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**VIA ELECTRONIC CORRESPONDENCE**

February 27, 2015

CCN: 59182
File No: 8.DC.20.19 & 52

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 7611
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RE: DOJ No. 90-5-1-1-4022/1
Walter.Benjamin.Fisherow@usdoj.gov

Chief, Clean Water Enforcement Branch
Water Protection Division
ATTN: Brad Ammons
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Florida Department of Environmental Protection
Southeast District – Suite 200
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West Palm Beach, FL 33401
Attn: Compliance/Enforcement Section
Michael.Hambor@dep.state.fl.us

**RE: Consent Decree (Case: No. 1:12-cv-24400-FAM)**
**Reference DOJ Case No. 90-5-1-1-4022/1**
**Section XI, Paragraph 52 – Force Majeure**
**Section XVII, Paragraph 77 – Notices**
**Force Majeure Notification Letter for Consent Decree Appendix D-2, Capital Improvement Project 4.10, Opa-Locka Airport 48" PCCP Force Main Replacement**

Dear Sir/Madam:

In accordance with the provisions of Section XI, Paragraph 52 of the above referenced Consent Decree, Miami-Dade orally notified EPA and FDEP on February 13, 2015 of a potential delay in the Appendix D-2 Capital Improvement Project (CIP) 4.10 Opa-Locka Airport 48" Force Main PCCP Replacement Project due to the possible presence of the Florida Burrowing Owl at the Opa-Locka Airport project site. In accordance with Section XI, Paragraph 52, this notification letter shall further describe and explain the reasons for the potential delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a

schedule for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; Miami-Dade's rationale for attributing such delay to a force majeure event if it intends to assert such a claim; a statement as to whether, in the opinion of Miami-Dade, such event may cause or contribute to an endangerment to public health, welfare or the environment, and documentation to support the force majeure claim.

As previously discussed, an Opa-Locka Airport employee cautioned Miami-Dade that the Florida Burrowing Owl has historically been sited at the Opa-Locka Airport at the same location as the proposed CIP 4.10 Opa-Locka Airport 48" Force Main PCCP Replacement Project. The State of Florida Fish and Wildlife Conservation Commission (FWC) has listed the Florida Burrowing Owl as a Species of Special Concern (Florida Administrative Code 68A-27.005 attached). This listing designation makes it illegal to take (pursue, hunt, capture, molest, or kill) Burrowing Owls and their nest burrows and eggs without a permit issued by FWC (68A-9.002 & 68A-27.005 F.A.C.). FWC policy is to issue incidental take permits to destroy Burrowing Owl nest burrows only as a last resort, after all reasonable alternatives (such as realigning development to avoid the nest) have been shown to be impractical. The following information is requested to apply for the aforementioned permits: (1) burrow location and status information, (2) a statement as to why the burrow(s) must be destroyed (i.e. nest burrow conflicts with proper installation/functioning of a structure or prohibits construction in a certain manner) in detail, (3) digital photographs and a detailed site plan or scaled diagram of the property that clearly indicates the location of the burrow(s) and its proximity/distance to the proposed structure/construction activity, and (4) a statement of mitigation measures that will be enacted to offset the loss of nesting habitat for this species. If and when such permits are issued, they apply only to inactive nests (i.e., burrows containing no eggs or flightless young). FWC currently has no guidelines for management of Burrowing Owls in situations where numerous burrows will be impacted. These permits are presumably more difficult to obtain so it is imperative that the population size be established early in the process to minimize a project delay.

MDWASD is in the process of identifying a qualified biologist to conduct a site investigation during peak nesting period, i.e. February 15$^{th}$ to July 10$^{th}$. In the meantime, a senior ecologist will conduct a preliminary field visit on Friday, February 27, 2015. If the Burrowing Owl is found to be present on the project site, measures will have to be taken to either re-route the proposed force main, or to secure a permit to remove the inactive Burrowing Owl nest as mentioned in the previous paragraph. Presently, we are identifying alternate force main alignments to avoid the potential nesting site. Both the permitting process and the re-routing of the force main could result in a delay in completing the project. The extent of the potential delay to the project is not yet known. If the biologist rules out the presence of an active nest, then there will most likely be no delay. This event will not cause or contribute to an endangerment to public health, welfare or the environment.

