. Skinner, 903 F.2d 1533, 1541-43 (11th Cir. 1990) (finding that an EIS with only two alternatives studied in detail was sufficient); Tongass Conservation Soc'y v. Cheney, 924 F.2d 1137, 1140-42 (D.C. Cir. 1991) (finding that agency complied with NEPA when thirteen of fourteen alternatives were eliminated as unreasonable and only one alternative was discussed in detail in the EIS). All that is required is that an agency consider reasonable alternatives in relation to the proposed action. Id. "As a general matter, the range of alternatives that must be discussed . . . is a matter within an agency's discretion." Save Our Cumberland Mountains v. Kempthorne, 453 F.3d 334, 342 (6th Cir. 2006) (citation and internal citation marks omitted). "So long as 'all reasonable alternatives' have been considered and an appropriate explanation is provided as to why an alternative was eliminated, the regulatory requirement is satisfied." Native Ecosystems Council vs. U.S. Forest Servs., 428 F.3d 1233, 1246 (N.D. Ga. 2008) (footnote omitted); see Nat. Res. Def. Council v. Nat'l Park Serv., 250 F. Supp. 3d 1260, 1292 (M.D. Fla. 2017), appeal dismissed, 17-11798-GG, 2017 WL 3202506 (11th Cir. May

1, 2017) (no in-depth analysis required of alternatives rejected from consideration in an EIS); 40 C.F.R. § 1502.14(a) (stating that agencies shall "[r]igorously explore and objectively evaluate all reasonable alternatives," but when alternatives have been rejected from consideration, agencies need only "briefly discuss the reasons for their having been eliminated" (emphasis added)).

Here, there is nothing demonstrating that FWS' treatment and analysis of the alternatives was inappropriate, as a brief discussion is all that NEPA requires. FWS discussed in the EA the various alternatives, fulfilling NEPA's requirement to "briefly" discuss the rejected alternatives. The Court finds that the FWS' actions were not arbitrary or capricious, and did not violate the APA or NEPA.

3. EIS.

Third, Plaintiffs argued that the FWS failed to prepare an EIS as required because the proposed action was significant. In this connection, Plaintiffs asserted that the FONSI was arbitrary and capricious, in violation of NEPA, the APA and the ESA.

Defendants argued that the FWS was not required to conduct an EIS based upon a finding that the proposed action was not significant. See Nat. Res. Def. Council, 250 F. Supp. 3d at 1292 ("When mitigation measures compensate for otherwise adverse environmental impacts, the threshold level of 'significant impacts' is not reached so no EIS is required"). That determination centered on the effects on the endangered species and their habitat and mitigation. Mitigation measures must be "more than a possibility" for an agency to rely upon them in a FONSI. Sierra Club, 464 F.Supp.2d at 1224-25, aff'd, 508 F.3d 1332 (11th Cir. 2007) (quoting Wyo. Outdoor Council v. U.S. Army Corps of Eng'rs, 351 F.Supp.2d 1232, 1250 (D. Wyo. 2005)).

Plaintiffs also argued that the project was controversial. A proposal may be "highly controversial" where there is a "substantial dispute [about] the size, nature, or effect of the major

Federal action rather than the existence of opposition to a use." Native Ecosystems Council, 428 F.3d at 1240. "A substantial dispute exists when evidence . . . casts serious doubt upon the reasonableness of an agency's conclusions." Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 736 (9th Cir. 2001). The existence of a "controversy" is one of several factors in weighing whether or not to prepare an EIS. Even if this Court found there was a legitimate controversy, in light of the entire record, that finding would not be fatal to the FWS' EA or FONSI. See 40 C.F.R. § 1508.27(b).

4. Public Participation.

Fourth, Plaintiffs argued that the FWS thwarted meaningful public participation in the environmental analysis and approval of the proposed project. Defendants argued that the HCP, EA, and all supporting materials were subject to a 60-day notice and comment period, as well as an informational webinar.

Here, during the comment period, FWS received thousands of public comments. The Court notes that "there is no requirement that [an agency] individually address all public comments." Wildlaw, 471 F.Supp.2d at 1248. The fact that some comments contained opposing scientific views is not fatal. See Hughes River Watershed Conservancy v. Johnson, 165 F.3d 283, 288 (4th Cir.1999) ("Although an agency should consider the comments of other agencies, it does not necessarily have to defer to them when it disagrees. Agencies are entitled to rely on the view of their own experts.") (citations omitted). Moreover, an agency may respond to various comments in summarized form. See 40 C.F.R. § 1503.4b. The record reflects that FWS responded appropriately to the submitted comments and addressed them accordingly. [SOF, § V, at p. 7-37].

