



# FDOT and the Endangered Species Act Consultation Process

Webinar Series –

ESA Consultation Process – Part 1

February 15, 2022



With Presentation's from:



**NOAA  
FISHERIES**



# Welcome and Introduction to Workshop



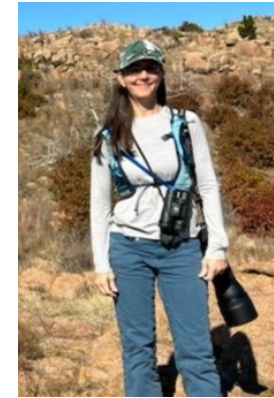
## Purpose of Workshop:

- The sessions are anticipated to provide a basic overview of the ESA consultation process for transportation projects. These webinars are intended for NEPA and Environmental Permitting practitioners and participants should have a base level understanding of the NEPA process and/or Environmental Permitting as it relates to the Federally listed species consultation process.

## Workshop Format:

- The sessions will be held every Tuesday from 9:00 to 12:00 EST for four (4) consecutive weeks beginning on February 15<sup>th</sup>, 2022, and continuing
  - ◆ February 22<sup>nd</sup>,
  - ◆ March 1<sup>st</sup>, and
  - ◆ March 8<sup>th</sup>.
- Each session requires a separate registration. Participation and feedback are welcome

## FDOT HOSTS:



**Katasha Cornwell**

State Environmental Process  
Administrator

Office of Environmental Management  
Florida Department of Transportation

**Denise Rach**

Project Delivery Coordinator  
Office of Environmental Management  
Florida Department of Transportation

# Orientation to the Go To Webinar Platform



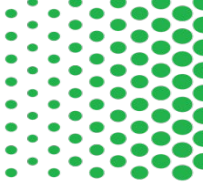
**Kendra Pewtress**  
Stantec  
Webinar  
Administrator

## How to...

- Send your questions and comments to the presenters through the Question box
- Questions and comments can be submitted any time during the workshop presentation
- These session will be recorded
- Materials from the webinar will be available

A screenshot of the GoToWebinar software interface. The top window is titled 'Audio' and contains a 'Sound Check' indicator with a green bar and a question mark. Below this are three radio button options: 'Computer audio' (selected), 'Phone call', and 'No audio'. A red 'MUTED' icon is visible. The microphone selection is 'Microphone (QuickCam Communicat...' and the speaker selection is 'Speakers (Realtek High Definition Au...'. Below the audio settings is a volume slider and a 'Talking:' indicator. The bottom window is titled 'Questions' and contains a text input field with the placeholder text '[Enter a question for staff]'. A 'Send' button is located to the right of the input field. At the bottom of the interface, there is a 'Webinar Now' section with the text 'Webinar ID: 359-913-139' and a red dot icon followed by the text 'This session is being recorded.' The GoToWebinar logo is at the very bottom.

# Speaker Introductions



**Mark Cantrell** – U.S. Fish and Wildlife Service (USFWS), Panama City



**David Rydene**- National Marine Fisheries Service (NMFS)-West Coast, Habitat Conservation Division (EFH)



**Zakia Williams** – U.S. Fish and Wildlife Service (USFWS), Jacksonville



**Kurtis Gregg**- National Marine Fisheries Service (NMFS)-East Coast, Habitat Conservation Division (EFH)

# FDOT and Endangered Species Act Consultation



# Objectives

FDOT Lead  
Agency Role

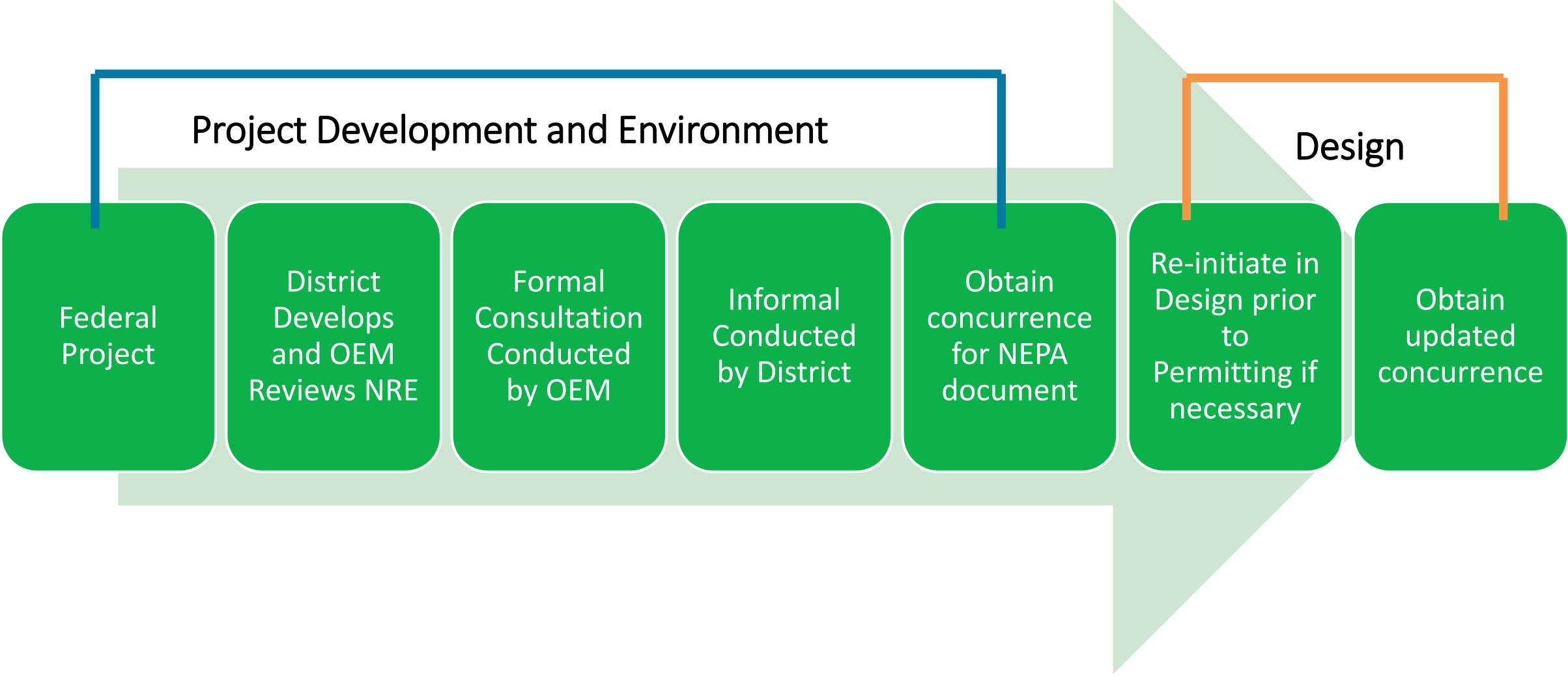
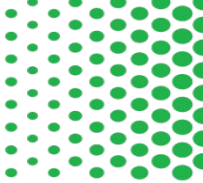
Responsibility  
for Effect  
Determinations