We believe that the presence of a Florida Burrowing Owl on the project site would qualify as a force majeure event, as the cause of this event is beyond the control of Miami-Dade, and the project could be delayed despite Miami-Dade's best efforts to complete the project according to the Consent Decree compliance schedule. Once we have received the results of the biologist's site investigation, we will provide you with an update on this project and further measures to mitigate the project delay. MDWASD is committed to successfully meeting the requirements of the Consent Decree. Should you have any questions regarding this matter, please call me at (786) 552-8979.

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering such information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Sincerely,

Douglas L. Yoder
Deputy Director

Attachments: Burrowing Owl Guidelines and FAC 68A-27.005

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# BURROWING OWL NEST PROTECTION GUIDELINES AND PROCEDURES IN URBAN AREAS

The Florida burrowing owl (*Athene cunicularia floridana*) is listed by the State of Florida, Fish and Wildlife Conservation Commission (Commission) as a Species of Special Concern (Florida Administrative Code [F.A.C.] 68A-27.005). This classification means that the burrowing owl has a high vulnerability to factors that may lead to its becoming a threatened species in the absence of appropriate protection or management. As a Species of Special Concern, it is illegal to take (pursue, hunt, capture, molest, or kill) burrowing owls and their nest burrows and eggs without a permit issued by the Executive Director of the Commission (68A-9.002 & 68A-27.005 F.A.C.). Burrowing owls and their nests are also afforded protection under the Federal Migratory Bird Treaty Act. Rules promulgated under this act (Title 50, Code of Federal Regulations, Part 21) prohibit the destruction of active (i.e., nests which contain eggs or flightless young) nests without a federal permit, which is issued by the U.S. Fish and Wildlife Service Regional Office in Atlanta, Georgia.

The Commission's policy is to issue permits to destroy burrowing owl nest burrows only as a last resort, after all reasonable alternatives (such as realigning development to avoid the nest) have been shown to be impractical. When such permits are issued, they apply only to inactive nests (i.e., burrows containing no eggs or flightless young). Burrowing owl nests can generally be considered inactive from 10 July to 15 February, although some nesting occurs as early as October each year. Between 15 February and 10 July, burrows attended by one or more burrowing owls are considered active nests unless information is available to suggest otherwise (i.e., proof that young fledged from the nest prior to 10 July).

Burrowing owls often nest on vacant lots in rapidly developing suburban areas. In these areas, home construction is a major cause of burrow destruction. However, Commission studies in Cape Coral, Lee County, have shown that if development is conducted in such a way that the area within 50 ft of the burrow is protected from disturbance, nesting is seldom interrupted. No Commission permit is needed to build a home on a lot when at least a 50-ft radius circle can be provided around the burrow, but cautionary measures must be taken to guard against accidental destruction of the nest. A larger buffer, ideally 150 ft, will decrease chances the nest burrow will be adversely impacted. We recommend that the buffer circle around the burrow entrance be staked and roped-off prior to initiating construction. Sod may be laid within the protected area outside the "active" nesting period, but the burrow entrance must be left open. Plugging the burrow entrance or causing the burrow to collapse would effectively destroy the nest, and as such, require a permit. As a cautionary measure, we recommend that after completion of the home, the homeowners place a T-perch (see enclosed brochure) near the burrow or stake-off the area around the burrow to prevent someone from accidentally stepping into the entrance.

At present, the Commission has no guidelines for management of burrowing owls in other than urban/suburban areas. Protection criteria for these situations, or situations where numerous burrows will be impacted, will be developed on a case-by-case basis.

*To request a permit to take a burrowing owl nest, submit an application via the Online Permitting System The application requests the following: (1) burrow location and status information, (2) a statement as to why the burrow(s) must be destroyed (i.e. nest burrow conflicts with proper installation/functioning of a structure or prohibits construction in a certain manner) in detail, (3) requires you to attach digital photographs and a detailed site plan or scaled diagram of the property that clearly indicates the location of the burrow(s) and it's proximity/distance to the proposed structure/construction activity, and (4) a statement of mitigation measures that will be enacted to offset the loss of nesting habitat for this species. You may contact the Permitting Office via email at WildlifePermits@myfwc.com or by mail attention Protected Species Permit Coordinator, Species Conservation Planning Section, Florida Fish and Wildlife Conservation Commission, 620 South Meridian St., Mail Station 2A, Tallahassee, FL 32399-1600, (850) 921-5990, ext. 17310.*

*Federal permits are required **only** if the nest is active (i.e., has flightless young or eggs present). Please contact the U.S. Fish and Wildlife Service.*

**68A-27.005 Designation of Species of Special Concern; Prohibitions; Permits.**

(1) During the moratorium created in subsection 68A-27.0012(4), F.A.C.: Management plans will be developed for the species listed in this rule and the species will be evaluated under the listing criteria in subsection 68A-27.001(3), F.A.C., for listing as a State-designated Threatened species. If the Commission determines that the species warrants listing as a State-designated Threatened species, final Commission action on the listing shall include removing reference to the species from this rule. If the species evaluation demonstrates the species does not qualify for listing as a State-designated Threatened species, the Commission will remove the species from this rule upon completion of a management plan. After a biological status review is conducted and a management plan is approved, the Commission will decide whether a species should remain listed when the species is determined to be data deficient pursuant to the Guidelines for Using the IUCN Red List Categories and Criteria.

