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March 11, 2015

**By Certified Mail**

Sally Jewel, Secretary  
U.S. Department of the Interior  
and  
Daniel M. Ashe, Director  
United States Fish & Wildlife Service  
1849 C Street, N.W.  
Washington, DC 20240

Lieutenant General Thomas P. Bostick  
United States Army Corps of Engineers  
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Washington, DC 20314

Eileen Sobek, Assistant Administrator for Fisheries  
National Oceanic and Atmospheric Administration  
National Marine Fisheries Services  
1315 East-West Highway  
Silver Spring, MD 20910

Heather McTeer Toney, Regional Administrator  
U.S. Environmental Protection Agency, Region 4  
Atlanta Federal Center  
61 Forsyth Street, SW  
Atlanta, GA 30303-3104

**Re: 60 Day Notice of Intent to Sue for Violations of Section 7 of the U.S. Endangered Species Act and for Violations of the National Environmental Policy Act of 1969 in connection with the Failure of the U.S. Fish and Wildlife Service, the U.S. Army Corps of Engineers, the U.S. Environmental Protection Agency, and the National Oceanic and Atmospheric Administration to Review Monroe County and the Florida Keys Aqueduct Authority's Shallow Well Injection of Municipal Sewage Effluent on Cudjoe Key, Florida**

On behalf of Mike Laudicina, we hereby provide notice, pursuant to section 11(g) of the Endangered Species Act, 16 U.S.C. § 1540(g), ("ESA") and the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370h, ("NEPA"), that the U.S. Fish and Wildlife Service ("Service"), the Environmental Protection Agency ("EPA"), the National Oceanic and Atmospheric Administration ("NOAA"), and the Army Corps of Engineers ("Corps") have violated and continue to contravene various provisions of the Acts and their implementing regulations by failing to conduct, initiate or otherwise complete the required consultation and analyses for the shallow well injection of regional municipal sewage effluent on Cudjoe Key, Florida by Monroe County and the Florida Keys Aqueduct Authority.

The Florida Keys Aqueduct Authority, as operator of Cudjoe Regional Wastewater Treatment Plant ("the Plant") and Monroe County, as owner, have announced their plans to begin injection of what they state will be just under a million gallons a day of partially treated sewage effluent at the Plant. Other projections indicate that the flow will be higher. They intend to commence injection sometime this month.

Monroe County and the Florida Keys Aqueduct Authority plan to inject the effluent into shallow wells drilled 120 feet into porous limestone and cased to 80 feet. The use of a deep well, as opposed to shallow wells, to reduce the impacts of the massive volume of nutrient-laden effluent on the Florida Keys National Marine Sanctuary (the "Sanctuary"), the Service's wetlands adjoining the Plant, and the endangered species and their habitat, has been rejected by Monroe County and the Florida Keys Aqueduct Authority.

## **BACKGROUND**

### **A. The Endangered Species Act**

The ESA has a broad citizen suit provision. Pursuant to the provision, "any person may commence a civil suit to enjoin any person, including... any... governmental instrumentality or agency... who is alleged to be in violation of any

provision of [the ESA]." 16 U.S.C. § 1540(g). Citizens can seek to enjoin both present activities that constitute an ongoing take and future activities that are reasonably likely to result in take. See *National Wildlife Federation v. Burlington Northern Railroad*, 23 F.3d 1508, 1511 (9<sup>th</sup> Cir. 1994); *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1069 (9<sup>th</sup> Cir. 1996). The ESA's citizen suit provision also provides for the award of costs of litigation, including reasonable attorney and expert witness' fees. 16 U.S.C. § 1540(g) (4).

The ESA "represent[s] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). Section 9 of the ESA prohibits any "person" from "taking" any member of an endangered or threatened species. 16 U.S.C. § 1538(a).<sup>1</sup> Where federal action is involved that is likely to take or otherwise impact listed species, the action agency must engage in consultation with the Service. *Id.* § 1536.