Use of  
Programmatic  
Keys

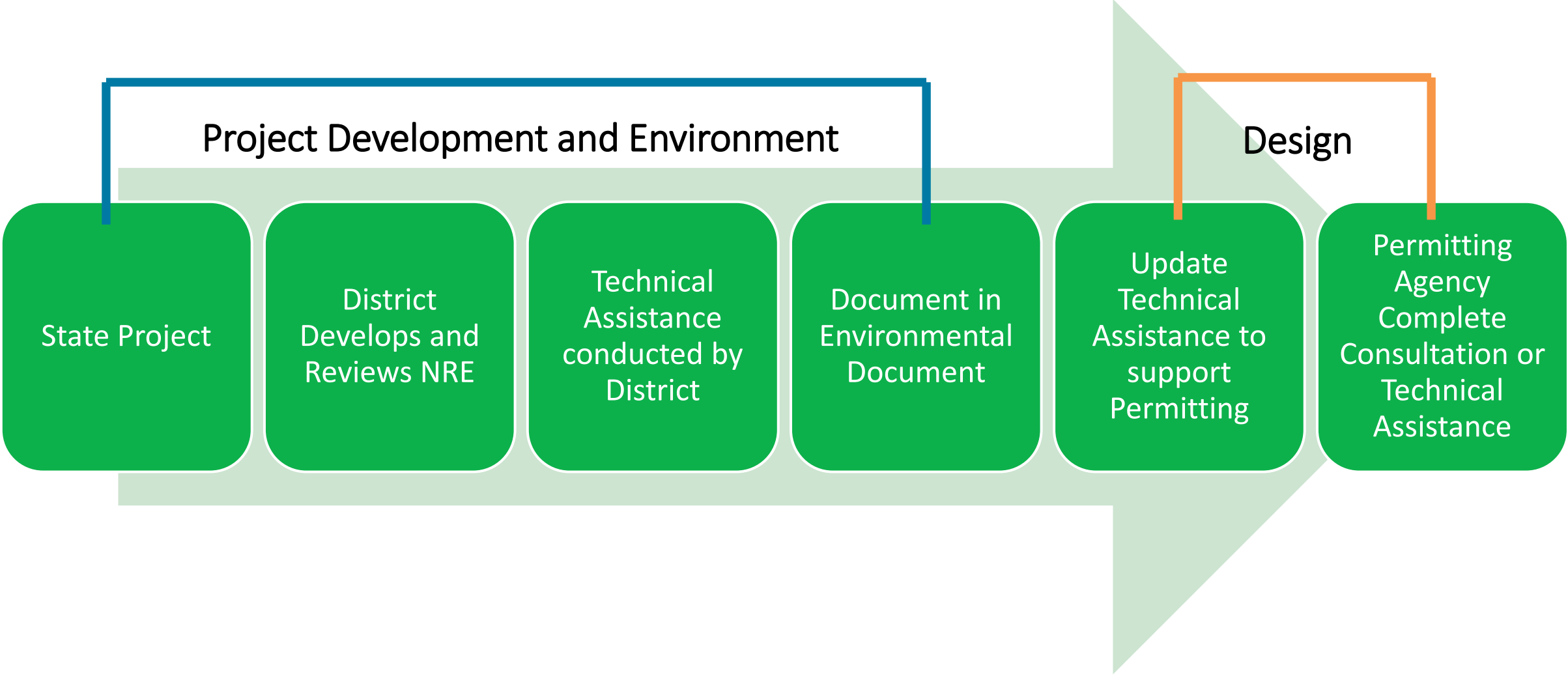
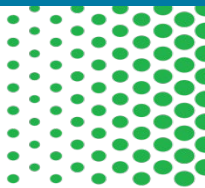
Documentation  
for PD&E  
Studies



# FDOT Lead Agency Role for Federal Projects



# FDOT Role for State Projects





# Clarification with Federal Partners



## United States Department of the Interior

FISH AND WILDLIFE SERVICE  
South Florida Ecological Services Office  
1339 20<sup>th</sup> Street  
Vero Beach, Florida 32960



March 13, 2019

Jason Watts  
Director, Office of Environmental Management  
Florida Department of Transportation  
605 Suwannee Street  
Tallahassee, Florida 32399

Subject: FDOT Lead Agency Role for Endangered Species Act Consultation

Dear Mr. Watts:

Thank you for your February 13, 2019, letter regarding the Florida Department of Transportation (FDOT) role as lead agency for Endangered Species Act (ESA) consultation.

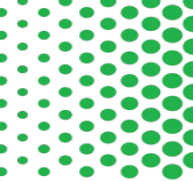
FDOT is unique due to its authority established in federal legislation for responsibilities under the National Environmental Policy Act (NEPA) for highway projects<sup>1</sup>. The Federal Highway Administration assigned, and FDOT assumed, all responsibilities under federal environmental laws, including those under the Endangered Species Act. FDOT is the lead agency for ESA consultation on federal projects; FDOT coordinates with federal agencies on state-funded projects that require ESA consultation during permitting.

1. For federal-funded projects, as the "lead agency," FDOT analyzes and consults with the U.S. Fish and Wildlife Service (Service) as part of its Project Development and Environment (PD&E) Study phase. For minor projects without a PD&E phase, FDOT will initiate consultation during the permit application process.
2. For state-funded projects requiring ESA consultation for federal permits, FDOT will obtain technical assistance from the Service during the PD&E phase, and subsequently coordinate with the U.S. Army Corps of Engineers and/or the U.S. Coast Guard to determine lead agency status for ESA consultation.

Thank you for the clarification of the process and expectations for ESA consultation as FDOT manages these distinct categories of federal and state-funded transportation projects in Florida. If you have any questions, please contact me at 772-469-4285.

Sincerely,

Larry Williams  
State Supervisor





# Effect Determinations

No Effect

May Affect Not  
Likely to  
Adversely Affect

May Affect  
Likely to  
Adversely Affect

# FDOT No Effect Determinations and use of USFWS Species Programmatic Effect Determination Keys



United States Department of the Interior

FISH AND WILDLIFE SERVICE  
South Florida Ecological Services Office  
1339 20<sup>th</sup> Street  
Vero Beach, Florida 32960



December 14, 2018

Jason Watts  
Director, Office of Environmental Management  
Florida Department of Transportation  
605 Suwannee Street  
Tallahassee, Florida 32399

Subject: Clarification of no effect determinations and species keys for endangered species

Dear Mr. Watts:

Thank you for your December 12, 2018, letter regarding the Florida Department of Transportation (FDOT) responsibilities for the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA) consultation.