C. CONCLUSION

In conclusion, and based on the foregoing analysis, the undersigned finds that Plaintiffs are

not likely to succeed on the merits of either set of claims. Because Plaintiffs cannot establish the first requirement for the issuance of a preliminary injunction–likelihood of success on the merits–it is not necessary to continue the analysis.

BOND

The Developers have requested that Plaintiffs post a bond in connection with the continuance of the TRO. Plaintiffs argued that no bond should be posted because they are non-profit organizations and a bond would be contrary to citizens enforcement of environmental laws.

Rule 65 of the Federal Rules of Civil Procedure provides that "[t]he court may issue a preliminary injunction . . . only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained." Fed. R. Civ. P. 65(c). "The purpose of a bond is to provide security to the enjoined party in the event that the injunction was wrongly issued." Edge Systems, LLC v. Aguila, No. 14-24517-CIV-Moore/McAliley, 2015 WL 1268177, at *14 (S.D. Fla. Jan. 29, 2015). However, the amount of a bond is a matter within the discretion of the court, as is the election of requiring no security at all. BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., LLC, 425 F.3d 964, 971 (11th Cir. 2005).

An injunction bond "is intended to afford security only for those damages, if any, that might be 'proximately caused by the [wrongful] issuance of [an] injunction." Int'l Equity Invs., Inc. v. Opportunity Equity Partners Ltd., 441 F.Supp.2d 552, 565-66 (S.D.N.Y. 2006) (citation omitted). Typically, a security bond is required when a court enters an injunction preventing commercial money-making activities. See Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs, 297 F.R.D. 633, 634 (N.D. Ala. 2014) (citing Zambelli Fireworks Mfg. Co. v. Wood, 592 F.3d 412, 426

(3d Cir. 2010)).

When Judge Ungaro issued the temporary restraining order, she set a nominal bond in the amount of one dollar. (ECF No. 10). At that time, neither the Developers nor UM was a party to the case. Given the continuation of the TRO, at least until this court issues a report and the district court has an opportunity to review same, the Developers requested that a bond be posted in accordance with the damages they were incurring as a result of the delays caused thereby. At the preliminary injunction hearing, the Developers stated that they were incurring current losses in the amount of $48,000 per day. As such, they requested that the Court set a bond in the amount of $2.88 million, anticipating a 60-day period from the date of the hearing until Judge Ungaro issues her order on this matter.

Here, requiring Plaintiffs to post a bond in an amount sufficient to cover the potential losses to the Developers would, in effect, bar Plaintiffs–four non-profit public interest organizations–from obtaining meaningful judicial review or appropriate relief. See People of State of Cal. ex rel. Van de Kamp v. Tahoe Regional Planning Agency, 766 F.2d 1319, 1325 (9th Cir. 1985). Although the Court is sympathetic to Defendants' legitimate and colorable financial concerns, the bond amount requested by the Developers would be prohibitive and would cut against citizens' rights to enforce environmental laws.

Consequently, the undersigned **RECOMMENDS** that the bond be maintained as set by Judge Ungaro.

RECOMMENDATION AND ORDER

Accordingly, it is hereby **RESPECTFULLY RECOMMENDED** that Plaintiffs' Motion for Preliminary Injunction (ECF No. 4) be **DENIED**.

It is further **ORDERED** that in the interest of justice, and upon good cause shown, the terms of the temporary restraining order shall remain in effect pending further order of the Court.

Pursuant to 28 U.S.C. § 636(b)(1)(c), the parties may file written objections to this Report and Recommendation with Judge Ungaro, within fourteen (14) days of receipt. Failure to file timely objections shall bar the parties from attacking on appeal any factual findings contained herein. RTC v. Hallmark Builders, Inc., 996 F. 2d 1144, 1149 (11th Cir. 1993); LoConte v. Dugger, 847 F. 2d 745 (11th Cir. 1988).

RESPECTFULLY RECOMMENDED in Chambers, at Miami, Florida, this 17th day of January 2018.

WILLIAM C. TURNOFF
United States Magistrate Judge