Specifically, the action agency must ensure that the action at issue "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." *Id.* § 1536(a) (2). An action will cause jeopardy if it "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02. An agency must evaluate the effect of a proposed project requiring a federal permit to determine the effect of the project on the species' chances of survival and recovery. This evaluation must use "the best scientific and commercial data available." 16 U.S.C. § 1536(a) (2).

At the end of the consultation process, the Service issues a biological opinion, which must analyze the effects of the proposal on listed species, determine whether the proposal is likely to jeopardize any listed species based on both survival and recovery risks, and determine any reasonable and prudent alternatives that might exist (if a jeopardy determination is made), or reasonable and prudent measures to minimize take (if a non-jeopardy determination is made). *Id.* § 1536(b). The Service must also provide an incidental take statement that must specify (1) the amount or extent of such incidental taking on the species; (2) the reasonable and prudent measures necessary to minimize such impacts; and (3) the terms and conditions that must be complied with to

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<sup>1</sup> The term "take" is defined broadly to include "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." *Id.* § 1532(19). FWS has further defined "harass" to include "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, including breeding, feeding, or sheltering." 50 C.F.R. § 17.3. In addition, "harm" is defined to "include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." *Id.*

implement the reasonable and prudent measures. 16 U.S.C. § 1536(b) (4); 50 C.F.R. § 402.14(i) (1) (i). The incidental take statement must provide a meaningful trigger for reinitiation of consultation in the event that the level of take authorized by the biological opinion is reached or exceeded.

Without an adequate biological opinion in place, any activities likely to result in incidental takes of members of listed species are unlawful. Accordingly, anyone who undertakes such activities, or who authorizes such activities, 16 U.S.C. § 1538(g), may be subject to criminal and civil federal enforcement actions, as well as civil actions by citizens for declaratory and injunctive relief. *See id.* § 1540.

## **B. The National Environmental Policy Act of 1969**

The National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. §§ 4321-4370h, is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1. Its purposes are to “help public officials make decisions that are based on understanding of environmental consequences, and to take actions that protect, restore, and enhance the environment,” and to “insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” *Id.* §§ 1500.1 (b)-(c).

To accomplish these purposes, NEPA requires all agencies of the federal government to prepare a “detailed statement” regarding all “major federal actions significantly affecting the quality of the human environment,” 42 U.S.C. § 4332(C), including situations where several separate actions may have a cumulatively significant impact on the environment. 40 C.F.R. § 1508.27(b) (7).

This statement - known as an Environmental Impact Statement (“EIS”) - must describe: (1) the “environmental impact of the proposed action;” (2) any “adverse environmental effects which cannot be avoided should the proposal be implemented;” (3) “alternatives to the proposed action;” (4) “the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity;” and (5) “any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.” 42 U.S.C. § 4332. NEPA further provides that agencies “shall ... study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” *Id.* § 4332(2) (E).

At the time of its decision to take a proposed action, the agency must prepare a concise public “record of decision,” which must identify all reasonable alternatives and “[s]tate whether all practicable means to avoid or minimize environmental harm from

the alternative selected have been adopted, and if not, why they were not.” 40 C.F.R. § 1505.2.

### **C. The Florida Keys National Marine Sanctuary, Cudjoe Regional Wastewater Treatment Plant, and the Florida Keys Water Quality Improvements Program**

The Florida Keys Water Quality Improvements Program, with the Corps as the lead agency, is intended to implement wastewater and stormwater improvements that will alleviate the water quality degradation that has resulted from the discharge of inadequate and untreated wastewater and stormwater into nearshore waters of the Sanctuary.

The Sanctuary is part of a complex ecosystem encompassing approximately 2,800 square nautical miles of nearshore and marine waters, including the Everglades, Florida Bay, and adjacent areas. The Florida Keys (the “Keys”) is a chain of more than 800 islands extending approximately 220 miles southwest from the southern tip of the Florida peninsula and through the Sanctuary.