FDOT has a formal agreement with the Federal Highway Administration (FHWA) for its responsibilities under NEPA for highway projects. Under this NEPA Assignment, FDOT performs NEPA analysis, reviews and approvals; including those under the ESA. FDOT follows FHWA guidance for implementation of the ESA for highway projects.

Because FDOT is the "action agency" based on the NEPA Assignment, it is appropriate for FDOT to make "no effect" determinations and concurrence from the U.S. Fish and Wildlife Service (USFWS) is not required for "no effect" determinations. We agree it is appropriate for FDOT to use the various programmatic effect determination keys to evaluate its proposed actions, and to include the results in the NEPA Environmental Document. Some of these keys have been developed between USFWS and the U.S. Army Corps of Engineers. We will work with you to maintain a list of the latest tools for regulatory streamlining during transportation project review, and to regularly review their effectiveness.

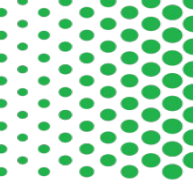
Thank you for your partnership in conserving fish and wildlife resources. If you have any questions, please contact me at 772-469-4285 or by email at [larry\\_williams@fws.gov](mailto:larry_williams@fws.gov).

Sincerely yours,

A handwritten signature in blue ink that reads "Larry Williams".

Larry Williams  
State Supervisor, Ecological Services

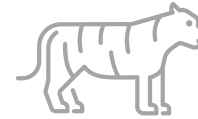
cc:  
USFWS, Jacksonville, Florida (Jay Herrington)  
USFWS, Panama City, Florida (Catherine Phillips)  
USFWS, Vero Beach, Florida (Roxanna Hinzman)



# Other Agency Consultation Keys Approved for Use



Eastern Indigo Snake  
– North and South  
Florida



Florida Panther



Florida Manatee



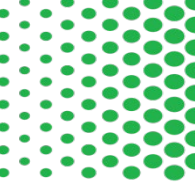
Piping Plover



Wood Stork – North,  
Central and South  
Florida



Florida Bonneted  
Bat



# Documenting Use of Programmatic Effect Determination Keys

B. Permit will be conditioned for use of the Service's most current guidance for Standard Protection Measures For The Eastern Indigo Snake (currently 2013) during site preparation and project construction.....go to C

Permit will not be conditioned as above for the eastern indigo snake, or it is not known whether an applicant intends to use these measures and consultation with the Service is requested.....may affect

C. The project will impact less than 25 acres of eastern indigo snake habitat (e.g., sandhill, scrub, pine flatwoods, pine rocklands, scrubby flatwoods, high pine, dry prairie, coastal prairie, mangrove swamps, tropical hardwood hammocks, hydric hammocks, edges of freshwater marshes, agricultural fields [including sugar cane fields and active, inactive, or abandoned citrus groves], and coastal dunes).....go to D

The project will impact 25 acres or more of eastern indigo snake habitat (e.g., sandhill, scrub, pine flatwoods, pine rocklands, scrubby flatwoods, high pine, dry prairie, coastal prairie, mangrove swamps, tropical hardwood hammocks, hydric hammocks, edges of freshwater marshes, agricultural fields [including sugar cane fields and active, inactive, or abandoned citrus groves], and coastal dunes).....may affect

D. The project has no known holes, cavities, active or inactive gopher tortoise burrows, or other underground refugia where a snake could be buried, trapped and/or injured during project activities.....NLAA

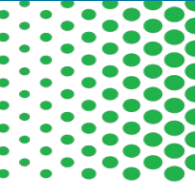
The project has known holes, cavities, active or inactive gopher tortoise burrows, or other underground refugia where a snake could be buried, trapped and /or injured.....go to E

E. Any permit will be conditioned such that all gopher tortoise burrows, active or inactive, will be excavated prior to site manipulation in the vicinity of the burrow<sup>1</sup>. If an eastern indigo snake is encountered, the snake must be allowed to vacate the area prior to additional site manipulation in the vicinity. Any permit will also be conditioned such that holes, cavities, and snake refugia other than gopher tortoise burrows will be inspected each morning before planned site manipulation of a particular area, and, if occupied by an eastern indigo snake, no work will commence until the snake has vacated the vicinity of proposed work.....NLAA<sup>2</sup>

Permit will not be conditioned as outlined above.....may affect

End Key

# Documenting Use of Programmatic Effect Determination Keys

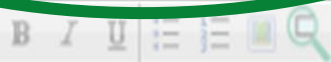


## 6. Section 7 of the Endangered Species Act (ESA) of 1973, as amended, or Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA):

- No ESA listed species and/or Essential Fish Habitat (EFH) present
- ESA listed species and/or Essential Fish Habitat (EFH) present

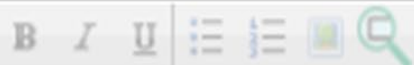
Determination of No Effect

Enter names of species (required)

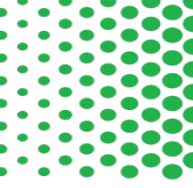


Used key, no consultation required

Enter names of species (required)



# FDOT Programmatic Approaches



**FDOT Programmatic Approach for  
Minor Transportation Activities**

Prepared in partnership with  
Florida Department of Transportation  
605 Suwannee Street, MS-37  
Tallahassee, Florida 32399

U.S. Fish and Wildlife Service  
Southeast Region 4  
1875 Century Boulevard NE  
Atlanta, GA 30345

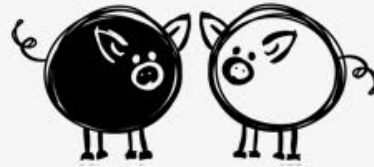
The environmental review, consultation, and other actions required by applicable laws for this project are being, or have been, carried out by FDOT pursuant to the Memorandum of Understanding December 14, 2016, and executed by FDOT and USFWS.

July 2021  
Version 1.1

**COMING SOON –  
MONARCH CCAA**



**This Little Piggy...**



**Narrow Pigtoe**



**Oval Pigtoe**



**Tapered Pigtoe**



**Fuzzy Pigtoe**





# FDOT Programmatic Approach for Minor Transportation Activities



- ✓ Activities entirely within right-of-way
- ✓ Potential Impacts are insignificant, discountable or wholly beneficial
- ✓ No significant environmental effects



Covers up to 15 federally listed species



Covers up to 27 transportation construction activities



All necessary conservation measures are implemented



Effect determination(s) is No Effect or May Affect Not Likely to Adversely Affect

# SWEPT PA TOOL



Home > Programmatic Approach for Minor Transportation Activities

## StateWide Environmental Project Tracker

**OEM** Office of Environmental Management | **SWEPT** StateWide Environmental Project Tracker

### Initial Effect Determinations

Activity Matrix with Effect Determinations

		Species	
		Audubon's Crested Caracara	Eastern Indigo Snake
Category: Activities with Minimal Ground Disturbance B			
1	Upgrade, removal, or addition of guardrail. Installation or replacement of impact attenuators. Upgrade or installation of median barriers.	NE	NE
2	Clear zone safety improvements, such as fixed object removal or relocation; does not include any type of vegetation management, such as tree removal.	NE	NE
Category: Activities with Moderate Ground Disturbance or In-Water Work C			
5	Sidewalk, trail or multi-use path construction.	MANLAA	MANLAA
Highest degree of effect		MANLAA	MANLAA

### Species-Specific Avoidance and Minimization Measures

#### Audubon's Crested Caracara

No additional conservation measures necessary

#### Eastern Indigo Snake

1. If Eastern indigo snakes have the potential to occur, then the most recent version of the Standard Protection Measures for the Eastern Indigo Snake must be followed during site preparation and project construction.
2. If gopher tortoise burrows are onsite and do not require excavation by FWC permit, then silt fence must be installed to protect the burrow from destruction during ground-disturbing activities. Silt fence must be installed to allow any animals to leave the burrow and escape the project area.
3. Snake refugia must be inspected each morning before planned site manipulation, and if an indigo snake is found, no work will commence until the snake has left the work area on its own volition.