(2) The following species are hereby declared to be of special concern, and shall be afforded the protective provisions specified.

(a) No person shall take, possess, transport, or sell any species of special concern included in this subsection or parts thereof or their nests or eggs except as authorized by permit from the executive director, permits being issued upon reasonable conclusion that the permitted activity will not be detrimental to the survival potential of the species. For purposes of this section, the definition of the word take in Rule 68A-1.004, F.A.C., applies.

(b) Fish:

1. Bluenose shiner (*Pteronotropis welaka*),
2. Harlequin darter (*Etheostoma histrio*),
3. Lake Eustis pupfish (*Cyprinodon hubbsi*),
4. Rivulus (*Rivulus marmoratus*),
5. Saltmarsh topminnow (*Fundulus jenkinsi*),
6. Southern tessellated darter (*Etheostoma olmstedi maculaticeps*).

(c) Amphibians:

1. Florida bog frog (*Lithobates okaloosae*),
2. Georgia blind salamander (*Haideotriton wallacei*),
3. Gopher frog (*Lithobates capito*),
4. Pine Barrens treefrog (*Hyla andersonii*).

(d) Reptiles:

1. Alligator snapping turtle (*Macrochelys temminckii*),
2. Barbour's map turtle (*Graptemys barbouri*),
3. Florida Keys mole skink (*Eumeces egregius egregius*),
4. Florida pine snake (*Pituophis melanoleucus mugitus*),
5. Red rat snake (*Elaphe guttata*); lower Keys population only,
6. Suwannee cooter (*Pseudemys suwanniensis*).

(e) Birds:

1. American oystercatcher (*Haematopus palliatus*),
2. Black skimmer (*Rynchops niger*),
3. Brown pelican (*Pelecanus occidentalis*),
4. Burrowing owl (*Athene cunicularia*),
5. Limpkin (*Aramus guarauna*),
6. Little blue heron (*Egretta caerulea*),
7. Marian's marsh wren (*Cistothorus palustris marianae*),
8. Osprey (*Pandion haliaetus*); Monroe County population only,
9. Reddish egret (*Egretta rufescens*),
10. Roseate spoonbill (*Platalea ajaja*),
11. Scott's seaside sparrow (*Ammodramus maritimus peninsulae*),
12. Snowy egret (*Egretta thula*),
13. Tricolored heron (*Egretta tricolor*),
14. Wakulla seaside sparrow (*Ammodramus maritimus juncicola*),
15. White ibis (*Eudocimus albus*),

16. Worthington's marsh wren (*Cistothorus palustris griseus*).

(f) Mammals:

1. Eastern chipmunk (*Tamias striatus*),
2. Florida mouse (*Podomys floridanus*),
3. Homosassa shrew (*Sorex longirostris eonis*),
4. Sanibel Island rice rat (*Oryzomys palustris sanibeli*),
5. Sherman's fox squirrel (*Sciurus niger shermani*),
6. Sherman's short-tailed shrew (*Blarina carolinensis shermani*).

(g) Mollusks:

Florida treesnail (*Liguus fasciatus*)

(h) Crustaceans:

1. Black Creek crayfish, also known as Spotted royal crayfish (*Procambarus pictus*),
2. Panama City crayfish (*Procambarus econfinae*),
3. Santa Fe Cave crayfish (*Procambarus erythrops*).

*Rulemaking Authority Art. IV, Sec. 9, Fla. Const. Law Implemented Art. IV, Sec. 9, Fla. Const. History–New 8-1-79, Amended 6-22-80, 6-21-82, 7-1-84, 7-1-85, Formerly 39-27.05, Amended 6-1-86, 5-10-87, 4-27-89, 10-22-92, 5-26-94, 6-23-99, Formerly 39-27.005, Amended 2-27-01, 5-1-01, 9-29-03, 6-1-06, 11-8-07, 11-8-10, 9-19-12.*