Cudjoe Regional Wastewater Treatment Plant (“Plant”) is the final regional wastewater treatment plant to be constructed and is the culmination of a several decades project to improve the water quality of the Florida Keys pursuant to Congressional mandate.

The Florida Keys Water Quality Improvements Plan is based on the concept that removing shallow package plant wells and septic tanks and installing centralized sewers will improve water quality. Thus, the other two large wastewater treatment plants in The Florida Keys – in Key West and Key Largo – utilize deep wells for injection of the partially treated sewage effluent. The intention at Cudjoe, however, is to collect the sewage from over 7,000 households, businesses, and commercial establishments and concentrate it in four shallow wells drilled to an open hole at 80 feet into porous limestone along the coast of Cudjoe Key, surrounded by Outstanding Florida Waters in the Sanctuary as well as the Florida Keys Wildlife Refuges Complex, and Service wetlands.

Cudjoe Key is part of what is known as the Lower Keys, located in unincorporated Monroe County. Cudjoe Key, site of the Plant, is located between mile markers (MM) 20.5 and MM 23, directly west of Summerland Key, and covers approximately 3580 acres. The majority of development is located on the south side of U. S. Highway 1; the Plant is located to the north of U. S. Highway 1.

Cudjoe Key is bordered on the north by the shallow waters of the back county and on the south by the Atlantic Ocean. On the east and west are Kemp and Bowe Channels. Cudjoe Key lies within the fragmented boundaries of the Florida Keys

## Wildlife Refuges Complex.

The Plant and its four shallow sewage injection wells are located adjacent to a solid waste transfer station and a former landfill located approximately one mile north of U.S. Highway 1 and a half mile west of Blimp Road. The Plant is located adjacent to the west side of and uses two cells of a Monroe County decommissioned landfill. The four shallow injection wells are located about 75 feet from mangroves fringing a shallow marine lagoon, and each is spaced about 75 feet from each other. The well sites are also about 400 feet from wetlands owned and managed by the Service. Near the site of the Plant and shallow sewage injection wells are marine and estuarine wetlands, classified as E2FO3P, E2USM, and some E2SS3N, E2SS3P, and E2USN, according to the Service's wildlife refuge.

The shallow waters of the back county are on the north side of the mangrove-fringed shallow marine lagoon adjacent to the shallow sewage injections wells. The controlling depth in the back country is 3-4 feet for quite some distance. To the east and west of the well sites are Bowe and Kemp Channels, transferring the diurnal tidal flow to and from the back county and the Atlantic Ocean, including Looe Key National Marine Sanctuary, approximately 10 miles to the south.

### **D. The Species At Issue**

Coral reefs and other benthic habitats are identified as Essential Fish Habitat and must be considered as part of any federal action. Three endangered terrestrial species and one endangered marine species have been observed by Service personnel on Cudjoe Key near the Plant site. The endangered Elkhorn and Staghorn corals are also found on Looe Key, just 10 miles to the south, and are known to grow in near shore waters.

The Lower Keys Marsh Rabbit (*Sylvilagus palustris hefneri*) is a critically impaired and endangered species that maintains its primary habitat in the tidal marshes and adjacent upland habitat on Cudjoe Key, and has been observed there by Service personnel.

The Silver Rice Rat (*Oryzomys argentatus*; *Oryzomys palustris natator*) is an endangered species that maintains its habitat in the areas containing contiguous mangrove swamps, salt marsh flats, and buttonwood transition vegetation (See, Goodyear 1987) as well as freshwater occurrences located on Cudjoe Key which is designated critical habitat for the species. Service personnel have observed the Silver Rice Rat on Cudjoe Key.

The Key Deer (*Odocoileus virginianus clavium*) is an endangered species that utilizes Cudjoe Key's fresh water, pinelands, hardwood hammocks and mangroves for its habitat and grassy areas for feeding. It may move to adjacent islands during wet weather, returning in dry periods to islands having fresh water. Key Deer have been observed by Service personnel on Cudjoe Key.