### Final Effect Determinations

Not Finalized

[Save Draft](#) [Save Final](#)

[Proposed Action](#)  
[Not Covered](#)  
[Covered Activities](#)  
[Environmental Review](#)  
[Initial Effect Determinations](#)  
**[Species-Specific Avoidance and Minimization Measures](#)**  
[Final Effect Determinations](#)

[Save Draft](#) [Save Final](#)

- Consistent application for user
- Easy reporting to USFWS
- Accessible On-Line
- Automatically becomes part of Project Record (Archived)

# Natural Resources Evaluations Overview

Includes information on protected species and habitat, wetlands and essential fish habitat



When is an NRE required?

Formal/Informal  
Consultation for  
ESA

Wetland Impacts  
Requiring Standard  
or SAJ-92 permit

Substantial adverse  
effects to EFH

# Natural Resources Evaluations Overview

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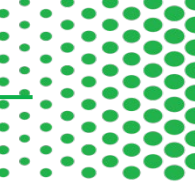
Technical report for  
consultation/coordination with  
resource agencies

---

OEM reviews the NRE prior to  
resource agency submittal **regardless  
of federal Class of Action.**

---

NREs for state funded projects do not  
require OEM review



# Technical Memorandum

## For protected species

- *No effect*
- *Use of key that results in no further consultation*

## Wetlands

- *Projects with impacts requiring a general or nationwide permit*

## EFH

- *Impacts are minor*

# PD&E Documentation of ESA Consultation

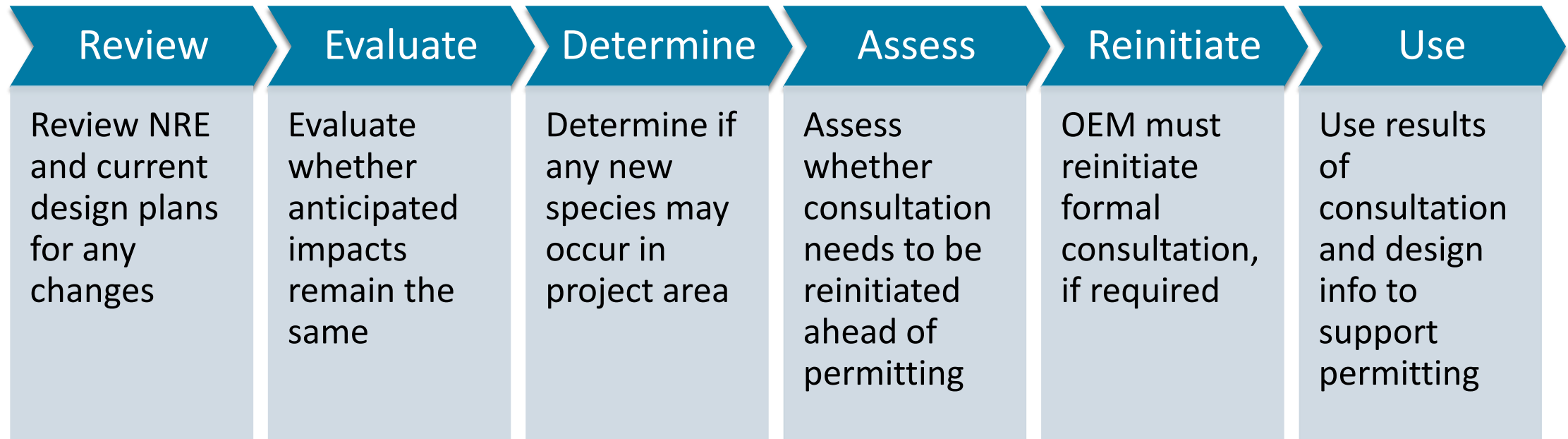


Summarized in the Environmental Document

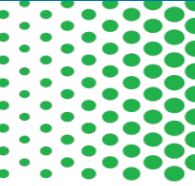
Concurrence letters attached to NEPA document

Other correspondence included in SWEPT project file

# Design and Permitting ESA Documentation



# FDOT ESA Consultation Resources



PD&E Manual  
Part 2, Chapters  
16 and 17

NRE Outline  
and Guidance  
Document

[OEM Training program \(fdot.gov\)](http://fdot.gov) – See Track 5



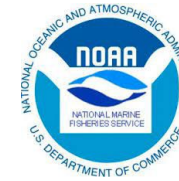
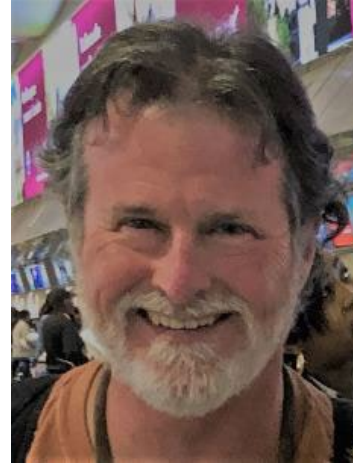
# Speaker Introductions



**Mark Cantrell** – U.S. Fish and Wildlife Service (USFWS), Panama City



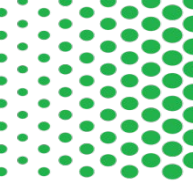
**Zakia Williams** – U.S. Fish and Wildlife Service (USFWS), Jacksonville



**David Rydene**- National Marine Fisheries Service (NMFS)-West Coast, Habitat Conservation Division (EFH)



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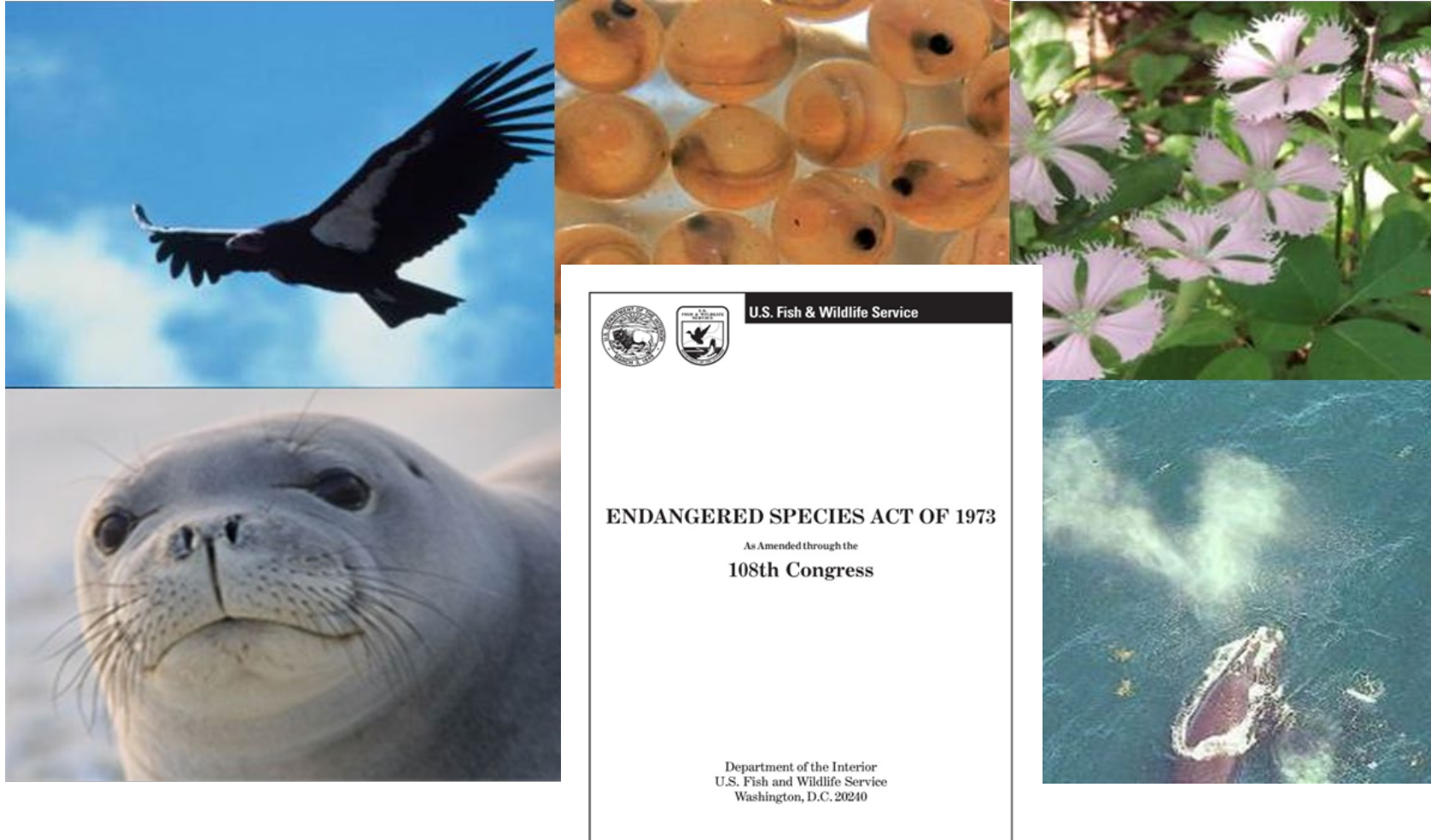


# USFWS and NMFS

- Overview of Endangered Species Act
- Overview of Section 7
  - The Administrative Record
  - The Participants
  - How the Process Starts
    - ◆ *Pre-initiation coordination*
  - Components of an Action
  - Effects Analysis
    - ◆ *Informal vs. Formal consultation*
    - ◆ *Proposed conservation measures*
      - *Current construction provisions (e.g. NMFS new conditions)*
    - ◆ *For projects with noise concerns and have the right info, be sure to include in the NRE/BA*
    - ◆ *Discuss jurisdictional differences for certain species*
- **Developing NRE/BA and FDOT making effect determinations prior to submittal to agencies (analysis from action agency)**



# Endangered Species Act Overview



# 1973 Endangered Species Act

- Focuses on protecting species in their natural environments
- Assigns administration authority to Interior and Commerce (FWS and NOAA Fisheries)



Key deer



American alligator



Sea turtle

Photo by R. Bush

# The Endangered Species Act of 1973



- Sec. 2. Findings, purposes, and policy.
- Sec. 3. Definitions.
- Sec. 4. Determination of endangered species and threatened species.
- Sec. 5. Land acquisition.
- Sec. 6. Cooperation with the States.
- **Sec. 7. Interagency cooperation.**
- Sec. 8. International cooperation.
- Sec. 9. Prohibited acts.
- Sec. 10. Exceptions.
- Sec. 11. Penalties and enforcement.
- Sec. 12. Endangered plants.
- Sec. 13. Conforming amendments.
- Sec. 14. Repealer.
- Sec. 15. Authorization of appropriations.
- Sec. 16. Effective date.
- Sec. 17. Marine Mammal Protection Act of 1972.
- Sec. 18. Annual cost analysis by FWS

# §2 Findings and Purpose



## Findings:

- Some species of fish, wildlife and plants are now extinct “as a consequence of economic growth and development **untempered by adequate concern and conservation.**”
- Other species are **in danger** of extinction.
- Species have aesthetic, ecological, educational, historical, recreational, and scientific **value.**

## Purpose:

- “... to provide a means whereby the **ecosystems** upon which endangered and threatened species depend **may be conserved...**”

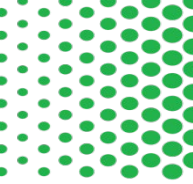
# Policy of Congress



*“All Federal departments and agencies shall seek to conserve endangered and threatened species and shall utilize their authorities in furtherance of the purposes of the Act.”*



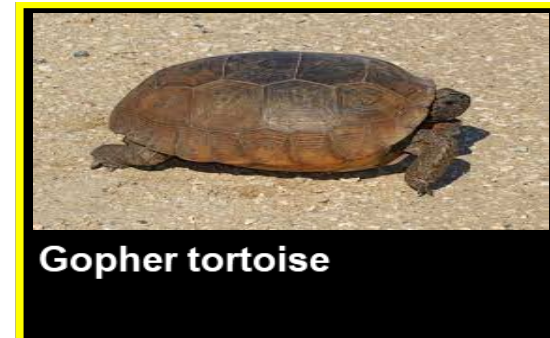
# Key Definitions



**Endangered** Any species in danger of extinction throughout all or a significant portion of its range



**Threatened** Any species likely to become endangered in the foreseeable future



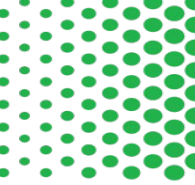
**Critical Habitat** Specific geographic areas with physical and biological features essential to the conservation of a listed species



CFR: Title 50 part 17 section 3, part 402 section 2



# Key Definitions



## Conserve, Conserving, and Conservation

- To use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.