The Small Tooth Sawfish (*Pristis pectinate*) is an endangered species that makes its home in shallow coastal and estuarine waters such as those off Cudjoe Key. Service personnel have observed a Small Tooth Sawfish in the nearshore waters off Cudjoe Key.

Elkhorn Coral (*Acropora palmate*) and Staghorn Coral (*Acropora cervicornis*) are threatened species with designated critical habitat located just south of Cudjoe Key. Elkhorn Coral and Staghorn Coral are extremely susceptible to the sedimentation and eutrophication threatened by the Plant and its shallow sewage injection wells.

"The limited amount of undeveloped natural habitat in the Keys makes these areas and associated species vulnerable to development. Because there are so few remaining developable lands, any project that results in the loss of natural areas is likely to impact protected species." U.S. Fish & Wildlife Service.

#### **E. The Plaintiff**

Plaintiff, Mike Laudicina, whose mailing address is P.O. Box 430411, Big Pine Key, FL 33043, is a resident of Big Pine Key, Florida within the area served and affected by the proposed agency action. Mike Laudicina's substantial interests in environmental integrity will be directly, adversely and immediately affected by the actions about to be undertaken by the Florida Keys Aqueduct Authority. The shallow injection wells will allow partially treated sewage effluent and contaminated groundwater to rise to the surface waters, where the quantity and salinity of the effluent, as well as the nutrients present in the effluent, will cause or contribute to algal mats; decreased visibility in the waters; shadowing and decreased oxygen, all of which will adversely impact the benthic organisms that support the fisheries used by Plaintiff; and will cause other adverse effects to the water resources and marine life resources of the State of Florida regularly used by Plaintiff.

He is a commercial fisherman who regularly harvests crab and lobster from the near shore waters around the Plant. He also snorkels, crabs, and fishes the area for recreation. He has lived in Monroe County for over 40 years, and has served on the Florida Keys National Marine Sanctuary Advisory Council for nine years and the Gulf of Mexico Spiny Lobster Advisory Council for many years, and has frequently worked for, and collaborated with, numerous marine scientists conducting research in the Lower Florida Keys. The proposed action will devalue the fish, spiny lobster and crabs

which he regularly consumes, provides to family and friends, and sells and will make them undesirable. The proposed agency action will also make the waters utilized by Plaintiff visually and aesthetically unpleasant, and interfere with his use and enjoyment of the waters.

## DISCUSSION

### **A. Imminent Threat of Harm**

It has come to our attention that Florida Keys Aqueduct Authority, with the agreement of Monroe County, is conducting dye-tracer studies and is intent on moving into the operation phase of the shallow sewage injection wells as soon as possible. Already, several million gallons of chlorine and chloramine-contaminated freshwater, with no effort at dechlorination, have been injected into the shallow wells without adequate consultation with the Service and without appropriate environmental review.

Additionally, Florida Keys Aqueduct Authority and Monroe County have announced their intention to begin injection of partially treated sewage effluent this month. Again, there has been no biological consultation and no proper environmental review.

The Corps was the “lead agency” for the development of the Florida Keys Environmental Improvements Program, which included a Final PEIS for the entire Florida Keys. Environmental Assessments or Environmental Impact Statements were contemplated to be conducted for each project within the County plan, including Cudjoe Regional. However, although Monroe County and Florida Keys Aqueduct Authority have been circulating a document entitled “Draft Environmental Assessment November 2010” with the Corps logo and name on it, in fact, the Corps did not author this document and did not participate in any environmental review of the Cudjoe Regional Wastewater Plant.

Despite the fact that federal funds were used for the County-wide PEIS conducted by the Corps, and despite the fact that Cudjoe Regional, through sponsorship by Monroe County, is the recipient of federal funds through the State Revolving Loan Fund, there has been no environmental review of the Project as mandated by the ESA and NEPA, and therefore EPA, the Corps, and NOAA have failed to comply with their obligations under the ESA and NEPA to ensure that such environmental review occurs.