## Recovery (defined in 50 CFR 402.02)

- Improvement in the status of the species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act.

CFR: Title 50 part 17 section 3, part 402 section 2

# §4 Determination of Threatened & Endangered Species

- *Listing: species & critical habitat*
- *Protective regulations*
- *Recovery*
- *Delisting*

Federal register/Listing process



Florida scrub-jay

# Eligible for listing

- Species of plants and animals
- Subspecies, including plant varieties
- Distinct population segments of vertebrates (NMFS = evolutionarily significant units)



Northern spotted owl-subspecies



Willamette daisy-plant variety



Alligator snapping turtle

# Listing



*Factors considered in determining whether a species is endangered or threatened:*

1. Present or threatened destruction, modification, or curtailment of the species range or habitat
2. Over-use for commercial, recreational, scientific, or educational purposes
3. Disease or predation
4. Inadequacy of existing regulatory mechanisms
5. Other natural or man-made factors affecting the continued existence of the species

# Proposed for Listing



- Any species for which the FWS or NOAA has published, in the *Federal Register*, a proposed rule to list as threatened or endangered
- These species are not ‘protected’ by the Endangered Species Act
- *Conference* procedures apply



Panama city crayfish



Suwannee alligator snapping turtle

# Candidates for Listing



- These species are not ‘protected’ by the Endangered Species Act
- **FWS**: status review completed; listing proposal is warranted, but precluded by higher-priority listing activities. FWS treats candidate species as if they are proposed for listing during intra-Service consultations.
- **NMFS**: species that are undergoing a status review announced in a Federal Register notice, whether or not they are the subject of a petition.

# Critical Habitat



- Requires a formal designation process (rulemaking published in the *Federal Register*)
- Designates specific geographical areas on which are found those **physical or biological features essential** to the conservation of the species, and which may require special management or protection
- May include areas **not currently occupied** by the species, but that are needed for recovery
- The only part of the ESA that requires an **economic analysis**

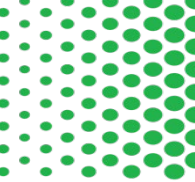
# Critical Habitat in Florida

- Designated and Proposed
- Critical Habitat requires additional review in section 7 consultation.
- It doesn't create a “preserve” or require any action from the landowner/manager.
- NMFS distinction of EFH





# Critical Habitat example



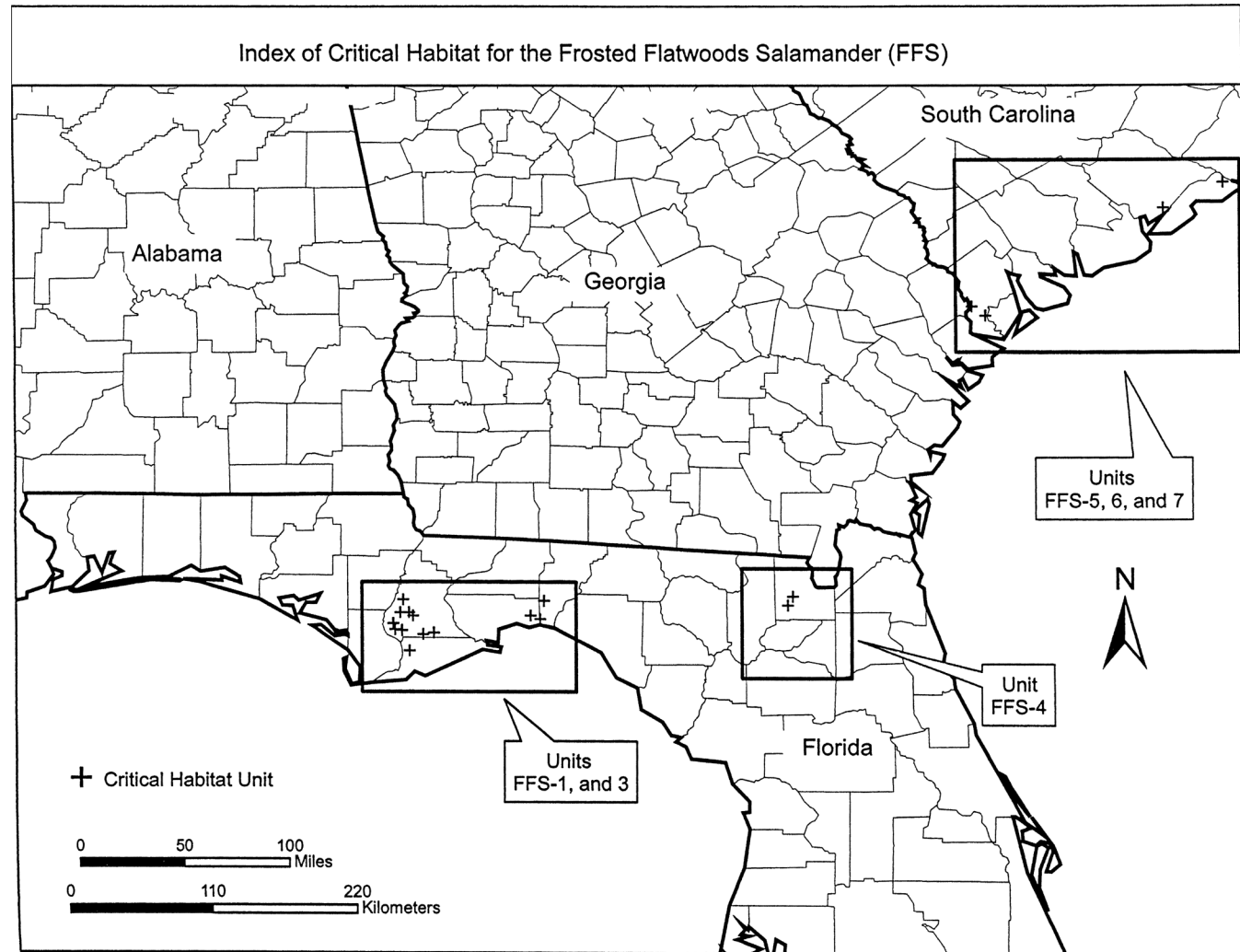
## Frosted Flatwoods Salamander (*Ambystoma cingulatum*)

(1) Critical habitat units are depicted for Baker, Franklin, Jefferson, Liberty, and Wakulla Counties in Florida; and Berkeley, Charleston, and Jasper Counties in South Carolina on the maps below.