Further, the Service, while normally waiting for a lead agency to initiate Section 7 consultation under the ESA, has been advised by the undersigned of the lack of Section 7 consultation for Cudjoe’s shallow sewage wells. The Service also has an obligation to ensure that compliance with the federally required environmental review processes occurs prior to actions by FCAA and Monroe County which may endanger protected

species and their habitat.

Mangrove stands on Cudjoe Key are valuable communities that serve a variety of natural functions including acting as storm buffers, decreasing erosion and stabilizing land, enhancing water quality, recycling nutrients, providing habitat for a large variety of animals, and acting as nursery grounds for many species, including many commercially valuable fish species. (See, Snedeker and Lugo 1973, USFWS 1999, NOAA 2001b). The ecosystem of the mangroves and the viability of the plant species which grow in their understory is affected by changes in salinity. This is important habitat for the mentioned endangered species.

Marine and benthic habitats in the nearshore waters of Cudjoe Key include seagrass beds, tidal/sand flats, sand/mud bottom, and hardbottom communities. These communities are sensitive, complex ecosystems influenced by many different sources. Changes in water temperature, pH, and clarity levels all affect the health and survival of marine and benthic communities.

South of the shallow wells and adjacent to the Plant is a large area of wetlands belonging to and managed by the Service. These wetlands have mangroves, open areas and depressions which collect rainwater and appear to receive groundwater contribution as well, according to observations of intermittent yellow, oily water in the depressed areas. They appear to extend to the coastline on the west of the Plant.

The wetlands, the shallow marine lagoon, and the nearshore waters north of the well sites are within the radius of a large increase in groundwater level which is calculated to result from the proposed injection of approximately 30 million gallons a month of partially treated effluent at the Plant into the shallow sewage injection wells. This increased gradient, as mapped and modeled, is projected to be capable of pushing the chemically-contaminated groundwater (from the landfill), along with the nutrient-rich, partially treated sewage effluent, into the wetlands adjacent to the Plant. The increased groundwater gradient is also projected to force the landfill-contaminated groundwater and the partially treated sewage effluent into the near shore waters as well. Flooding at the site and the wetlands is to be expected.

The endangered species found on Cudjoe Key and the habitat they use to attempt recovery and survival are all impacted by additions of landfill-contaminated groundwater to their drinking water and plant communities, along with nutrient-laden sewage effluent, both of which will alter the chemistry of the water and promote algal growth.

There are existing groundwater quality changes at Cudjoe Key and other developed areas of the Keys. Aside from becoming less saline because of the freshwater influence of wastewater inputs, groundwater quality has become degraded

because wastewater effluent is typically oxygen-depleted, enriched in the nutrients like nitrogen and phosphorus, and contains fecal coliform bacteria. Because of its open nature, the effects of degraded ground water can be seen in nearshore and offshore marine waters and their ecosystems. Degraded groundwater can flow into near shore waters of the Sanctuary within hours or days.

Rainfall is an important factor affecting the movement of substances through groundwater, especially in the Keys. During a rainfall event, nutrients and pathogens are transported from groundwater to local canals and adjacent nearshore waters through the porous characteristic of the underlying aquifer.

In addition, the movement of nutrient enriched ground water from inland areas to adjacent near shore waters increases at low tides (Kruczynski 1999, Lapointe and Matzie 1996). The cumulative effect of these actions is an increase in ground water transport into near shore environments.

The shallow marine lagoon and the near shore waters adjacent to the well sites are already degraded, with large algal mats covering turtle grass beds and other marine life. When dead algae decompose, oxygen is depleted and can create hazardous or toxic conditions for organisms, resulting in adverse impacts such as fish kills and species shifts. Large algal blooms would also cause hypoxic (low oxygen) or anoxic (oxygen depleted) conditions in shallow, poorly flushed locations such as the lagoon off the Cudjoe Plant well sites. In addition, elevated nutrient loads can induce changes in species composition of a community and can stress seagrasses by promoting epiphyte growth.

Nearshore habitats, particularly seagrasses, are adversely affected by water quality degradation. Nutrient enrichment and contaminant introduction lead to algal blooms, decreased water clarity and light penetration and subsequent loss of seagrasses.

Increasing dysfunction of the impacted areas and the impacts themselves can extend farther from shore (Kruczynski and McManus 2002), affecting offshore water quality and the health of coral reef ecosystems. Historic extinctions of entire trophic levels in coastal ecosystems make them more vulnerable to other natural and human-induced disturbances such as nutrient loading and hypoxia, disease, storms, and climate change (Jackson *et al.* 2001). Excessive nutrient loading in nearshore waters of the Sanctuary can only exacerbate historic problems related to coral reef health.

Water quality degradation due to the release of contaminants and pathogens from wastewater, landfill contaminated groundwater, and stormwater can result in bioaccumulation and biomagnification of the pollutants as the pollutants “build-up” as individual organisms are consumed by larger and larger organisms and transferred up the food chain.

Hardbottom communities and coral reefs thrive in oligotrophic environments (Kruczynski and McManus 2002). Nutrient-enrichment in these environments can stimulate nutrient limited phytoplankton, leading to algal blooms in the water column. Both algal blooms and Total Suspended Solids can reduce water clarity by decreasing light penetration and subsequently reducing photosynthesis and production in seagrass beds. Besides decreasing water clarity, eutrophic conditions can stress corals by promoting macroalgal growth (Lapointe *et al.* 1994)

Changes in salinity of the wetlands and the shallow marine lagoon due to the massive amounts of less-saline wastewater may have adverse effects on the flora and fauna in both areas.

Without the complete and adequate protective measures required by Federal review processes prior to testing and operation of the shallow sewage injection wells, there exists an imminent threat of harm to listed species and the environment on and around Cudjoe Key and in the Sanctuary. Therefore, we respectfully request the immediate issuance of a stop work or cease and desist order until all required Federal reviews and consultations are complete.

#### **B. Violation of the Endangered Species Act**

To date, the record shows absolutely no signs of consultation with the Service under Section 7 of the ESA.

#### **C. Violation of the National Environmental Policy Act**

Similarly, the record is also completely devoid of a Record of Decision, let alone an Environmental Impact Statement on the imminent use and operation of the shallow sewage injection wells and their impact on the environment of the Florida Keys, the National Marine Sanctuary, and the groundwater, wetlands, and nearshore waters of Cudjoe Key.

In fact, Monroe County and the Florida Keys Aqueduct Authority have been circulating a document entitled "Draft Environmental Assessment" dated November, 2010. This document bears the name and logo of the Corps, but the Corps has denied authorship of the document. Thus, not only is there no compliance with NEPA and the ESA, but circulation of this document has made it erroneously appear as though the Corps has prepared a federal compliance document, when it has not.

## CONCLUSION

As described above, clear and imminent violations of the ESA and NEPA have occurred and will continue to occur with regards to Monroe County and the Florida Keys Aqueduct Authority's testing and operation of the four shallow sewage injection wells located at the Cudjoe Regional Wastewater Treatment Plant. Therefore, we urge the Service, the EPA, NOAA, and the Corps to immediately instruct Florida Keys Aqueduct Authority and Monroe County that they may not proceed with such testing or operation and to promptly conduct legally permissible analyses of the effects of the action on the listed species and the environment

Please do not hesitate to contact us if you wish to discuss this matter or have any questions concerning this letter. If we do not hear from you, we will assume that no action will be taken and will consider all available avenues, including litigation, to conserve the highly imperiled listed species on Cudjoe Key, the environment of the Florida Keys, and the Florida Keys National Marine Sanctuary in accordance with the requirements of the ESA and NEPA.

Sincerely,

/s/  
Caron Balkany  
Christopher T. Byrd

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