(2) The primary constituent elements of critical habitat for the frosted flatwoods salamander are:

**(i) Breeding habitat.** Small (generally less than 1 to 10 ac (less than 0.4 to 4.0 ha)), acidic, depressional standing bodies of freshwater (wetlands) that: (A) Are seasonally flooded by rainfall in late fall or early winter and dry in latespring or early summer; (B) Are geographically isolated from other water bodies; (C) Occur within pine flatwoods savanna communities; (D) Are dominated by grasses and grass-like species in the ground layer and overstories of pond-cypress, blackgum, and slash pine; (E) Have a relatively open canopy, necessary to maintain the herbaceous component that serves as cover for flatwoods salamander larvae and their aquatic invertebrate prey; and (F) Typically have a burrowing crayfish fauna, but, due to periodic drying, the breeding ponds typically lack large, predatory fish (for example, *Lepomis* (sunfish), *Micropterus* (bass), *Amia calva* (bowfin)).

**(ii) Non-breeding habitat.** Upland pine flatwoods-savanna habitat that is open, mesic woodland maintained by frequent fires and that ...



# Recovery and Delisting



- *Recovery Plans establish a recovery strategy with goals to:*
  - Reduce or eliminate threats to listed animals and plants
  - Restore self-sustaining wild populations
  - Remove species from the list
  - Plans outline measurable downlisting and delisting criteria
  - Delisted (recovered) species are monitored for at least 5 years



Bull trout



Chinook salmon

# Cooperation with the States



*The Secretary may:*

- enter into **cooperative agreements** with any State that maintains a *program* to conserve listed species by conducting research, acquiring land, and implementing other conservation actions.
- enter into **management agreements** with any State to manage *areas* that were established for the conservation of listed species.
- provide **financial assistance** to any State with a conservation program for listed species to conduct research, fund development of habitat conservation plans, fund acquisition of lands needed for recovery, and to assist in implementing habitat conservation plans

# §7 Interagency Cooperation



## Affirmative Conservation Mandate

- Section 7(a)(1) – Federal agencies shall use their authorities to carry out their programs for the **conservation** of endangered & threatened species
- **Conservation:** the use of methods and procedures to bring an endangered or threatened species to the point where provisions of the ESA are no longer necessary

# §7 Interagency Cooperation



## **Duty to Avoid Jeopardy and Adverse Modification of Critical Habitat**

- Section 7(a)(2) – Federal agencies must ensure that actions they fund, authorize, or carry out are not likely to jeopardize the continued existence of listed species or adversely modify or destroy critical habitat

# §9 Prohibited Acts: Wildlife



**Section 9(a)(1)(B):** It is unlawful for any **person** subject to the jurisdiction of the United States to **take** any such species ....

- **Take:** to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in these activities.
- Section 9(a)(1) also prohibits importing or exporting listed wildlife from the US, take on the high seas, possession and selling, and other activities not specifically relevant to section 7(a)(2).



Canada lynx  
USFWS Photo



Humpback whale  
Photo by S. Wilkin

# §9 Prohibited Acts



## *Harass*

### **Defined by regulation (50 CFR 17.3)**

- An intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt
- normal behavioral patterns which include, but are not limited to, breeding, feeding or sheltering.

## *Harm*

### **Defined by regulation (50 CFR 17.3)**

- An act which actually kills or injures wildlife.
- Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.
- Take applies to individuals, not habitat

# §9 Prohibited Acts: Plants



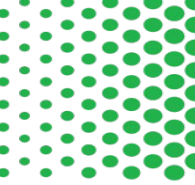
- **Section 9(a)(2):** Establishes the prohibitions with regard to endangered species of plants.
- Prohibitions vary depending on the ownership of the lands.
- Prohibitions differ for threatened and endangered species because the FWS did not extend the same section 4(d) protections to plants as it did for wildlife.



Western lily

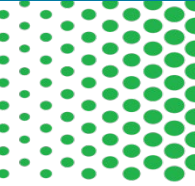


# §10 Exceptions



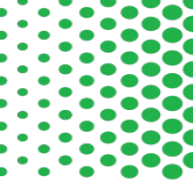
- **Scientific take permits (section 10(a)(1)(A))**
  - *Scientific purposes*
  - *Enhance the propagation or survival of listed species*
- **Incidental take permits (section 10(a)(1)(B)) (a.k.a., the habitat conservation planning process)**
  - *For projects with take that is incidental to otherwise legal activities (available to entities without a Federal nexus)*

# §11 Penalties and Enforcement



Provides for civil or criminal penalties for ESA violations

Provides for citizens' lawsuits to compel the Secretaries to enforce the ESA



# So, now we will focus on §7 and the roles that FDOT typically enjoys

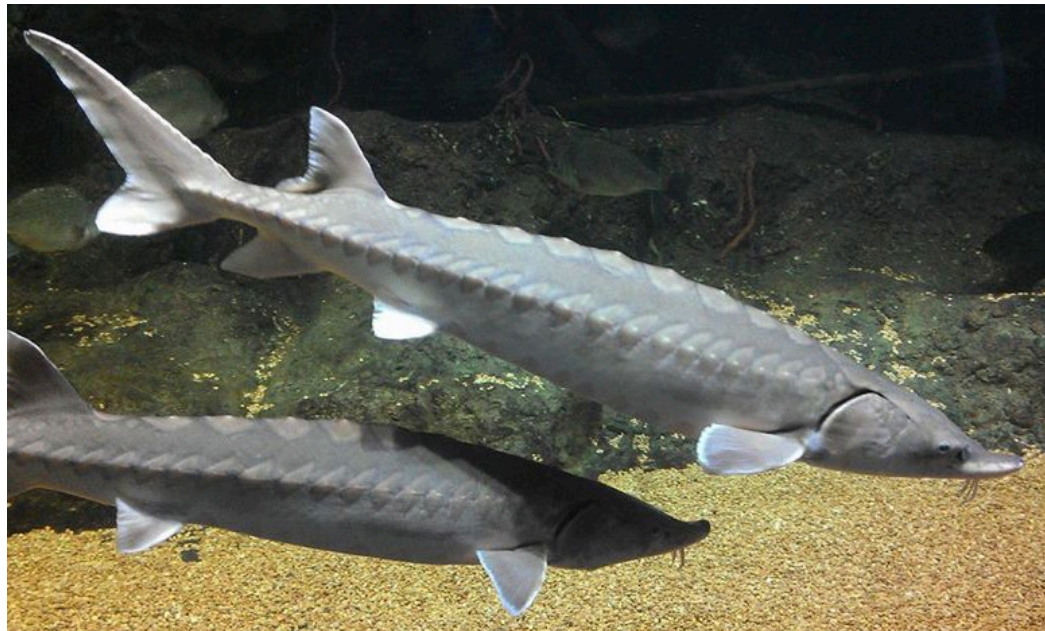


- *Example: American crocodile at US1*



# Overview of §7

- The Administrative Record
- The Participants and Their Roles
- Listed Species with Split Jurisdictional Responsibilities



# The Administrative Record



**Government agencies follow general rules regarding how we conduct business.**

These rules govern:

- ◆ How we keep records;
- ◆ How we seek advice from others;
- ◆ How we release information to the public; and
- ◆ The quality of the information we use.

# Administrative Procedure Act

- The APA calls for Federal agency decisions to be supported; our decisions cannot be “arbitrary and capricious.”
- The administrative record documents the rationale for decisions.
- We start the administrative record at the beginning of the process and maintain an official file throughout the consultation



# Freedom of Information Act



- The Freedom of Information Act requires Federal agencies to make public any records that were used in decision-making.
- Records include all the information used in the process, in any form, except for publications already widely available to the public.
- Any member of the public can make a formal request.
- Nine exemption categories exist (Refer to notebook).





# Information Quality Act



Agencies are responsible for the accuracy of data and information they cite in documents and use in their decisions.

...ensuring and maximizing the quality, objectivity, utility, and integrity of information (including statistical information) disseminated by Federal agencies...

If you cite information, you should be familiar with that information.



# Section 7 Consultation: The Participants and Their Roles

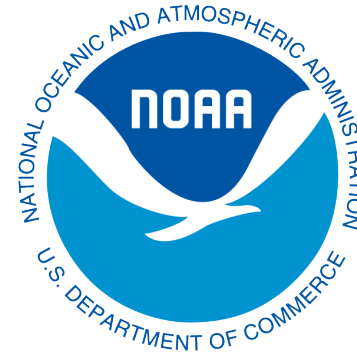
- Objective: By the end of this module, you will be able to describe the roles that the various participants play in the section 7 consultation process.



# Regulatory Lead: FWS or NOAA

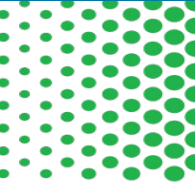
## Role:

- Provide regulatory, policy, and biological information, as needed, including current status of the listed species or critical habitat
- Discuss the potential effects of the action on the listed species or critical habitat
- Discuss measures to reduce or avoid those effects



**NOAA**  
**FISHERIES**

# Action Agency



***Action Agency = federal agency funding, permitting, or carrying out action.***

## **The action agency:**

- Must provide best available information
- Must guide, supervise, review, and evaluate the biological assessment
- Should be an active participant in the consultation process
- Has specific post-opinion requirements

# Potential Action Agencies for Transportation Projects:

- Federal Highway Administration
- Florida Department of Transportation (as *assigned* by FHWA)
- Florida Department of Transportation (as designated non-federal representative for FHWA)
- Army Corps of Engineers
- U.S. Coast Guard
- Federal Emergency Management Administration
- Others?



# Designated Non-Federal Representative



- Must be designated in writing by the Federal agency
- FDOT's former role with FHWA.
- May request species lists, prepare biological assessments, request concurrence, and provide other information
- Cannot initiate formal consultation

*“The ultimate responsibility for compliance with section 7 remains with the Federal agency.” (50 CFR 402.08)*

# Applicant



**Definition: Any person who requires formal approval or authorization from a Federal agency before conducting an action**

- Section 3(13) of the ESA defines a person broadly as an any private entity or any agent of a local, State, Federal, or foreign government subject to the jurisdiction of the United States
- Federal agency determines an applicant's status in the consultation process
  - *Example: FDOT is project applicant during Section 7 consultation for 404 permits.*



# Applicant's Role:

- Submits information for consideration during consultation
- May review and comment on a draft opinion through the Federal agency
- Must submit any comments on a draft biological opinion through the Federal agency
- Is entitled to the final consultation document





# Applicant

- The involvement of an applicant in the formal consultation process affects the time frames of consultation (i.e., approves request for >60d extension of BiOp deadline).
- An applicant may apply for an exemption from the section 7(a)(2) process if NOAA or FWS issues a jeopardy or adverse modification biological opinion.
- An applicant is responsible for complying with terms and conditions and monitoring and reporting the process of an action and its impact on the species.



# Role of State Agencies in ESA Activities

FWS, NOAA, and State agencies work together in conserving America's imperiled fish, wildlife and plants.

- ◆ *Section 6 agreements.*
- ◆ *Section 7 coordination.*
- ◆ *Section 10 permits for research*



In Florida, the State agencies responsible for fish, wildlife, and plants are FWCC & DOACS

# How We Coordinate with State Agencies in Section 7 Consultations



1. Inform them of actions likely to adversely affect listed or proposed species or critical habitat. Request relevant information.
2. Request information update prior to final biological opinion (BO) to ensure it's based on the best scientific data available.
3. Recommend Action Agency provide them final BO. We provide non-sensitive final BOs, if not provided by the Action Agency, after 10 working days.

We rely heavily on information from state agencies regarding endangered species.



# Coordination with Tribes

- Executive Order 13175 (Nov. 6, 2000) *Consultation and Coordination with Indian Tribal Governments*
- Secretarial Order 3206 (June 5, 1997) – Joint FWS and NOAA policy
- Other Policies



# Coordination between FWS and NOAA



We share responsibility for some species.

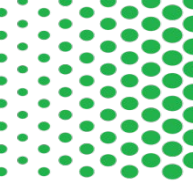
- Our responsibilities and consultations may overlap, e.g., sea turtles, Gulf Sturgeon



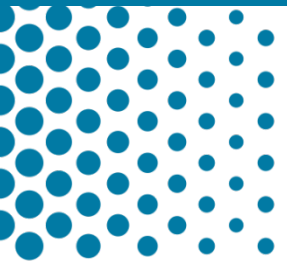
# Example: Gulf Sturgeon

Joint jurisdiction.

- FWS lead in riverine units.
- NOAA lead in marine units.
- Estuarine units split by action agency.
  - FWS: DOT, EPA, USCG, FEMA
  - NOAA: DoD, ACOE, MMS (BOEM), and others.



# Session 1 Part 1 Wrap-Up



## Questions?

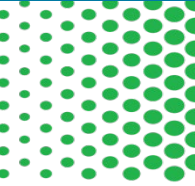
# END OF SESSION 1 - OVERVIEW



- FDOT – reviewed its NEPA assignment
- FWS & NMFS provided an overview of the ESA, scope, purpose, intent, definitions
- Questions, reflections?



# Wrap-Up: ESA Consultation Process- Part 1



**Thank you for participating!**

- Remember to register for ESA Webinar 2 – Feb. 22, 2022
- Next weeks webinar will continue with the FWS and NMFS consultation process as well as hear species specific presentations on the smalltooth sawfish and the importance of detailed specifications.

# Session 2 – Overview of ESA Consultation from USFWS, NMFS – Part 2



- USFWS and NMFS (tag team where USFWS discusses process and then NMFS can highlight any differences
  - ◆ Initiating Consultation
  - ◆ Concurrence
  - ◆ Biological Opinions
  - ◆ Incidental Take
  - ◆ Reinitiation & Post-Consultation Processes
- Species Specific Highlight – Smalltooth Sawfish – **Adam Brame**, NMFS
- Detailed Specifications - **Katasha Cornwell**, FDOT

Thanks for participating and we will see you next week.

